

**IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT OF
FLORIDA, IN AND FOR MANATEE COUNTY**

STATE OF FLORIDA

V.

CASE NO. 2007-CF-2565 - J

JOHNNY VASQUEZ,
Defendant.

_____ /

**ORDER ON OBJECTION TO INVOLUNTARY
APPOINTMENT OF PRIVATE ATTORNEY, DECLARING
UNCONSTITUTIONAL CERTAIN PARTS OF SECTION 27.5304, FLORIDA
STATUTES (2007) AS APPLIED TO DEFENDANT VASQUEZ**

THIS CAUSE came before the undersigned on May 1, 2008, for evidentiary hearing upon the motion and request of attorney Joseph Campoli to be relieved as court appointed counsel in this action.¹ Upon the evidence presented and a review of the court file, for the reasons stated below the objection is **OVERRULED** and the motion to withdraw is **DENIED**. By the greater weight of the evidence the court **FINDS**:

I. Background

A. Introduction

Joseph Campoli, a Manatee County attorney, has been appointed by the court to represent Johnny Vasquez, an indigent defendant in this case. Mr. Campoli is not on the list of lawyers who have agreed to accept Justice Administrative Commission (JAC) legal services contracts, a statutory pre-condition to court appointments. He also declines to accept the “one-time only” contract offered by the JAC [Ex. B].²

In effect, Mr. Campoli is being directed by the court to contribute legal services involuntarily and, without provision being made for reasonable compensation, he objects. As will be seen, unique circumstances have developed that give the court no option but to require counsel to remain on the case.

The issues before the court arise directly as a consequence of the legislature’s passage of chapter 2007-62, Laws of Florida (also referred to as Senate Bill 1088), and the application of revised section 27.5304, Florida Statutes (2007) to the circumstances of Johnny Vasquez’s case. This was a major change in the registry system of private

¹ “Ex.” refers to exhibits introduced at the hearing; “T” refers to the hearing transcript page.

² The Justice Administrative Commission was notified for the hearing. It did not appear but filed a response stating it took no position regarding counsel’s objection to his involuntary appointment. The response stated JAC “cannot pay any attorney fees, due process costs, or related expenses until Counsel executes” [the] non-standard Agreement for Attorney Services” which is on its website.

counsel. *Crist v. Florida Association of Criminal Defense Lawyers*, _____ So. 2d _____, 2008 WL 659435, 3/1/08, FN 7. Section 27.5304 sets forth new procedures for the appointment of private attorneys, and today these procedures present fresh challenges when the court is seeking to honor the constitution's mandate that indigent defendants in criminal cases receive the services of competent defense counsel.

B. Senate Bill 1088 and the Shortage of Registry Attorneys in Manatee County

Vasquez is a sixteen year old Hispanic youth charged as an adult with Racketeering (Count 1) and Conspiracy to Commit Racketeering (Count 2), both of which are first degree felonies. He is accused of being a member of a local gang known as Sur 13. He and thirteen other alleged members of this group were named co-defendants in an information filed by the Office of Statewide Prosecution in Manatee County on July 6, 2007.

Several co-defendants were arrested contemporaneous with the filing of the first information. Mr. Vasquez remained at large until January of 2008. Upon his arrest he was determined to be indigent and ordered to be housed in the juvenile section of the Manatee county jail where he remains today. By the time Vasquez was apprehended eleven other suspected gang members were in custody. A few retained private attorneys. The rest qualified for and received court-appointed counsel.

The Twelfth Circuit's Office of Criminal and Civil Conflict Regional Counsel (OCCRC) was not operational when the statewide prosecutor filed charges against Mr. Vasquez and the other alleged gang members. However, by the time Vasquez was in custody both the public defender and OCCRC had undertaken representation of other co-defendants, and thus the government lawyers were ethically precluded from accepting his case.

When the court turned to the roster of registry attorneys who had agreed to accept the JAC contract and court appointments, in attempting to find an attorney for Vasquez it found the list had been exhausted, meaning that all registry attorneys in Manatee County qualified and eligible to represent defendants in first degree felony cases had already been appointed to represent Vasquez's co-defendants. In short, there were more defendants in the case than there were registry attorneys in Manatee County available for appointment.

C. The Court's Efforts to Recruit Registry Attorneys

The possibility that the list of registry attorneys in Manatee County would be too short to accommodate the representation of all fourteen defendants targeted by the statewide prosecutor had been anticipated by the court. [T-15] The problem became manifest immediately upon the passage of SB 1088 when Walt Smith, the Trial Court Administrator (TCA), began to receive notices from members of the criminal defense bar that they were withdrawing their names from the registry list. [T - 13] Attrition was dramatic circuit wide.

As early as July 20, 2007, the lack of a sufficient number of registry attorneys to handle the alleged racketeers was discussed in a letter sent by the chief judge to Victoria Montanaro, Executive Director of the JAC [Ex. F] [T-25 -27]. The letter suggested that the chances of finding attorneys willing to accept appointments in complex cases like the racketeering ones would be enhanced if the court were able to conduct an early hearing to determine if the case met the standard of unusual and extraordinary, or if the appointment would be confiscatory for the attorney. However, JAC replied that the statute did not allow for early fee determinations. [T-27]

Initially, the Manatee County roster of defense attorneys shrank from about fifteen lawyers to five [T-15]. These were the first to be appointed to represent Vasquez's co-defendants. About eight of the fourteen defendants were arrested when the information was filed [T-16].

In an effort to encourage more attorneys to accept the JAC contract, with the assistance of Mr. Smith the court initiated a public relations campaign and recruitment drive.[T-13-14]. There was some improvement with more names being added to the Manatee roster, but only a handful of attorneys indicated a willingness to accept first degree felonies. The following summarizes the attempts made to increase the number of registry attorneys.

Personal contact was made with defense attorneys by the court administrator, judges, and others in an effort to persuade them to remain on the roster. [T-14; T-122] The chief judge and the TCA met with members of the Florida Association of Criminal Defense Lawyers (FACDL) in Sarasota and Manatee County [T-13; T-17]. Efforts were made to alert the public to the problem through articles in the Sarasota Herald Tribune and the Bradenton Herald [T-21], and the chief judge wrote articles for the Sarasota and Manatee Bar Association newsletters informing their members of this new challenge to the criminal justice system [T-29].

