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IN THE SUPREME COURT OF THE

STATE OF FLORIDA

ROBERT LEE DENNIS,

Petitioner,

VS

OKEECHOBEE COUNTY, FLORIDA,

Respondent.

CASE NO. 66,829

DCA CASE NO. 83-1179

PETITIONER'S BRIEF ON THE MERITS

ROBERT LEE DENNIS
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POINTS ON REVIEW - CERTIFIED QUESTIONS:

A. WHETHER SECTION 925.036 FLORIDA STATUTES (1983) IS 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 THE FIRST QUESTION IS NEGATIVE, COULD THE STATUTE BE HELD UNCONSTITUTIONAL AS APPLIED TO EXCEPTIONAL CIRCUMSTANCES;

C. IF THE ANSWER TO THE SECOND QUESTION IS AFFIRMATIVE, 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 THEIR PETITIONS AND TESTIMONY;

STATEMENT OF THE CASE AND OF THE FACTS:

(For purposes of the Statement Of The Case And Of The Facts, reference to the appropriate portions of the Record on Appeal will be made by way of the intial "R", followed by the relevant pagination; reference to the "Appellant's Initial Brief" will be made by the initial "A", followed by the appropriate pagination; and reference to the Opinion of the District Court of Appeal in Martin County VS Makemson, No. 83-1138 (Fla. 4DCA Mar. 6, 1985) 10 F.L.W. 569 will be made by the intials "O.M.", followed by the appropriate pagination; and, reference to the opinion of the opinion of the District Court of Appeal in Okeechobee County, Florida Vs Jennings, et. al, No. 83-1179 (Fla. 4DCA, March 6, 1985 (10F.L.W. 572) will be made by the initials "O.J.", followed by the appropriate pagination)

V. L. Underhill and eleven others were jointly charged in the Lower Tribunal cause, and V. L. Underhill was specifically charged in four counts of the Information with: Count I., Conspiracy To Bring Cocaine and Marijuana Into The State Of Florida; Count II., Trafficking In Cannabis In Excess of 100 Pounds; Count III., Trafficking in Cannabis In Excess of 100 Pounds; and Count IV., Arson (R.P. 22). On December 8, 1982, Robert Lee Dennis, Esquire (hereinafter "the Petitioner") was appoint-

ed to represent V. L. Underhill as a Special Public Defender of the Nineteenth Judicial Circuit of the State of Florida, In And For Okeechobee County, Florida (R.P. 102). On February 7, 1983, Petitioner Robert Lee Dennis, filed his "Motion For (Immediate) Partial Payment of Attorney's Fees and Costs" (R.P. 102-105). This motion recited an expenditure of 52.07 hours in Court and 168.80 hours out of court by the Petitioner on behalf of V. L. Underhill's case; and the motion requested attorney's fees in an amount of $8,511.50, based upon this total of 221 hours expended. And on February 8, 1983, an Order specifically finding "...that all proper persons were given notice ...." and Ordering Okeechobee County, Florida, to pay the Petitioner attorney's fees of $8,511,50 was rendered by the Lower Tribunal Judge (R. P. 107). No motion for rehearing was filed thereafter; no appeal has even been taken with regard to that Order; and the money was paid by the County to the Petitioner Robert Lee Dennis (R. Passim; D.M., PP. 10-11).

Thereafter, on February 25, 1983, another Hearing respecting attorney's fees was held (R.PP. 1-72), and at this Hearing the Petitioner and Co-Counsel presented five expert witnesses in the area of the defense of drug trafficking type cases who testified as to the utter impossibility of the Circuit Courts of the State being able to appoint competent attorneys to represent indigent

defendants in drug trafficking and conspiracy type cases for the maximum fee of $2,500.00 prescribed by F. S. 925.036 (1983). Inter alia, these attorney witnesses who specialized in the defense of such drug trafficking type cases, declared these cases as a class to be the most complex and difficult of all criminal cases to defend; opined expertly that F. S. 925.036 (1983) was unconsitutional--at least as applied to the V. L. Underhill case; and, Wilbur Smith, Esquire, testified in addition that a reasonable fee in accordance with what the V. L. Underhill case required to defend it competently would be $150,000.00 plus costs, but, that the Courts likely would be able to find competent lawyers, fully aware of what the case entailed, who would defend it for $30,000.00 - $40,000.00, plus costs. (R.P. 50).

