STATE OF MICHIGAN

IN THE SUPREME COURT

86099

IN THE MATTER OF THE RECORDER'S COURT BAR ASSOCIATION, THE CRIMINAL DEFENSE ATTORNEYS OF MICHIGAN, THE MICHIGAN TRIAL LAWYERS ASSOCIATION, WOMEN LAWYERS ASSOCIATION OF MICHIGAN, and THE SUBURBAN BAR ASSOCIATION,

Petitioners,

v

WAYNE COUNTY CIRCUIT COURT AND RECORDER'S COURT,

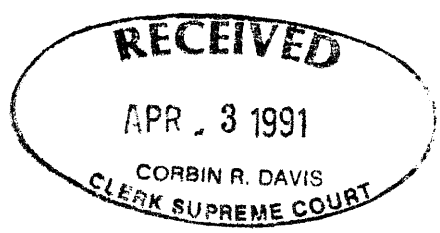
Respondents,

and

WAYNE COUNTY,

Intervening Respondent.

REPORT OF SPECIAL MASTER - HONORABLE TYRONE GILLESPIE



FINDINGS OF FACT

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A. The Third Circuit and the Recorder's Court of Detroit were merged in 1987. The Chief Judges of each court still sit as Chief Judge of their courts, but they interchange as Executive Chief Judge.

There are 29 Recorder's Court judges and 35 Circuit Court judges.

The Recorder's Court of Detroit has jurisdiction of all criminal matters arising out of crimes charged in the City of Detroit. Since the merger a panel of five judges from the circuit court are assigned for arraignment and trial purposes to the Recorder's Court so, in essence, it is one court for the county handling all criminal matters within the county. If a defendant is not a resident of Detroit, he or she technically under Local Court Rule 6.102 could demand arraignment before one of the circuit judges, but practically the judges operate interchangeably between the two courts in criminal matters on an assigned basis.

The procedure, upon arrest, is that the defendant is arraigned on the warrant before a magistrate or judge in the 36th District Court, either in the city or out county. At that point it is determined whether the defendant will be incarcerated or bonded and whether he demands or is unable to hire counsel. In the event that he or she wants counsel, the matter is assigned to an assignment judge, which judge is assigned by the Executive Chief Judge for a brief period of one week. This position is not provided for by statute and some judges refuse the assignment.

Consequently, not all judges serve in this capacity. The assignment judge assigns the defendant an attorney from either the public defender's office (which takes 25% of the cases) or from a list of over 600 attorneys who have indicated desire for assignments. Assigned counsel are notified of their appointments by telephone and have 24 hours to appear at the clerk's office to pick up paperwork. If they do not appear in time and have not made other arrangements, the case is reassigned. In addition to the order of appointment, the lawyer is given an early discovery packet that includes the police investigator's report (warrant request), the defendant's prior record, and a standard signed discovery order. In January, 1990, a sentencing guidelines calculation was added to the discovery packet.

Preliminary examinations are scheduled for 7-10 days after arraignment on the warrant. Since early discovery packets are available on the third day after the arraignment, counsel has 4-7 days to confer with the defendant and review the case. If no lawyer appears for the preliminary examination, the case is assigned to "house counsel", a standby lawyer who is assigned to be available in District Court to cover such situations. On occasion, the defender office has been removed from a capital case by a district judge for refusing to conduct a preliminary examination without additional discovery and other counsel was appointed. If the case is bound over, arraignment on the information (AOI) occurs in seven days if the defendant is in jail and fourteen days if the defendant is free on bond. Thus the total

time elapsed from the appointment of counsel to AOI is 17 days in jail cases and 24 days in bail cases. If the defendant pleads guilty at AOI, sentencing is set for 10 days later.

If the defendant is bound over, he or she is next required to appear before one of the executive floor judges who will arraign him or her on the information or indictment. If at that time the defendant stands mute or pleads not guilty, the case is assigned to a judge for trial. The attorneys then meet with the trial judge to establish a trial track for motions to quash, Walker hearings and trial date and other preliminary matters.

The Chief Judge of the Recorder's Court is responsible for moving the docket and he may, and often does if there is an overload, remove a case or cases to his docket for disposition. If the trial lasts for more than three days, the Recorder's Court automatically allows $300 per day for trial time. In circuit court, the attorney must apply to the Chief Judge for extraordinary fees which are often allowed in whole or in part. Many attorneys are reluctant to ask for extraordinary fees or compensation for unusual expenses, fearing that such requests may prejudice their standing or possibilities for assignment with the judges and, accordingly, pay such costs themselves. Petitions for extraordinary fees are filed in two percent of the cases and are rarely granted in full. The Public Defender's Office is rarely granted any fees beyond the schedule amounts.