Expecting other alleged members of Sur 13 to be apprehended, and being advised by the line judge assigned the racketeering case that she was running out of registry attorneys [T-16], the TCA began calling lawyers on the Sixth Circuit (Pinellas County) and Twentieth Circuit (Charlotte County) court-appointed lists. Because of the low flat fee and the nature of the charges, these attorneys declined the invitation [T-15].

Walt Smith then contacted The Florida Bar and obtained the names of every attorney in the Twelfth Circuit who practiced criminal law [T-18]. The Sarasota and Manatee County phone directories were searched for the names of the lawyers advertising themselves as criminal defense attorneys. These names and others known to be practicing in the field but who were not members of the local bar associations were added to the list by the chief judge and court administrator [T-18].

The result was a roster of about seventy attorneys [T-19]. To this group the chief judge sent a letter (Ex C - "Crisis in Criminal Court Appointed Cases") encouraging them to sign up to help indigent defendants. The letter pointed out the critical shortage in registry

attorneys, that the JAC had a “one-time contract” which was available for those who did not wish to accept regular appointments, and that their assistance in volunteering for this vital service would assist the court in insuring that defendants’ Sixth Amendment right to counsel was protected. The letter also warned that a shortage of attorneys could result in the involuntary appointment of members of the defense bar. [T- 19-20].

To this invitation, there were no acceptances. The responses that were transmitted, both in writing and telephonically, were empathetic but emphatic: The fee structure was unreasonable; the attorneys felt they could not effectively represent defendants for the sums the legislature was offering [T-20-21]. A sampling of the written replies were introduced as Exhibit J.

For economic reasons due primarily to the low fee caps, nearly all attorneys in adjoining Sarasota and Desoto Counties have restricted themselves to cases originating in their home counties and decline to offer their services for clients facing charges in Manatee.

D. Procedures Adopted by the Circuit to Address the Shortage of Registry Attorneys – The Involuntary Appointment List

Having exhausted all options to expand the list of lawyers willing to accept regular JAC contracts, the decision was made to create a second roster. This one - which to avoid confusion with the registry list will be referred to as the Involuntary Appointment List - would contain the names of the attorneys in each county identified by the court as criminal law practitioners but who were unwilling to accept court appointments on a regular basis. The Involuntary Appointment List [Ex. E] is broken down by county, and was created using the same list of seventy or so circuit lawyers to whom the chief judge’s recruitment letter (Exhibit C) was sent.

In an effort to develop procedures to cope with the shortage of registry attorneys, the chief judge sent a memorandum to the clerks on October 1, 2007 [Ex. L]. The memo sets forth the procedures to be used to obtain counsel for the indigent in criminal cases. The following is an excerpt from that memo. A lengthy portion is quoted because it explains the history and the confluence of events that led to the present impasse:

“The 2007 statute effectively abolished the Indigent Services Committees which were formerly charged with the responsibility of compiling and maintaining the list of private attorneys available for conflict appointment. These duties have now been split between the Chief Judge, who compiles the list, and the clerk, who maintains the list.

According to new section 27.40(3)(a) and (b), the Chief Judge assembles the list of attorneys in private practice, by county and category of cases, providing the list to the clerk of court in each county. Thereafter, when there is a need for indigent representation that neither

the Office of Regional Counsel nor the Public Defendant can fill, the court is required to appoint attorneys in rotating order using this list.

Pursuant to section 27.40(3)(b), the clerk maintains the registry and provides the court with the names of the attorneys for appointment. When the registry list in a county is inadequate, the statute says the court is to provide the clerk with the names of at least three private attorneys who have the relevant experience to properly represent the indigent party. The clerk then is supposed to send an application to these attorneys requesting that they register for appointment.

The statutory scheme outlined above assumes at least one of the attorneys who receives the application will then agree to accept appointment to the case, and that there will always be a pool of private lawyers willing to voluntarily represent the indigent. However, when the legislature adopted Senate Bill 1088 it also adopted a flat fee schedule that has been found unacceptable by most of the lawyers who were willing to accept court appointments under the former law.

In addition to the low flat rates and the new provision that requires fee override decisions to be made by judges at the end of the case, attorneys object to the standard contract adopted by the Judicial Administrative Commission (JAC). Signing of this document is a prerequisite to their ability to accept indigent clients and they find the contract's provisions onerous. Consequently, all counties in our circuit are experiencing a severe shortage of attorneys willing to work for the new state rates. This is especially true in criminal cases.

The Court Administrator and myself have used all available resources to recruit local attorneys to join the criminal defense registry list, or to agree to be appointed on a case-by-case basis to criminal conflict cases. This includes letters to all resident lawyers known to practice criminal law, as well as personal one-on-one solicitation of attorneys.

To our knowledge, at this time the names that appear on the attached registry list, **Exhibit A**, are the only attorneys in the circuit willing to accept appointment under the JAC contract. They are listed by county and area of law. However, this list changes almost weekly. Several on the list who practice criminal law have given notice that they are considering dropping off, due to being overwhelmed with appointments and/or because they are no longer able to tolerate the financial sacrifice required to work for the state rate. You will note the lack of any names willing to accept capital cases.

Given the nearly universal opposition to the provisions of Senate Bill 1088 by the private bar, it is my opinion that submitting the names of

three local lawyers to the clerk each time a conflict criminal attorney is needed is impractical, that it will be an exercise in futility and a waste of the clerk's time and resources. Moreover, it will delay real time appointment of attorneys by the criminal division judges, who now sign many conflict appointment orders in the courtroom. However, in compliance with the statute I will provide you with a comprehensive list of local attorneys who are competent in criminal law, and will leave it to you to decide whether to send them applications.

To summarize the current state of affairs, the Office of Regional Counsel is not ready to accept appointments, there are too few private criminal defense attorneys willing to sign the JAC contract and to work for the statutorily capped attorney fees, and there is an immediate need for indigent defendants charged with jailable offenses to be represented by qualified attorneys.

