

12-12

IN THE SUPREME COURT OF  
FLORIDA

CASE NUMBER: 74,509

01A2-7-90

DANIEL E. REMETA,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR REVIEW OF  
FIFTH DISTRICT COURT OF APPEALS  
CASE NUMBER: 89-26

**FILED**  
 SD J. WHITE  
 NOV. 30 1989  
 CLERK, SUPREME COURT  
 By \_\_\_\_\_  
 Deputy Clerk

INITIAL BRIEF OF PETITIONER

*(Handwritten flourish)*

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STATEMENT OF THE CASE AND THE FACTS

This matter is before the Court to review the opinion of the Fifth District Court of Appeals in State v. Remeta, 547 So.2d 181 (Fla. 5th DCA 1989) filed on June 8, 1989. This opinion granted a Petition for Writ of Certiorari sought by the State of Florida and quashed the Order of the Marion County Circuit Court that had granted this attorney an attorney's fee in excess of the \$1,000.00 maximum set forth in Section 925.035(4), Florida Statutes. A re-hearing of that action was denied by the Fifth District Court of Appeals on July 18, 1989 (547 So.2d at 181) A Notice to Invoke Discretionary Jurisdiction, dated July 25, 1989, was filed with this Court. Jurisdictional Briefs were timely filed and this Court on October 24, 1989 entered its Order accepting jurisdiction.

This attorney was appointed pursuant to Section 925.035(4), Florida Statutes, by the Marion County Circuit Court to represent Daniel E. Remeta in an application for Executive Clemency. After that representation was concluded, an application was made to the trial court for compensation for 51.65 hours and the trial court awarded attorney's fees in the amount of \$3,000.00 and expenses in the amount of \$622.78, which is in excess of the \$1,000.00 provided for in Section 925.035(4), Florida Statutes. The State of Florida (Department of Corrections) sought a Writ of Certiorari from the Fifth District Court of Appeals to set aside the trial court's order and the pleadings as outlined above have resulted.

SUMMARY OF THE ARGUMENT

Petitioner contends that the trial court can properly set attorneys' fees in clemency proceedings under the court's inherent power, in that the fee limitation established by Section 925.035(4) is unconstitutional in its application to this case. Section 925.035(4) and Section 925.036 must be read in pari materia and Makemson v. Martin County, 491 So.2d 1109 (Fla. 1986), has held Section 925.036 to be unconstitutional when applied to certain cases. White v. Board of County Commissioners of Pinellas County, 537 So.2d 1376 (Fla. 1989), has extended Makemson and has held that the test to be applied is not whether the case is extraordinary, but what impact the service to an indigent client has had on that attorney's availability to serve other clients.

Further, petitioner contends that Section 925.035(4) is unconstitutional in that to apply same would be violative of the attorney's constitutional right to not be deprived of his property without due process of law. Even though Makemson and White dealt with criminal judicial proceedings, the rationale of those cases should be extended to attorneys who are appointed to represent indigent defendants for clemency proceedings, especially since that rationale has been extended to other areas, such as dependency matters and post-conviction proceedings.

ARGUMENT

POINT I - THE TRIAL COURT CORRECTLY ESTABLISHED REASONABLE  
ATTORNEYS' FEES THAT EXCEEDED THE \$1,000.00 LIMITATION  
OF SECTION 925.035(4)

Section 925.035(4), Florida Statutes, indicates that a defendant who has been sentenced to death is entitled to representation by an attorney in that defendant's application for executive clemency. There is no "discretion" noted in this statute as the legislature obviously recognized the defendant's right to representation at this stage of the proceedings. The second sentence of subparagraph (4) says:

. . . The public defender or an attorney appointed pursuant to this section may be appointed by the trial court that rendered the judgment imposing the death penalty, to represent an indigent defendant who has applied for executive clemency as relief from the execution of the judgment imposing the death penalty.

The word *may* therein refers to the fact that the judge *may* appoint the public defender or another attorney who has been appointed pursuant to this section, and apparently is referring to the possibility of appointing the same attorneys who had previously represented the defendant. It is submitted that the use of *may* in that particular sentence is not there to indicate that the court has discretion as to whether or not to appoint counsel for the indigent defendant who is under a death sentence.