B. The present system of paying for assigned counsel on a flat fee basis has merit for the following reasons:

1. The system shortens the time between arrest and disposition, thus alleviating some of the pressure for more jail space.
2. The system tends to keep the docket moving and in better control by speeding resolution and disposition of cases.
3. If a client is pled guilty quickly, the compensation is very adequate as it represents payment for only three or four hours of attorney time.
4. Frivolous motions are reduced as there is no financial incentive to do work which merely takes time.
5. Alternative resolutions, such as work release and probation, are encouraged.
6. Dismissals of weak cases occur at an early stage.
7. Much judicial time in review of schedules and expense accounts is eliminated.
8. Padding of hourly accounts is eliminated.
9. The system is administratively easier to operate.

The negative side of paying assigned counsel on a flat fee basis is:

1. The system encourages attorneys who are not conscientious to persuade clients to plead guilty as attorneys compensation is not improved materially by trial. This discourages use of the full panoply

of constitutional rights.

2. While the system discourages the filing of frivolous motions, it also gives disincentive to file serious motions, as no additional compensation is paid for greater effort.

3. The system discourages plea bargaining in that the prosecutor is aware that the defense attorney has no financial incentive to go to trial and will assent to a guilty plea to a higher charge.

4. While the flat fee system is not directly related, the fact that guilty pleas are well rewarded allows assigning judges to appoint favorites to a volume of cases. One case was cited where an assigning judge appointed a female attorney, with whom he was friendly, to the majority of his assigned cases which required only pleas to be entered.

5. The system also supports a group of substandard attorneys, estimated to be 10 to 15% of the criminal bar, to operate without offices, secretaries, files, from pocket notes and to make a living on guilty pleas.

C. At the beginning of 1990, there were 630 attorneys eligible for appointment. One hundred eighty-six of those did not receive appointments, leaving four hundred forty-four who were appointed in 1989. One hundred seventy-seven attorneys who were not on the eligible list did receive assignments; forty-five

attorneys on the list receiving appointments received $1,000 or less.

The total sum paid for services was $7,130,333 in 1989. Seventy attorneys, about 12% of those eligible for appointment, were paid $3,556,662, or approximately 50% of the total payments made. $1,777,674 of the amount paid to the first seventy attorneys was paid to attorneys not qualified to try capital cases.

The payments of the first seventy attorneys break down as follows:

Over $100,000	1 attorney	$148,102*
Between $90,000 and $100,000	1 attorney	91,264
Between $80,000 and $ 90,000	1 attorney	81,510
Between $70,000 and $ 80,000	4 attorneys	302,149
Between $60,000 and $ 70,000	5 attorneys	325,147
Between $50,000 and $ 60,000	10 attorneys	555,123
Between $40,000 and $ 50,000	11 attorneys	476,665
Between $30,000 and $ 40,000	37 attorneys	1,580,633
Total	70 attorneys	$3,556,662

* Public Defender's Office

Eighty-five percent of the criminal cases in both the Recorder's Court and the Circuit Court require assigned counsel. There are about 12,000 assignments annually in Recorder's Court and 3,400 annually in Wayne Circuit. Indigent defense fees approximate three and-a-half percent of Wayne County's General Fund.

D. The finance situation in Wayne County is extremely fragile and an increase in sums paid for attorneys fees for the indigent could have serious financial repercussions. Wayne County at the close of its fiscal year, November 30, 1987, had a deficit of $134 million in its general fund and an additional debt of

$56 million owed to the State from previous loans to help the county's deficit situation.

In order to rectify this situation, the County, in 1988, negotiated the debt settlement agreement with the State of Michigan, wherein the county was able to borrow $120 million from the State Emergency Loan Board and the county received permission to borrow $103 million in fiscal stabilization bonds.

As conditions for the debt settlement agreement, the county, pursuant to state law, its charter and the additional debt settlement agreement, is required to maintain a balanced budget.

A failure on the part of Wayne County to maintain a balanced budget would require it to pay 10% interest on the sum owing to the state, e.g., $10 million, and may result in the state invoking the provisions of the legislation authorizing the solvency package and place the county in receivership.

In 1989, the county's budget for indigent attorney fees was $13.2 million for circuit, Recorder's, and probate courts, and expenses were approximately $16.7 million, an overrun of approximately $3 1/2 million.