To resolve the current impasse, until the situation is mitigated by the legislature or the courts, to insure that all persons accused of crimes are provided a lawyer, and until such time as the Office of Regional Counsel is operational (at which time this will be modified) I am considering adopting the following interim procedure. I would appreciate your questions and suggestions before this becomes effective:

When judges assigned to the criminal divisions are informed that the Public Defender has withdrawn from a case or is unable to accept a client due to a conflict, that judge will contact the clerk's office with a request that the clerk provide the identity of the lawyer whose name appears next on the registry list. If the registry is inadequate to provide an attorney, the clerk will be asked to pick a name from a list of qualified defense attorneys to be compiled by the Chief Judge. The latter list will be used by the clerk to select the name of an attorney in rotating order, and he or she will be involuntarily appointed to the case. This document is being drafted and will be available soon.

The name submitted by the clerk will be inserted in the appointment order by the judge and filed of record. If this does not occur in court, the clerk may inform the court by email or phone of the names submitted for appointment. In all instances the clerks would maintain the updated master list of private attorneys and the cases to which they have been appointed. Your offices also would be asked to inform the Chief Judge whenever a deputy clerk learns of attorneys who have removed themselves from the JAC approved registry list.

With your assistance I am hopeful a procedure can be established that will permit judges to obtain the names of private conflict counsel

through their clerks while the clerks and judges are in court, for example, at arraignments. If the “three application” option is not adopted, this should shorten the appointment process and enable attorneys to begin work on their assigned cases much sooner.

Attorneys involuntarily appointed will be provided an opportunity to present their objections to the Chief Judge. Objections that are sustained will require the appointment of the next name on the rotation list and the clerk will be duly notified. A copy of a draft order of appointment is attached.

In summary, we will be asking the clerks to maintain two lists: One will be the registry list containing the names of attorneys who have agreed to accept the JAC contract. When it proves inadequate, the other will be a list of local attorneys known to be competent to practice criminal law. This list will be compiled by the Chief Judge and used by your offices to identify lawyers for involuntary appointment.

The only exception to this will be capital cases. Neither list should be used for appointment of attorneys in such instances. Only attorneys who have met the Supreme Court’s special requirements are authorized to represent persons facing the death penalty. Pending the opening of Regional Counsel’s office, the Chief Judge and the Court Administrator will attempt to find qualified attorneys in all capital cases.” * * * *

When the registry list (Exhibit A to the memo) proved insufficient to supply all the lawyers required for the racketeering defendants, after Vasquez’s arraignment, using the protocol outlined in the memo the clerk selected Joseph Campoli’s name from the Involuntary Appointment List, and the assigned division judge ordered his appointment. In due course this led to the objection that is now before the court. [See Ex. A, Order Appointing Private Attorney dated 3/16/08.]

The appointment order advised Mr. Campoli that he had two choices: either accept a one-time JAC contract and the statutory rules for compensation, or proceed to provide *pro bono* services. An evidentiary hearing was authorized for attorneys objecting to the appointment.

At the hearing, the court administrator testified that while there are Manatee attorneys on the registry list who have declared themselves willing to accept clients facing the type of charges filed in this case, they are already representing Vasquez’s co-defendants [T-34 - 35]. The remainder of registry attorneys are new members of the bar or others who self-limit the level of crimes they feel competent to defend [T-34-35], to the exclusion of first degree felonies.

Additionally, although there are criminal defense attorneys practicing in Sarasota and Desoto Counties who are on their home county’s registry list, they limit their court

appointments to the locations where they have offices [T-33-35] and they decline to be available for Manatee County clients.

The bottom line: Despite all recruitment efforts, today there are no registry attorneys in Manatee County qualified and eligible to accept a client charged with two first degree felony counts, and no volunteers from the private bar have been forthcoming.

II. Statutory Factors Inhibiting Vasquez's Representation by Private Court-Appointed Counsel

In its effort to control escalating due process costs, the legislature adopted language in Chapter 27 that creates serious challenges for private attorneys agreeing to accept court appointments under the terms of a JAC contract. The following summarizes some of the major sections that discourage lawyers from adding their names to the registry list. These are especially critical to any attorney who might consider representing Mr. Vasquez. All these are found in section 27.5304, Florida Statutes (2007):

A. No Stacking

When defending a client facing a multi-count information, the attorney is to be paid the flat rate of the most serious charge. Stacking is not allowed. For example, an attorney defending against ten counts is paid for only one, regardless of the complexity and diversity of the charges. This is set forth in section 27.5304(1) which states: **“This section does not allow stacking of the fee limits established by this section.”**

B. No Payment Until Case is Concluded

Section 27.5304(3) states that the “court retains primary authority and responsibility for determining the reasonableness of all billings for attorney’s fees, costs, and related expenses, subject to statutory limitations.” Then, in a provision that is most problematic in Mr. Vasquez’s case, it says **“counsel is entitled to compensation upon final disposition of a case.”** [Emphasis added.] Like the stacking prohibition, this requirement appeared in prior versions of the law.

C. Low Fees for Serious Crimes

Section 27.5304(11) states the legislative intent that “the flat fees under this section and the General Appropriations Act comprise the full and complete compensation for private court-appointed counsel.” Attorneys representing clients facing noncapital, nonlife felonies are to be paid a flat fee of **\$2,500.00**. Section 27.5304 (5)(2). Since Mr. Vasquez is facing two first degree felonies, this is the maximum the attorney could expect to be paid, absent a fee override approved by the judge pursuant to the requirements of section 27.5304(12).

In many instances, when cases are assigned to registry attorneys they find the flat fees mandated by the new statute for the various levels of crime are mere token payments,

bearing little or no relationship to the amount of work required for the lawyer to provide competent representation. The temptation for registry lawyers to not work a court-appointed case comprehensively, to take short cuts that may not always be in the client's best interest is ever present, increasing the likelihood of viable post-conviction relief issues [T-96].

D. Restrictions on Motions to Exceed the Statutory Cap

Section 27.5304(12) recognizes that on "rare occasions" an attorney may be called upon to represent a client in a case that requires unusual and extraordinary effort, in which event a fee in excess of the cap may be requested. When the motion comes before the court, the following provisions of section 27.5304(12) apply and are pertinent to the case at hand:

(b) Following receipt of the motion to exceed the fee limits, the chief judge or a designee shall hold an evidentiary hearing.

