IN THE SUPREME COURT OF FLORIDA

CASE NO. 66, 829

ROBERT LEE DENNIS,

Petitioner,

vs.

OKEECHOBEE COUNTY, FLORIDA,

Respondent.

BRIEF ON THE MERITS OF AMICUS CURIAE METROPOLITAN DADE COUNTY

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STATUTES

PRELIMINARY STATEMENT

Amicus Curiae, Metropolitan Dade County, has made an effort in this brief to avoid being repetitious of its brief in Robert Makemson, et al., v. Martin County, Supreme Court Case No. 66, 780. However, the Fourth District certified the identical questions in the instant matter and in Martin County v. Makemson, No. 83-1138 (Fla. 4th DCA Mar. 6, 1985), 10 F.L.W. 569. In discussing the same issues, this brief inevitably will repeat some of the same arguments in Makemson. To understand Metropolitan Dade County's complete position, one should read both briefs. Therefore, Metropolitan Dade County has served copies of both briefs to counsel for all parties in the two petitions.

STATEMENT OF FACTS AND CASE

Metropolitan Dade County accepts and adopts Respondent, Okeechobee 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?

SUMMARY OF ARGUMENT

The inherent power to appoint counsel to fulfill the requirements of the Sixth Amendment does not extend to a power to compensate court-appointed counsel. This Honorable Court and all District Courts of Appeal have found that the Legislature's will is supreme in the matter of court-appointed attorney's fees.

Trial courts have no authority to override the fee limits of Section 925.036 (1983) even in cases of exceptional circumstances. The Honorable Court in dicta in Metropolitan Dade County v. Bridges, 402 So.2d 411 (Fla. 1981), specified the only manner in which Section 925.036 can be declared unconstitutional: (1) The defendant's sixth amendment rights must have been violated; (2) the case must belong to a class of cases in which defendants' sixth amendment rights to counsel have been violated because of the fee limits of Section 925.036; and (3) it must be impossible for the trial court to appoint competent counsel because of the statutory fee limits.

Actually, the instant case meets both of the above criteria. Defendant Underhill did not receive incompetent assistance of counsel. There was an

insufficient showing that the instant case is within a class of cases in which defendants' sixth amendment rights to counsel have been violated by the low fee limits. Furthermore, it was not impossible but merely difficult for the trial court herein to appoint competent counsel. Under Section 27.53, Florida Statutes, the trial court had authority to appoint a public defender from another circuit, even if it was impossible to appoint competent private counsel.

Assuming arguendo that the factual situation in the Lower Court meets the tests enunciated in Bridges's dictum, the tests regarding when Section 925.036 can be declared unconstitutional should be re-examined. The obligation of attorneys to represent the court pro bono and changes in Section 27.53 (3)(b) indicate that it is never impossible to appoint competent counsel because of the statutory limits. Any hardship this may cause attorneys should be remedied by changes enunciated by the Legislature, not the courts.

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 TO ENTER SUCH ORDERS AS ARE NECESSARY TO CARRY OUT ITS CONSTITUTIONAL AUTHORITY

The inherent power of the courts to appoint counsel as well as the historical obligation of lawyers to represent the poor pro bono obviates any alleged need to compensate court-appointed counsel beyond the fee limits in Section 925.036. The inherent power of courts to appoint counsel does not extend to compensating such counsel. Florida courts have upheld the inherent power of the court to appoint competent counsel and at the same time denied that the court has inherent power to compensate such attorneys.

As early as 1971, this Honorable Court distinguished appointment from compensation in Carr v. Dade County, 150 So.2d 865 (Fla. 1971). Without questioning the trial court's authority to appoint a special prosecutor, the Florida Supreme Court denied the courts' power to compensate the appointed attorney without statutory authority. Carr, supra, at 866. Even the dissenting opinion of Justice Drew recognized that the inherent authority of courts extended only to the power to appoint acting prosecutors essential to the proper functioning of the court.

