IN THE SUPREME COURT OF FLORIDA

CASE NO. 66,780

ROBERT MAKEMSON, et al.,

Petitioners,

vs.

MARTIN COUNTY,

Respondent.

BRIEF ON THE MERITS OF AMICUS CURIAE METROPOLITAN DADE COUNTY

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OTHERS

STATEMENT OF THE CASE AND FACTS

Metropolitan Dade County accepts and adopts Respondent, Martin County's statement of facts and case.

QUESTIONS CERTIFIED AS
BEING OF GREAT PUBLIC IMPORTANCE

A.

IS SECTION 925.036, FLORIDA STATUTES (1983) UNCONSTITUTIONAL ON ITS FACE AS AN INTERFERENCE WITH THE INHERENT AUTHORITY OF THE COURT TO ENTER SUCH ORDERS AS ARE NECESSARY TO CARRY OUT ITS CONSTITUTIONAL AUTHORITY?

B.

IF THE ANSWER TO QUESTION A IS NO, IS SECTION 925.036, FLORIDA STATUTES (1983) UNCONSTITUTIONAL AS APPLIED TO EXCEPTIONAL CIRCUMSTANCES OR DOES THE TRIAL COURT HAVE THE INHERENT AUTHORITY, IN THE ALTERNATIVE, TO AWARD A GREATER FEE FOR TRIAL AND APPEAL THAN THE STATUTORY MAXIMUM IN THE EXTRAORDINARY CASE?

C.

IF THE ANSWER TO QUESTION B IS YES, SHOULD THE TRIAL COURT HAVE AWARDED AN ATTORNEY'S FEE ABOVE THE STATUTORY MAXIMUM FOR PROCEEDINGS AT THE TRIAL LEVEL, GIVEN THE FACTS PRESENTED TO IT BY TRIAL COUNSEL BY HIS PETITION AND TESTIMONY?

D.

IF THE ANSWER TO QUESTION B IS YES, SHOULD THE TRIAL COURT HAVE AWARDED AN ATTORNEY'S FEE ABOVE THE STATUTORY MAXIMUM FOR PROCEEDINGS AT THE APPELLATE LEVEL BEFORE THE SERVICES WERE RENDERED AND WITH THE FACTS KNOWN TO IT AT THE TIME OF THE AWARD?

SUMMARY OF ARGUMENT

The definition of inherent powers precludes trial courts from overriding statutory fee limits. There is no reasonable necessity for a court to override statutory fee limits to ensure indigents receive competent representation. Several practical alternatives, including appointing a public defender from another jurisdiction or additional counsel, are available to trial courts short of awarding fees in excess of statutory mandates.

Moreover, the trial courts have no jurisdiction to award such excessive fees. It is within the sole discretion of the Legislature to determine the amount of compensation, if any, court-appointed attorneys should receive. Section 925.036 is mandatory and precludes trial courts from awarding fees above statutory limits.

This Honorable Court has specified in dicta that only upon a showing that the statutory fee limits cause a violation of sixth amendment rights in the criminal justice system as a whole or in a class of cases can Section 925.036 be declared unconstitutional. The Record herein fails to make such a showing.

Florida courts have held that the fee limits of Section 925.036 are constitutional even when applied to extraordinary circumstances. The courts have no authority even under extraordinary circumstances to award excessive fees. Even if Florida were to adopt the minority view that a case of hardship or extraordinary circumstances

does entitle courts to override fee limits, Petitioners have not established a record of hardship or extraordinary circumstances as recognized by the minority of states advocating this theory.

Finally, the mandatory provisions of Section 925.036 prevent trial courts from awarding special public defender fees prior to completion of the representation. Petitioner Udell has also not established a record entitling him to a fee in excess of the Statute. Petitioner Udell is on notice of the fee limits when he accepts an appointment. Petitioner Udell's "bid" is therefore modified and limited by the maximums for fees found in Section 925.036.