Based upon the evidence presented, the trial court found: that F. S. 925.036(1983) was unconstitutional as applied to the V. L. Underhill case; that the V. L. Underhill case was the type of case under Broward County V. Wright, 420 So.2d 401 (Fla. 4DCA 1982), Rose V. Palm Beach County, 361 So.2d 135 (Fla. 1978), and Metropolitan Dade County V. Bridges, 402 So.2d 411 (Fla. 1981), which demonstrated such extreme circumstances as to mandate exceeding the statutory limit for Special Public Defender fees; that no competent lawyer who was not independently wealthy and who was aware of the complexity of the case would accept representation for $2,500.00. (R.PP. 58-59).

These ultimate findings the Court derived from the facts that as of February 21, 1983: the State had listed over 130 witnesses; there were eight co-defendants jointly to be tried; there were 4,000 pages of State evidence subject to being introduced at trial; that most of the witnesses should be deposed or at least be interviewed by each defense counsel; that the case involved: the use of interception of oral communication by way of body bugs; the use of informers; investigation by both Federal and State agencies; the defense of entrapment; that it was estimated that over six weeks at approximately 4 days per week and 4 hours each day would be required even to select a jury; that four weeks of evening motion sessions at 3 hours per day, two or three times per week had been expended already; that it was estimated that the trial would take between 4 and 8 weeks at 4 days per week, 6 hours a day; that pretrial discovery had already taken between 40 and 165 hours per defense counsel; and, that a reasonable fee for private retained counsel would be between $40,000.00 - $40,000.00, plus costs. (R.PP. 56-59). This hearing was apparently held upon the Motions of Appellees J. Blayne Jennings, Esq. (R. PP. 81-84), Robert G. Udell, Esq. (R. PP. 91-95), and Richard D. Kibbey, Esq., (R.PP. 97-100) to set aside F. S. 925.036 (1983) as applied to drug trafficking cases in general, and, while the Petitioner Robert Lee Dennis took part in the Hearing on February 25, 1983, he neither made any such motion in writing nor adopted this motion as his own. The

only motion which he made was the "Motion For (Immediate) Partial Payment of Attorney's Fees And Costs" of February 7, 1983 (R.PP. 102-106), which motion in turn was granted by the terms of the unappealed Final Order of payment of $8,511.50, which Order was rendered by the Trial Court on February 8, 1983 (R.P. 107).

On May 9, 1983, fifty-eight days after the appeal time had elapsed from this Final Order of February 8, 1983, the Trial Judge rendered the Order sought to be reviewed by way of the instant Appeal. On June 6, 1983, the Respondent filed only one original Notice of Appeal of this Order of May 9, 1983, (Supplemental Record on Appeal; D.M. P. 12); and, on June 17, 1983, the trial Court rendered an "Amended Order" based upon the hearing of February 25, 1983, awarding all appointed counsel, including the Petitioner, a total fee of ten-thousand dollars ($10,000.00) (Supplemental Record on Appeal).

On March 6, 1985, the Honorable District Court of Appeal of Florida, Fourth District issued its opinion in the instant case and in the companion case of Makemson, supra, certifying the instant points on appeal for decision by the Supreme Court of Florida; on April 3, 1985, the petitioner filed his invocation of the jurisdiction of the Supreme Court; and on April 8 , 1985, the Supreme Court ordered the filings by the Petitioner and the

Respondent of thier briefs on the merits. The fourth point certified in Makemson, supra, does not involve Petitioner Robert Lee Dennis.

ARGUMENT AND CITATIONS OF LAW:

A. POINT ON REVIEW - CERTIFIED QUESTION NUMBER ONE:

WHETHER FLORIDA STATUTE 925.036 (1983) IS UNCONSTITUTIONAL ON ITS FACE AS AN INTERFERENCE WITH THE INHERENT AUTHORITY OF THE TRIAL COURTS TO ENTER SUCH ORDERS AS ARE NECESSARY TO CARRY OUT ITS CONSTITUTIONAL AUTHORITY:

To the Petitioner, the term "inherent authority", implies that no express authority exists by virtue of constitution, statute, or rule which justifies a particular action by a court, but, that the justification nonetheless exists, in order for the system to function. If such is indeed the case, the Petitioner respectfully suggests that the Honorable District Court's certified question is too narrow in scope and begs the question that no express authority has been granted to the trial courts to exceed the limits of Florida Statute 925.036(1983) in a given case. Therefore, the Petitioner would respectfully suggest that the first of the questions certified by the Honorable District Court in this case should have read as follows:

> "WHETHER FLORIDA STATUTE 925.036 (1983) IS UNCONSTITUTIONAL ON ITS FACE AS AN INTERFERENCE WITH BOTH THE EXPRESS AND SPECIFIC CONSTITUTIONAL AUTHORITY OF ART. V. S.5(b) FLA. CONST. AND THE INHERENT AUTHORITY OF THE TRIAL COURTS BEYOND THIS CONSTITUTIONAL PROVISION TO ENTER SUCH

ORDERS AS ARE NECESSARY TO CARRY OUT ITS CONSTITUTIONAL AUTHORITY AND RESPONSIBILITIES."