The county budgeted approximately $15.8 million for indigent attorney fees for 1990 -- $9.2 million for Circuit and Recorder's Courts and $6.6 million for probate.

In 1989, by comparison, the county budgeted approximately $12.9 million for the prosecutor's office. The prosecutor's office, of course, has no rent factor in its budget. It also has no factor for investigations or fringe benefits and has some income

through grants and forfeiture money which amount to $5- or $6 million a year.

The county receives no reimbursement from the state or any other source for the sums spent on attorneys fees for the indigent. The county has fiscal responsibility for payment of indigent attorney fees, but has no authority to effect the rate structure. The county addresses indigent attorney fees as a priority in its budget process.

E. From the testimony, the average overhead rate in the Detroit area varies from $35 to $45 an hour. Several attorneys who have been assigned to high publicity, complex cases which have resulted in protracted trials have not been paid enough to meet overhead. Some reported receipt of less than $15 per hour on critical cases.

On the other hand, attorneys with no secretaries, no offices and working from telephone contacts may be paid $675 for a non-capital case in which there was a guilty plea which might be concluded in less than three hours.

F. There is no screening process for indigent defendants in Circuit or Recorder's Court and consequently 87% of the criminal cases in Wayne County require the assistance of appointed counsel. It was the opinion of several witnesses that any attempt to set up standards of indigency or to attempt to recover all or part of the fees paid for defense counsel appointed would be counterproductive. No experiments were reported which would verify these opinions.

Experiments in Genesee County of "loaning" attorney

services to defendants who are unable to pay in full for representation have been somewhat successful. This system would refer a defendant who pleads indigency to an assignment attorney who works for the system. The assignment attorney would determine what, if any, assets are available to the defendant to fund the defense. If the defendant is employed or has other assets, the attorney would take an assignment of the assets or note payable over a period of time from the defendant. On some occasions, a credit card has been used. In any case, the payment of the attorney's fee is guaranteed by the court and collection, if any, is made by the assignment attorney. It has been the experience in some counties that 10% of assessed attorney fees are collected from defendants, usually as a condition of probation.

G. The Federal Court for the Eastern District of Michigan reimburses assigned attorneys at a rate of $75 an hour. There is no distinction made between in-court and out-of-court time and expenses are routinely reimbursed.

Testimony revealed that in Wayne County, when extraordinary fees are requested and allowed, the Chief Judge in Recorder's Court utilizes a figure of $300 a day which is fairly automatic. The Chief Judge in Wayne Circuit computes such fee at $35 an hour.

The fees paid for expert witnesses such as psychologists, psychiatrists, medical experts, interpreters, investigators and other supplemental requirements are so low as to make their services unavailable without supplementation of funds by the

attorney. Some costs, such as postage, copy and local travel, are never reimbursed.

H. Wayne County's fee schedule is unique in Michigan. All other schedules in the state are event based. Only Wayne County pays a flat fee based on the potential maximum sentence. Under this system, the amount paid bears an inverse relationship to the amount of effort expended. The lawyer who puts three or four hours into a case may earn $200 per hour; a lawyer who engaged in a protracted jury trial may earn as little as $12 an hour under the Wayne County system.

The flat fee schedule had a decided impact on the Public Defender's Office, which operates in Wayne County, on the same basis as an attorney who accepts appointments in private practice. The result has been a diminution of funds to run that office to the extent of about $200,000 per year.

I. Several witnesses claimed that the schedule currently in effect, which has the result of rewarding a guilty plea and providing disincentive for going to trial, is in some measure supporting overcharging and stiffness in the prosecutor's office in negotiation of pleas as the prosecution is aware that the defense lawyer is at a personal disadvantage by going to trial as it will cost him money personally. No witnesses were called from the prosecutor's office, consequently such statements went unrebutted. These thoughts do sound facially logical and certainly in the realm of probability.

J. From a review of the Prosecuting Attorneys Association Report for 1989 (Pl. Ex. 35) and the State Bar Association Defender and Services Committee Report for 1989 (Pl. Ex. 36) the following information would appear. The reliability of the information was not tested.

The annual budget for prosecutors in Michigan in 1989 was $61.5 million. The annual budget for prosecutors in Wayne County was $14,110,982, or 23% of the total state budget for prosecutors. The state population was shown to be 9,201,716 according to the 1980 census. Wayne County's population was shown as 2,337,240 or 25.4% of the state population. There were 73,857 felony warrants issued in Michigan. 19,024 of such warrants, or 25.75%, emanated in Wayne County. The above figures are fairly consistent, however the statewide budget for felony defense in the state totalled about $22.5 million. The amount spent in Wayne County on felony defense was listed as $9.26 million, or 41% of the state total budget for defense. This figure was affirmed by the testimony of Mrs. Lannoye as to the Wayne County expenditure.

