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FILED IN THE
SUPREME COURT
OF THE STATE OF COLORADO
APR 20 1981

David W. Bazina

IN THE COLORADO SUPREME COURT

Action No. **81SA170**

ANDERSON, CALDER & LEMBKE,)
a Professional Corporation,)
)
Petitioners,)
)
v.)
)
DISTRICT COURT OF LARIMER)
COUNTY, and THE HONORABLE)
JOHN-DAVID SULLIVAN, One)
of the Judges thereof,)
)
Respondents.)

PETITION FOR RELIEF IN
THE NATURE OF PROHIBITION

COMES NOW the Petitioners above named, Anderson, Calder & Lembke, A Professional Corporation, Attorneys and Counselors at Law, and by these presents petitions this Honorable Court pursuant to Rule 21 of the Colorado Appellate Rules, as amended, for the issuance of an Order to Show Cause directed to the Respondents directing that they show cause, if any they have, why the herein requested relief in the nature of Prohibition should not be granted.

I.

NATURE OF REFUSAL TO ACT
BY THE COURT BELOW

After proper, timely and appropriate notice of intent to withdraw as counsel of record in Criminal Action No.s 80CR823 and 80CR779 was given to the Defendant, Joseph Holness, Respondent Court denied Petitioners' Motion to Withdraw as such counsel.

II.

CIRCUMSTANCES RENDERING IT
NECESSARY OR PROPER THAT THE
SUPREME COURT EXERCISE ITS
ORIGINAL JURISDICTION

(A) Factual Introduction: On or about December 23, 1980, Petitioners and Joseph E. Holness, the Defendant in Criminal Action No.s 80CR823 and 80CR779, entered into a written "Retainer Agreement" which provided, interalia, that Mr. Holness pay \$4,000.00 to Petitioners on or before February 20, 1981. It was further agreed in Paragraph 6 of said Agreement that:

"Failure to pay any installment when due (emphasis in original) or failure to pay the final installment of estimated fees referred to in the foregoing paragraph at least 30 days prior to trial or trials, results in withdrawal of this firm from any pending action."

Petitioners entered their appearance as counsel of record for Mr. Holness on or about December 16, 1980. After the rendition of approximately \$3,000.00 in services on Mr. Holness' behalf the February 20, 1981, deadline for payment of the \$4,000.00 retainer came and passed with only a \$500.00 credit having been remitted on Mr. Holness' account. After several unsuccessful efforts to rectify the situation, Petitioner served Mr. Holness with a Notice of Intent to Withdraw and Motion to Withdraw pursuant to the Retainer Agreement on March 2, 1981, (copies of which are attached hereto and incorporated herein by this reference). The Motion to Withdraw was scheduled for hearing on April 7, 1981, notice of which was given Mr. Holness by Petitioners on March 10, 1981.

At the hearing on Petitioners' Motion to Withdraw, although Mr. Holness neglected to appear, the Respondent denied the Motions stating that Respondent Court as a matter of course refuses to permit withdrawal of counsel for failure to pay attorney's fees.

At the hearing, Petitioners showed that there would be no prejudice to Mr. Holness by reason of the withdrawal in view of the fact that proper notice was given March 2, 1981, and Mr. Holness would have, and did have, ample time to obtain substitute

counsel prior to the first hearing on the criminal matters which was scheduled for June 30, 1981, (a preliminary hearing, there being no trial date scheduled at this time).

(B) Circumstances Necessitating Invocation of the Supreme Court's Original Jurisdiction: Petitioners are aware that the Trial Court, by case law, disciplinary rule and local rule has discretion in determining whether to allow counsel to withdraw from a pending action. However, in the instant case, the Respondents' refusal to permit or even consider the withdrawal of Petitioners upon the grounds stated in their Motion constitutes an abuse of the Respondent Court's discretion and amounts to conduct in excess of Respondent Court's jurisdiction.

Petitioners submit that the rules giving the Courts discretion in allowing the withdrawal of counsel have their roots in the need to insure the smooth and effective administration of Court business, and to prevent the prejudice to clients which would result from uncontrolled and indiscriminate withdrawal of attorneys from pending matters. Riley v. District Court, 181 Colo. 90, 507 P.2d 464 (1973); Blackwell v. Midland Federal Savings, 132 Colo. 45, 284 P.2d 1060 (1955); Code of Professional Responsibility, DR2-110(a)(2).