1. At the hearing, the attorney seeking compensation must prove by competent and substantial evidence that the case required extraordinary and unusual efforts. The chief judge or designee shall consider criteria such as the number of witnesses, the complexity of the factual and legal issues, and the length of trial. The fact that a trial was conducted in a case does not, by itself, constitute competent substantial evidence of an extraordinary and unusual effort. **In a criminal case, relief under this section may not be granted if the number of work hours does not exceed 75 or the number of the state's witnesses deposed does not exceed 20.** [Emphasis added.]

2. The chief judge or designee shall enter a written order detailing his or her findings and identifying the extraordinary nature of the time and efforts of the attorney in the case which warrant exceeding the flat fee established by this section and the General Appropriations Act. . .

* * *

(d) If the chief judge or designee finds that counsel has proved by competent and substantial evidence that the case required extraordinary and unusual efforts, the chief judge or designee shall order the compensation to be paid to the attorney at a percentage above the flat fee rate, depending on the extent of the unusual and extraordinary effort required. The percentage shall be only the rate necessary to ensure that the fees paid are not confiscatory under common law. The percentage may not exceed 200 percent of the established flat fee, absent a specific finding that 200 percent of the flat fee in the case would be confiscatory. **If the chief judge or designee determines that 200 percent of the flat fee would be confiscatory, he or she shall order the amount of**

compensation using an hourly rate not to exceed \$75 per hour for a noncapital case and \$100 per hour for a capital case. However, the compensation calculated by using the hourly rate shall be only that amount necessary to ensure that the total fees paid are not confiscatory. [Emphasis added.]

While fee override provisions were included in former statutes, the new requirements are exceptionally detailed, often requiring the billing lawyer to invest considerable time interacting with JAC just to get paid. What is not apparent from reading the statute is how the billing operation occurs in actual practice, and the demands this makes on the time a registry lawyer must spend on these low fee cases.

The reality is that hassles with the JAC in getting bills reviewed and approved are commonplace, and delays in payment even after court approval have become routine.

The following testimony highlights an aspect of indigent representation that discourages attorneys from signing JAC contracts. The witness, Andrea Mogensen, is a defense attorney and a veteran of the registry list:

Q. What was your typical turnaround time between when you submitted the bill and when you got your flat fee?

A. It depended on the time of year. There were periods of time where JAC could turn around an uncontested bill in about two weeks. That is rare and extraordinary. It's closer to eight to ten weeks, generally. But having said that, in the last ten months since I've had a JAC contract, I have been court appointed on probably 40 - 45 cases because I was one of the handful of people who is willing to work under the flat fee agreement, and I did remove myself from that position because of some of the issues that have been raised today.

Q. You're no longer on the JAC list?

A. I recently went back on after they resolved the constitutionality of the Regional Conflict Office. I was off for that time period.

I believe of the cases that I have been court-appointed on, I have possibly three that were not rejected by JAC for one thing or another. They don't give you a written list of the rules. I'm very tolerant of bureaucracy. I've worked in bureaucracy before, but it's very capricious. They had me on a flat fee agreement. They rejected one of my bills for not submitting an hourly. I've never agreed to an hourly, I've never been required to do an hourly. So then I was required to sit down and spend two and a half hours going over court appearance records, going back over my schedule trying to put together an hourly bill because they suddenly required it.

I've had to spend a lot of time trying to get my vendors paid, court-appointed experts, when they're indigent for costs. I've spent hours and hours doing that. So I really can't tell you the average turnaround time because 95 percent of my bills have been rejected for some technical reason. They changed the form and tell you to put it on the new form. They tell you codefendant cases are supposed to be on the same form, then they go to separate forms. It struck me that they had - - you get paid with the rhythm of when they get an infusion of cash, and when the cash is low, there seems to be more rejections.

The Court: Q. They're working with the budget given them by the legislature?

A. Yes, sir.

The Court: Q. And they're trying to control the output to correspond with the amount of money they have?

A. That's what it appears to be to me, because the rejections are odd, unusual, unpredictable.

The Court: Q. So in other words, when it appears that the JAC funding is not at an adequate level, that delays your payments?

A. That's correct. It appears that they're funded quarterly from the rhythms of the time frame on which I get paid. [T- 123-126]

Ms. Mogensen relates that while it consistently takes eight to ten weeks to get paid for an uncontested bill, when the JAC objects it can add another month or two, time which is spent getting the matter before the court and re-submitting invoices to JAC [T 126-127]. She estimates she spends ten to fifteen hours a month working with the agency to get the bills in a form it will find acceptable, all of which is noncompensable. Similar problems are experienced in getting due process service providers paid, with forms changing, additional documentation being required, and JAC even refusing to honor court orders [T 127 - 128].

As will be seen, as applied in Mr. Vasquez's case, the fee override sections of Chapter 2007-62, Laws of Florida, and the practical consequences of accepting court appointments under the current statutory scheme present a daunting challenge for any private attorney required to competently represent this indigent client.

III. Economic and Case Specific Factors Inhibiting Vasquez's Representation by Private Counsel

Various factors are in play in this case which impinge on the ability of court appointed counsel to competently represent the defendant for the statutory fee.

A. Discovery Considerations

According to testimony elicited at the evidentiary hearing, the prosecutor has filed a witness list with 315 names [T-98] in Mr. Vasquez's case. Given the number of predicate incidents alleged and the number of years of incarceration facing his client if convicted (sixty), when testing the state's evidence, like any diligent defense attorney Mr. Campoli is inclined to leave few stones unturned [T-100 - 101]. This will include the need to investigate predicate acts implicating his client and others named in his two counts. [T-100].

Wiretaps are expected to be part of the state's discovery disclosure [T-99]. If so, transcripts have to be verified and reviewed. The initial round of depositions will take six days [T-183] and have to be coordinated between the prosecutor and twelve defense attorneys. Spanish language interpreters likely will be required during hearings and trials, thereby extending the time counsel has to spend in court. The trial of the case, if the co-defendants' charges are not severed, easily could exceed a month. Pre-trial motions can be expected to consume considerable preparation, research, and argument time.

B. Law Office Economics in 2008

Mr. Campoli objects to the appointment in this case for a number of reasons. They are concisely set forth in his motion. Several of these concern the economic sacrifices he would have to make to provide competent counsel for his client. In short, he sees no way to do so given the low statutory fee schedule and the attention he will have to devote to the case to do a competent job.

