

IN THE SUPREME COURT OF FLORIDA

CASE NO. 66,780

ROBERT MAKEMSON, ET AL.,

Petitioners,

vs.

MARTIN COUNTY,

Respondent.

21  
Gardner  
**FILED**

SID J. WHITE

APR 19 1985

SUPREME COURT

Chief Deputy Clerk

INITIAL BRIEF ON THE MERITS OF

PETITIONER, ROBERT MAKEMSON

ROBERT MAKEMSON, ESQUIRE  
200 Seminole Street  
Post Office Box 538  
Stuart, Florida 33495  
(305) 287-8822

TABLE OF CONTENTS

	<u>PAGE(S)</u>
Table of Contents	i
Citations of Authority	ii
Preliminary Statement	iii
Statement of the Case and of the Facts	iv-v
Questions Certified	vi
Summary of Argument	vii
Argument:	
Question I	1
Question II	4
Question III	9
Conclusion	12
Certificate of Service	13

CITATIONS OF AUTHORITY

<u>CASES</u>	<u>PAGE(S)</u>
<u>Brown v. Board of County Commissioners,</u> 85 Nev. 149, 451 P.2d 708 (1969)	6
<u>Daines v. Markof,</u> _____ Nev. _____, 555 P.2d 490 (1976)	6
<u>Dickens v. State,</u> 147 Ga.App. 25, 248 S.E.2d 36, (Court of Appeals, 1978)	8
<u>Edgerly v. Commonwealth,</u> 396 N.E.2d 453 (Mass. 1979)	8
<u>Metropolitan Dade County v. Bridges,</u> 402 So.2d 411 (Fla. 1981)	3
<u>People v. Randolph,</u> 35 Ill.2d 24, 219 N.E.2d 337 (1966)	5,6
<u>Rose v. Palm Beach County,</u> 361 So.2d 135 (Fla. 1978)	2,3,6,7
<u>Smith v. State,</u> 118 N.H. 764, 394 A.2d 834 (1978)	1,2
<u>State v. Allies,</u> 597 P.2d 64 (Mont. 1979)	8
<u>State v. Robinson,</u> _____ N.H. _____, 465 A.2d 1214 (1983)	4,5
<u>STATUTES:</u>	
18 U.S.C., Section 3006A(d)(3)	8

PRELIMINARY STATEMENT

Petitioner was the Petitioner at the trial court level and was the Respondent in the District Court of Appeal. Respondent was the Respondent at the trial court level and was the Petitioner in the District Court of Appeal.

In this Brief the parties will be referred to as they appear before this Honorable Court. The following symbol will designate the appropriate portion of the transcript of the hearing before the trial court - "T".

STATEMENT OF THE CASE AND OF THE FACTS

Petitioner, ROBERT MAKEMSON, was appointed by the Honorable C. Pfeiffer Trowbridge of the Nineteenth Judicial Circuit, as a special public defender to represent the defendant, J.B. PARKER, pursuant to Section 925.035, Florida Statutes (Appendix Item No. 1). J.B. PARKER was charged by the State of Florida with murder in the first degree, armed robbery, and kidnapping (Appendix Item No. 2). Petitioner was appointed on May 18, 1982, and represented the defendant through sentencing on January 11, 1983.

On February 18, 1983, after the close of the case, Petitioner moved the Honorable Philip G. Nourse of the Nineteenth Judicial Circuit, to award him attorney's fees in the amount of \$9,652.00 (Appendix Item No. 3). Hearings were held on Petitioner's Petition for Attorney's Fees on March 11, 1983, and April 20, 1983, before the Honorable Philip G. Nourse (Appendix Item No. 4). At the hearings two expert witnesses testified that this was an exceptional case, and after the conclusion of the hearing the Honorable Philip G. Nourse enter an Order on May 4, 1983, finding Section 925.036, Florida Statutes (1981), unconstitutional and awarding Petitioner \$9,500.00 as attorney's fees (Appendix Item No. 5). Said Order directed Respondent to pay Petitioner \$3,500.00 immediately and to put \$6,000.00 in escrow pending appeal of the Order.