ARGUMENT

Point I

SECTION 925.036, OF THE FLORIDA STATUTES CAN NOT BE DECLARED UNCONSTITUTIONAL ON ITS FACE AS AN INTERFERENCE WITH INHERENT POWERS OF TRIAL COURTS

By definition, Florida trial courts lack the inherent power to award attorney's fees in excess of the maximums found in Florida Statutes Section 925.036 (1983). Rose v. Palm Beach County, 361 So.2d 135, 137 (Fla. 1978), limited a trial court's inherent power to "all things...reasonably necessary for the administration of justice within the scope of its jurisdiction subject to valid existing laws and constitutional provisions". An award of attorney's fees in excess of Section 925.036 is outside the scope of a trial court's inherent power for three definitional reasons:

(1) Such an award is not reasonably necessary for the administration of justice;

(2) Such an award is not within the scope of the trial court's jurisdiction; and

(3) A valid existing law, Section 925.036, Florida Statutes (1983), precludes the excercise of any inherent powers over attorney's fees.

Trial courts have no reasonable need to award fees exceeding statutory maximums in order to ensure

administration of justice. Trial courts do not even need to appoint a private attorney in cases of conflict with the local public defender. The courts have the authority under Florida Statutes Section 27.53(3)(b)(1983) to appoint a public defender from another circuit. In that manner, the courts can obtain competent counsel for indigents without payment under Section 925.036.

The trial courts could also solicit private counsel in cases of conflict to represent indigents pro bono. Appointment of pro bono counsel obviates any need for excessive fee awards.

Thirdly, court can require private counsel to represent indigent defendants within the fee limits of Section 925.036. There is no need for the courts to exceed the fee limits of Section 925.036 to ensure that indigents receive competent counsel. If necessary, the court can appoint additional counsel as was done in Dade County v. Goldstein, 384 So.2d 183 (Fla.3d DCA 1980).

The court may even require an attorney to represent the poor without compensation. This Honorable Court concluded that requiring an attorney to represent the poor without compensation "does not constitute an unfair 'taking' of private property." Metropolitan Dade County v. Bridges, 402 So.2d 411, 414 (1981). Noting that at common law a lawyer has a professional obligation to represent the poor without compensation, the Florida Supreme Court cited In the Interest of D.B. and D.S., 385 So.2d 83 (Fla. 1980),

as authority for holding that even requiring an attorney to represent the poor without compensation does not violate due process. The uncompensated time that Petitioners in the instant case spent becomes part of their pro bono obligation to represent the poor. Requiring such pro bono work does not violate any constitutional provision. As Bridges, supra, at 414, and In the Interest of D.B. and D.S., supra, at 92, emphasize the obligation of the government to provide indigents with legal representation under certain circumstances does not relieve private attorneys from their historical professional obligation to represent the poor without compensation.

Trial courts faced with the necessity of appointing private counsel may even do so via its contempt power. If an attorney refuses to accept an appointment, the trial court may require him do so or face contempt of court. The trial courts thus have numerous options to ensure competent representation of indigents having conflicts with the local public defender. The courts can:

> (a) Appoint a public defender from another jurisdiction; (b) Solicit and appoint pro bono counsel; (c) Appoint counsel pursuant to the statutory fee limits in Section 925.036; (d) Appoint additional counsel if necessary; (e) Require counsel to serve an indigent client or face contempt of court.

There is thus no reasonable necessity to override the statutory maximum fee limits in Section 925.036.

The appointment of attorneys to represent indigents is in sharp contrast to the necessity of inducing witnesses to appear in Rose. Rose involved the taxation of witness fees against Palm Beach County to pay for the travel of indigent witnesses subpoenaed to appear at a criminal trial 300 miles away in Duval County. The Court specifically determined that the contempt power could not be used to enforce the subpoenaes, because the indigent witnesses lacked the funds to travel to the distant locale and to afford lodging. Therefore, the court found it necessary to provide witness fees in excess of the statutory maximums in order for essential witnesses to be available for trial. In finding that this unique situation authorized the exercise of the trial court's inherent powers, the Supreme Court warned:

> The doctrine of inherent powers should be invoked only in situations of clear necessity. The courts' zeal in the protection of their prerogatives must not lead them to invade areas of responsibility confided to the other two branches. Accordingly, it is with extreme caution that this Court approaches the issue of the power of trial courts to order payments by local governments for expenditures deemed essential to the fair administration of justice. The same extreme caution should be used by trial courts seeking solutions to practical administrative problems that have not been resolved or provided for by the legislature. 361.So.2d at 138.

