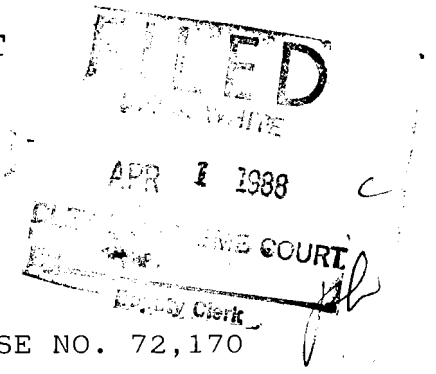
IN THE SUPREME COURT

STATE OF FLORIDA



JOHN THOR WHITE,

Petitioner,

vs.

CASE NO. 72,170

PINELLAS COUNTY, a political subdivision of the State of Florida,

Respondent.
_____/

APPLICATION FOR DISCRETIONARY REVIEW OF THE

DISTRICT COURT OF APPEAL, SECOND DISTRICT OF FLORIDA

BRIEF OF PETITIONER ON JURISDICTION

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STATEMENT OF THE CASE AND OF THE FACTS

Petitioner, JOHN THOR WHITE, seeks to have reviewed a decision of the Second District Court of Appeal, dated and filed on March 7, 1988; rehearing denied on February 18, 1988.

The Petitioner was original Plaintiff below and the Appellant before the District Court of Appeal. The Respondent was the original Defendant in the trial forum and was the Appellee before the District Court of Appeal.

This was an appeal from a final judgment/order entered in the Circuit Court in and for Pinellas County which denied Petitioner's motion for payment of court appointed attorney's fees in excess of the statutory fee cap for first degree murder cases as set forth in sect. 925.036(2)(d) Fla. Stat. (1985).

The Second District Court of Appeal denied Petitioner's petition for certiorari by 2:1 vote; J. Lehan dissenting in a 28 page dissent.

The facts before the lower court were at no time in dispute. The subject fee petition arose after the conclusion of State vs. Mark Davis (now pending before the Court on appeal), a capital murder case in which Petitioner was appointed to represent the said indigent defendant. In his motion for excess fees Petitioner and all interested parties stipulated to the fact that Petitioner expended 134 hours labor in the case (including approximately 8 days in trial), that Petitioner entered the case with substantial prior capital case experience at both the trial and appellate

levels, and that he exhibited an exceptional degree of professional expertise throughout the undertaking.

During argument upon his fee petition, Petitioner relied heavily upon Makemson v. Martin County, 391 So. 2d 1109 (Fla. 1986). The lower court in turn relied upon Makemson in its "Order Awarding Attorney Fees" (see Appendix) and Makemson was the sole authority relied upon in the Second District Court of Appeal's opinion/order now appealed from.

Petitioner respectfully submits and in this Brief he will conclusively show that the lower tribunal applied only a portion of the Makemson criteria when reaching its decision to deny fees in excess of the statutory fee cap and that the District Court's opinion/order affirming the denial likewise was in conflict with the law set forth in Makemson.

QUESTION PRESENTED

WHETHER THE DECISION IN THE INSTANT CASE DIRECTLY AND EXPRESSLY CONFLICTS WITH THE DECISION IN MAKEMSON v. MARTIN COUNTY WHICH HELD THAT FEES IN EXCESS OF THE STATUTORY CAP SHOULD BE AWARDED IN INDIGENT CASES WHEN TO DO OTHERWISE WOULD BE CONFISCATORY OF THE ATTORNEY'S TIME, ENERGY, AND TALENTS

ARGUMENT

The landmark case of Makemson v. Martin County set forth a two pronged test to be utilized in determining whether fees in indigent capital cases should be awarded in excess of the statutory fee cap of $3,500.

Makemson, at p. 1115, held that payment of excess fees is required when the subject case is (1) extraordinary and unusual (defined as high profile and heavily prosecuted) and (2) when payment of merely the statutory cap would be confiscatory of the attorney's time, energy and talents.

The somewhat elaborate order of the lower court simply utilized the "extraordinary and unusual" portion of the Makemson standard to the exclusion of the "confiscatory" aspect of the Makemson holding. The District Court opinion affirming the lower court's denial of excess fees cited Makemson as its sole authority and thereby affirmed the utilization of a standard in direct, express conflict with the Makemson standard.

In support of Petitioner's aforementioned conclusion of direct and express conflict, it should be noted that the lower court's order repeatedly and virtually exclusively relies on the "extraordinary and unusual" aspect of the Makemson holding and indeed the said opinion quotes that verbiage with **emphasis added**!

Ultimatley and literally the bottom line finding of the lower court was that the case at bar was not "extraordinary and unusual." (In support of this contention,

Petitioner has supplied herewith a copy of the lower court's order in his Appendix. Pertinent portions have been highlighted as an aid to the Court.) Hence, the "confiscatory" aspect of Makemson was never considered despite the fact that it constituted the quintessential rationale of the Makemson opinion. If the Makemson opinion is to be stripped of its logical underpinnings, then Makemson becomes a denuded exercise of futility and $26.00 per hour fees in capital case trials will be legitimized.

SUMMARY OF ARGUMENT AND CONCLUSION

The decision of the Second District court of Appeal which Petitioner seeks to have reviewed is in direct and express conflict with the decision of the Florida Supreme Court in Makemson v. Martin County, 491 So. 2d 1109 (Fla. 1986). Because of the reasons and authorities set forth in this brief, it is submitted that the decision in the present case is erroneous and that this Court should extend its jurisdiction to this cause, enter its order quashing the decision hereby sought to be reviewed, and grant upon remand an award of attorney's fees at the rate established by local rules for indigent cases in Petitioner's jurisdiction.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to John E. Schaefer, Assistant County Attorney, by regular US mail on this 30th day of March, 1988.

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