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IN THE SUPREME COURT OF
FLORIDA

JAN 9 '90

CASE NUMBER: 74,509

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DANIEL E. REMETA,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent,

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

REPLY BRIEF OF PETITIONER

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CASE AUTHORITY:

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537 So. 2d 1376 (Fla. 1989)..... 1, 3

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PRELIMINARY STATEMENT

Petitioner reasserts and relies on the argument and authority as to each point previously set forth in the Initial Brief of Petitioner, and in reply to the State's Answer Brief respectfully submits the following:

ARGUMENT

POINT I - THE TRIAL COURT CORRECTLY ESTABLISHED
REASONABLE ATTORNEYS' FEES THAT EXCEEDED
THE \$1000 LIMITATION OF SECTION 925.035(4)

The State contends that Sections 925.035(4) and 925.036 should not be read in pari materia, while conceding that some subsections of 925.035 make specific reference to 925.036 (Answer Brief, p. 4). But Petitioner submits that one must examine the statutes as a whole to determine if it is appropriate to read them together. Doing so indicates that they are dependent on each other, and given this close relationship, the case law cited by Petitioner construing Section 925.036, and the fee caps established by the section, is appropriate. Contrary to the statements of the State that subsection (4) of 925.035 "clearly addresses a wholly separate subject matter, to wit: executive clemency proceedings rather than judicial criminal prosecutions" (Answer Brief, p. 4), both sections are addressing the same subject - criminal procedure and the compensation of attorneys who represent indigent defendants.

The principles set forth in Makemson v. Martin County, 491 So.2d 1109 (Fla. 1986), and White v. Board of County Commissioners of Pinellas County, 537 So. 2d 1376 (Fla. 1989) apply to 925.035(4) just as they apply to 925.036. The subject matter is the same. The rationale is the same.

At page 3 of its Answer Brief, the State says that Petitioner

herein "commands the court to read section 925.035(4) in pari materia with section 925.036 and to then apply the cases construing the latter statute." (emphasis supplied) Petitioner would not presume to command the court to do anything, but we do suggest that such a reading would be proper.

Since the Initial Brief of Petitioner herein, the Second District Court of Appeals has dealt with the exact same situation as is involved in our case at hand. State v. Drayton, 14 F.L.W. 2831 (2nd DCA, 12/6/89) involves a trial court awarding an attorney \$4595.00 for his representation of a defendant in a clemency proceeding. The Second District upheld the trial court's award and said:

...Although clemency proceedings may bring the parties before the executive branch, the legislature has endowed the judiciary with the responsibility of selecting and appointing attorneys to represent the applicants in what is literally a life-or-death situation. With that responsibility must go the ability to ensure adequate remuneration for services rendered; without some leeway for exceptionally difficult cases the courts cannot acquit this responsibility properly, a concern expressed by the court in Remeta when it observed "that attorneys, as officers of the court, are under compulsion to accept an appointment proposed by the court, and the court [by adhering to the statute] has inadequate discretion and legal authority to fairly compensate attorneys whose services the court has somewhat coerced," 547 So. 2d at 183 (14 F.L.W. at 2832)

The Second District has certified their decision to this court because of the direct conflict with the Fifth District in this case.

POINT II - SECTION 925,035(4) IS UNCONSTITUTIONAL
AS APPLIED TO THIS CASE

The State has entitled its second argument: "The Doctrine of Inherent Judicial Power Is Inapplicable In The Context Of Executive Clemency Proceedings", and it is to that argument that Petitioner responds at this time.

The State refers here to Makemson, supra, and to the court therein employing the doctrine of inherent power to over-ride section 925.036 under certain conditions and then White, supra, diminishing certain of those factors but not diminishing the requirement that " (1) the defendant could not have obtained competent counsel otherwise,.." (Answer Brief, p. 5) It is unclear if the State is asserting that Remeta could have somehow obtained counsel privately, or if the State is saying that Remeta was not entitled to counsel on a constitutional basis. If it is the former, then Petitioner would assert that it has never been an issue as to whether Remeta, sitting on death row, was or was not indigent. If the latter, the fact is that the legislature provided for counsel in clemency matters, whether it is constitutionally mandated or not. We are now at the stage of determining whether or not the courts have the authority to set the fees for the appointed counsel, and it continues to be Petitioner's position that the court system does have that authority under its inherent power, as set forth in Makemson and White, and through the logical extension of those cases to the clemency proceedings as expressed by the Second District Court of Appeals in Drayton, supra.

The State refers at page 8 of the Answer Brief to that portion of the decision below wherein the Fifth District Court of Appeals expressed their feeling that the acceptance of an appointment was discretionary, given the language of the statute. See State v. Remeta, 547 So. 2d 181, 183 (Fla. 5th DCA 1989) As pointed out in Petitioner's Initial Brief, that phraseology does not mean to give discretion to the appointee to accept or not, but gives discretion to the judge as to who he might appoint. As pointed out in Drayton, which quoted Remeta, an attorney cannot refuse the appointment.

The clemency hearing is provided to the person sentenced to death as a chance to convince the Governor and Cabinet that for some reason he or she should be allowed to live. The legislature apparently realized that counsel should be provided, given the fact that many defendants sentenced to death are unable to read and write, and many more are unable to adequately represent themselves. As stated before, if counsel is to be provided and appointed by the courts, then the courts must be allowed to determine fair compensation under their inherent power.

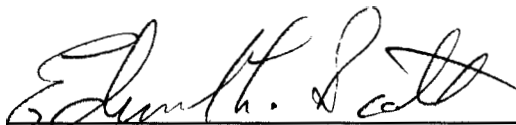
CONCLUSION

Based on the arguments and authorities cited herein and in the Initial Brief of Petitioner, this Court is respectfully urged to reverse the decision of the Fifth District Court of Appeals, and require reinstatement of the order of the trial court which granted a fee to counsel in an amount in excess of the limitation in the statute.

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 Appeals, 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 8th day of January, 1990.

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