IN THE SUPREME COURT OF FLORIDA

CASE NO. 66,731

MARSHA L. LYONS and the CIRCUIT COURT
FOR THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA,
CRIMINAL DIVISION (03),

Petitioners,

vs.

METROPOLITAN DADE COUNTY,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW
FROM THIRD DISTRICT COURT OF APPEAL

RESPONDENT, METROPOLITAN DADE COUNTY'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Metropolitan Dade County's Appendix shall be referred to as "MDC's App." Petitioner's Appendix shall be referred to as "App.".

STATEMENT OF THE FACTS AND CASE

Over two years before this Honorable Court's decision in Makemson v. Martin County, 491 So.2d 1109 (Fla. 1986), cert. pending United States Supreme Court Case No. 86-636, and Dennis v. Okeechobee County, 491 So.12d 1115 (Fla. 1986), cert. pending United States Supreme Court Case No. 86-636, the trial court herein awarded Marsha L. Lyons, Esquire, $25,000.00 for services rendered as a special assistant public defender in three cases involving Defendant, Robert Patton. See, App., at 3. The statutory cap under Fla. Stat. §925.036 for the three cases is $8,500.00. In the trial court, Metropolitan Dade County argued that under the existing case law the amount of time spent on a case is not relevant once a special public defender under Chapter 27 and 925 has expended time which is valued at a rate exceeding the statutory cap.

The Third District Court of Appeal reversed the trial court's award and remanded the matter for an award of fees not to exceed $8,500.00. See, App., at 2.

On July 17, 1986, this Honorable Court decided Dennis and Makemson. For the first time, §925.036 fee limits were found to be directory only. On October 15, 1986, Martin County and Okeechobee County filed a writ of certiorari before the United States Supreme Court. MDC's App., at M-1. On November 12, 1986, Robert Lee Dennis, Esquire, filed a response to the writ

of certiorari in the United States Supreme Court. MDC's App., at M-2. The constitutionality of Fla. Stat. §925.036 under extraordinary circumstances is now pending before the nation's highest court.

SUMMARY OF ARGUMENT

In Martin County and Okeechobee County v. Makemson, et al., U.S. S.Ct. Case No. 86-636, Okeechobee County and Martin County filed a writ of certiorari in the United States Supreme Court challenging this Court's decisions in Dennis v. Okeechobee County, 491 So.2d 1115 (Fla. 1986), and Makemson v. Martin County, 491 So.2d 1109 (Fla. 1986). Because the United States Supreme Court is examining the decisions in Dennis and Makemson, this Honorable Court should stay the instant case until a decision emanates from the nation's highest court.

The ruling in Makemson and Dennis should not apply retroactively. Ms. Lyons was appointed in 1981 and applied for fees on June 5, 1984. See, App., at 4. This Honorable Court in Dennis and Makemson recognized that the burden of the counties should be minimized by limiting an award of reasonable fees to exceptional cases. Statements in Makemson imply its decision should not apply retroactively. Retroactive application would create a financial and administrative nightmare for the counties and trial courts.

Under Florida Statutes Section 43.28, fees exceeding Fla. Stat. §925.036 should be awarded from the State, not the counties. In an analogous situation, Florida courts held that court-appointed counsel for children in neglect and abuse

proceedings should be paid by the State of Florida under Fla. Stat. §43.28. A trial court exercising state inherent powers in a state criminal proceeding should tax fees against the State.

Finally, this Honorable Court should at least remand this case for a hearing pursuant to Makemson and Dennis. At the time of Ms. Lyons's motion for fees, extraordinary circumstances were not relevant. The County should have an opportunity to rebut Ms. Lyons's position under the new guidelines for awarding extraordinary fees.

QUESTIONS PRESENTED

I.

SHOULD THIS MATTER BE STAYED UNTIL THE UNITED STATES SUPREME COURT RULES ON THE COUNTIES' WRIT OF CERTIORARI IN DENNIS AND MAKEMSON?

II.

IS THE RULING IN DENNIS AND MAKEMSON RETROACTIVE?

III.

SHOULD THE STATE OF FLORIDA, RATHER THAN THE COUNTIES, PAY FEES EXCEEDING THE LIMITS OF FLA. STAT. §768.28?

IV.

SHOULD THIS HONORABLE COURT REMAND THIS MATTER FOR A TRIAL COURT HEARING CONSISTENT WITH THE GUIDELINES OF MAKEMSON AND DENNIS?

ARGUMENT

I.

THIS MATTER SHOULD BE STAYED UNTIL THE UNITED STATES SUPREME COURT RULES ON THE COUNTIES' WRIT OF CERTIORARI.