In the instant case, as indicated by the notices and dates thereof, as well as by the dates of scheduled hearings in Mr. Holness' criminal case, no prejudice would result by the withdrawal of counsel at the time of the April 7, 1981, hearing or within a reasonable time thereafter. Mr. Holness has had more than ample time to procure substitute counsel or to request the services of the Public Defender in the event that he can not afford private counsel. Conversely, if Petitioners were not allowed to withdraw, Mr. Holness risks prejudice to his case due to the fact that he has chosen not to communicate with Petitioner since the fee dispute arose. Because of the Respondents routine refusal to consider withdrawal in such situations, the

question of prejudice and steps to alleviate it were never addressed by Respondents. Petitioners submit that the Notice of Intent to Withdraw adequately apprises Mr. Holness of his obligations and responsibilities in the criminal case, and was given at a time which negates any prejudice as a result of counsel's withdrawal.

Petitioners submit that the Respondents' refusal to permit their withdrawal without even considering surrounding factors such as the issue of prejudice to the client, or lack thereof, amounts to the imposition of involuntary servitude in violation of the proscriptions contained in Article 1, Section 10, of the United States Constitution, and Article 2, Section 26, of the Colorado Constitution.

Petitioners are mindful that the "Involuntary Servitude" Clauses of the United States and Colorado Constitutions were enacted originally to prevent the kind of servitude characterized by African Slavery and other forms of peonage. However, as with many other provisions of the Constitution, the 13th Amendment has been extended in scope to embrace "other forms of compulsory labor(...) which tend to produce undesirable consequences; and the words 'Involuntary servitude', as used in the Amendment, have a more comprehensive meaning than the word 'slavery'". Pollock v. Williams, 64 S.Ct. 792, 322 U.S. 4, 88 L.Ed. 1095; Slaughterhouse Cases, 16 Wall 36, 21 L.Ed. 394; 16 CJS Sec. 203(1) at page 996.

As in most constitutional proscriptions on governmental power, the involuntary servitude clause is not absolute. Instead, various forms of servitude owing to the state have been exempted from application of the 13th Amendment, among these is conscription, the obligation to pay taxes, jury duty, etc. An attorney's duty to remain on a case (where withdrawal is not mandated by DR2-110(B)) if withdrawal would prejudice the client seems to fit within these exceptions to the 13th Amendment's

involuntary servitude provision. But, where a showing is made, or attempted to be made, that no prejudice would result from counsel's withdrawal, and the grounds for withdrawal are expressly recognized by the Code of Professional Responsibility, then a Court's blanket refusal to allow withdrawal for non-payment of fees, regardless of the circumstances, omits consideration of the salient issue of prejudice to the client.

In conclusion, DR2-110(C) expressly authorizes withdrawal when the client "deliberately disregards an agreement or obligation to the lawyer as to expenses or fees." Though the Trial Court has discretion in matters of "permissive withdrawal", Petitioners submit that Respondent refused to exercise any discretion when it failed to consider the salient circumstances involving prejudice to the client. Petitioners submit that such mechanical refusal to permit withdrawal is an abuse of the discretion and jurisdiction conferred on the Respondent Court in that such a refusal can not be reconciled with the involuntary servitude provision of the United States and Colorado Constitutions. Petitioners urge this Court to hold that at the very least, the 13th Amendment requires some justification for the imposition of continued service by an attorney of record against his will in a criminal case; such as a determination, based on evidence, that withdrawal of counsel would prejudice the client or hinder the administration of justice. Neither is present in the instant case.

III.


RELIEF REQUESTED

Petitioners request the issuance of an Order to Show Cause, directed to the Respondent, requiring that the Respondent show cause, if any it has, why the Petitioners should not be granted leave to withdraw as attorneys of record in Criminal Action No.s 80CR823 and 80CR779, as requested herein.

Respectfully Submitted:


ANDERSON, CALDER & LEMBKE
a Professional Corporation

By:


STEPHEN P. CALDER, REG. #8220
Attorney for Petitioner
Market Tower Two, Suite 921
3025 South Parker Road
Aurora, Colorado 80014
Telephone: 751-9444

CERTIFICATE OF MAILING

I hereby certify that I have mailed a true and correct copy of the foregoing PETITION FOR RELIEF IN THE NATURE OF PROHIBITION, by depositing the same in the United States Mail, postage prepaid, on this 17th day of April, 1981 and addressed to the following: The Honorable John-David Sullivan, District Court Judge, 8th Judicial District, Post Office Box 2066, Larimer County Courthouse, Ft. Collins, CO 80521, and to Joseph Holness, P.O. Box 5939, Austin, TX 78763.