Such a compelling case for the exercise of the trial court's inherent power to award attorney's fees in excess

of the limits set by the Legislature cannot be found in cases of attorneys appointed to represent indigents. As has been pointed out, the Defendant's attorneys had a professional responsibility to serve their client pursuant to their appointment and had an obligation to advocate effectively on their behalf, even though the Legislature had limited their fees to an amount which was less than they thought they deserved. See, Dade County v. McCrary, 260 So.2d 543 (Fla.3d DCA 1972); United States v. Dillon, 346 F.2d 633 (9th Cir. 1965). Because the attorney had this obligation, the instant situation was not one of "clear necessity" for which the court was authorized to invoke its inherent powers.

The trial courts lack jurisdiction as well as a reasonable need to award fees in excess of statutory maximums. The compensation of court appointed attorneys is a subject area over which the legislature has traditionally had complete control. The cases of Dade County v. McCrary, supra, and Dade County v. Grossman, 354 So.2d 131 (Fla.3d DCA 1978), demonstrate Florida's adherence to the majority rule in this country that court appointed attorneys are not permitted to obtain any compensation from public funds in the absence of statutory provisions authorizing their payment. While Rose v. Palm Beach County, 361 So.2d 135 (Fla. 1978), recognized that in certain limited circumstances courts possess the inherent power to do things reasonably necessary for the administration of

justice in the scope of their jurisdiction, the Supreme Court also reaffirmed that statutes providing for the rates of compensation of court appointed attorneys concern a subject over which the legislature exercises sole control. The court stated in its opinion at footnote number 5:

> Some previous decisions of this Court indicate generally that the will of the Legislature is to prevail on the matter of compensation of court appointed public prosecutors and defenders. MacKenzie v. Hillsborough County, 288 So.2d 200, (Fla. 1973); Strauss v. Dade County, 253 So.2d 864 (Fla. 1971); Carr v. Dade County, 250 So.2d 865 (Fla. 1971). Rose, supra, at 417, n.5.

The Rose Court placed the above footnote next to the text limiting the definition of inherent powers to those things within the court's jurisdiction, subject to valid existing laws.

This Honorable Court reaffirmed in Bridges that the Legislature has exclusive power to regulate court-appointed attorney's fees:

> ...if a change in the foregoing statutorily provided compensation [for special public defenders] be called for, it is within the province of the Legislature, not the courts, to make such a change. [Footnote omitted] 288 So.2d 201' Metropolitan Dade County v. Bridges, 402 So.2d 411, 414 (Fla. 1981).

Aside from jurisdictional problems of invoking the courts' inherent power in these situations, Section 925.036 itself precludes the invocation of inherent powers. Section 925.036(2) (1983) reads:

> ...(2) The compensation for representation [of an indgent having a conflict with the public defender] shall not exceed the following:
> (a) For misdemeanors and juveniles represented at the trial level: $1,000.
> (b) For noncapital, nonlife felonies represented at the trial level: $2,500.
> (c) For life felonies represented at the trial level: $3,000.
> (d) For capital cases represented at the trial level: $3,500.
> (e) For representation on appeal: $2,000.

The Legislature has clearly mandated that an appointed attorney may be compensated in an amount up to a maximum for representing a defendant. Any compensation in excess of that amount is not authorized by statute and is contrary to established precedent. If the Petitioners feel that they and their fellow attorneys should be compensated in a greater amount in extraordinary cases, they should urge the Legislature to amend the law. Thus, there can be no doubt that the statutory maximums in Section 925.036 are mandatory. In Bridges, supra, at 415, this Honorable Court held "that the maximum fee schedule in section 925.036 is mandatory, and we uphold the consitutionality of this statute." The Bridges Court held that it was error for the trial court to amend the statute to make it directory rather than mandatory. Bridges, supra at 414. Accord, County of Seminole v. Waddell, 382 So.2d 357 (Fla. 5th DCA 1980) (holding statutory limits in capital cases are mandatory and constitutional).

