

IN THE SUPREME COURT OF OHIO

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	Case No.: 2014-1035
	:	
v.	:	
	:	
Willie G. Wilks, Jr.	:	
	:	
Defendant-Appellant	:	Capital Case
	:	

MOTION FOR INTERIM BILLING AND EXTRAORDINARY FEES

COUNSEL FOR APPELLEE:

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MEMORANDUM IN SUPPORT

Undersigned counsel were appointed by this Court to represent Appellant after original counsel were granted permission to withdraw; the appellant is indigent and under a sentence of death from Mahoning County. Counsel timely filed the Merit Brief February 1, 2016.

Under the Ohio Public Defender Standards and Guidelines for Appointed Counsel Reimbursement, Section S.1, periodic billing is authorized. Both of appellant's counsel are sole practitioners so the timely payment for services rendered is especially important to maintain each business. Counsel is requesting permission to file one fee bill now that the merit brief is filed and a final bill at the conclusion of the case.

It is not unusual for a death penalty appeal to take 3-5 years to be fully litigated in the Ohio Supreme Court. If counsel are not paid until 2018-2020, the anticipated conclusion of this appeal, then it would be a hardship. It must be noted that the prosecutors receive a regular paycheck, court reporters are paid in a timely fashion and nobody except defense counsel is denied payment for services rendered until the end of the case.

The Court has granted interim fee bill payments in at least two other death penalty appeals, i.e. State v. Deem, 2011-2005 (entry dated 3-5-12) and State v. Thomas, 2012-2026 (entry dated 1-29-13).

Counsel also requests that they be paid at the state public defender rate of \$95 per hour. See Ohio Public Defender Standards and Guidelines for Appointed Counsel Reimbursement, Page 14, section D.2. Appellate Level Proceedings; Extraordinary Fees are also authorized in Section G, page 16.

The current Mahoning County hourly rate of \$60.00/hour is out of the mainstream for capital cases both within Ohio and throughout the nation. The hourly rate within Ohio varies by county from \$40.00 to \$95.00 per hour.

The Joint Task Force to Review the Administration of the Death Penalty 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).

The ABA Guidelines for the Performance of Defense Counsel (2003) are the standards by which counsel conducted themselves in this case. The ABA prevailing norms of practice have been cited with approval as an example of professional standards by which counsel should be judged. See Strickland v. Washington, 466 U.S. 668, 688-89(1984)(the legal profession's maintenance of standards ...the proper measure of attorney performance remains simply reasonableness under prevailing professional norms.) In the realm of death penalty litigation, the ABA Guidelines are a standard by which counsel are judged within the profession and by the courts. See Rompilla v. Beard, 545 U.S. 374 (2005). This Court has also cited with approval the ABA Guidelines. See State v. Herring, 2014 Ohio 5228, paragraphs 69, 81, 82, 97.

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.

It is instructive to know what other states have held concerning fees in indigent cases. 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 fourteen 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 about \$180 per hour without a cap.

It is important that the Court have experienced private counsel to act as qualified counsel and Counsel must be fairly compensated. The \$60 per hour rate is simply not equitable given the importance of the case for Mr. Wilks and the community. Counsel have been efficient in their representation and cognizant that public funds are being spent.

The trial in this case comprised over 4300 pages of transcript, hundreds of pages in juror questionnaires and other documents and video recordings.

However, the hourly rate of \$60 is not reasonable and should be adjusted to no more than the Ohio Public Defender maximum of \$95 per hour. The ABA Guidelines and this Court's Joint Task Force recognize that counsel must be paid fairly and equally throughout the State. The Court recently granted similar motions in State v. Davis, 2011-0538, a death penalty appeal from Butler County where the hourly rate was \$40.00 /hour and recently granted extraordinary fees in State v. Maxwell, 2007-0755, a Cuyahoga County case. Thus, counsel respectfully request an adjustment to the hourly pay rate in this case, extraordinary fees consistent with the above listed authorities and the authority to file one interim fee bill now and a final bill at the conclusion of the appeal.

Respectfully submitted,

/s/Kathleen McGarry

/s/John P. Parker

Counsel for Appellant

CERTIFICATE OF SERVICE

A copy of the foregoing Motion was served upon, Ralph M. Rivera, Assistant Prosecutor, Mahoning County, 21 W. Boardman St., 6th Floor, Youngstown, OH 44503 on this 17th day of February via prepaid U.S. Mail and the Court's electronic notification system.

/s/ John P. Parker