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 REPLY 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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ARGUMENT

I.

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

This Court has never reviewed the constitutionality or other legal reasonableness of hourly rates established by *ex parte* administrative orders in the various circuits for representation of indigent capital defendants. The respondent invokes mere tautology in its reliance on the First District's mention of a local prevailing hourly rate in the context of indigent criminal defense because no such prevailing rate exists other than the rate established by unilateral administrative order of the Chief Circuit Judge. In the context of court-appointed representation, only one rate exists in each circuit pursuant to administrative order, and so constitutes a self-fulfilling "prevailing" rate for indigent defense established with no reference whatsoever to the economic marketplace.

Affording greater deference to an *ex parte* administrative order than to a statutory cap on total compensation for indigent representation under the circumstances is untenable. No evidence exists in this record that the Chief Circuit Judge conducted any proceedings or even inquiry to determine any sort of prevailing hourly rate, which had not been changed since 1986 until an amended order was

entered during the pendency of this case in the district court. [R. I, 119]; *Sheppard & White, P.A. v. City of Jacksonville,* 751 So.2d 731, 736 (Fla. 1st DCA 2000). Reasonableness rarely can be determined by fiat. Accordingly, the certified question should be answered in the affirmative.

The First District concluded that this Court must have assumed in *White v. Board of County Commissioners of Pinellas County,* 537 So.2d 1376 (Fla. 1989), that fees set by administrative order are "reasonable." *Sheppard & White, P.A. v. City of Jacksonville,* 751 So.2d 731, 735 (Fla. 1st DCA 2000), *citing White,* 537 So.2d at 1379. In *White,* however, reasonableness of the hourly rate unilaterally set by the Chief Circuit Judge was neither litigated nor decided. This case presents an opportunity and basis for this Court to address the constitutional reasonableness of the hourly rate at issue under the circumstances of a highly burdensome, complex and difficult capital appeal.

The court below erred in relying upon *Hillsborough County v. Unterberger,* 534 So.2d 838 (Fla. 2nd DCA 1988), given the record in this case. The *Unterberger* court focused upon particularized evidence of whether the low hourly rate has had an empirically demonstrable impact on the rights of indigent defendants. The evidence in the record in this case demonstrates a single board-certified criminal trial attorney willing to accept representation at the previous $40.00 hourly rate, and the petitioner's

acquiescence to the trial judge's repeated overtures to accept the appointment in light of the judge's inability to find other counsel, despite petitioner's repeated protestations of the unreasonableness of the hourly rate. That the petitioner provided competent and zealous representation, resulting in reversal of Mr. Murray's convictions, should not in effect be held against the petitioner in justifying compensation at an hourly rate that "can't pay your light bill." [R. V, 603]. Under these circumstances, the question certified by the District Court of Appeal should be answered in the affirmative.

Law office practice management realities demonstrate the gross inadequacy and confiscatory nature of the hourly rates at issue. For example, overhead alone, in Georgia law firms, averages $52.00 per hour. *Small Fees, Big Problem for Defense Bar,* Criminal Practice Guide, (BNA) Vol. 1, No. 5, at 1-3, May 17, 2000. In that roughly one-half of law firm gross income is committed to various overhead expenses, and the balance of such income also must account for continuing to cover expenses during economically slow periods and further must fund periodically necessary capital improvements, compensation at the rate in the Fourth Circuit essentially provides that the attorney involved in such representation receive little or even no compensation himself. Moreover, appointed counsel under these circumstances must await payment pending the completion of the litigation and so are furnishing the local governmental entity with interest-free financing, while having either to borrow, with attendant

financing, or depend on capital reserves that otherwise would earn interest or other gains, further depriving counsel in the position of the petitioner in this case. For an attorney who might bill 1,500 hours per year, the rate of compensation of $50.00 per hour, less overhead, would render a gross income of less than $40,000.00, prior to taxes and periodic necessary purchase of capital equipment, and without accounting for inevitable "rainy days" of slow business.[1]