The Manatee criminal defense bar is composed primarily of sole practitioners. Mr. Campoli is no exception. He is an experienced attorney specializing in criminal law but in his twelve years as a lawyer he has never handled a racketeering case [T-81 - 82]. He has one office in the city of Bradenton, and he has been off the court appointed list for a number of years [T-78-79]. At the time of his motion hearing, May 1, 2008, Mr. Campoli had already performed about 60 hours of *pro bono* work, three times the minimum requested by The Florida Bar [T-80].

He conducts his solo practice in a manner similar to many other local attorneys. He has one full time employee, a legal assistant. His office overhead is about \$11,171 per month [T-85]. He arrives at the overhead figure by adding his average monthly expenditures for advertising, his health insurance, his employee's salary and health insurance, taxes, business phone, office rent, and office supplies. This calculation is very conservative as it makes no mention of elements such as continuing legal education expenses, bar and

professional organization dues, malpractice insurance, or the cost to acquire and maintain office furniture, machines and computers [T-87-88]. It excludes salary or any personal compensation [T-86-87].

Mr. Campoli is feeling the pinch of the current economic slowdown. He describes his current financial situation as “difficult” [T- 84]. His wife, who has been a stay-at-home mother for the last three and half years, has just returned to part-time employment as a dental hygienist [T- 83-84].

Like many practicing criminal law, he charges clients a flat fee for legal services collected upfront before representation is undertaken [T-89]. The fee goes into an office operating account out of which he pays overhead expenses [T 88 - 89]. He relies on money coming in at a fairly steady rate [T-94]. Costs such as photocopying or postage are included in the fee of paying clients. If enough fees come into the operating account he can cover his office expenses and take home a profit. If not, he faces a deficit and no income to live on for that month. Using his figures, if he works 160 hours a month, assuming a 40 hour work week, Mr. Campoli needs to earn about \$62.50 an hour before he can bring home a paycheck [T-88].

Based on what he and Mark Lipinski, Esq., his expert witness, have seen of the case so far, it is estimated that about 500 hours will be required to conduct discovery and to properly prepare the case for trial [T-112-113]. If the case goes to trial, Campoli estimates it could take a month or more and an additional 500 hours of attorney time [T-115]. This raises the legitimate issue of whether the Vasquez appointment will preclude other employment.

According to Mr. Campoli, to have a solvent solo practice it is important for a defense lawyer to be accessible to new clients. He has lost many prospects to other counsel because when that first urgent call came to his office, he was in court or in deposition and unavailable. [T 90-91]. Persons under investigation or facing imminent arrest feel the need for immediate access to counsel. They often will hire the first lawyer with whom they consult [T- 44 - 45; T- 92].

This is relevant to the Vasquez appointment because if for the contract rate of \$2,500 Mr. Campoli is forced to devote 500 pretrial hours to this case, and another month or 500 hours to trial related work, he will miss opportunities to accept new clients or even to attend to existing clients’ cases. This will cause him to be denied the funds that are the lifeblood of a viable criminal defense practice [T 93-94] and he may even lose clients who have already paid, raising the specter of refunds. Mr. Campoli is not independently wealthy and the overhead of a law office takes no holidays. A month in trial without the prospect of engaging new clients and without compensation to offset his overhead and make a profit would have a devastating effect on his practice [T-93-94.]

If approached by a prospective paying client seeking representation in a case like Vasquez’s, in evaluating the economic impact of accepting such a complex matter, Mr. Campoli would have to calculate how many new fees he might lose during the time he

was attending to the racketeering charges, and weigh that against the amount the defendant is offering for representation. Mr. Lipinski, who is a leader of the defense bar in Manatee County and who has handled a racketeering (RICO) case in federal court, testified he would only consider taking the Vasquez case for \$100,000 if there were no trial, and would charge another \$100,000 if the case went to trial [T-42].

In the case of a paying client, the attorney is able to set a fee that will cover his overhead expense. If the fee on the table is not sufficient to cover overhead and provide a profit, the attorney can reject the case. Registry attorneys do not have this option. They must take all appointments. Attorneys who sign JAC contracts are gambling, betting they will get enough simple cases to offset the ones that are time magnets, and hoping the out-of-pocket expenses of a particular case will not consume a major portion of the small flat fee.

Adding insult to the injury of a low statutory fee is the requirement that persons accepting JAC contracts bear all “office overhead” expenses, several items of which, like photocopying and postage, were reimbursed under the prior law. [T-13] The JAC will not compensate contract attorneys for copying documents and there is already voluminous documentation in the racketeering case. Unless the statewide prosecutor agrees to provide photocopies of documents for free, a perquisite that has not yet been offered, Mr. Campoli may have to pay for about 2000 pages of copied material out of his own pocket and the discovery process is barely underway [T- 100 & T- 111].³

Mileage and travel costs intra-county are other expenses not compensated under the JAC contract. These also nibble away at the bottom line of counsel working as court-appointed lawyers. The county jail is in a remote area known as Port Manatee. Mr. Campoli faces a round trip of 34 miles each time he leaves his office to visit his client [T-82]. Personal visits are necessities as all telephone conversations at the jail, including attorney – client conferences, are recorded and monitored by law enforcement officers. [T-83]. This decreases the already thin and frequently non-existent profit margin of a court appointed case and increases the time a conscientious attorney has to expend on a low paying matter.

Moreover, there are currently eleven attorneys on the case. Each motion or pleading mailed to the court, the prosecutor, his client and co-counsel will cost nearly \$6.00 in first class postage, and there may be many mailings in the course of the litigation, none of which is reimbursable. This is another irksome burden imposed on the attorney for the privilege of representing the poor. Such an expense may be insignificant for large law firms with a wealthy client base, but it is not trivial for the solo practitioners trying their best to conscientiously represent the indigent on the shoestring budget mandated by the legislature.

³ The prospect for free copies from the state are not encouraging. In the State’s Second Supplemental Discovery Exhibit filed March 27, 2008, defense attorneys were served notice that “Copying charges will be assessed pursuant to Section 119.07, F.S. as follows: \$.15 per one-sided copy; \$8.50 per hour labor in excess of one hour; actual mailing/shipping costs.”