The Fifth District Court of Appeals, in its opinion in this case, seems to interpret "may" as used in the statute as meaning that the court has discretion as to whether or not to appoint any counsel for the defendant. It was so stated:

. . . If this problem is not further addressed by the legislature, perhaps trial courts should note that section 925.035(4), Florida Statutes, provides only that such appointment "may," (not "shall") be made by the trial court and decline to make an appointment of counsel who is unwilling to accept the appointment for compensation within the statutory limitation and, also, when the needed services are not to be performed within the traditional judicial setting, perhaps counsel should feel no obligation as "officers of the court" to accept a tendered judicial appointment in the absence of legislative assurance of just compensation for services to be rendered. (547 So.2d at 183).

It would be a violation of the due process clause of the Fifth Amendment to the United States Constitution to deny counsel to a defendant under the circumstances of an executive clemency hearing, and the legislature apparently recognized that fact, even though the clemency hearing does involve the executive branch of the government.

The entitlement to counsel under Rule 3.850, Florida Rules of Criminal Procedure, was discussed in Brevard County Board of County Commissioners v. Moxley, 526 So.2d 1023 (Fla. 5th DCA 1988), and the court said:

. . . We recognize that a prisoner has no absolute constitutional right to appointed counsel in a collateral attack on his conviction. Pennsylvania v. Finley, \_\_\_ U.S. \_\_\_, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987). Finley, however, deals with the right to counsel imposed upon the states by the sixth amendment. On the other hand, the Florida cases of Williams v. State, 472 So.2d 738 (Fla. 1985) and Graham v. State, 372 So.2d 1363 (Fla. 1979) are the progeny of State v. Weeks, 166 So.2d 892 (Fla. 1964), which is predicated upon a provisional right to counsel generated by the fifth amendment and by the Florida Constitution. In Weeks, the Florida Supreme Court was concerned with an indigent prisoner's entitlement to the assistance of counsel as a matter of right upon an appeal from an adverse ruling in a collateral assault on his conviction and sentence. The Florida Supreme Court recognized there was no organic entitlement under the sixth amendment to have the assistance of counsel as a matter of right in a post-conviction collateral proceeding. However, it is also held that "such

remedies are subject to the more flexible standards of due process announced in the fifth amendment, Constitution of the United States" where the post-conviction motion presents an apparently meritorious claim for relief and is potentially so complex as to suggest the need for counsel, Id. at 896. Subsequently, in Graham, the elements to be considered by the trial court in deciding upon appointment of counsel were explicated by the supreme court: "The adversary nature of the proceeding, its complexity, the need for an evidentiary hearing, or the need for substantial legal research." 372 So.2d at 1366. Graham reiterated the Weeks admonition that although the appointment authority in a post-conviction collateral proceeding is discretionary, any doubts must be resolved in favor of an indigent defendant. (526 So.2d at 1026).

Surely, the same concerns for due process expressed in the Brevard County case, would be applicable to an executive clemency hearing wherein a defendant is attempting to avoid death, as compared with a Rule 3.850 proceeding which may involve much lighter consequences.

Therefore, it is established that counsel must be appointed under Section 925.035(4), Florida Statutes. It follows that it must be left to the courts to determine the reasonable legal fees for service of an attorney in this regard, under the court's inherent power.

The regulation of attorneys is left with the Supreme Court of Florida and the lower courts acting within the guidelines set forth by the Florida Supreme Court. In Makemson v. Martin County, 491 So.2d 1109 (Fla. 1986), cert. denied, 479 U.S. 1043, 107 S.Ct. 908, 93 L.Ed.2d 857 (1987), this court found that the fee provisions within Section 925.036 (Florida Statutes), infringed on the inherent power of the trial courts to allow, "in extraordinary and unusual cases," a departure from the fee guidelines, (491 So.2d at 1115).