With such circumstances in mind, the District Court of Appeal, while feeling itself constrained to deny the bulk of the relief requested by the petitioner, was absolutely correct in its criticism of the reasonableness of the Fourth Circuit's hourly rate. This Court has authority to overrule a local administrative order, and where reasonable rates in all other areas of the law greatly exceed those permitted for indigent capital representation, with human life at stake, resulting in "the current appalling situation," *Charlotte County v. Shirley,* 750 So.2d 706, 708 (Fla. 2nd DCA 2000), the Court do so in this case. Accordingly, the Court should answer the certified question in the affirmative and quash the decision below.

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[1] Available references documenting these practical circumstances include the Florida Bar 1998 Economics and Law Office Management Survey; the 1999 Survey of Law Office Economics by Altman Weil, Inc.; and surveys by the Hildebrand Consultancy.

The manner by which to establish a reasonable fee paid to counsel for indigents constitutionally entitled to representation previously has been addressed by this Court. In *In the Interest of D.B. and D.S.,* 385 So.2d 83 (Fla. 1980), the Court considered such circumstances by balancing the governmental obligation to provide constitutionally-required representation of indigents with the obligation of lawyers to assist in the provision of legal services to the poor. This Court, in balancing those burdens, endorsed a formula of compensating such counsel "at 60% of the fee a client of ordinary means would pay an attorney of modest financial success." *Id.* at 92, *quoting, State v. Rush,* 217 A.2d 441, 448 (N.J. 1996) (internal quotations omitted). Given all of the circumstances of this case, and the record before this Court, the compensation sought by the petitioner in this case is reasonable and not in the least excessive. Accordingly, the certified question should be answered in the affirmative and the decision below should be quashed.

II.

RESPONDENT'S ESTOPPEL ARGUMENT IS WAIVED BY ITS FAILURE TO RAISE THE ISSUE BELOW AND LACKS ANY MERIT.

The respondent failed to assert the affirmative defense of estoppel at the trial court level and on appeal to the First District Court of Appeal, hence, the defense is waived. *See Dicks v. Colonial Finance Corporation,* 85 So.2d 874, 876 (Fla. 1956) (holding that the affirmative defense of estoppel must be specifically plead at the trial court level); *Sunrise Lakes Condominium Apartments v. Hechtman,* 446 So.2d 272, (Fla. 4th DCA 1976) (holding that estoppel must be specifically pled or it is waived). Therefore, because the respondent failed to raise the affirmative offense of estoppel in the trial court level, [R. I, 76-78], and also failed to raise the defense in the District Court of Appeal, the defense of estoppel has been waived.

Even if the respondent is deemed not to have waived an estoppel claim, its argument fails on the merits. The respondent has failed to assert, and cannot demonstrate, the elements of estoppel: that the petitioner misrepresented a material fact, that the respondent relied upon the misrepresentation, and that the respondent detrimentally changed its position on account of that misrepresentation. *See Mandarin Paint & Flooring v. Potura Coatings of Jacksonville, Inc.,* 744 So.2d 482, 485 (Fla. 1st DCA 1999). First, the petitioner made no misrepresentation. The

petitioner originally declined the appointment because of the inadequate compensation. Second, the respondent did not detrimentally change its position in reliance on any position taken by the petitioner. The trial court initially could not find an attorney to accept the appointment to represent Mr. Murray on appeal, and the petitioner resisted the appointment because of the inadequate compensation rate. [R. V, 603]. Furthermore, the respondent has not alleged, and cannot show, any detriment it has suffered in reliance on any position taken by petitioner. Therefore, the facts in the instant case are inconsistent with an estoppel defense.