In Art. V. S. 5(b), Fla. Const., supra, the people of the State of Florida expressly provided, inter alia, the following with respect to the authority of the Circuit Courts of the State

> "...shall have the power to issue...all writs necessary or proper to the complete exercise of their jurisdiction...."

Nor, the Petitioner respectfully submits, can there be any doubt under Gideon V. Wainwright[1.] and Argersinger V. Hamlin[2.] that the trial courts have an absolute "jurisdictional" duty to provide counsel for the indigent criminal defendants of the state of Florida in order to comply with the Sixth and Fourteenth Amendments to the Constitution of the United States itself. As a consequence, it would necessarily follow, the Petitioner submits, that the powers of the trial court in a particular case must necessarily be coextensive with the jurisdictional duties which it must perform, and the constitution of the State of Florida has effectually codified what would otherwise be only an "inherent" power.

To the extent that a mere statute of the State of Florida such as F. S. 925.036(1983), has even the potential effect of repealing or circumscribing these powers and duties of the Florida Courts pursuant to Amendments Six and Fourteen of the Constitution of the United States, and Art. V, S. 5(b), Fla.

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1. 372 U. S. 335, 83 S.Ct. 792, 9L.Ed.2d 799(1963)
2. 407 U. S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972)

Const., in a given case, the Petitioner respectfully suggests that it is unconstitutional on its face. And unless, or even if, Florida, as with some federal trial courts, introduces effectual involuntary servitude and impressment of its attorneys by preventing an officer of that court from refusing any criminal case at all upon pain of disbarment (if F. S. 925.036(1983) remains, immutably mandatory),the Florida Courts will be unable to find willing, effective specialists competent to defend cases such as the instant case wherein there are defendants whom the Public Defender's Office can not defend. Moreover, even if the Florida Courts did decide to impress civil law practitioners, including perhaps <u>County Attorneys</u>, as well as the criminal defense bar, many members of the Florida Bar at large would be pauperized by the statutory minimum of F. S. 925.036(1983).

In short, in the highly complex contraband - racketeering - conspiracy type case such as the one at bar, F. S. 925.036(1983), will preclude the trial courts of Florida from appointing effective counsel for the indigent criminal defendant as required by the federal constitution unless those courts either discriminatorily impress members of the criminal defense bar alone or else impress all members of the Florida Bar, regardless of their areas of specialty. As a consequence, F. S. 925.036(1983) is facially unconstitutional in that it has the alternative potential

either to destroy a large segment of the Fla. defense bar and the Florida bar generally by imposing involuntary servitude and impressment upon Florida attorneys or to preclude the Florida trial courts from providing indigent criminal defendants with the same right to defend themselves as solvent defendants can afford--especially if F. S. 925.036(1983) can never be held unconstitutional as applied to a particular, extraordinary case, such as here.

B. POINT ON REVIEW - CERTIFIED QUESTION NUMBER TWO:

IF THE ANSWER TO THE FIRST QUESTION IS NEGATIVE, COULD THE STATUTE BE HELD UNCONSTITUTIONAL AS APPLIED TO EXCEPTIONAL CIRCUMSTANCES:

The Petitioner respectfully suggests that this question has been answered in the affirmative by this Honorable Court in Metropolitan Dade County VS Bridges[3] as follows:

> "...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...."(internal emphasis the Petitioner's)

In view of this language it seems clear that this Honorable Court left the door ajar for a "demonstration" that the statute could be held unconstitutional as applied upon a showing by defense counsel in a given case or class of cases(such as here, the Petitioner submits) that extreme and extraordinary

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3. 402 So.2d 411(Fla. 1981), at P. 414

circumstances existed (See also by analogy in the similarly statutory controlled situation of witness hardship and the duty of citizens to respond as witnesses Rose V. Palm Beach County[4]). And this must be true, for otherwise the same involuntary servitude, impressment, inability of the courts to appoint competent counsel for indigent defendants described above must inevitably ensue, in inherently exceptional class of cases.