The Fifth District Court of Appeals in the case herein has adopted a portion of the State's argument in regard to a distinction between the criminal judicial proceeding and the clemency hearing in applying Makemson. State v. Remeta, (547 So.2d at 182). The rationale of Makemson should also apply in the clemency matter, which is the next stage in representation of a defendant who has been convicted of first degree murder and sentenced to death. The concern shown by the Florida Supreme Court for adequate representation of defendants charged with a capital offense must extend to this next logical stage in the proceeding which began with the State of Florida charging the most serious criminal offense.

The Second District Court of Appeals dealt with a statutory fee limitation in Board of County Commissioners of Hillsborough County v. Scruggs, 545 So.2d 910 (Fla. 2d DCA 1989), in a civil dependency proceeding under Section 39.415, Florida Statutes, (1987). It was Hillsborough County's position that Makemson was only applicable to criminal cases, but the court did not agree and said:

We can discern no meaningful distinction between the maximum fee limit imposed in section 39.415 and the maximum fee limit held to be unconstitutional in section 925.036(2). Although the right to counsel in criminal cases emanates from the sixth amendment, and in civil dependency and termination of parental rights proceedings, from due process considerations, counsel is required in each case because fundamental constitutional interests are at stake. (545 So.2d at 912).

The Scruggs case goes on to say that the fee limitation established under Section 39.415 is a "constitutionally impermissible legislative encroachment upon the judiciary's power of 'ensuring adequate representation by competent counsel,'" Scruggs, 545 So.2d at 912, quoting from Makemson, 491 So.2d, at 1113.

It seems obvious that if counsel is to be provided to a defendant in a clemency matter, as is done under Section 925.035(4) "adequate representation" is what the legislature had in mind.

White v. Board of County Commissioners of Pinellas County, 537 So.2d 1376, (Fla. 1989), speaks to adequate representation and the statutory maximum fees, and this court said therein:

. . . The court may exercise its inherent power to depart from the statutory maximum "[w]hen 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.' (537 So.2d at 1378, quoting from White v. Board of County Commissioners of Pinellas County, 524 So.2d 428, 431 (Fla. 2d DCA 1988) and the dissenting opinion therein).

A \$1,000.00 limit in this case certainly seems to fall within the parameters of White given that this attorney put in 51.65 hours, including two trips from Ocala, Marion County, Florida to Florida State Prison, one trip from Ocala to Daytona to examine the trial transcript; and a trip to Tallahassee from Ocala, without even considering in-office preparation time (Transcript, 3-5). The \$1,000.00 statutory fee limitation in this case, under these facts, certainly bears no relation to reality.

POINT 11-SECTION 925.035(4) IS UNCONSTITUTIONAL

AS APPLIED TO THIS CASE

It is submitted that Section 925.035(4) must be read in pari materia with Section 925.036. This has been done in State v. Peek, 441 So.2d 158 (Fla. 2d DCA 1983), when that court interpreted the cost provisions of the two statutes. Just as the statutes are considered together as to cost, they should be so considered as to attorneys' fees.

As previously discussed, Makemson has held Section 925.036 unconstitutional when applied in certain cases and White has extended those certain cases to all capital cases just because of the nature of the case. It is further submitted that the language used in White as to "capital case" must extend to the clemency proceeding since that is a mere extension of the capital case, and an extension to which the defendant is entitled to counsel and "adequate representation".

The Makemson court, in discussing the unconstitutionality, stated:

Although facially valid, we find the statute unconstitutional when applied in such a manner as to curtail the court's inherent power to ensure the adequate representation of the criminally accused. At that point, the statute loses its usefulness as a guide to trial judges in calculating compensation and becomes an oppressive limitation. As so interpreted, therefore, the statute impermissibly encroaches upon a sensitive area of judicial concern, and therefore violates article v, section 1, and article 11, section 3 of the Florida Constitution. . . . (491 So.2d at 1112).