Also by said Order, the Honorable Philip G. Nourse appointed Petitioner, ROBERT G. UDELL, to represent the defendant on appeal

and set his attorney's fee at \$4,500.00. The Order directed Respondent to put \$4,500.00 in escrow for payment of Petitioner Udell's fees.

Respondent filed a Notice of Appeal with the Clerk of the Circuit Court of the Nineteenth Judicial Circuit in and for Martin County, Florida, on May 31, 1983 (Appendix Item No. 6). On February 1, 1984, the Fourth District Court of Appeal filed an Order granting Respondent's Motion to Treat the Notice of Appeal as a Petition for Writ of Common Law Certiorari (Appendix Item No. 7).

On March 6, 1985, the Fourth District Court of Appeal rendered a decision granting the Writ of Certiorari and quashing the award to trial counsel. The Order of the Fourth District Court of Appeal also granted the Writ of Certiorari as to the fee of Petitioner Udell, and quashed the award of attorney's fees to Petitioner Udell. In that opinion, the Fourth District Court of Appeal certified to the Supreme Court the questions involved in this appeal (Appendix Item No. 8).

On March 18, 1985, Petitioners, ROBERT MAKEMSON and ROBERT G. UDELL, filed a Notice to Invoke Discretionary Jurisdiction with the Clerk of the Fourth District Court of Appeal (Appendix Item No. 9).

QUESTIONS CERTIFIED AS BEING  
OF GREAT PUBLIC IMPORTANCE

I.

IS SECTION 925.036, FLORIDA STATUTES, (1981) 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?

II.

IS SECTION 925.036, FLORIDA STATUTES (1981) 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?

III.

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?

IV.

SHOULD THE TRIAL COURT HAVE AWARDED AN ATTORNEY'S FEE ABOVE THE STATUTORY MAXIMUM FOR PROCEEDINGS AT THE APPELATE LEVEL BEFORE THE SERVICES WERE RENDERED AND WITH THE FACTS KNOWN TO IT AT THE TIME OF THE AWARD?

## SUMMARY OF ARGUMENT

Florida Statute 925.036 (1981) is unconstitutional because it interferes with the authority of the courts in carrying out their obligation to provide fair trials to indigent criminal defendants. A previous decision of this Court declared that a statute with an absolute statutory maximum payment improperly infringed upon the authority of the courts.

The elimination of any consideration as to the reasonableness of court-appointed counsel fees along with the absolute maximum in Florida Statute 925.036 (1981) results in an unconstitutional application of the statute in exceptional cases. If the statute is not unconstitutional as applied to exceptional cases, the courts have the inherent authority to exceed the statutory maximum amounts when the statutory maximum amount interferes with the courts' obligations.

The evidence presented to the trial court at the hearing on Petitioner's attorney's fees was uncontradicted and was determined by the trial court to be sufficient to demonstrate that this was an exceptional case. The trial judge was in the best position to decide whether this was an exceptional case, and his decision should not be reversed without a finding of abuse of discretion.



I.  
IS SECTION 925.036, FLORIDA STATUTES  
(1981) 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?

Florida Statute 925.036 (1981) is unconstitutional for the reason that it interferes with the authority of the courts to carry out their constitutionally mandated obligation to provide fair trials to indigent criminal defendants. The statute sets an absolute maximum fee to be paid to court-appointed counsel in five different situations, one of which is for capital cases represented at the trial level. There is no consideration in the statute as to the reasonableness of the fee, nor is there any consideration for extraordinary circumstances.

While previous decisions of this Court have held the pre-1981 versions of the statute constitutional, the Supreme Court of New Hampshire, upon considering a New Hampshire statute very similar to Florida's, but not as arbitrary nor inflexible, ruled that the New Hampshire statute was unconstitutional because it shifted the state's obligation to provide legal representation of indigents to the legal profession, and also because it intruded upon an exclusive judicial function. In Smith v. State, 118 N.H. 764, 394 A.2d 834 (1978), the pertinent statute provided that appointed counsel in criminal cases shall be reasonably compensated. Another section of the statute provided that the total compensation shall not exceed \$500.00 unless the charge was homicide or the penalty exceeded 25 years and there were

exceptional circumstances. In those special cases, payment in excess of the statutory maximum may be made.