C. POINT ON REVIEW - CERTIFIED QUESTION NUMBER THREE:

IF THE ANSWER TO THE SECOND QUESTION IS AFFIRMATIVE, 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 WITH THEIR PETITIONS AND TESTIMONY:

The Petitioner respectfully suggests that as with at least Point On Review - Certified Question Number Two, *supra*, the answer must be in the affirmative.

In the instant case, both a showing of demonstrably extreme circumstances *and* a showing relating to lawyers or types of cases as a class has been amply made out to undergird a successful constitutional attack upon F. S. 925.036(1983), for the Order of May 9, 1983, and the findings, conclusions, and ruling of the Lower Tribunal in the Order of May 9, 1983, are overwhelmingly supported by the record (as is evidenced by the instant Record on Review taken as a whole).

At the hearing on February 25, 1983 (R. PP. 1-72), the evidence adduced establishes uncontrovertedly: that in both the

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4. 361 So.2d 135(Fla. 1978)

specific case and in drug trafficking cases in general, virtually any lawyer who is appointed to represent an indigent for $2,500.00 would be forced out of business and effectually subjected to involuntary servitude; that drug trafficking cases are the most complex and time consuming of all criminal cases; that one must be a specialist in this area of the law in order to do a competent job--be he retained or appointed; that no competent lawyer would voluntarily accept appointment to such a case for $2,500.00; that equal protection and treatment would be denied the criminal defense bar, for these practitioners of the criminal law, rather than specialists in probate, tax, and civil practice would necessarily have to be appointed in order that a defendant be adequately represented; and, that a reasonable fee for retained counsel in such a case or cases would be at least between $30,000.00 and $40,000.00, plus costs. Clearly, the evidence thus adduced both demonstrates extreme circumstances and that competent counsel cannot be appointed in the drug trafficking class of cases for $2,500.00. Moreover, as the Lower Tribunal Judge noted at P. 66, lines 5-6, even for fees in excess of $2,500.00 much of the appointed attorney's time in the instant case and in such cases as a class would yet be "pro bono", so that in no way would exceeding the statutory limit conflict with the salutary concept that members of the bar should engage in some pro bono work on behalf of the legal profession.

Understandably, the Respondent in this cause must rely heavily upon the principle that all attorneys,(including perhaps County Attorneys as well?)have an obligation to represent indigents sans compensation upon court appointment. However, not even Powell V. Alabama [5], which will necessarily be relied upon heavily by the Respondent, contemplated the instant circumstances and class of case, it is respectfully submitted. Nor, did Powell, supra, contemplate the literal destruction of individual law practices and even segments of the criminal defense bar and the Florida Bar itself which would result from an unrealistic and discriminatory overapplication of the pro bono principle of Powell to the instant class of cases. In short, neither the Code of Ethics nor any case should require an attorney to go broke to defend an indigent.

At the hearing on February 25, 1983, the Respondent's counsel offered no evidence, and engaged in no cross examination which even remotely undermined the evidence upon which the Trial Court relied. Rather, all that he did at the hearing, was to argue, based upon sheer assumption. But even if there had been evidence that the Appellee and other Defense Counsel knew in advance of the horrible vissicitudes of the coming trial in the instant case, what were defense counsel to do? On the one hand, the Respondent will undoubtedly argue that Defense Counsel should be

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5. 287 U. S. 48, 53 S.Ct. 55, 77 L.Ed 158 (1932)

on notice in accepting an appointment to any case on behalf of an indigent that the accepting attorney may not be fully compensated; yet, on the other hand, the Respondent will undoubtedly, at the same time posit an absolute duty in the defense attorney in fact to accept such appointments without any compensation at all and simply because he is an officer of the Court. And to the extent that he does so argue, the Respondent will necessarily advocate that a defense attorney be on notice in a case such as the instant cause that his practice will be annihilated, but,that he is nonetheless duty bound to accept the appointment anyway, because it is his immutable duty as an officer of the Court to be so annihilated.

Based upon the proceedings in the District Court, Respondent, sans evidence in the Record on Appeal, will assert to this Honorable Court that nobody forced the appointed defense attorneys to represent the indigent defendants in this case, and that they did so with full knowledge of the $2,500.00 limit. What the Respondent will elide in making this assertion, however, is as was stated by defense attorney Petersen at R.P. 55:

> "...no one could reasonably have anticipated the complexities of this, Your Honor, until we got into it. Even if they had been warned there were 4,000 pages of documents and 150 witnesses."

