

ORIGINAL

**IN THE SUPREME COURT OF OHIO**

STATE OF OHIO, :  
 Appellee, :  
 -vs- : Case No. 2011-2005  
 JASON DEAN, : *Death Penalty Case*  
 Appellant :

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**ON APPEAL FROM THE CLARK COUNTY  
 COURT OF COMMON PLEAS  
 CLARK COUNTY, OHIO, CASE NO. 05 CR 0348**

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**JASON DEAN'S MOTION FOR EXTRAORDINARY FEES  
 AND TO ALLOW PERIODIC BILLING  
 (*Expedited Ruling Requested*)**

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**ON APPEAL FROM THE CLARK COUNTY  
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On October 26, 2010 this Court reversed Appellant's conviction and death sentence in *State v. Jason Dean*, 2010-Ohio-5070, 127 Ohio St.3d 140, and remanded the case to the Clark County Court of Common Pleas for a new trial. When the case returned to the Clark County Court of Common Pleas, it proceeded under the original case number and a visiting judge, Judge Sumner Walters, was assigned to preside over the new trial. The Office of the Public Defender, who had represented Mr. Dean on appeal to this Court, remained as counsel for Mr. Dean.

Mr. Dean was once again found guilty and the jury recommended a sentence of death. On September 30, 2011 the trial court adopted the recommendation of the jury, and imposed a sentence of death.

Judge Sumner Walters contacted undersigned counsel in regard to representing Mr. Dean on direct appeal to this Court. The trial court explained that the Office of the Ohio Public Defender could not be appointed, since attorneys from that office had represented Mr. Dean at trial. Furthermore, there were no attorneys in Clark County certified under Sup. R. 20 to serve as appellate counsel.

Clark County has established a cap of \$10,000, to be divided among two attorneys for a direct appeal in a capital case. The hourly rate set by Clark County is \$55.00 an hour. Assuming that the fees would be split evenly among counsel, this would allow 90 hours of work on the case by each attorney, at which point the cap of \$5,000 per attorney would be reached. This 90 hours would include all work on the case, including the preparation of all necessary motions, reviewing the record, reading the transcript, legal research, preparing the brief, reviewing opposing counsel's brief, preparing a reply brief, preparing for oral argument, attending oral argument and the preparation of any post-opinion motions.

Undersigned counsel indicated that they would not accept the appointment, under the standard fee schedule set by Clark County. This is particularly so since this case was a retrial under the original case number; therefore all the trial level documents for both trials are included in the record. Review of the record and reading the new trial transcript would most likely consume most of the 90 hours allotted per attorney, before brief writing even begins. <sup>1</sup>

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<sup>1</sup> In counsel's most recent death penalty appeal in this Court, counsel spent 201 hours of work on the direct appeal of the case. *State v. Marvin Johnson*, 2006-Ohio-6404, 112 Ohio St. 3d 210.

To address counsel's concerns Judge Walters indicated he would put on an entry adopting the fee caps set out by the Office of the Ohio Public Defender, \$25,000 for the two attorneys. (See, Appellate Counsel Fees Entry, attached). Under those circumstances, counsel agreed to the appointment and an entry was filed appointing undersigned counsel to represent Mr. Dean on his direct appeal to this Court.

The notice of appeal was filed by undersigned counsel on November 30, 2011. Counsel is now awaiting the preparation of the transcript of proceedings.

Subsequent to their appointment, undersigned counsel had been in contact with the reimbursement office (Kathryn Smith) at the Office of the Ohio Public Defender. Counsel apprised Ms. Smith of the trial court's order. Ms. Smith contacted the Clerk's Office of this Court, and it was learned that the trial court's order would carry no authority in this Court since appellate counsel's payment vouchers would need to be approved by this Court, not the trial court. As such, counsel was advised to file a motion in this Court to clarify their appointment status.

Undersigned counsel is not willing, and not able financially, to continue working on this case if the Clark County fee schedule for appointed counsel in capital cases is imposed. Counsel is requesting that the fee schedule adopted by the trial court and set forth by the Office of the Ohio Public Defender be adopted in this case, ie. \$55.00 an hour with a \$25,000 cap for two attorneys. Counsel believes this increased cap is imminently fair since counsel is willing to accept \$55.00 an hour, an exceedingly low hourly rate. In contrast, the hourly rate for Criminal Justice Act appointments in federal court in capital cases is \$178.00 an hour and for non-capital

cases, the rate is \$125.00 an hour, more than double the Clark County hourly rate. Counsel would also note that although the trial court's entry regarding appellate counsel fees did not address the hourly rate of pay, the Ohio Public Defender has set the maximum rate for compensation at \$95.00 an hour.

In addition, counsel also requests that interim billing be allowed. Counsel anticipates submitting one bill after the briefing is completed and then a second bill when the case is completed. There is traditionally a significant lapse of time between briefing and oral argument and another lapse between oral argument and the decision of the Court. Counsel submits that it would be unfair, financially, to ask counsel to wait for years for payment to be made for their work.

This Court has been at the forefront of trying to ensure that capital defendants are properly represented. Ohio was one of the first states to adopt qualifications for appointed counsel. (Sup. R. 20, formerly known as Sup. R. 65)

This Court has recently appointed a task force to examine the administration of the death penalty in Ohio. Part of any assessment must be the qualifications and compensation of counsel. The American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003), Guideline 9.1 Funding and Compensation, provides:

A. The Legal Representation Plan must ensure funding for the full cost of high quality legal representation, as defined by these Guidelines, by the defense team and outside experts selected by counsel.