When it comes to appointing lawyers for the indigent, it is the Joseph Campoli's of the bar upon whom the judiciary depend for competent counsel. His situation is fairly typical. As a solo attorney in a moderately populated county, the economics of maintaining a successful criminal law practice on a narrow margin of profit is not much different than that of his peers on the Involuntary Appointment List. The odds are high that the other defense attorneys on the list face the same financial challenges as Mr. Campoli. Granting his application to withdraw would not solve the problem that Vasquez faces - the need for a lawyer today.

IV. CONSTITUTIONALITY OF SECTION 27.5304 AS APPLIED TO VASQUEZ

A. Extraordinary and Unusual, and Confiscation Issues

As is required of the judicial branch, this court must give due deference to the legislature's enactments, especially in this time of critical revenue shortfalls. However, functions of the criminal justice system that are essential to the constitutional duties of the court can not be constricted to the point that court-appointed lawyers are unable to represent criminal defendants for legitimate fears of jeopardizing their own financial security. A lawyer should never get rich representing the indigent, but by taking their cases he should not be forced to join the indigent.

As part of a lawyer's professional responsibilities, The Florida Bar requires its members to assist without charge those who cannot afford legal representation. *Pro bono* service is ubiquitous, encouraged and honored. The Oath of Admission to the bar requires the applicant to affirm that he or she "will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed," but it does not require that the lawyer impoverish himself and his family in the process.

This is the principle recognized implicitly in the landmark case of *Makemson v. Martin County*, 491 So. 2d 1109 (Fla. 1986), where the court quoted approvingly from the dissent in *MacKenzie v. Hillsborough County*, 288 So. 2d 200, 202 (Fla. 1973):

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.
Makemson, 491 So. 2d at 1114.

The stress today between the legislature's vital role as stewards of the public treasury and the constitutional imperatives of the court is not new. At the time of *Makemson*, the counties were responsible for paying the expenses associated with court-appointed counsel and there was considerable litigation over trial judges exceeding statutory fee caps. As the court noted:

A survey of the repeated attacks on the validity of the statute highlights the strong tension between the counties' treasuries, as protected by the statutory maximum fees, and the attorneys seeking compensation more fair than that the legislature would grant. As previously pointed out, we must focus upon the criminal defendant whose rights are often forgotten in the heat of this bitter dispute. In order to safeguard that individual's rights, it is our duty to firmly and unhesitatingly resolve any conflicts between the treasury and fundamental constitutional rights in favor of the latter. *Makemson*, 491 So. 2d. at 1113

The Supreme Court held “that it is in the inherent power of Florida’s trial courts to allow, in extraordinary and unusual circumstances, departure from the statute’s fee guidelines when necessary in order to ensure that an attorney who has served the public by defending the accused is not compensated in an amount which is confiscatory of his or her time, energy and talents.” *Id.* at 1115.

When applied to this defendant, portions of section 27.5304, Florida Statutes (2007) impair the court’s inherent authority to ensure adequate representation of the criminally accused. In order for the court to provide Mr. Vasquez with an attorney, it is essential that the court disregard the flat fee, the override restrictions, and the requirement that fees be paid at the conclusion of the case. Without judicial intervention, the referenced provisions of section 27.5304 constitute an insurmountable obstacle inhibiting the court from fulfilling its obligation to secure counsel for the indigent. In sum, the statute has become an oppressive limitation and has lost its usefulness to the court as a guide to calculating compensation. *Makemson*, 491 So. 2d. at 112.

As in *White v. Pinellas County*, 537 So. 2d 1376 (Fla. 1989), the court finds that as applied to Johnny Vasquez, the legislatively fixed attorney fees of Chapter 2007-62, Laws of Florida, are so out of line with reality that they materially impair the ability of court-appointed lawyers to fulfill their roles of defending the indigent and curtail the ability of this court to appoint an attorney to execute that responsibility. The law impermissibly encroaches upon a sensitive area of judicial concern and violates article V, section 1, and article II, section 3, of the Florida Constitution.

Specifically, the court finds the Vasquez case extraordinary and unusual. Racketeering cases are not the types of crimes typically found in the Twelfth Judicial Circuit. Few local criminal defense attorneys have experience with such offenses. Consequently, most defense attorneys involved in the case, including Mr. Campoli, are starting at ground zero. There will be a steep learning curve [T-82]. They have to study the applicable Florida statute, most of which is modeled after federal law, and all of which is outside the mainstream practice of nearly all Manatee County lawyers. Moreover, Mr. Campoli will not be acquiring an education that he likely will be able to use in the future, organized crime cases in his home jurisdiction being a rare occurrence.

White v. Pinellas County, 537 So. 2d 1376, at 1380, reminds trial judges faced with fee override issues to focus on the time expended (or in this case, to be expended) by counsel

and the impact upon the attorney's availability to serve other clients, not on whether the case is factually complex.

By substantial competent evidence the court finds legal representation of Mr. Vasquez will require the commitment of an enormous portion of the attorney's time and logistical resources. By any fair reckoning it is clear at the outset that the case will exceed the 75 work hours and 20 depositions of state witnesses required in section 27.5304(12)(b)(1), Fla. Stat., and will be confiscatory of his time, energy and talents even if the flat fee is doubled by 200%.

While a precise time estimate is not possible at this early stage, the projection of 500 hours or more for pre-trial work is not unreasonable. While he attends to Mr. Vasquez's defense, the odds are high that the work will consume successive days and weeks on Mr. Campoli's calendar and that he will lose compensable time and new paying clients as a result. Without fair compensation for his services on this case, he can not cover his overhead or make a profit and his law practice will face financial catastrophe.

The prosecution will not be over in a matter of months. Given the number of alleged gang co-conspirators (14), the number of state's witness (315 so far), the extensive documentary material that must be reviewed (about 2000 pages to date), the depositions yet to be taken (six days are set), hours to be consumed by language and translation disputes, the inherently complex legal issues involved in racketeering and conspiracy counts (2 predicate incidents naming Vasquez, 63 more implicating co-defendants), and the number of pre-trial hearings that are likely to occur, it may be years before Vasquez's case lumbers to a conclusion in the trial court.

It would result in the confiscation of the attorney's professional services infringing on Vasquez's Sixth Amendment right to counsel to make Mr. Campoli wait until the end of the case to collect a fee. Consequently, to protect the constitutional rights of this defendant the circumstances of the case require the court to implement a "pay-as-you-go" compensation arrangement.