Martin County and Okeechobee County have filed a writ of certiorari before the United States Supreme Court in Martin County and Okeechobee County v. Makemson, Dennis, et al., United States Supreme Court Case No. 86-636. See, MDC's App., at M-1. Petitioner, Marsha L. Lyons, relies upon Dennis v. Okeechobee County, 491 So.2d 1115 (Fla. 1986), cert. pending, U.S. S.Ct. Case No. 86-636, and Makemson v. Martin County, 491 So.2d 1109 (Fla. 1986), cert. pending, U.S. S.Ct. Case No. 86-636, to assert she is entitled to a fee of $25,000.00 rather than the statutory maximum of $8,500.00 for representation in three cases under Chapters 27 and 925 of the Florida Statutes. Even if Dennis and Makemson are applicable to the instant case, this Court should stay this case until the United States Supreme Court's findings on the issue:

> Whether, in state criminal proceedings, the indigent defendants' Sixth Amendment right to effective assistance of counsel invalidates a state statute, imposing limits on the fees of court-appointed counsel, where
>
> (a) counsel has provided effective assistance, and
>
> (b) the statutory fee limit is "inflexibility imposed in cases involving unusual or extraordinary circumstances" or is "confiscatory of [counsel's] time, energy and talents."

See MDC's App., at M-1, et seq.

If Petitioners in the instant case are correct, the issues in Dennis and Makemson to be ultimately resolved by the United States Supreme Court shall determine the outcome of this case. It is highly proper to await the United States Supreme Court's ruling on the constitutionality of Fla. Stat. §925.036 fee limits. Robert Lee Dennis, Esquire, has recently indicated he has filed a response in Martin County, et al. v. Makemson, et al., United States Supreme Court Case No. 86-636. See, MDC's App., at M-2. The issue of the constitutionality of Fla. Stat. §925.036 is now pending in the United States Supreme Court. The only proper finding is that this matter be stayed.

II.

DENNIS AND MAKEMSON SHOULD NOT APPLY RETROACTIVELY.

The law on retroactivity indicates that the new standard of reviewing court-appointed attorney's fees should not apply retroactively. In Gosa v. Mayden, 413 U.S. 665 (1973), the United States Supreme Court found that a pronouncement of a newly recognized constitutional principle does not automatically mandate retroactive application. In rejecting retroactive application of the rule that servicemen cannot be tried by a military tribunal for non-service connected offenses, the Gosa Court considered the purposes served by the decision, reliance on the law as it stood before the decision and the effect of holding the decision retroactive.

State v. LeCroy, 461 So.2d 88 (Fla. 1984), cert. denied, 105 S.Ct. 3532, two cases, 87 L.Ed.2d 656, rejected retroactive application to cases pending on appeal of a change in the

constitutional interpretation of suppression of defendants' statements, because the current interpretation created a new rule and retroactive application would have a disruptive effect on administration of justice. See also, Witt v. State, 387 So.2d 922 (Fla. 1980), cert. denied, 449 U.S. 1067 (considerations in determining whether new rule of law should be applied retroactively are purpose to be served by new rule, extent of reliance on old rule and effect on administration of justice of a retroactive application of the new rule).

Applying the case law on retroactivity to the instant facts mandates that Ms. Lyons's request for fees over $8,500.00 be rejected.

Petitioner, Marsha L. Lyons, submitted her application for fees exceeding the $8,500.00 limit on June 4, 1984. See, App., at 4. Makemson and Dennis fail to speak directly to the issue of retroactivity. However, the wording of Makemson recognizes the increasing burden upon the counties of the new interpretation of Fla. Stat. §925.036 and implies that the ruling should not apply retroactively:

> This ruling may indeed require some financial adjustment in the counties' budgeting process and the exploration of some alternatives. We note, however, that the counties' fears may be in part misplaced. Petitioners seek only "reasonable" and not "market value" compensation. Token compensation is no longer to be an alternative.

Makemson, supra, at 1113. (emphasis added).

Implicit in this Honorable Court's ruling is an avoidance of overburdening the counties' treasuries. In Makemson and Dennis, this Court excepted only extraordinary cases from the

fee limits of Fla. Stat. §925.036. Makemson and Dennis also limited compensation to a reasonable fee. Such limitations recognize the limited treasuries of the county as well as equitably distribute the burden upon the counties and the Bar.

To expand the new standards in Makemson and Dennis to applications of fees before July 17, 1986 would overly burden the county treasuries and create an administrative nightmare. Many cases in Dade County besides the instant matter have involved court-appointed attorneys who spend time valued far in excess of Fla. Stat. §925.036 limits. Prior to July 17, 1986, Metropolitan Dade County strictly enforced all statutory fee limits. The County made no exceptions for extraordinary circumstances. Retroactive application of this Court's ruling would burden the County and courts financially and administratively with hundreds, or perhaps thousands of cases, where attorneys, such as Ms. Lyons, spent large amounts of time prior to the new interpretation of Fla. Stat. §925.036. The only logical and equitable resolution of this case is to deny Ms. Lyons's request for excess fees because to do otherwise would create an overly taxing situation in the counties. If Ms. Lyons's fees of $25,000 are approved, must a county pay an attorney fees exceeding statutory limits five, six, ten or twenty years before Dennis and Makemson? Statutory fee limits on court-appointed counsel in Florida have been in effect since 1939. Laws 1939, c. 19554. The logical and equitable solution is to apply the fee limits of Fla. Stat. §925.036 to only those cases in which attorneys are appointed after July 17, 1986. Such attorneys would validly have an expectation under Dennis

and Makemson that they will be paid a fee exceeding statutory fee limits in extraordinary circumstances. Such a decision accords with Aldana v. Holub, 381 So.2d 331 (Fla. 1980), which applied the decision holding the Medical Mediation Act to only those cases after the date of its decision.