The petitioner has consistently challenged the constitutionality of the token hourly rate of compensation for court-appointed counsel for capital defendants sentenced to death. Petitioner originally refused to accept the appointment, stating that the fee was inadequate. [R. V, 603-04]. The trial judge contacted counsel several times unsuccessfully seeking to persuade petitioner to accept the appointment. Petitioner ultimately acceded to the judge's request after others, including Holland & Knight, declined, but still maintained that the hourly rate was inadequate. [R. V, 603-04]. After this Court reversed Mr. Murray's conviction on all counts, petitioner filed a Motion for Payment of Attorney's Fees and Costs at a reasonable rate different than that of the rate established by administrative order. [R. I, 1-74]. On petition for certiorari, the First District Court of Appeal granted the petition to reflect an

intervening hourly rate increase, denied the petition otherwise and certified a question of great public importance to this Court stating, "such an hourly rate [$50.00] does seem to approach a confiscatory rate in a capital case, as here, requiring nearly 550 hours of an attorney's time." *See Sheppard & White, P.A. v. City of Jacksonville,* 751 So.2d 731, 736 (Fla. 1st DCA 2000)*(emphasis added)*. The petitioner has not waived, and is not estopped from raising, its challenge to the rate as unconstitutionally confiscatory and a threat to the right of indigent defendants to receive constitutionally effective assistance of counsel.

The petitioner is not estopped from challenging the rate set by administrative order because the petitioner has actively asserted that the rate of compensation is inadequate to compensate an attorney for a capital case that requires extensive hours and skills. A constitutional right must be waived knowingly, voluntarily, and intelligently and cannot be waived by mere silence on the record. *See Brady v. United States,* 397 U.S. 742 (1970); *State v. Upton,* 658 So.2d 86, 88 (Fla. 1995). The petitioner stated its disagreement with the fee rate before and upon acceding to the appointment, at the trial court fees proceedings, and on appeal, and respondent raised no estoppel claim until its answer brief in this Court.

The fixed rate established by the Administrative Order of the Chief Judge is not analogous to an oral attorney's fee agreement in that an appointed attorney does not

have the bargaining power to establish what fee rate is reasonable for the time necessary for the case. The authorities upon which respondent relies, *McQueen v. First Guaranty Bank & Trust Co.,* 669 So.2d 747 (Fla. 1st DCA 1997) and *Lugassy v. Independent Fire Insurance Co.,* 636 So.2d 1332 (Fla. 1994), are inapposite to this appeal because those decisions involve circumstances of fee agreements negotiated between attorneys and clients. In the instant case, the fee rate is not determined by contract entered into by two free agents, but rather determined unilaterally by the Chief Judge of each circuit.

Furthermore, the petitioner is not merely challenging an alleged "contractual fee schedule," but rather the constitutionality of the Chief Circuit Judge's token hourly rate for all capital court-appointed attorneys litigating for a person's life. Additionally, the appointing judge and the petitioner did not agree to the $40.00 hourly rate as adequate. Rather, counsel acceded to the appointment when the trial judge prevailed upon him to do so, despite his objections to the hourly rate, after the judge was unable to find other appellate counsel to accept the appointment, including the largest law firm in Florida. [R. V, 603-04]. Under these circumstances, petitioner cannot be deemed to have agreed to the hourly rate established by the Fourth Circuit administrative order.

Respondent cites this Court's opinion in *Billings v. City of Orlando,* 287 So.2d (Fla. 1973), but that decision is inapplicable to the instant case. In *Billings,* the police officer plaintiffs solicited the city for jobs, furnishing them multiple forms of consideration in addition to the type of consideration at issue in the case. *Id.* at 318. In *Billings,* two police officers sought and accepted employment with the city, and as part of that employment participated in a pension fund that automatically took 5% out of their paychecks, but guaranteed them a pension if they reached the minimum age of retirement, as well as accidental coverage. *Id.* at 317. The Court in holding that the officers were estopped from challenging the statute stated, "[o]ne who accepts the benefits of a contract cannot, having retained these benefits, question the validity of the contract." *See id.* at 318.