This will require the JAC to make serial payments pursuant to court orders after evidentiary hearings are conducted on the reasonableness of the interim billing. Mr. Campoli will be required to submit invoices and time records in advance to the JAC, which it may review and object to, and the agency's lawyers will be permitted to attend and participate in the fee hearings. Because timely payments of court-ordered attorney compensation in this case are inextricably tied to Mr. Vasquez's right to counsel, unreasonable delays in payment following court approval can not be tolerated.

The procedure adopted by this order represents one approach to fair compensation. The court will leave the door open to other alternatives and the ingenuity of a higher court, the bar, or the legislature to find better options.

B. Methodology Used to Calculate a Reasonable Attorney Fee

It should be self-evident from the earlier discussion that this case is the poster child for what is “unusual and extraordinary.” Where the Vasquez case is different, is the court’s need to determine a fee structure early in the litigation. In other cases where a fee override issue has come before an appellate court, the assessment of the fee is after services already have been provided and the court is able to engage in a retrospective analysis. See, for example, *Makemson*, 491 So. 2d 1109;⁴ *White v. Pinellas County*, 537 So. 2d 1376 (Fla. 1989); *Hillsborough County v. Scruggs*, 545 So. 2d 910 (Fla. 1989); *Swartz v. Manatee County*, 842 So. 2d 980 (Fla. 2d DCA 2003); and *Anderson v. E.T.*, 862 So. 32d 839 (Fla. 4th DCA 2003).

The courts have to have a fair and efficient system for appointing private counsel, one that respects the profession and compensates criminal defense attorneys on reasonable terms for their vital services to the indigent. If the state is going to pay government lawyers decent compensation to prosecute criminal gang cases, it should do the same for private counsel forced to defend the accused.

Here, the court cannot justifiably order Mr. Campoli to remain on the case absent accommodations that will insure fair compensation. What follows is the court’s attempt to do so.

The court considered ordering the state to pay one lump sum within the range of estimates of Mr. Campoli and Mr. Lipinski, but that could result in a windfall and be wasteful of state resources if the case terminates early, for example, by an attractive plea deal being offered or Vasquez turning state’s evidence.

Moreover, assuming the court could estimate the total fee with a precise degree of accuracy, JAC periodically suffers from lack of due process appropriations to pay registry and private attorneys, and large invoices present particularly difficult management issues for the agency. So the remaining alternative is to require interim billings to JAC and serial payments accompanied by judicial scrutiny and approval.

When the circuits’ Indigent Services Committees were abolished by SB 1088, so were the hourly fee schedules set by the chief judges and the less restrictive fee override provisions established by former section 27.5304. Accordingly, to facilitate interim billing the court is obliged to make a fresh effort to construct a formula that will arrive at an appropriate hourly rate for the attorney selected to represent Johnny Vasquez.

To achieve this goal, the court looked for guidance to the pre-*Makemson* opinion *In re D.B. and D.S.*, 385 So. 2d 83 (Fla. 1980). In that case the question was whether parents facing loss of custody of their children in a dependency case were entitled to counsel paid for by the county. The Supreme Court answered affirmatively, and set forth the

⁴ Although in *Makemson*, the Supreme Court approved the trial judge’s decision to approve an appellate fee before the cost was incurred, using a bidding process. *Id.* at 1115.

underlying philosophy and methodology for payment of counsel, who were private members of the bar appointed to represent the indigent clients:

It is our view that the government has an obligation to provide legal representation when such appointment is required by the constitution, but lawyers should not be totally relieved of their professional obligation to provide legal services to the poor. In the absence of a statutory payment formula, we find that when the appointment of counsel is constitutionally required under *Potvin*, payment should be made under the formula expressed by the Supreme Court of New Jersey in *State v. Rush*, 46 N.J. 399, 217 A.2d 441, 448 (1966):

We are satisfied the burden is more than the profession alone should shoulder, and hence we are compelled to relieve the profession of it.

... But for the time being at least, we think the members of the bar should contribute something more, despite still other calls upon them for gratuitous service. **To that end, the compensation should be less than that expected of a client who can pay. The rate should reimburse assigned counsel for his overhead and yield something toward his own support. In approximate terms the overhead of the average law office probably runs about 40% of gross income. To meet that expense and yield something to assigned counsel, we suggest compensation at 60% of the fee a client of ordinary means would pay an attorney of modest financial success.** [Emphasis added.] *In re D.B. and D.S.*, 385 So. 2d 83, at 92.

The *D.B. and D.S.* opinion was written by Justice Overton in 1980. The holding in the New Jersey opinion, *State v. Rush*, adopted by the Florida Supreme Court in *D.B. and D.S.* was a 1966 case. Because the nature of law practice has changed over the decades, and as a check on the current reliability of the 40% overhead figure cited by Justice Overton, the court found instructive an article in The Florida Bar publication, Florida Civil Practice Before Trial (2004), Chapter 1, *Attorney - Client Relationship*, by Mark W. Klingensmith, which relates the following:

According to Altman Weil's 2001 Survey of Law Firm Economics, the average overhead of a law office in the United States is about **43% of the office's gross income**. Although there are 365 days in a year, after deducting 52 Sundays, 26 (one-half day) Saturdays, eight legal holidays, 11 productive days lost by two weeks' vacation, and, to make a realistic round number, eight days to cover sickness, continuing legal education, civic and bar activities, and recreation, only **260 productive**

working days remain. If an attorney has five productive hours per day that actually can be charged to clients, there will be 1,300 chargeable hours in a year. If an attorney can charge **seven hours per day** to clients, there will be **1,820 chargeable hours in the year**. To calculate the theoretical hourly rate an attorney must charge, the amount of gross annual income necessary to provide the amount of net income believed to be the reasonable worth of the attorney's annual labor should be determined, and that figure should be divided by the chargeable hours. The result is the value per hour of the attorney's services based solely on the time-skill element of fee charging. [Emphasis added.]