The New Hampshire Supreme Court stated that the state had the obligation to provide counsel for indigent defendants and that:

"...it is peculiarly within the judicial province to ascertain reasonable compensation when the person who performs the services is acting under court appointment as an officer of the court. We view it implicit in the constitutional scheme that the courts of this state have the exclusive authority to determine the reasonableness of compensation for a court-appointed counsel. The statutes in question intrude upon this judicial function in violation of the constitutional separation of powers mandate." Smith v. State, supra at page 838.

This Court has previously declared that an absolute statutory maximum in witness compensation fees improperly infringes on the authority of the courts to carry out their constitutionally mandated obligation to provide fair trials. In Rose v. Palm Beach County, 361 So.2d 135 (1978), the Court was considering Florida Statute 90.14 (1975), in which maximum witness compensation and travel expense reimbursements are set out. While this Court did not specifically rule the statute unconstitutional, it indicated that if the statute was an absolute maximum, then it would be an infringement upon the court's authority. In making its ruling, this Court said:

"If the statute is deemed to establish an absolute maximum in all situations, then it must be said to improperly infringe the prerogative of the court in effectuating the

constitutional right to compulsory process."  
Rose v. Palm Beach County, supra at page 139.

Chief Justice Sundberg in his specially concurring opinion in Metropolitan Dade County vs. Bridges, 402 So.2d 411 (Fla. 1981), expressed his opinion that if the statute proved to interfere with a trial court's duty to appoint competent counsel, then it should be declared unconstitutional:

"Hence, should it be demonstrated that the monetary limitation placed by the legislature on the compensation paid to court-appointed attorneys representing indigent criminal defendants be so unreasonable as to make it impossible to secure effective counsel to those individuals, then there is no doubt in my mind that it would be the duty of the courts to strike down such limitations in favor of reasonable compensation."  
Metropolitan Dade County v. Bridges, supra, at page 415.

The absolute maximum in Florida Statute 925.036 (1981) and the absence of any requirement of reasonable compensation without any regard to exceptional circumstances, results in an infringement and intrusion on the courts' authority, and is therefore unconstitutional.

II.  
IS SECTION 925.036, FLORIDA STATUTES (1981)  
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?

In 1981, the Florida Legislature removed from Florida Statute 925.035 the allowance of "reasonable compensation" for representation of indigent criminal defendants. The elimination of the consideration of the reasonableness of the fee combined with the absolute maximum in Florida Statute 925.036 (1981), may result in unfairness and unreasonableness in compensation to appointed counsel in exceptional cases. The result is that, as applied to those exceptional cases, a strict application of the absolute maximum in the statute results in an unconstitutional application of the statute.

In a recent decision, the Supreme Court of New Hampshire made such a ruling. In State v. Robinson, \_\_\_\_\_ N.H. \_\_\_\_\_, 465 A.2d 1214 (1983), the Court was confronted with a New Hampshire Supreme Court Rule that set a limit of \$500.00 for the defense of misdemeanors. The Court amended the Rule to provide for the exceptional case.

"Because the \$500.00 limit on fees for the defense of misdemeanors, as applied in this case, may result in unfairness and unreasonableness, we hereby amend Supreme Court Rule 47 to lift the blanket limit in this instance. For all indigent defense appointments made after the date of this opinion, we revert, and Supreme Court Rule 47 is so amended, to the pre-June 1, 1982,

language of Superior Court Rule 104 that 'for good cause shown in exceptional circumstances' the maximum (for misdemeanors) 'may be exceeded with the approval of the trial justice.' This will adequately protect both the indigent defense fund and the right of an accused citizen to effective assistance of legal counsel." State v. Robinson, supra, at page 1216.

If Florida Statute 925.036 (1981) provided that in exceptional circumstances the statutory maximum could be exceeded, then the statute could be fairly and reasonably applied to those exceptional cases. The requirement in the statute that the fee be computed at the hourly rate fixed by the Chief Judge and the exercise of the trial court's discretion and judgment, will protect the counties from unreasonable fees and at the same time allow a reasonable compensation to court-appointed counsel.