In an analogous situation, this Honorable Court held in Kaulakis v. Boyd, 138 So.2d 505 (Fla. 1962), that even Dade County and its Board of County Commissioners could not waive by home rule amendment state-mandated immunity from tort actions. A fortiori, the trial court has no inherent authority to waive state-mandated fee limits.

Without a statute or contract entitling an attorney to payment, there are no grounds for seeking payment from the county. Dade County v. McCrary, 260 So.2d 543 (Fla.3d DCA 1972); Dade County v. Strauss, 246 So.2d 137 (Fla. 3d DCA 1971); cert.den., 253 So.2d 864 (1971), cert.den., 406 U.S. 924 (1972). The Florida Supreme Court more recently in In the Interest of D.B. and D.S. held that there was no authority for paying for counsel appointed for parents and children in certain dependency proceedings. The clear impact of such decisions is that trial courts lack inherent power to award attorney's fees to court-appointed counsel. The only avenue for awarding such fees is by statue or contract.

Moreover, this Honorable Court has stated that the only conceivable ground for declaring Section 925.036 unconstitutional is on the basis of the sixth amendment rather than an interference with the inherent powers of trial courts. The distinction between defendant's rights and an attorney's application for fees is the basis for the test enunciated in dictum by the Florida Supreme Court:

> Unless it is demonstrated that the maximum amounts designated for representation in criminal cases by section 925.036 are so unreasonably insufficient as to make it impossible for the courts to appoint competent counsel to represent indigent defendants, we cannot say that Section 925.036 violates the sixth amemdment right to counsel. Bridges, supra, at 414.

The test is thus whether or not there is a showing that defendants were denied sixth amendment rights.

The plurality decision in Bridges holds that the statute is violative of the sixth amendment only if it is shown that the "courts" can not appoint competent counsel for indigent defendants' cases. Use of plural rather than singular nouns implies that the record must reflect an inhibition of the sixth amendment in the criminal justice system as a whole.

The concurring opinion by then-Chief Justice Sundberg advocated a test of whether or not sixth amendment rights are violated by requiring a showing that relates "to lawyers or types of cases as a class and [a challenge to the statute's constitutionality] should not be entertained on an individual lawyer or individual case basis as was done by the trial court in the instant case." Bridges, supra, at 416.

The Bridges Court implicitly found no grounds for a constitutional challenge to Section 925.036 based on a conflict with the inherent power of trial courts. By finding the sole basis for such a challenge to be inhibition of defendants' sixth amendment rights in a multiplicity of

cases, Bridges rejected all other grounds for challenging the statute.

Petitioner Makemson at pages 1 and 3 of his brief attempts to distinguish Bridges because this Honorable Court dealt with the "pre-1981" statute which he claims required reasonable compensation. However, Florida Statutes 925.035 (Supp. 1978) in effect at the time of Bridges, was the only reference in Chapters 27 or 925 to reasonable compensation. Section 925.035 is confined to capital cases. Bridges dealt with a defendant charged with two life felonies. Neither Section 925.036 nor Section 27.53, applicable to conflict appointments in life felony cases, referred to reasonable compensation. Bridges thus upheld the mandatory nature of statutory fee limits even when the Legislature did not require consideration for reasonable compensation.

Petitioner ignores the decision in Mackenzie in which the "absolute" cap of $750 was imposed where a reasonable fee would far exceed the $750 limit. Considerations of reasonableness have not formed the basis for upholding statutory fee limits in the decisions of this Honorable Court or district courts of appeal. Indeed, it has been accepted that a reasonable fee for attorneys in Bridges and its progeny exceeds the fee imposed by statute.

Petitioner Makemson at pages 1 and 3 of his brief also claims that the lack of consideration for extraordinary services constitutes a basis for invalidating Section 925.036. Yet, as explained in Point II of this brief, Florida courts

have consistently held that the fee limits of Section 925.036 are constitutional and mandatory in cases involving extraordinary circumstances.

Point II

FLORIDA STATUTES SECTION 925.036 IS CONSTITUTIONAL AS APPLIED TO EXCEPTIONAL CIRCUMSTANCES AND THE TRIAL COURT HAS NO INHERENT AUTHORITY TO AWARD A GREATER FEE FOR TRIAL AND APPEAL THAN THE STATUTORY MAXIMUM IN THE EXTRAORDINARY CASE

This Honorable Court has upheld Section 925.036 of the Florida Statutes as constitutional under extraordinary circumstances.