For Johnny Vasquez's representation, the court concludes that a reasonable rate for Mr. Campoli's services is **\$110.00** an hour.⁵ As suggested in *D.B. and D.S.*, the court finds this is what a client of ordinary means would pay a court-appointed attorney of modest financial success. The number was not created out of whole cloth. Several elements from the sources cited above were helpful in assisting the court in arriving at the rate. It appears the overhead percentage held steady. The following illustrates the court's calculations leading to this result:

HOURLY RATE CALCULATIONS

- a. Campoli's monthly overhead = \$11,171, or \$134,052 annual overhead; (T- 85-86)
- b. Number of billable hours per working day = 7 (Florida Civil Practice Before Trial)
- c. Number of productive work days per year = 260 (Florida Civil Practice Before Trial)
- d. Number of chargeable hours per year = 7 x 260 = 1820
- e. Percent of overhead to gross profit = 40% overhead; 60% profit (per *D.B. and D.S.*);

\$134,052 annual overhead = \$74.00/hour for overhead (\$73.65 rounded up)
1820 average annual billable hours

If \$74.00/hr (overhead) = 40% of gross profit, then the standard hourly rate = \$185/hour;
60% of 185/hour (standard hourly rate) = **\$110** (reduced hourly rate for indigent client;
\$111.00, rounded down)

This hourly rate and the payment procedures adopted by the court outlined below should be adequate for Mr. Campoli to work the case without undue financial stress. There may be some defense attorneys in the county who could better withstand the economic pressure of representing clients like Vasquez, but the court has neither the time nor the resources to sort through the bar membership to find the lawyer most likely to suffer the least. Nor should Vasquez have to wait for such a process to run its course. He needs

⁵ The \$75.00 per hour maximum rate for noncapital cases found in Section 27.5304(12)(d) bears no relation to the economic realities of Mr. Campoli's practice nor the practices of most of the local criminal defense bar. It can not be used in this case without a confiscation of the attorney's time, energy and talents.

counsel now and the appointment and payment process should have sufficient integrity to allow the attorney to accept the case without the lawyer having to expose his practice to financial ruin.

There are two more alleged co-conspirators at large in this Sur 13 offensive, and more gang-related, multi-defendant cases may be in the offing. By this order the court intends to establish a procedure that will allow the criminal justice system to operate efficiently when registry lists fail to provide counsel in sufficient numbers to address the constitutional needs of the accused.

NOW, THEREFORE, IT IS ORDERED:

A. For the reasons stated in Paragraph IV above, section 27.5304 (2007) as it relates to the statutory fee cap, the restrictions on judges exceeding the flat fee under certain circumstances, and the requirement that private attorneys wait until the end of the case to receive compensation is declared **UNCONSTITUTIONAL** as applied to defendant Johnny Vasquez. The section substantially impairs the ability of court-appointed lawyers to fulfill their roles of defending the indigent and curtails the ability of the court to appoint an attorney to execute that responsibility. It prevents the court from providing competent counsel as required by the Sixth Amendment of the federal constitution. Furthermore, in this instance the law impermissibly encroaches upon a sensitive area of judicial concern and violates article V, section 1, and article II, section 3, of the Florida Constitution.

B. Joseph Campoli shall continue his court-appointed representation of Johnny Vasquez. Pending further court order, the following procedures shall be followed:

1. The attorney shall be entitled to charge for his professional legal services at the rate of **\$110** per hour. He shall keep time records on a form comparable to the one adopted by the JAC for use by registry attorneys.
2. The attorney may include in his billing itemized requests for reimbursement for unusual litigation costs, including photocopying or postage expenses related to the case. Entitlement to these will be determined by the court on an individual basis if objected to by the JAC.
3. The court has determined this case qualifies as extraordinary and unusual, freeing the court from the flat fee and hourly rate restrictions and allowing it to make alternate arrangements reasonably necessary to compensate the attorney. However, to facilitate the billing process both JAC and Mr. Campoli shall comply with the provisions of section 27.5304 (12)(a), which sets forth a procedure for filing motions and JAC review of invoices. Objections to the billing that are not resolved by JAC and the attorney will be adjudicated by the court.
4. Mr. Campoli may submit motions for payment and invoices for services when the total hours expended on the case equal or exceed forty (40). Each motion shall indicate

the dates and amount paid on prior invoices and shall state the cumulative total of payments made to the date of the motion.

5. The chief judge or his designee shall conduct evidentiary review hearings to approve or reject the billings submit by counsel. The JAC is invited to attend and participate in the hearings. Its counsel may appear in person or telephonically. The issues to be addressed in the hearing are the reasonableness of the hours expended by counsel, and the necessity of the state reimbursing counsel for any unusual litigation expenses. The question of whether this case meets the requirement of being extraordinary and unusual has been answered by this order and will not be re-addressed in the fee review hearings.

6. Court orders awarding interim fees and costs shall be paid by JAC within twenty (20) days of entry of the order. Timely payments in this case are essential to protect the integrity of defendant's right to counsel.

C. As incident to the court's inherent power to protect defendant's right to counsel, in the event of an appeal of this Order on Objection to Involuntary Appointment of Private Attorney by JAC, or upon JAC's willful failure or refusal to timely comply with a court ordered payment, the court reserves jurisdiction to consider the propriety and necessity of appointing private counsel to enforce payment orders or to defend the appeal upon terms of compensation to be set at that time.

D. Absent compelling circumstances or other good cause, the hourly rate and interim payment procedure adopted by the court in this case will be used in other situations where:

1. No government lawyer (public defender or regional counsel) or registry attorney is available to represent an indigent client at the beginning of a non-capital criminal case; and
2. Due to the unavailability of registry lawyers, to protect the Sixth Amendment rights of the accused it becomes necessary to draft a private defense attorney to provide involuntary legal services and the attorney is unwilling to accept a "one-time-only" JAC contract; and
3. At the beginning of the case the statutory cap is shown by competent substantial evidence to be confiscatory of the lawyer's time and that a flat fee is inappropriate.

E. The court reserves jurisdiction to enforce the terms of this order.

**DONE AND ORDERED THIS 12th DAY OF MAY 2008, IN BRADENTON,
MANATEE COUNTY, FLORIDA.**



LEE E. HAWORTH, CHIEF JUDGE

cc: Derek Byrd, Esq., Attorney for Joseph Campoli, Esq.

Joseph Campoli, Esq., Attorney for Johnny Vasquez

Victoria A. Montanaro, Executive Director
Justice Administrative Commission

Diane M. Croff, Esq., Special Appointed Assistant State Attorney
Office of Statewide Prosecution