It is interesting to note that statewide the budget for defense is 36% of the budget for prosecution, which does not include rent, investigations and other factors before mentioned.

K. Under the present system of assigning attorneys, there are at all times over 400 attorneys willing to take assignments which is a number that is entirely adequate.

It appears that in a few complex and unpopular cases, such as the famous Easter Case, the judges have had to use their

personal influence with good attorneys to persuade them to take the case.

The Detroit Bar Association has made a giant step toward improving the quality and capability of the defense bar in organizing the Criminal Advocacy Program (CAP) which was testified to by Judge Ravitz and others and funded by 1% of the assigned counsel fees. Judges and competent trial attorneys have lent their support by teaching in this program.

The plaintiffs allege that good attorneys are dropping out of the assignment program because of low fees. This was not borne out by the testimony as a problem in Wayne County. It was shown that a few very capable attorneys who have made their reputations as superior defense attorneys are taking more private work because it is undenied that private, criminal practice pays infinitely better than assigned work. Typical of this phenomena was Thomas Loeb, a witness in this case, who has become a very well known and highly capable defense attorney who no longer seeks assignments because he commands sufficient private clients to occupy his time. There have been some drop out of attorneys seeking assignments, but that has not been in Wayne County.

Assigning judges are well aware of the competent attorneys and tend to assign them to a number of cases. This may cause an imbalance in income of attorneys depending on assignments but, in all probability, it is to the advantage of the defendants that the best lawyers are assigned most often.

L. The 1982 recommendation on assigned attorneys fees was a carefully considered plan of compensation on an event basis. It had the endorsement of attorneys and judges. Fear on the part of Wayne County Administrators induced them to dissuade the Chief Judges from putting it into effect because of a possible impact on the budget.

Criminal defense does not have great popular appeal and administrators and supervisors, when allocating limited money, are not inclined to give top priority to defending people who have committed crimes.

The current schedule was developed by George Gish at the direction of Judge Roberson. The schedule was adopted by Judge Roberson and Judge Kaufman with the best of motives of moving their crowded dockets and keeping the jail from overcrowding.

The record reflects little change in case movement since the advent of the present schedule. There are a few more guilty pleas. There are more short bench trials, known as "long pleas", due to the hard position on plea bargaining taken by the prosecutor. Due to lack of plea bargaining, the success rate on trial has dropped. On cases that go to trial, 63.5% of murder charges result in conviction of lesser offenses. 76.7% of all assault with intent to murder charges are reduced. The Wayne County bench trial rate is 15 times higher than the state average.

RECOMMENDATIONS

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1. That the fixed fee schedule based on maximum possible sentence be found unreasonable in that it only includes one factor of what this Court found to be the test of reasonableness in WOOD v D.A.I.I.E., 413 Mich 573, 588 (1982). That decision did not determine "reasonableness" in a criminal context but discussed reasonableness in a general context.

The factors to be considered, as in that case defined, are:

1. The professional standing and experience of the attorney;
2. The skill, time and labor involved;
3. The amount in question (in this case maximum potential sentence.
4. The results achieved;
5. The difficulty of the case;
6. The expenses incurred;
7. The nature and length of the professional relationship.

Having found the schedule based solely on maximum possible sentence unreasonable, several alternatives could be offered.

A. That a study be made of reasonable time involved to defend each of the crimes in the present schedule, thus establishing a norm similar to those used by garages in estimating repair work. If the fee request submitted falls within the norm, it would be automatically approved for the time expended at a reasonable rate of $60 to $70 per hour. Excesses would have to be justified.

B. Do as the plaintiff asks and install the Jobes Committee report with a reasonable escalator based on inflation since 1982.

C. Direct the court to devise an alternative plan within a reasonable time which would: (1) compensate attorneys

fairly for time spent, and (2) put no pressure on defendants to plead guilty. It is believed that Mr. Gish could do that if so directed knowing of the criticism of the present plan and in the parameters of present sums expended.

These objectives could be reached by:

1. Conference with the Chief Judges.
2. A letter to the Recorder's and Circuit Court requesting a restudy of the present plan recognizing its weaknesses as defined by these hearings.
3. An Order of Superintending Control.

