OA 2-7-90

IN THE SUPREME COURT OF FLORIDA

CASE NUMBER: **74,509**

DANIEL E. REMETA,

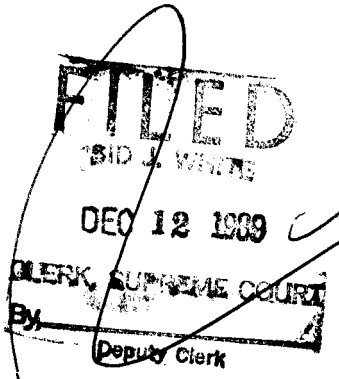
Petitioner,

v.

STATE OF FLORIDA,

Respondent.

PETITION FOR REVIEW OF FIFTH DISTRICT COURT OF APPEALS
CASE NUMBER: **89-26**




ANSWER **BRIEF OF RESPONDENT**

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## STATEMENT OF THE CASE AND THE FACTS

Respondent, Department of Corrections, adopts the Statement of the Case and the Facts in toto as contained in the Initial Brief of Petitioner.

## SUMMARY OF ARGUMENT

The Fifth District Court of Appeals' Opinion and Order in State of Florida v. Daniel Remeta, 547 So.2d 181 (Fla. 5th DCA 1989), should be affirmed.

The right to recover attorney fees in executive clemency proceedings is provided exclusively by Section 925.035(4), Florida Statutes. This particular subsection (4) makes no reference to section 925.036, providing for compensation of appointed counsel in criminal prosecutions. The two sections involve wholly different subject matters and should therefore not be read in pari materia. Consequently, the cases interpreting section 925.036 are themselves inapplicable to construe section 925.035(4).

The rationale of the cases dealing with section 925.036, the Doctrine of Inherent Judicial Power, is likewise inapplicable to section 925.035(4). This doctrine has been applied by courts to implement the judiciary's authority to safeguard constitutional rights. Section 925.035(4) providing for appointment and compensation of attorneys in executive clemency proceedings is purely statutory and involves no constitutional rights of indigents or their counsel. It implicates neither the due process clause nor the sixth amendment right to counsel. Section 925.035(4) is thus not a sensitive area of judicial concern, but rather a matter solely within the province of the legislature.

## ARGUMENT

The right to recover attorney fees as part of costs in an action did not exist at common law and therefore had to be provided by statute. Mackenzie V. Hillsborough County, 288 So.2d 200 (Fla. 1973); Dade County v. Strauss, 246 So. 2d 137 (Fla. 3d DCA 1971). Therefore, in 1981, the legislature enacted Section 925.035(4), Florida Statutes to deal with compensation to attorneys representing defendants in clemency proceedings. The statute, which has remained substantially unaltered since its enactment, provides in pertinent part as follows:

> If the death sentence is imposed and if affirmed on appeal to the Supreme Court, the appointed attorney shall be allowed compensation, not to exceed $1,000.00, for attorney's fees and costs incurred in representing the defendant as to an application for executive clemency, such fund to be paid out of general revenue from funds budgeted to the Department of Corrections. (emphasis supplied).

Petitioner contends that the trial court can set attorney's fees in clemency proceedings under the court's inherent power, in that the fee limitation established by section 925.035(4) is unconstitutional in its application to this case. Petitioner however, cites no case directly supporting this contention. Rather Petitioner commands the court to read section 925.035(4) in pari materia with section 925.036 and to then apply the cases construing the latter statute.

## SECTION 925.035(4), FLORIDA STATUTES EXCLUSIVELY PROVIDES FOR ATTORNEY'S FEES IN EXECUTIVE CLEMENCY PROCEEDINGS AND SHOULD NOT BE READ IN PARI MATERIA WITH SECTION 925.036, FLORIDA STATUTES

In pari materia is defined as "of the same matter; on the same subject..." Black's Law Dictionary, Rev. 4th Ed., 1968. Although other provisions of section 925.035 specifically reference section 925.036 (see section 925.035(1), (2), and (3)), subparagraph (4) of section 925.035 is not interdependent on section 925.036, does not in any way acknowledge that section, and clearly addresses a wholly separate subject matter, to wit: executive clemency proceedings rather than judicial criminal prosecutions. Section 925.035(4) therefore stands alone in its directive, is self-contained, and should **not** be read in pari materia with the unrelated provision of section 925.036. The cases cited by Petitioner, Makemson v. Martin County, 491 So.2d 1109 (Fla. 1986), and White v. Board of County Commissioners of Pinellas County, 537 So.2d 1376 (Fla. 1989), which construe section 925.036 to be unconstitutional when applied to certain cases, are consequently inapplicable to section 925.035(4).