In MacKenzie v. Hillsborough County, 288 So.2d 200 (Fla. 1974), an appointed attorney sought compensation in excess of the $750 statutory maximum then provided by 925.035, Fla.Stat. (1971). The majority rejected the significance of the fact that "[t]he record details the voluminous amount of work involved in his representation -- the large amount of time expended at the expense of his private practice." MacKenzie, supra at 202. Although the attorney asserted that the $750 statutory cap was unconstitutional as applied to a case where the attorney provided extraordinary services, the Supreme Court found no merit in the constitutional challenge and held the limiting of compensation for court appointed attorneys was within the providence of the legislature. Accord, Dade County v. Strauss, supra. As a corollary to this rule, it is also clear that the trial court has no power to award an attorney compensation from a county in the absence of a statute authorizing such an award and that when appointed by a court, a lawyer as an officer of the court is under a duty

to respond and serve, even if he must do so without compensation. Dade County v. McCrary, 260 So.2d 543 (Fla. 3d DCA 1972). The decisions of Florida courts on these subjects are in conformance with the federal rule and decisions in the overwhelming majority of states. See, United States v. Dillon, 346 F.2d 633 (9th Cir. 1965); "Right of Attorney Appointed by Court for Inidgent Accused To, and Court's Power to Award, Compensation by Public, in Absence of Statute or Court Rule," 21 A.L.R.3d 819; "Attorney's Refusal to Accept Appointment to Defendant to Defend Indigent, or to Proceed in Such Defense, as Contempt," 36 A.L.R.3d 1221.

Both the plurality and concurring opinions in Bridges found that the limits placed on special assistant public defenders' fees are constitutional even though Petitioner in Bridges, Alan Ross, claimed his services were extra-ordinary. Both the concurring and plurality opinions in Bridges rejected the trial court's authority to award a fee in excess of the statutory limits. All Florida District Court opinions since Bridges have reiterated that there is no authority for a court to override the fee limits of Section 925.036 even in extraordinary circumstances. See, Metropolitan Dade County v. Lyons, 462 So.2d 487 (Fla. 3d DCA 1984); Broward County v. Wright, 420 So.2d 401 (Fla. 4th DCA 1982); Marion County v. DeBoisblanc, 410 So.2d 951 (Fla. 5th DCA 1982). The decisions in Florida are unanimous that the statutory fee limits for special public defenders

are constitutional and mandatory even as applied to exceptional circumstances. As explained in Part I of this brief, the trial courts have no inherent power to award attorney's fees under any circumstances. See, Bridges, supra; Mackenzie, supra; Carr supra; Strauss, supra.

Point III

THE TRIAL COURT SHOULD NOT HAVE AWARDED ATTORNEY'S FEES ABOVE THE STATUTORY MAXIMUM, GIVEN THE FACTS PRESENTED TO IT BY THE TRIAL COUNSEL BY HIS PETITION AND TESTIMONY

The trial court should not have awarded any attorney's fees in excess of the statute, because the tests enunciated by this Honorable Court for declaring the statutory fee limits unconstitutional were not met. The Supreme Court in Bridges specified in dictum the only conceivable method of declaring Section 925.036 unconstitutional. The Record below does not meet the unique criteria required to nullify Section 925.036.

The plurality in Bridges found that Petitioner Ross did not show that the defendants' sixth amendment rights to competent counsel were violated. Therefore, Petitioner Ross had no colorable claim that the statute should be invalidated. Bridges, supra, at 415. In the instant case, the record reflects the defendant did receive competent representation and therefore there is no authority to nullify the statutory limits.

There is also no evidence in the Record that the fee limits cause Defendants' sixth amendment rights to be violated in the criminal justice system as a whole in Martin County or in a class of cases to which State v. J.B. Parker belongs. Honorable Philip G. Nourse makes no reference in his Order to any other case besides State v. J.B. Parker. See, Petitioner Makemson's Appendix Item No. 5.