2. That the Supreme Court in an opinion in this case, or another appropriate case, bring to the attention of the legislature that convictions for felonies are under laws passed by the state, that appeals are to state courts and from state courts and all Michigan prison inmates are state prisoners. Such appeals should, therefore, be state funded.

Circuit and Recorder's Court judges, unless specially assigned, have no control or even knowledge, during the appellate process of the work performed by the assigned attorneys but are expected to approve payment therefor from their respective counties. Each circuit has a different rate or method of payment. In Jewell v Maynard, 383 SE2d 536 (1989), the Supreme Court of West Virginia, in a case with facts very similar to those posed here, called upon the state of West Virginia to pay $45 an hour for out-of-court work and $60 an hour for in-court work in spite of a statute which provided for $20 an hour for out-of-court work and $25 for in-court work and gave the legislature one year to implement the decision. Prior attempts to obtain money for appeals in Michigan have become snarled with debates on judges salaries and

pensions and have been pushed back by the legislature and thereafter forgotten. It seems appropriate that, if due process in Michigan is to be maintained, the state should include the cost in the budget.

In the matter of In re Frederick, SC No. 90310, which was heard by this Court on March 7, 1991, this precise issue was raised. Frederick was appointed to defend an indigent, David Cook, on appeal. The Court of Appeals found no law to effect payment for his services. This Court must find the system to pay Frederick. If this Court finds Frederick must be paid, then it must be decided by whom.

The mechanism for designating attorneys for appeals was set up in detail in MCL 780.711 et seq. (the Appellate Defender Act). In this Act, section MCL 780.717 provides for contracts for special assistant appellate defenders, but does not provide for single appointments of non-contract attorneys.

The Supreme Court could clarify in an appropriate opinion that it was the intent of the legislature to set up an appellate scheme to handle all appeals to the Michigan Court of Appeals and to the Michigan Supreme Court between the State Appellate Defender's Office and the Michigan Appellate Assigned Counsel Service.

That having been decided, then the legislature should be called upon to correct the glaring funding omission of the Appellate Defender Act.

If this were accomplished not only would the system in Wayne County be relieved, but also the system in every county of

the state where the counties are with great difficulty bearing a burden on strained budgets which properly belong to the state.

3. The discussion in the previous recommendation is in reference only to appeals from the 55 circuit courts and Recorder's Court of Detroit.

There is another problem in that each of the 55 circuits has a different plan for compensation of assigned counsel for trial in that circuit. Even the Recorder's Court and the Third Circuit for Wayne County have slight differences in their plans.

As a result of these differences, all Michigan defense representation is not equal. Indigent defendants charged in counties that pay assigned counsel very low rates are treated differently than those defendants who can afford to hire their own attorneys. They are also treated differently than defendants in counties that provide skilled representation. Much of the information on these problems has been gathered by the Supreme Court Administrator and MAACS and should be amenable to fast assembly.

It is recommended that this Wayne County study be expanded to encompass the assignment of counsel throughout the entire state to unify the hodgepodge of plans for indigent representation that now exist.

While much of the information has already been gathered for such a study by existing organizations, it is the recommendation that such study be conducted by an independent group or agency to diminish any appearance of empire building. Too, such a study must consider the responsibilities and sensitivity of

sitting judges who must accept the recommendations, as it is their responsibility to operate their courts efficiently and economically. It is also their responsibility to convince county supervisors to fund the program.

4. In Wayne County, the chief judges should be encouraged to devise a plan to eliminate the criticism of assigning attorneys who operate from their cars and by telephone and live on payment for pleas and waivers.

Likewise chief judges should be made aware that the Supreme Court is aware that instances exist of appointment of attorneys who have personal relationships with assigning judges and that such appointments are not favored. There is, of course, no criticism of those judges who have had to use personal relationships to obtain competent counsel for hard cases.

5. It should be pointed out that MCL 780.711, § 2 specifically puts the supervision of the state agencies whose duties are the operation and management of appellate defense under the State Court Administrator. In practice, it does not operate that way.

If the appellate services were centralized in the Supreme Court Administrator's Office and funded by the state, much of the problems on the appellate level statewide would disappear.

At the trial level, if the 55 circuits were operating under standard rules for those utilizing public defender offices, and a separate set of standards for those not using the public defender system, most of the grievances of the plaintiffs in the Wayne County case would be met.

It is hoped that the comment and recommendations herein contained will be helpful in the solution and not part of the problem posed by this case.

-- Tyrone Gillespie
Special Master

Dated: March 18, 1991