## THE DOCTRINE OF INHERENT JUDICIAL POWER IS INAPPLICABLE IN THE CONTEXT OF EXECUTIVE CLEMENCY PROCEEDINGS

Petitioner next argues that the rationale of Makemson, supra, and White, supra, if not the cases themselves, be applied in the context of executive clemency proceedings. These judicial decisions are based upon the doctrine of inherent judicial power. In Makemson, the court employed the doctrine of inherent power to over-ride section **925.036** only when it appeared that: 1) the defendant could not have obtained competent counsel otherwise, **2)** when the attorney would suffer a hardship if the fee limitation were strictly imposed, and **3)** only when the attorney has proven the existence of extraordinary circumstances. The court in White, supra, again interpreting section **925.036,** expanded Makemson by holding that **all** criminal prosecutions in capital cases, by their very nature, involve extraordinary circumstances. However, White did not diminish the first factor enumerated in Makemson.

Notably this first factor, the court's concern with the defendant's representation by competent counsel, is founded in the sixth amendment right to counsel in all criminal prosecutions. Makemson holds that when the court's duty to safeguard fundamental rights is curtailed, it may exercise its inherent power to over-ride a statutory fee limitation. There are two elements involved here: the duty to protect constitutional rights, and the interference with that duty.

The doctrine as applied in Makemson and White should therefore not be extended to this case, as these elements are not present in the context of an executive clemency proceeding.

Specifically, a clemency proceeding does not involve the prosecution of a criminal defendant. It is an executive function of the Governor and cabinet. Although the court plays a ministerial role in the proceeding by appointing counsel, this does not render the entire proceeding "judicial" in nature nor ascribe to the judge's role in this instance all attributes of judicial power possessed in the judicial proceeding context. As recognized by the fifth district court in its decision herein,

> The Judiciary plays an important role in safeguarding an indigent defendant's constitutional right to effective assistance of counsel...[however] ... the constitutional right of indigent defendants to appointed counsel as guaranteed by the sixth amendment to the federal constitution or the fifth amendment due process clause, relates to...judicial proceedings and does not extend to a collateral executive clemency proceeding...[C]ounsel in clemency proceedings is a statutory right, ...no constitutional right is involved.

State v. Remeta, supra at 182-83. Although clemency is "the next stage in representation of a defendant who has been convicted of first degree murder and sentenced to death", as asserted by Petitioner, there is neither a "right" nor a "taking" involved in clemency. The defendant at this stage either remains in status quo or is granted a pardon. As

stated in Turner v. Wainwright, 379 So.2d 148, 151 (Fla. 1st DCA 1980), citing Sullivan v. Askew, 348 So.2d 312 (Fla. 1977), "...the clemency powers...are not subject to constitutional due process strictures as interpreted and enforced by the judicial branch." Petitioner's reliance upon Brevard County Board of County Commissioners v. Moxley, 526 So.2d 1023 (Fla. 5th DCA 1988), is therefore misplaced.

Other cases employing the doctrine of inherent power likewise involved statutes which curtailed the court's inherent power to provide and ensure effective counsel when constitutionally required, an exclusive function of the courts. See Board of Countv Commissioners of Hillsborough County v. Curry, 545 So.2d 930 (Fla. 2d DCA 1989) and Board of County Commissioners of Hillsborough County v. Scruggs, 545 So.2d 910 (Fla. 2d DCA 1989). The court in Scruggs found due process considerations applicable because "fundamental constitutional interests are at stake" in civil dependency and termination of parental rights proceedings. Scruggs, id at 912.

Petitioner argues at length that to uphold Section 925.035(4) as a valid statutory attorney fee limitation would violate his own constitutional right not to be deprived of his property without due process of law. Yet counsel's services herein were not mandated. His acceptance of the appointment did not constitute involuntary servitude.

