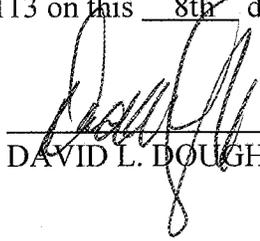




**CERTIFICATE OF SERVICE**

A copy of the foregoing Appellant's Motion for Extraordinary Fees was served upon Timothy J. McGinty, Esq., Cuyahoga County Prosecutor, or a member of his staff, The Justice Center, 1200 Ontario Street, 9th Floor, Cleveland, Ohio 44113 on this 8th day of July, 2014.

  
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DAVID L. DOUGHTEN

## MEMORANDUM IN SUPPORT

Appellate counsel here accepted an appointment to represent Charles Maxwell in the appeal of his death penalty conviction and appointment in March of 2007. The motion for reconsideration was decided in June of 2014. At the time, counsel was not able to file interim payments. Thus, counsel fronted all costs, including copying and mailing in addition to the hotel stay for oral argument, in the representation of Mr. Maxwell.

At the time of the appointment, the trial judge agreed to pay counsel at the Ohio Public Defender rate and the ABA guideline rate. Because the trial judge wanted experienced counsel to represent Maxwell, and the judge understood the delay in payment and the extent of the work involved, he approved to grant a rate paid greater than the then limitation of a maximum five thousand dollars per counsel. Appointed counsel would not have accepted the appointment at that ridiculously low rate for so important of a duty.

Cuyahoga County has recently raised the maximum fee of \$7,500 per attorney. This fee is paid at a rate of fifty dollars an hour out of court and sixty in court. This sum is not much of an improvement.

Counsel requests that they be paid at the state public defender rate of \$95 per hour and a cap of \$15,000.00 per attorney. This is particularly applicable here as not only did counsel prepare the full briefing on the usual schedule, but this Court also ordered counsel to file supplemental briefing on the confrontation issue of whether a coroner's report fell under the auspices of Crawford v. Washington.

Counsel Doughten billed for 192.5 hours. At the O.P.D. rate, counsel fees would exceed the maximum fee of \$15,000.00. But again, counsel was required to prepare and file an extra

briefing at this Court's request.

Counsel Parker billed for 163 hours. It should also be noted the extraordinary length of time it took this case to be decided, i.e. approximately seven years. The Ohio Supreme Court, in Superintendence Rule 20.03(A), requires counsel to provide "high quality" legal representation or have his certification to represent indigent. The ABA Guidelines for the Performance of Defense Counsel (2003) are the standards by which counsel conducted himself in this case.

ABA Guideline 9.1(B) states

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.

ABA Guideline 9.1(B)(1) states simply the "Flat fees, caps on compensation and lump sum contracts are **improper** in death penalty cases." (Emphasis added)

ABA Guideline 9.1(D) states "Additional compensation should be provided in unusually protracted or extraordinary cases."

The commentary to the ABA 9.1 Guidelines is instructive concerning other professional standards that are applicable to this case. In short, the justice system gets what it pays for with respect to the quality of attorneys who will accept death penalty cases.

The Joint Task Force to Review the Administration of the Death Penalty also recently recommended uniform pay throughout the state to private counsel on indigent capital cases (See Recommendation #16; vote count 16-0) and the implementation of the ABA Guidelines (See Recommendation #11; vote count 12-2).

On November 24, 2010 the Iowa Supreme Court held that fee caps for indigent appeals was improper and remanded the case to determine “reasonable and necessary” fees that are consistent with the constitutional mandate of the effective assistance of counsel. See Simmons v. State Public Defender, 791 N.W. 2d 69 (Iowa 2010).

Some courts have invalidated fee caps on the grounds that fee caps amount to a taking of the property of attorneys in violation of Due Process of law. See DeLisio v. Alaska Superior Court, 740 P.2d 437 (Alaska 1987); Arnold v. Kemp, 813 S.W.2d 770, 775 (Ark. 1991); State ex rel. Stephen v. Smith, 747 P.2d 816, 842 (Kan. 1987); State v. Lynch, 796 P.2d 1150 (Okla. 1990) and State ex rel. White v. Trent, 519 S.E.2d 649 (W.Va. 1999).

It is helpful to understand the pay other jurisdictions have in indigent capital cases at the trial level. Work on appeals in this Court is certainly not less valuable.

About twelve years ago Alabama changed its rate of compensation to \$40 per hour out of court and \$60 per hour in court, plus an additional hourly sum for “office overhead expenses” that averages approximately \$30 per hour, thus bringing the hourly rates to \$70/\$90. Wright v. Childree, 972 So.2d 771 (Ala. 2006). There is no limit to the hours submitted in a capital case in Alabama.

Louisiana, through the Louisiana Indigent Defense Assistance Board (now the Louisiana Public Defender Board), has created regional offices to handle capital cases – for conflict cases the state pays an hourly rate ranging from \$75 in Shreveport to \$110 in New Orleans.

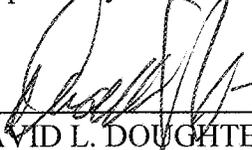
Virginia pays court-appointed attorneys \$125 per hour with no limitations as to number of hours; Illinois, which abolished the death penalty on 3/10/11, was paying its capital attorneys \$145.39 per hour as of 2007; Idaho pays a range of \$90-150 per hour.

Mississippi now pays conflict counsel \$125 per hour without limitations to lead counsel and \$100 per hour to associate counsel. The federal government pays private counsel \$180 per hour without a cap.

Here, counsel is only requesting to be paid for the hours worked as promised in the trial court's appointment entry. It is important that appointed counsel in capital cases consist of a mix of both private counsel and the state public defender office. In order for private counsel to invest the time necessary to be trained and stay qualified as appellate counsel as required by Evitts v. Lucey (1985), 469 U.S. 387, counsel must be fairly compensated when they are appointed. Otherwise, qualified counsel will simply be unable to accept capital assignments in this state for financial considerations.

Counsel are aware that this Court does not set the fee schedules. Counsel are also aware that this Court has not been known to cut or curtail the payment of capitally assigned counsel in the processing of fee applications. Therefore, it is hoped this Court will honor the intention of the assigning judge and approve the extraordinary fees requested here; extraordinary meaning being paid for the work performed at a rate well within the norm of capitally appointed counsel.

Respectfully submitted,

  
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DAVID L. DOUGHTEN

  
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JOHN P. PARKER  
Counsel for Appellant