It is further submitted that the statute in question is unconstitutional if applied to this case in that it would be confiscatory within the meaning set forth in the Makemson court when they talked of the inherent powers of the Florida trial courts to depart from fee guidelines "when necessary in order to insure 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." (491 So.2d at 1115). The court looked to the earlier case of MacKenzie v. Hillsborough County, where there was a similar discussion of the compensation issue. See MacKenzie, 288 So.2d 200, at 202 (Fla. 1973). This problem was discussed in State of Kansas v. Smith and Fromme, 747 P.2d 816 (Kan. S.Ct., 1987), which has a lengthy discussion of the entire problem of service to indigents and appointments of attorneys by the state government. In that discussion, the Kansas Supreme Court said:

Attorneys make their living through their services. Their services are the means of their livelihood. We do not expect architects to design public buildings, engineers to design highways, dikes, and bridges, or physicans to treat the indigent without compensation. When attorneys' services are conscripted for the public good, such a taking is akin to the taking of food or clothing from a merchant or the taking of services from any other professional for the public good. And certainly when attorneys are required to donate funds out-of-pocket to subsidize a defense for an indigent defendant, the attorneys are deprived of property in the form of money. We conclude that attorneys' services are property, and are thus subject to Fifth Amendment protection. (747 P.2d at 842).

In White, this court indicated that: "the focus should be on the time expended by counsel and the impact upon the attorney's availability to serve other clients, not whether the case was factually complex." (537 So.2d at 1380).

As to the confiscation of an attorney's time, See also DeLisio v. Alaska Superior Court, 740 P.2d 437 (Alaska 1987), wherein the Supreme Court of Alaska came to the same conclusion as the Kansas Supreme Court in State of Kansas v. Smith and Fromme, supra.

It is noted that the Federal Government has avoided this constitutional question as to appointed counsel for indigent defendants in collateral actions. 18 U.S.C.A., Section 3006A(a)(2)(B), provides for appointment of counsel in habeas corpus proceedings and provides for a \$750.00 maximum fee, but contains a provision that the court can waive that amount. This is written into the Federal Statute under Section 3006A(d)(3). It is emphasized that this provision is in a habeas corpus proceeding, as opposed to representation on the original criminal charges against the defendant in Federal Court. It seems very likely that the reason the United States Congress allowed the waiver provision in that section is to avoid a constitutional question, and it is probably an acknowledgment that the trial judge or the judge presiding in the proceeding is the best determiner of fair compensation. See Martin v. Dugger, 708 F.Supp. 1265 (S.D.Fla. 1989).

CONCLUSION

Petitioner submits that the trial court properly exceeded the statutory fee limitation of Section 925.035(4), and that the Writ of Certiorari should not have been granted by the Fifth District Court of Appeals.

Petitioner respectfully urges that the decision of the Fifth District Court of Appeals herein be reversed, and that the order of the trial court be reinstated.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail and/or hand delivery to FRANK J. HABERSHAW, CLERK, Fifth District Court of Appeal, 300 South Beach Street, Daytona Beach, Florida 32014; HONORABLE CARVEN D. ANGEL, Post Office Box 2075, Ocala, Florida 32678; REGINALD BLACK, Assistant State Attorney, Fifth Judicial Circuit of Florida, County Office Building, 19 N.W. Pine Avenue, Ocala, Florida 32670; and to ANN M. CHITTENDEN, Assistant General Counsel, Department of Corrections, 1311 Winewood Boulevard, Tallahassee, Florida 32399-2500, this 17<sup>th</sup> day of August, 1989.

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OA 2-7-90

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DEC 14 1989  
*[Handwritten signature]*

AMENDED CERTIFICATE OF SERVICE TO PETITIONER'S  
INITIAL BRIEF OF PETITIONER

I HEREBY CERTIFY that a copy of the foregoing Initial Brief of Petition has been furnished by U.S. Mail and/or hand delivery to FRANK J. HABERSHAW, CLERK, Fifth District Court of Appeal, 300 South Beach Street, Daytona Beach, Florida 32014; HONORABLE CARVEN D. ANGEL, Post Office Box 2075, Ocala, Florida 32678; REGINALD BLACK, Assistant State Attorney, Fifth Judicial Circuit of Florida, County Office Building, 19 N.W. Pine Avenue, Ocala, Florida 32670; and to ANN M. CHITTENDEN, Assistant General Counsel, Department of Corrections, 1311 Winewood Boulevard, Tallahassee, Florida 32399-2500, the 17th day of November, 1989.

DATED: December 11, 1989

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