B. Counsel in death penalty cases should be fully compensated at a rate that is commensurate with the provision of high quality legal representation and reflects the extraordinary responsibilities inherent in death penalty representation.

1. Flat fees, caps on compensation, and lump-sum contracts are improper in death penalty cases.

2. Attorneys employed by defender organizations should be compensated according to a salary scale that is commensurate with the salary scale of the prosecutor's office in the jurisdiction.

3. Appointed counsel should be fully compensated for actual time and service performed at an hourly rate commensurate with the prevailing rates for similar services performed by retained counsel in the jurisdiction, with no distinction between rates for services performed in or out of court. Periodic billing and payment should be available.

Counsel would not have accepted appointment in this case if it was known that the compensation limits set forth by Clark County applied to the representation of Mr. Dean. The trial court attempted to address the concerns of counsel by entering an order raising the cap on compensation to \$25,000. Counsel now finds themselves appointed to this death penalty appeal, with no compensation guarantees.

Wherefore, counsel for Mr. Dean requests that this Court grant this motion and raise the cap for compensation to \$25,000 and permit interim billing as set forth above. Alternatively, counsel would request to withdraw from representation and request that new counsel be appointed to represent Mr. Dean. For that reason, undersigned counsel is also requesting an expedited ruling so that if counsel needs to withdraw, new counsel can be appointed and Mr. Dean's case will not be prejudiced.

Respectfully submitted,

Kathleen McGarry\*, #0038707

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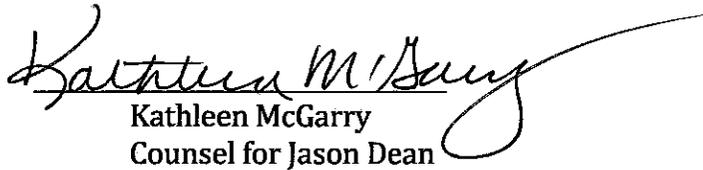
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Counsel for Appellant, Jason Dean

### **CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing Motion for Extraordinary Fees and to Allow Interim Billing was forwarded by regular U.S. Mail to D. Andrew Wilson, Prosecuting Attorney, P.O. Box 1608, Springfield, Ohio 45501, this 14<sup>th</sup> day of February, 2012.

  
Kathleen McGarry  
Counsel for Jason Dean

IN THE COURT OF COMMON PLEAS, CLARK COUNTY, OHIO

State of Ohio,  
Plaintiff,

v.

Jason Dean,  
Defendant.

Case No. 05-CR-0348  
JUDGMENT ENTRY  
APPELLATE COUNSEL

CLERK OF COURT  
COMMON PLEAS COURT  
CLARK COUNTY, OHIO

2011 SEP 30 PM 2:05

This matter comes on sua sponte for consideration of the matter of the Clark County Assigned Counsel Fee Schedule.

Included therein, the Board of County Commissioners of Clark County has established a cap on appellate counsel fees at a total of \$10,000, for two attorneys, for the appeal of a capital murder, death penalty conviction. The Supreme Court of Ohio, per Sup.R. 65, requires the appointment of two capital certified appellate counsel to represent a defendant in a death penalty appeal.

The court has attempted to secure counsel to represent the defendant in the appeal of the death penalty imposed herein. The State of Ohio Public Defender's Office is disqualified from appointment because they provided trial counsel herein. And there are no certified appellate counsel in Clark County. The court has been unable to secure appellate counsel that the court deems competent, who are willing to accept appointment under the fee limitations imposed by the Clark County Assigned Counsel Fee Schedule. A deprivation of competent counsel because of a fee cap imposed by the Board of County Commissioners would constitute a violation of the defendant's right to counsel secured by the Sixth and Fourteenth Amendments to the U. S. Constitution. See *State v. Sells*, 2006-Ohio-5134, ¶ 17 (Miami Co. App.).

The Clark County Assigned Counsel Fee Schedule may also violate Ohio Adm.Code 120-1-15(A), which provides that "[i]n establishing a fee schedule to be paid appointed counsel in indigent cases eligible for reimbursement pursuant to section 120.33 of the Revised Code, the county commissioners and county bar association shall establish a schedule that is comparable to the fees paid to retained counsel in the same type of cases." While a violation of the Ohio Administrative Code would not constitute a deprivation of a defendant's constitutional rights, it is instructive as to what constitutes a reasonable fee for indigent defense.

The court has considered the fee caps applicable in other Ohio counties. The Ohio Office of Public Defender, which is responsible for the reimbursement of fees to the counties, has established a maximum fee of \$25,000 for two attorneys. The court finds

that to be a reasonable fee cap, which will enable the court to appoint competent counsel to represent the defendant herein.

Therefore, it is the ORDER of this court that the fees for assigned counsel in this matter will be subject to the following limitation:

The maximum fee permitted in this matter will be limited to \$25,000.

Dated: September 30, 2011

  
Sumner Walters, Judge

JOURNALIZED  
OCT 04 2011  
RCN VIKENT  
CLERK OF COURTS