III.

THE STATE OF FLORIDA SHOULD PAY ANY FEE EXCEEDING THE LIMITS OF FLORIDA STATUTES SECTION 925.036.

The genesis of county and State liability for paying counsel fees for indigent defendants is Section 43.28, Florida Statutes, which reads:

> The counties shall provide appropriate courtrooms, facilities, equipment, and, unless provided by the State, personnel necessary to operate the circuit and county courts.

Florida Statutes Chapter 27 provides for State payment of the salaries of public defenders and assistant public defenders. Chapters 27 and 925 limit county liability to payment of certain maximum fees to special assistant public defenders.

There is no specific statutory provision for paying special assistant public defenders more than the maximum fee under Fla. Stat. §925.036. Florida Statutes, case law and logic dictate that the State should pay for extraordinary fees of special assistant public defenders. In an analogous situation, Florida courts have held that the State of Florida, rather than the counties, under §43.28, is responsible for

paying court-appointed attorney fees. In In the Interest of M.P., 453 So.2d 85 (Fla. 5th DCA 1984), cert. denied, 472 So.2d 732 (Fla. 1985), attorney Birr was appointed as counsel for a child under Fla. Stat. §827.07(16) (1981). The statute had no specific provisions for the source of payment. The Fifth District in In the Interest of M.P., supra, at 90, found the language "unless provided by the State" in §43.28 significant.

In excluding Lake County from liability for attorneys appointed pursuant to §827.07(16), the Fifth District found that the State having prime responsibility for the provisions of Chapter 827, should provide the personnel necessary for representing indigent children in dependency proceedings. M.P., supra, at 90. Accord, State Dept. of H.R.S. v. Metropolitan Dade County, 459 So.2d 1182 (Fla. 3d DCA 1984). Similarly, under §43.28, the State could pay court-appointed attorneys for awards in excess of Fla. Stat. §925.036. The State has brought the prosecution of this action and the State, rather than the counties, has primary responsibility for the administration of criminal justice and courts. The Legislature has provided an avenue for State and county liability for personnel necessary under §43.28. The Legislature has mandated limits on county liability; however, no such limits exist on the State of Florida's liability for such necessary personnel. Therefore, the courts, state entities exercising state inherent powers, should tax fees exceeding the county's liability against the State pursuant to §43.28. The Legislature has not limited the State's liability for providing indigents competent counsel, who are personnel necessary under §43.28. Assessing

fees against the State would satisfy Petitioner and send a message to the Legislature that the fees to be paid by counties are not sufficient in all circumstances. If Petitioner's viewpoint is adopted, assessing fees against the State may alert the Legislature to the inadequate funding from the County that attorneys such as Petitioner have been limited. Petitioner need not resort to just Dade County for payment. Under §43.28, the State also has an obligation to provide for their services.

IV.

AT A MINIMUM, THIS MATTER SHOULD BE REMANDED FOR A HEARING CONSISTENT WITH MAKEMSON AND DENNIS.

At the time of Ms. Lyons's motion, the County was guided by the current state of the law which indicated extraordinary circumstances are not relevant to the calculation of a fee. See, Metropolitan Dade County v. Bridges, 402 So.2d 411 (Fla. 1981); Mackenzie v. Hillsborough County, 288 So.2d 200 (Fla. 1973). Metropolitan Dade County took the position at all hearings on Ms. Lyons's motion that it was irrelevant whether or not this was an exceptional case.

In July of 1986, this Court for the first time held that extraordinary circumstances are relevant. The County and the trial court should have an opportunity to apply the standards of Dennis and Makemson to scrutinize the instant matter. The trial of this cause lasted only six days. No change of venue occurred. The normal rather than the exceptional death penalty case involves counsel's investment of many hours.

If this Court chooses to retroactively apply Dennis and Makemson, the County should have the opportunity to challenge applications of fees under the new guidelines.

CONCLUSION

This matter should be stayed until the United States Supreme Court decision in Dennis and Makemson. In the alternative, this Honorable Court should uphold the Third District Court of Appeal's quashing of the trial court's order. At a minimum, this matter should be remanded for a hearing consistent with Makemson and Dennis.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing and Metropolitan Dade County's Appendix was mailed this 17th day of November, 1986, to: MARSHA L. LYONS, ESQUIRE, Lyons & Ferrar, P.A., 1401 Brickell Avenue, Suite 802, Miami, Florida 33131; THE HONORABLE GERALD T. WETHERINGTON, Chief Judge, Dade County Circuit Court, 73 West Flagler Street, Miami, Florida 33130; and to THE HONORABLE JIM SMITH, Attorney General, Park Trammel Building Suite 804, Tampa, Florida 33602.

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