When he accepted appointment in this case he impliedly accepted the restriction of the statutory fee cap. At no time prior to or during the pendency of the clemency proceeding did counsel indicate that the representation was causing him a financial hardship or request any type relief. Counsel voluntarily gave of his time, energy, and talents to the defendant. There has been no **"taking"** by the government in this instance.

Both cases cited by Petitioner regarding his fifth amendment right involved appointment of attorneys when constitutionally required in criminal prosecutions. They are based on the state's constitutional duty to provide counsel in these contexts and resulting obligation to pay counsel. The statutory language at issue in the instant case, in contrast, does not mandate the court to provide counsel in executive clemency proceedings. The court in Remeta discussed this aspect of the statute:

> ...section 925.035(4), Florida Statutes provides only that such appointment **"may"**, (not **"shall"**) be made by the trial court and decline to make an appointment of counsel who is unwilling to accept the appointment for compensation within the statutory limitation and, also, when the needed services are not to be performed within the traditional judicial setting, perhaps counsel should feel no obligation as "officers of the court" to accept a tendered judicial appointment in the absence of legislative assurance of just compensation for services to be rendered." (footnote omitted).

Remeta at 183. Even if appointment in this instance were deemed compulsory, as stated in Williamson v. Vardeman, 674 F.2d 1211, at 1214-15 (8th Cir. 1982),

> the vast majority of federal and state courts which have addressed the due process issue here decided that requiring counsel to serve without compensation is not a taking of property without just compensation. These courts reason that compulsion of service is not a taking because there is a pre-existing duty to provide such service.

Petitioner's contention that §925.035(4) must be held unconstitutional as applied to this case is thus without merit.

> A legislative enactment is valid and will not be declared unconstitutional unless it is demonstrated beyond a reasonable doubt that the statute conflicts with some designated provision of the constitution. Whenever reasonably possible and consistent with the protection of constitutional rights, courts will construe statutes in such a manner as to avoid conflict with the constitution.

Metropolitan Dade County v. Bridges, 402 So.2d 411, 413 (Fla. 1981).

The Remeta court properly declined to extend the rationale of Makemson and the subsequent cases to proceedings wherein the right to counsel is purely statutory. Furthermore, since clemency proceedings are vested in the executive branch of government, they are not a sensitive area of judicial concern.

It is simply not the function of the courts to safeguard by use of inherent power non-judicial, non-constitutional concerns. "The court's zeal in the protection of their prerogatives must not lead them to invade areas of responsibility confided to the other two branches.!! White v. Board of County Commissioners for Pinellas County, **524 So.2d 428, 437 (Fla.** 2d DCA **1988).** "Arguments to permit payment of earned fees in this type situation, however meritorious, must be addressed to the **legislature."** Board of County Commissioners of Collier County v. Hayes, **460** So.2d 1007, **1010** (Fla. 2d DCA **1984).**

## CONCLUSION

In summary, Respondent, Department of Corrections requests this court to affirm the order of the Fifth District Court of Appeals limiting the attorney fee award to the $1,000.00 maximum provided in section 925.035(4). The statute is clear and unequivocal. It is an exclusive and controlling fee limitation. The cases of Makemson, White, and others dealing with fundamental rights, are not authority for construction of this statute. The doctrine of inherent judicial power is inapplicable to a non-judicial, non-constitutional proceeding of this nature. It is within the exclusive province of the legislature to set a statutory maximum fee for legal representation in executive clemency proceedings.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail and/or hand delivery to Frank J. Habershaw, Clerk, Fifth District Court of Appeal, **300** South Beach Street, Daytona Beach, Florida **32014;** Honorable Carven D. Angel, Post Office Box **2075,** Ocala, Florida **32678;** Reginald Black, Assistant State Attorney, Fifth Judicial Circuit of Florida, County Office Building, **19** N.W. Pine Avenue, Ocala, Florida **32670;** and to Edward L. Scott, Esquire, Laurel Run Professional Center, **2100** S. E. **17th** Street, Suite **802,** Ocala, Florida **32671,** this 12TH day of December, **1989.**

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