In Dade County v. Strauss, 246 So.2d 137 (Fla. 3d DCA 1971), cert. den., 253 So.2d 864 (Fla. 1971), cert. den., 406 U.S. 924 (1972), the Third District found no authority for awarding fees to special assistant public defenders without authority by contract or statute. This Honorable Court in Mackenzie v. Hillsborough County, 288 So.2d 200, 201 (Fla. 1973), found that attorney's fees must be provided by the Legislature if at all.

The clearest enunciation of the distinction is found in Dade County v. Goldstein, 384 So.2d 183 (Fla. 3d DCA 1980). In Goldstein, the trial court appointed two attorneys to represent one defendant and awarded two fees, each above the statutory maximum. The Third District found that the trial court had the inherent authority to appoint two attorneys. However, Goldstein held that the court had authority to compensate only one attorney as per the provisions of Section 27.53 of the Florida Statutes. Finally, Goldstein found that the trial court had no inherent authority to award that one attorney any more than authorized by the Legislature.

The rationale behind the distinction between appointing and compensating attorneys is based on (1) lack of jurisdiction of the court over actions involving appropriation of public funds and (2) the historical obligation of attorneys, as officers of the court, to

represent the poor without compensation. As Justice Drew found in Carr, supra, at 867, the constitutional power and responsibility of providing compensation for state or county officers is a peculiar and exclusive function of the legislative branch. Such compensation is an appropriation of public funds which must be approved by the Legislature.

Justice Drew's rationale was reiterated in Strauss, supra. Strauss found that the lack of common law rights to attorneys' fees meant that such fees could be awarded only by statute or contract. Strauss, supra, at 141, held that the trial court exceeded its jurisdiction in awarding fees in excess of statutory maximums. Accord, Mackenzie, supra, at 201 (Legislature is sole authority for attorneys' fees because of the lack of common law right to such fees); Metropolitan Dade County v. Lyons, 462 So.2d 487 (Fla. 3d DCA 1984), pet for rev. pending; County of Seminole v. Waddell, 382 So.2d 357 (Fla. 5th DCA 1980) .

This Honorable Court in Metropolitan Dade County v. Bridges, 402 So.2d 411 (Fla. 1981), clearly deferred to the Legislature in the matter of court-appointed attorneys' fees. The plurality decision found that the provisions of Section 925.036 are mandatory and not directory and that the trial court may not award fees in excess of the statute. Rose v. Palm Beach County, 361 So.2d 135, 137 n.5 (Fla. 1978), even recognized that this Honorable Court had held that

Legislative will is supreme in matters of court-appointed attorney's fees.

Despite the abundance of law reserving the authority to the Legislature to compensate special public defenders and other officers of the court, Petitioner argues on pages 8 and 9 of his brief that the duty of the trial court to provide counsel to indigents is coextensive with an inherent power to award attorneys' fees. All Florida courts have rejected Petitioner's theory.

Courts can satisfy the requirements of the Sixth Amendment without awarding fees beyond their jurisdiction. Contrary to Petitioner's blanket assertions on page 9 of his brief, Florida courts have authority to obligate an attorney to represent an indigent without compensation.

The court in United States v. Dillon, 346 F.2d 633 (9th Cir. 1965), traced the historical roots of the obligation of attorneys to represent the poor without compensation. Fifteenth-century England and pre-Revolutionary America traditionally obligated attorneys to represent the poor. In England, the obligation was a matter of common law and in the seventeenth century statutes provided that attorneys must represent indigents charged with treason.

In colonial America, statutes obligated counsel to represent indigents upon a court's order.

The obligation to serve indigents is a well-established and time-honored tradition of the legal profession. Florida courts have reiterated this obligation to represent indigents pro bono or with little compensation.

As Dillon, supra, at 638, indicates, if a court requires an attorney to represent the poor pro bono, it is merely invoking the attorney's pre-existing obligation. Such requirements are not considered "takings". All Florida courts have adopted the reasoning of Dillon. Justice Drew in Carr, supra, at 867, recognized that attorneys as officers of the court are expected to render many services without expectation of any payment or of more than token compensation. Mackenzie, supra, held that requiring attorneys to serve within the fee limits of $750.00 does not constitute a violation of Equal Protection or Due Process.