Assuming arguendo that Florida adopted criteria of minority jurisdictions in the United States, Petitioners have failed to establish a record of hardship or extraordinary circumstances to justify awarding fees in excess of the statutory maximums.

In People v. Randolph, 35 Ill.2d 24, 219 N.E. 2d 337 (1966), the Illinois Court confronted a statute limiting fees and costs to $500 per defendant. Florida Statutes 925.035 (1975) allowed Respondent to be paid $750 per court and whatever reasonable costs necessary. Unlike the instant case, five members of the Illinois bar had to assume new residences and pay for court costs from personal funds. All reasonable costs in State v. J.B. Parker were reimbursable from Martin County. Petitioner Makemson has not established a record of hardship even approaching that of the five attorneys in Randolph.

Point IV

THE TRIAL COURT SHOULD NOT HAVE AWARDED AN ATTORNEY'S FEE ABOVE THE STATUTORY MAXIMUM BEFORE THE SERVICES WERE RENDERED AND WITH FACTS KNOWN TO IT AT THE TIME OF THE AWARD

As observed by the Fourth District in the instant case, there is no authority for a premature award of an appellate fee prior to rendition of services. Section 925.036 of the Florida Statutes (1981) and (1983) state that:

> [a]n attorney appointed pursuant to s.925.035 or s.27.53 shall, at the conclusion of the representation be compensated... however, such compensation shall not exceed the maximum fee limits established by this section. (emphasis added)

As per the statute, Honorable Philip G. Nourse had no authority to award Petitioner Udell any fees prior to the conclusion of his representation. The trial court is also limited to the statutory limit in its award to Petitioner Udell. Section 925.036(2) (1981) provides:

> [t]he compensation for representation shall not exceed the following:... (e) for representation on appeal: $2,000.

The provisions of Section 925.036 are mandatory. Bridges, supra. Petitioner Udell made no showing that State v. J.B. Barker belongs to a class of cases where defendants were denied their sixth amendment rights by the application of the statutory fee limits. Thus, the trial court herein was without authority to override legislative mandates and without jurisdiction to declare such mandates unconstitutional.

Petitioner Udell's "bid" is modified and controlled by statutory mandates. Exhibit "A" of Petitioner's Appendix Item No. 5, the Invitation to Contract, specifies that attorneys prior to submitting bids should be familiar with Florida Statutes Section 925.036. Moreover, Petitioner Udell is on constructive notice of such fee limits and is thereby bound to such limits at the time of his appointment. Wright, supra, at 402, n.1.

CONCLUSION

This Honorable Court in Mackenzie and Bridges has upheld statutory fee limits for special public defenders as constitutional and mandatory. The decisions of this Court and District Courts of Appeal have found that trial courts have no inherent authority to override such statutory fee limits, even in exceptional circumstances.

The record below does not negate the fact that Petitioner and the trial court are on constructive notice that the fee limits are effective and provide no exceptions. The record below also does not satisfy the prerequisite tests ennunciated by Bridges for declaring the statutory fee limits unconstitutional.

There is no authority for awarding a special assistant public defender attorney's fees prior to rendering services. No authority exists for providing Petitioner Udell with fees in excess of the limits enunciated in Florida Statutes Section 925.036 (1981).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Amicus Curiae Brief was mailed on this 28th day of May, 1985, to: MICHAEL OLENICK, Martin County Attorney, 50 Kindred Street, Stuart, FL 33497; ROBERT MAKEMSON, Esquire, 200 Seminole Street, P.O. Box 538, Stuart, FL 33495; ROBERT G. UDELL, Esquire, 217 East Ocean Boulevard, Stuart, FL 33494; and MICHAEL ZELMAN, Esquire, 3050 Biscayne Boulevard, Suite 503, Miami, FL 33137; KYLE S. VANLANDINGHAM, Esquire, 304 N.W. 2nd Street, Okeechobee, FL 33472; JOHN R. COOK, Esquire, 202 N.W. 5th Avenue, Okeechobee, FL 33472; J. BLAYNE JENNINGS, Esquire, 2871 45th Street, Gifford, Florida 32960; and ROBERT LEE DENNIS, Esquire, 106 N.E. 2nd Street, Okeechobee, FL 33472.

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