IN THE DISTRICT COURT
IN AND FOR THE COUNTY OF LARIMER
STATE OF COLORADO

Criminal Action Numbers 80CR 824
and 80CR779, Division 3

THE PEOPLE OF THE STATE OF)
COLORADO,)
)
Plaintiff,)
)
vs)
)
JOSEPH E. HOLNESS,)
)
Defendant.)

NOTICE OF INTENT TO WITHDRAW
AS ATTORNEY OF RECORD

COMES NOW the law firm of ANDERSON, CALDER & LEMBKE, a Professional Corporation, and pursuant to the Local Rules of Procedure for the 8th Judicial District, hereby gives notice to the Defendant, Joseph E. Holness, of its intent to withdraw as attorney of record for said Defendant in the above-captioned action.

You are further notified that:

1. The Court retains jurisdiction over you and over the cause of action captioned above
2. You have the burden of keeping the Court informed of the address where notices, pleadings or other process may be served, or suffer the consequence of the issuance of a bench warrant against you.
3. You are notified that a preliminary hearing is presently scheduled for June 30, 1981, at the hour of 9:00 A.M., in Division 3 of the District Court. The holding of such proceedings shall not be effected by the withdrawal of counsel.

DATED THIS 23rd day of February, 1981.

ANDERSON, CALDER & LEMBKE,
a Professional Corporation

By: *Stephen P. Calder*
STEPHEN P. CALDER, Reg. #8220
Attorneys for Defendant
Market Tower Two, Suite 921
3025 South Parker Road
Aurora, Colorado 80014
Telephone: 751-9444

CERTIFICATE OF MAILING

I hereby certify that I have mailed a true and correct copy of the within NOTICE OF INTENT TO WITHDRAW AS ATTORNEY OF RECORD, by depositing the same in the United States mail, postage prepaid, on this 23rd day of February, 1981, and addressed to the following: Joseph E. Holness, P. O. Box 5939, Austin, Texas 78763 and to the District Attorney, Larimer County Courthouse, P.O. Box 2066, Fort Collins, Colorado 80521.

Richard J. Cochran

IN THE DISTRICT COURT
IN AND FOR THE COUNTY OF LARIMER
STATE OF COLORADO

Criminal Action Numbers 80CR824
and 80CR779, Division 3

THE PEOPLE OF THE STATE OF)	
COLORADO,)	
)	
Plaintiff,)	
)	MOTION TO WITHDRAW AS
vs)	
)	ATTORNEY OF RECORD
JOSEPH E. HOLNESS,)	
)	
Defendant.)	

COMES NOW the firm of ANDERSON, CALDER & LEMBKE, a Professional Corporation, and pursuant to the Local Rules of Procedure for the 8th Judicial District hereby moves this Court for its order granting counsel for the Defendant, Joseph E. Holness, leave to withdraw as attorney of record in the above-captioned action, and as grounds therefore states unto the Court as follows:

1. That Notice of Intent to Withdraw was given to the Defendant, Joseph E. Holness, on February 23, 1981, and also to opposing counsel.

2. That the Defendant, Joseph E. Holness, has failed and refused and continues to fail and refuse to pay attorney's fees to the undersigned law firm pursuant to the agreement between them. At present the Defendant is in arrears in the payment of \$3,500.00.

WHEREFORE, the undersigned law firm respectfully prays for leave of this Court to withdraw from the above-captioned action as attorney for the Defendant, Joseph E. Holness.

Respectfully submitted,

ANDERSON, CALDER & LEMBKE,
a Professional Corporation

By:

Stephen P. Calder
STEPHEN P. CALDER, Reg. 8220
Attorneys for Defendant
Market Tower Two, Suite 921
3025 South Parker Road
Aurora, Colorado 80014
Telephone: 751-9444

CERTIFICATE OF MAILING

I hereby certify that I have mailed a true and correct copy of the within MOTION TO WITHDRAW AS ATTORNEY OF RECORD, by depositing the same in the United States mail, postage prepaid, on this 23rd day of February, 1981, and addressed to the following: Joseph E. Holness, P.O. Box 5939, Austin, Texas 78763 and to the District Attorney, Larimer County Courthouse, P.O. Box 2066, Fort Collins, Colorado 80521.

Walter J. Cochran