The Bridges Court recognized this pro bono obligation of the bar. This Honorable Court cited In the Interest of D.B. and D.S., 385 So.2d 83 (Fla. 1980), for the proposition that attorneys remain under an obligation to represent the poor without compensation even though the state has shifted some of the burden of representing indigents to the counties. Indeed, this Honorable Court found in D.B. and D.S. that court-appointed attorneys have no right to compensation for representing the parents or the child in certain dependency cases.

The courts may even use its contempt power to ensure that attorneys fulfill their obligation to represent the poor. Justice Drew's research in Carr, supra, at 867, indicated that there was no record of an attorney refusing a court appointment. Apparently courts have not had to resort to the contempt power in the past.

Petitioners' remarks throughout his brief that perhaps County Attorneys are under an obligation to serve the courts with little or no compensation is correct. All attorneys have this obligation. Assistant Dade County Attorneys are appointed and indeed honored to represent Circuit Court Judges in various proceedings without compensation.

The inherent power of the trial court to require counsel to represent the poor is sufficient to ensure the Sixth Amendment rights of indigents are not violated. There is no need for the trial courts to intrude upon the province of the Legislature in appropriating funds. Therefore, the Legislature 's provision of little or even no compensation does not interfere with the trial court's duty to uphold the Sixth Amendment.

Point II

SECTION 925.036, FLORIDA STATUTES (1983) IS NOT UNCONSTITUTIONAL AS APPLIED TO EXTRAORDINARY CIRCUMSTANCES AND THE TRIAL COURT DOES NOT HAVE THE INHERENT AUTHORITY, IN THE ALTERNATIVE, TO AWARD A GREATER FEE FOR TRIAL AND APPEAL THAN THE STATUTORY MAXIMUM IN THE EXTRAORDINARY CASE.

This Honorable Court in Strauss, Mackenzie and Bridges have consistently rejected claims that extraordinary circumstances justify declaring statutory fee limits unconstitutional or overriding such limits on the basis of trial courts' inherent powers. Accord, Lyons, supra; Broward County v. Wright, 420 So.2d 401 (Fla. 4th DCA 1982); Marion County v. DeBoisblanc, 410 So.2d 951 (Fla. 5th DCA 1982), 419 So.2d 1196 (Fla. 1982) pet for rev. denied.

At pages 10 to 11 of his brief, Petitioner interprets dictum in Bridges to hold that a showing of extraordinary and extreme circumstances is sufficient to declare the statute unconstitutional. Bridges, supra, at 413, clearly holds that Section 925.036 can not be declared unconstitutional because of extraordinary circumstances. In dicta, Bridges, supra, at 414-15 states:

> 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 amendment right to counsel. In the present case, the defendant represented by Ross was not denied his sixth amendment right to representation by section 925.036, nor is it contended that he was denied such right.
>
> Accordingly we hold that the maximum fee schedule in section 925.036 is mandatory, and we uphold the constitutionality of this statute.

The clear import of such language is that Section 925.036 can not be declared unconstitutional in a given case, as indicated in Petitioner's brief at page 10. The test enunciated by Bridges's plurality and concurring opinions focuses upon a showing of a violation of Sixth Amendment rights in the whole criminal justice system or in a class of cases. This is a logical interpretation, because an indigent in any given case can receive incompetent representation for a variety of reasons unrelated to the statutory fee limits. The remedy in that case is a Rule 3 motion rather than invalidating statutory mandates on attorneys' fees. However, if the statutory fee limits of 925.036 were shown to cause appointment of incompetent counsel in the whole system or in a class of cases, then the dictum in Bridges indicates the statutes may be declared unconstitutional.

Petitioner neglects to mention a threshold question in the criteria for invalidating Section 925.036. Bridges, supra, at 415, indicates that the

courts must find that the defendant was rendered ineffective assistance of counsel. In Bridges, this Honorable Court found that the defendant received competent representation and therefore the statute had to be upheld.

This Honorable Court may wish to reconsider the test it enunciated in dictum in Bridges. Since the time of that decision, Florida statutes have provided a potential "safety valve" for classes of cases in which the compensation in Section 925.036 is so unreasonable that it is impossible to appoint competent private counsel. Section 27.53 provides that the trial courts may appoint a public defender from a different circuit in cases of conflict with the local public defender. Rather than declaring Section 925.036 unconstitutional in a class of cases where it is impossible to appint private counsel, a public defender from another circuit should be appointed in that class of cases.