And therein, it is respectfully submitted, the Respondent will destroy his own argument, for by virtue of the instant *Underhill* case--at least in the Nineteenth Judicial Circuit Of The State Of Florida--attorneys now *are* on notice and did refuse in this Underhill case, and will continue to refuse appointment until impressed. For as is evidenced at R.P. 32 a non-involved attorney for an indigent *was* in fact sought by the Lower Tribunal during the *Underhill* trial, and none was found who would take the case--the attorney who finally did "accept the job midway through the proceedings" (Petitioner's Brief P. 9) already being a retained attorney for a co-defendant in the case (R.PP. 68-71).

And as was further established during the Hearing of February 25, 1983, no competent attorney with notice, and certainly not those who had been appointed in the case would ever voluntarily accept such a case again for a $2,500.00 maximum. And had those who accepted the appointments truly been on notice that the case was far more than the average felony case for which $2,500.00 is arguably adequate in terms of the pro bono principle, they also would not have accepted in the first instance.

SUMMARY OF ARGUMENT

F. S. 925.036(1983) is unconstitutional on its face in that it inferferes with those powers of the trial courts of the State of Florida which have been expressly provided the courts by virtue of Art. V, S. 5(b), Fla. Const. and in that it also interferes with the inherent authority of the trial courts to issue whatever order or writ is necessary and proper in order to insure that competent attorneys can be appointed to represent indigent criminal Defendants as required by Amendments Six and Fourteen of the Constitution of the United States. Competent attorneys can not be found who will voluntary accept cases such as the instant case for the maximum amount provided by F. S. 925.036(1983), so that if F. S. 925.036(1983) is truly mandatory in all cases as the District Court in this case has ruled, then trial courts will be forced to impress not only the criminal defense practitioners of the Florida Bar into service in derrogation of their constitutional rights to due process of law and against involuntary servitude, but potentially the remainder of the Bar as well. Consequently, the first of the certified questions should be answered in the affirmative.

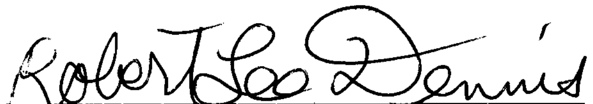
However, even if the proper answer to the first certified question is in the negative, it seems clear that Metropolitan Dade County VS Bridges, supra, does in fact permit a trial

court, upon a proper showing of exceptional circumstances by a defense attorney, to award an attorney fee in excess of the statutory maximum of F. S. 925.036(1983) in order both to prevent an attorney from literally starving to death in some individual cases and to insure the continued ability of the Trial Courts of Florida to appoint competent attorneys for indigent defendants whom the public defenders can not represent in general in those classes of cases wherein exceptional circumstances inherently exist. As a consequence, the second of the certified questions should be answered affirmatively.

Assuming an affirmative answer to certified question number two, and regardless of the answer to certified question number one, the Petitioner would respectfully suggest that if exceptional circumstances can ever exist sufficiently to justify exceeding the statutory maximum of F. S. 925.036(1983), surely this is the case, for as is evidenced by the record, the evidence is overwhelming and extreme. Consequently, the third certified question should also be answered in the affirmative.

CONCLUSION

Based upon the foregoing, the first of the certified questions in this cause should be answered in the affirmative, but even if answered in the negative, both certified questions two and three should nonetheless be answered in the affirmative; the decision of the Honorable District Court of Appeal of Florida, Fourth District should be quashed; and, the original order rendered by the trial court should be reinstated.



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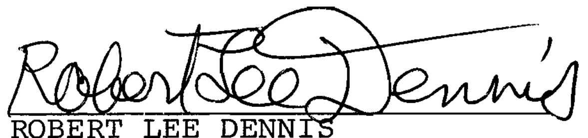
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true copy of the above and foregoing has been furnished to Michael Zelman, Esquire, Dade County Attorney, 3050 Biscayne Blvd., Suite 503, Miami, Florida 33137; Kyle S. Vanlandingham, Esquire, Okeechobee County Attorney, 304 N. W. 2nd Street, #108, Okeechobee, Florida 33472; John R. Cook, Esquire, 202 N. W. 5th Avenue, Okeechobee, Florida 33472; and, J. Blayne Jennings, Esquire, 2871 45th Street, Gifford, Florida 32960, by U. S. Mail, this 26th day of April, 1985.



ROBERT LEE DENNIS