Regardless of any determination of unconstitutional application of the statute, the courts have inherent authority to award compensation in excess of the statutory maximum in exceptional cases.

In 1966 the State of Illinois had a statute that provided a maximum of \$500.00 for fees and costs in capital cases. In ruling on a court-appointed counsel fee in an exceptional capital case, the Illinois Supreme Court held that the courts have inherent authority to award fees in excess of the maximum.

"At this time it is necessary to hold only that in the extraordinary circumstances presented in this case, the court's inherent power to appoint counsel also necessarily

includes the power to enter an appropriate order ensuring that counsel do not suffer an intolerable sacrifice and burden and that the indigent defendants' right to counsel is protected. If such judicial power did not exist, the courts probably could not proceed, and certainly could not conclude the trial of indigent defendants in cases such as this. ...We hold that upon the record presented here the petitioners are clearly entitled to payment of their costs and fees forthwith, as ordered by the trial court. A permanent solution to the problem presented is an appropriate subject for the legislature. The problem having now been exposed we trust that the General Assembly will respond. People v. Randolph, 35 Ill.2d 24, 219 N.E.2d 337 (1966).

The Supreme Court of Nevada, in Brown v. Board of County Commissioners, 85 Nev. 149, 451 P.2d 708 (1969), and reaffirmed in Daines v. Markof, \_\_\_\_ Nev. \_\_\_\_, 555 P.2d 490 (1976), cited People v. Randolph, supra, in also deciding that in extraordinary circumstances a court has the inherent authority to award fees in excess of statutory maximums.

The Florida Supreme Court in Rose v. Palm Beach County, 361 So.2d 135 (Fla. 1978), addressed the question of a court's inherent authority to exceed statutory maximums. In that case, the court was considering witness compensation and travel expenses in Florida Statute 90.14 (1975). The trial court in that case directed that the witnesses be paid \$9.25 per day, instead of the statutory amount of \$5.00 per day, and also directed that the witnesses be paid \$.10 per mile instead of the statutory \$.06 per mile. The County sought review by certiorari to the Fourth District Court of Appeal, and the Fourth District

Court of Appeal quashed the order, ruling that the Circuit Court had no authority to issue such order. The District Court of Appeal then certified the question to the Florida Supreme Court as to whether or not a trial court had inherent power to order compensation in excess of the statutory maximums. In its holding that trial courts have such inherent authority, this Court said:

"Every court has inherent power to do all things that are reasonably necessary for the administration of justice within the scope of its jurisdiction, subject to valid existing laws and constitutional provisions. The doctrine of inherent judicial power as it relates to the practice of compelling the expenditure of funds by the executive and legislative branches of government has developed as a way of responding to inaction or inadequate action that amounts to a threat to the courts' ability to make effective their jurisdiction. The doctrine exists because it is crucial to the survival of the judiciary as an independent, functioning and co-equal branch of government. The invocation of the doctrine is most compelling when the judicial function at issue is the safe-guarding of fundamental rights. Rose v. Palm Beach County, supra, at page 137.

This Court, after noting that it was exercising extreme caution in determining the power of trial courts to order payments by local governments for expenditures essential to the fair administration of justice, stated that the amounts provided by the Legislature for the witness compensation and travel expenses are probably quite adequate for the vast majority of proceedings, but because of the circumstances in this case this Court construed the statute not to preclude the order entered by

the trial court.

Several states have addressed the problem of the exceptional circumstance case by statute or rule. In Georgia the statute provides a maximum compensation by category of crime, but the Georgia statute also authorizes the trial court to award a higher fee if the trial court finds that exceptional circumstances exist, Dickens v. State, 147 Ga.App. 25, 248 S.E.2d 36, (Court of Appeals, 1978). Similar procedures have been established in Montanta, State v. Allies, 597 P.2d 64 (Mont. 1979), and in Massachusetts, Edgerly v. Commonwealth, 396 N.E.2d 453 (Mass. 1979).

The federal statutes establish a maximum fee by category, but the statute also provides that payments may be made in excess of any maximum amount for extended or complex representation ~~when~~ the court finds that such excess payment is necessary to provide fair compensation, 18 U.S.C. Section 3006A(d)(3).