In the instant case, the petitioner did not apply for the court appointment, but reluctantly acquiesced to the trial judge only after the judge could not find other counsel, while objecting still to the hourly rate. [R. 603-04]. The instant case can be distinguished from *Billings,* in that the petitioner did not benefit from the "contract," but lost money by turning away other clients who would have paid substantially greater rates. [R. V, 605-06]. Additionally, unlike *Billings,* the petitioner did not receive any additional benefits such as disability or survivor benefits resulting from his "contract" of employment. *See Billings,* 287 So.2d at 318. The only 'benefit"

petitioner has received "can't pay your light bill," [R. V. 603], and so is not a benefit sufficient to estop petitioner, particularly under the circumstances presented. *See Florida Horsemen Benevolent Protective Association v. Rudder,* 738 So.2d 449 (Fla. 1st DCA 1999) (distinguishing *Billings).*

In *City of Miami v. Lipe,* 156 So.2d 195, 196 (Fla. 3d DCA 1963), the court noted the Florida Supreme Court opinion finding unconstitutional a statute which established the status of an officer as either classified or declassified. *See Lipe v. City of Miami,* 1451 So.2d 738 (Fla. 1962). On remand, the District Court agreed with the City of Miami's argument that the employee was estopped from challenging the constitutionality of the statute because he had been notified of the statute, accepted employment, and served hi term during the period that the unconstitutional statute was in effect. *See id.* The court reasoned that both parties, the City of Miami and the employee "acted on faith of the statute" while it was in effect, but the employee was "under no obligation to assault the validity of the 1955 Act until he was adversely affected by it. This he did at the first opportunity." *Id.* Therefore, because the employee challenged the statute when his employment was terminated due to one of its provisions, he was not estopped from challenging its constitutionality. *See id.*

In the instant case, the petitioner also acted in good faith by representing its court-appointed indigent client on appeal for a "reasonable attorney's fee." At the

trial level, the petitioner argued that the $40.00 rate at which court-appointed attorneys were paid was unconstitutional and unreasonable. Therefore, the petitioner did not waive its right to challenge the constitutionality of the administrative order, but challenged the order at the first opportunity at which it was adversely affected. Accordingly, as in *Lipe,* the petitioner is not estopped from challenging the constitutionality of the administrative order as providing for unreasonably low attorney's fees.

Additionally, respondent cites the inapposite case of *Steigerwalt v. City of St. Petersburg,* 316 So.2d 554, 555 (Fla. 1976), in which this Court held that police regulation that provides that an officer discharged for "neglect of duty, disobedience of orders, habitual drunkenness or conviction of a felony, shall not be entitled to retirement pension." *Se id.* at 555. The court reasoned that the regulation benefitted not only the pensioner and his dependents by encouraging the officer to perform his duties faithfully, but allowed him peace of mind that he and his family will be supported by his years of faithful service. *See id.* Furthermore, the court reasoned that the officer violated the terms of his own contract and the law. *See id.*

The *Steigerwalt* case is not similar to the instant case in that the petitioner fulfilled its ethical duty to represent the indigent client to the best of its ability, even though the set fee was inadequate. There is no dispute in the record that petitioner put

forth great effort in representing this client. Furthermore, the appellate process in a state that provides for the death penalty is an important safeguard to the most extreme punishment available, death. Therefore, the petitioner in the instant case is exceedingly different from the officer who violated the law and his employment contract and later challenged the validity of the agreement.

Because the respondent failed to plead with specificity the affirmative defense of estoppel at the trial court level and before the First District Court of Appeal, the defense is waived. Additionally, even if the respondent's asserted defense was not waived, the respondent fails to establish that the fixed hourly rate set unilaterally by the Chief Circuit Judge constituted any contractual agreement between two bargaining parties with any benefit sufficient to support a claim of estoppel. Accordingly, the respondent's estoppel argument should be rejected, and this case should be decided on the merits.

CONCLUSION

For all the foregoing reasons and those listed in Petitioner's Initial Brief on the Merits, the certified question should be answered in the affirmative and the decision of the First District Court of Appeals should be quashed.

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 480, Jacksonville, Florida 32202, by Hand Delivery on the _____ day of June, 2000.

_____
ATTORNEY

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