However, it is never impossible to appoint competent private attorney(s) because the trial courts have the inherent authority to require counsel to serve pro bono. The remedy for the hardship this may cause certain attorneys is to petition for change in the Legislature. The Legislature has traditionally increased the fee limits and adjusted rules regarding court appointments in response to changing times. Until such time as the Legislature institutes a change, this

Honorable Court should strictly construe the statutory fee limitation to provide no exception for exceptional circumstances. It is respectfully submitted that the tests enunciated in dictum in Bridges should be reexamined in light of the inherent power of courts to obligate attorneys to represent the poor with little or no compensation and changes in Florida Statutes Section 27.53 (3)(b) .

Point III

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

If one applies the test enunciated in Bridges, the facts in the instant case do not establish that Section 925.036 should be declared unconstitutional or that trial counsel should receive a fee exceeding statutory fee limits. As in Bridges, Petitioner does not even allege that Defendant received incompetent representation. Petitioner, just like Alan Ross in Bridges, rendered effective assistance of counsel and can not therefore mount a constitutional challenge to Section 925.036. Petitioner Dennis does not belong to a class of incompentent lawyers who were appointed because of allegedly unreasonably low fee limits.

Moreover, the trial court did not find that it was impossible to appoint competent counsel, merely difficult. Indeed, the trial court found that an independently wealthy attorney could represent such a defendant. The trial court had the authority to appoint such an attorney.

Petitioner's scenario of the "destruction" of the criminal defense bar is unrealistic. It fails to take into account that the trial court can appoint many counsel for one defendant to relieve the burden on an individual attorney. Under Florida Statutes Section 27.53, the court could appoint a public defender from another circuit. Certainly public defenders all over the State of Florida competently defend complex drug cases with competence in the vast majority of such cases.

In any case, Petitioner's speculation regarding criminal defense bar's "destruction" is irrelevant to both the plurality and concurring opinions' tests in Bridges. Both tests focus on violations of Sixth Amendment rights, not hardships on attorneys. If the fee limts cause a hardship on the attorney and yet the defendants in the class receive competent representation, such as the excellent counsel Defendant received in the instant case, mandated limits must be upheld.

Assuming arguendo this case satisfies the tests enunciated in dictum in Bridges, the criteria for declaring Section 925.036 unconstitutional should be reexamined. This case shows that even a with a low fee limit it may be difficult but not impossible to appoint competent, private counsel. The trial court in this case had authority to compel Petitioner Dennis to continue to represent his client within the fee limits

of 925.036. Any hardship caused is a matter for the Legislature to consider. The trial court had the inherent power to appoint another attorney to relieve the burden on Petitioner.

Moreover, the Lower Court could have allowed Petitioner Dennis to withdraw and appoint a public defender from another circuit. The Lower Court would have thereby avoided an instrusion into the Legislature's domain and still ensured that Defendant's Sixth Amendment rights were protected. The trial court having numerous alternatives available to it short of overriding statutory mandates clearly exceeded its jurisdiction when it awarded fees exeeding those mandates.

CONCLUSION

The statutory fee limits for special assistant public defenders do not interfere with the trial court's inherent power to appoint competent counsel for indigents. Moreover, there is not exception to these statutory mandates for extraordinary circumstances.

The factual situation of the instant case does not satisfy the tests enunciated in *dictum* in *Bridges.* Even if the instant situation does meet those criteria, the tests for declaring Section 925.036 unconstitutional should be re-examined in light of the trial court's ability to appoint public defenders from other circuits and the traditional obligation to reprsent the poor *pro bono*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Amicus Curiae Brief was mailed 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; 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; and J. BLAYNE JENNINGS, Esquire, 2871 45th Street, Gifford, FL 32960, and ROBERT LEE DENNIS, Esquire, 106 N. E. 2nd Street, Okeechobee, Florida 33472, this 28th day of May, 1985.

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