Because Florida Statute 925.036 (1981) has no such procedure for exceptional cases, the absolute maximum in the statute interferes with with the courts' obligations, and under the doctrine of inherent authority, the courts may exceed the maximum in exceptional cases.



III.  
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 TESIMONY?

The evidence presented to the trial court in support of the Petition for Attorney's Fees included testimony from the Public Defender of the Nineteenth Judicial Circuit and testimony from a private attorney who testified that he was lead counsel on somewhere between 85 and 100 capital cases, and actually tried approximately 20 capital cases. It was the testimony of both experts that this case was an extraordinary case because of several factors. The identity of the victim produced an extraordinary amount of publicity and also caused the State Attorney's office to devote the total resources of their office in prosecuting the case (T. 14-15). There were well over 100 witnesses listed on the State's Answer to Demand for Discovery and in excess of 50 depositions were taken (T. 15). The cases were severed and because of a confession being featured in the local press, a change of venue was granted each defendant (T. 15-16). This change of venue required that the trial counsel be away from his home and his office for ten days during the trial of the case (T. 17).

Petitioner, in his Petition for Attorney's Fees, certified that he expended a total of 248.3 hours in the representation of the Defendant. This representation covered a nine month period culminating in a trial approximately 150 miles from the

Petitioner's home and office. During the time that the Petitioner was away from his office he was not able to work at night nor on weekends, and his private practice was neglected for the entire ten day period that he was away.

If the statutory maximum compensation of \$3,500.00 is all that is allowed the Petitioner, then his effective hourly rate of compensation is approximately \$14.00. Because the Petitioner was fulfilling an obligation of the State to provide the defendant with effective assistance of counsel, to allow him a maximum fee of \$3,500.00 is grossly unfair in light of the circumstances of the case, including the severity of the charge and penalty involved.

Petitioner is not seeking the same fee that a private attorney would charge for representation of this defendant. In his Petition for Attorney's Fees and in his testimony at the hearing before the trial court, Petitioner stated that he was asking for compensation in an amount computed by the application of the Chief Judge's established hourly rates as applied to the number of hours of work performed. In this case, the application of the established hourly rate to the number of hours expended, as found by the trial court, would fairly compensate the Petitioner, but not be so unlimited as to be a drain on the local government responsible for the payment of the Petitioner's fees.

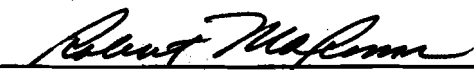
The trial judge was in the best position to determine whether or not this was an exceptional case since he had the opportunity to observe the trial, the quality of Petitioner's representation of the defendant, and also observe and consider the testimony given in support of the Petition for Attorney's Fees. The trial judge exercised his discretion in determining that this was an exceptional case, and unless this Court finds that his decision was an abuse of his discretion, his ruling that exceptional circumstances existed should be sustained.

CONCLUSION

The decision of the Fourth District Court of Appeal should be reversed because the facts of this case demonstrate that this was an exceptional case and the absolute statutory maximum in Florida Statute 925.036 (1981) rendered the statute unconstitutional on its face, or in the alternative unconstitutional as applied to the facts of this particular case.


The decision of the Fourth District Court of Appeal should also be reversed for the reason that trial courts have inherent authority to exceed statutory maximum amounts when those maximum statutory amounts interfere with the courts' obligation to insure a fair trial to an indigent criminal defendant.

Respectfully submitted,

  
\_\_\_\_\_  
ROBERT MAKEMSON  
200 Seminole Street  
P.O. Box 538  
Stuart, FL 33495  
(305) 287-8822

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief has been furnished, by hand, to Michael H. Olenick, Esquire, 50 Kindred Street, Stuart, Florida 33494; and to Robert G. Udell, Esquire, 217 E. Ocean Boulevard, Stuart, Florida 33494, this 17th day of April, 1985.

  
\_\_\_\_\_  
ROBERT MAKEMSON, ESQUIRE  
200 Seminole Street  
P.O. Box 538  
Stuart, FL 33495  
(305) 287-8822