STATE OF MICHIGAN

IN THE COURT OF APPEALS

In re Attorney Fees of Mitchell T. Foster

People of the State of Michigan,
Plaintiff-Appellee,

v

David George Boudrie, Sr.,
Defendant,

and

Mitchell T. Foster,
Appellant,

Michigan Appellate Assigned Counsel System (MAACS),
Intervening Appellant.

Court of Appeals
Case No. 327707

Iosco County Circuit Court
Case No. 13-008037-FH

BRIEF ON APPEAL BY INTERVENING APPELLANT MICHIGAN APPELLATE ASSIGNED COUNSEL SYSTEM (MAACS)

ORAL ARGUMENT REQUESTED

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STATEMENT OF APPELLATE JURISDICTION

Intervening Appellant MAACS concurs in the Statement of Appellate Jurisdiction provided in Appellant Mitchell T. Foster's Brief on Appeal.

STATEMENT OF QUESTION PRESENTED

This appeal addresses the trial court's policy of refusing to reimburse appointed appellate counsel for time and expenses related to pleadings which this Court ultimately deems non-meritorious. The appeal raises the following question:

> **Whether the trial court's contingent fee policy violates the Sixth and Fourteenth Amendment rights of indigent criminal defendants and the Fifth Amendment rights of appointed counsel, as well as the relevant state constitutional counterparts to these provisions.**

Intervening Appellant MAACS answers "Yes."

Appellee has not taken any position.

The trial court implicitly answered "No."

STATEMENT OF FACTS

On December 15, 2014, MAACS roster attorney Mitchell T. Foster was appointed to represent David Boudrie, Sr., an indigent criminal defendant appealing the sentence imposed after his guilty plea. In the Court of Appeals, Mr. Foster filed a Motion for Leave to File a Motion to Correct an Invalid Sentence, as well as an Application for Leave to Appeal. Mr. Foster argued that Offense Variable 3 was improperly scored because the record did not show that the victim suffered bodily injury. He also argued that trial counsel was ineffective for failing to object to the guidelines scoring, and that the sentence violated *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000), and *Alleyne v United States*, 570 US ___; 133 S Ct 2151; 186 L Ed 2d 314 (2013). This Court denied the Motion and the Application for Leave to Appeal in a short Order stating simply that there was "lack of merit in the grounds presented."

Upon the completion of his assigned counsel responsibilities, Mr. Foster requested reimbursement from the 23rd Circuit Court for his services and expenses. This included 23.3 hours at $60 per hour for a total of $1398.00, as well as $183.12 in expenses. The request was consistent with the 23rd Circuit's published attorney fee policy for appellate assigned representation. See Michigan Appellate Assigned Counsel System, A*ppellate Assigned Counsel Fees and Roster Membership at Levels by Circuit* <http://www.sado.org/content/pub/10332_MAACS-Fee-Survey---February--2014.pdf> (accessed July 27, 2015).

While the trial court reimbursed Mr. Foster for a portion of his request, it did not compensate him for 12.6 hours ($756), 295 pages of copies ($44.25), or $25.19 in postage.

Mr. Foster sought reconsideration of the trial court's order for payment. At a hearing on May 18, 2015, the court did *not* question the accuracy or necessity of Mr. Foster's 23.3 hours of work in this matter. Instead, the court explained that its "policy" was not to reimburse appellate counsel for the time or expenses related to pleadings that are ultimately unsuccessful. The court explained,

> [A]ccording to the Appeals Court Order it was denied, there being no merit and grounds is what the Order said. . . . So I gave you [payment] to go talk to him as well as your mileage which were the expenses. Other than that, if there were no grounds, I don't know—you know, we've got a poor county here and we can't . . . . afford to pay attorneys to file stuff that doesn't have a basis of merit to it.

(Motion Hearing Transcript, May 18, 2015, at 3.) When asked explicitly whether it was the trial court's "policy that anytime the Court of Appeals denies leave for lack of merit on a guilty plea case you don't pay," the court answered, "That's correct." (*Id.*)

After Mr. Foster concluded his representation, Mr. Boudrie filed a pro per Application for Leave to Appeal in the Michigan Supreme Court, which remains pending. Presumably, Mr. Boudrie raised the *Apprendi-Alleyne* issue that Mr. Foster had preserved on his behalf. If so, he may very well be eligible for sentencing relief in the near future. On July 29, 2015, the Michigan Supreme Court issued its opinion in *People v Lockridge*, ___ Mich ___; ___ NW2d ___ (2015) (Docket No. 149073),

which overruled this Court's decision in *People v Herron*, 303 Mich App 392; 845 NW2d 533 (2013), and agreed with one of the arguments that Mr. Foster had presented in this case. Thus, according to the Supreme Court, it appears that there was in fact "merit in the grounds presented" after all.

ARGUMENT

Intervening Appellant MAACS fully supports the arguments raised by Appellant Mitchell T. Foster, who agreed to accept the appointment in this matter based on the expectation that he would be fairly reimbursed for his time and expenses, and wo should be so compensated. This brief, however, focuses on the important constitutional and public policy implications of the trial court's contingent fee policy.

The trial court's contingent fee policy violates the Sixth and Fourteenth Amendment rights of indigent criminal defendants and the Fifth Amendment rights of appointed counsel, as well as the relevant state constitutional counterparts to these provisions.

Historically, Michigan attorneys have had a statutory right to reasonable compensation for providing criminal defense services to the indigent. See, e.g., *Recorder's Court Bar Ass'n v Wayne Circuit Court*, 443 Mich 110, 122; 503 NW2d 885 (1993). Until recently, MCL 775.16 provided in part that "[t]he attorney appointed by the court shall be entitled to receive from the county treasurer, on the certificate of the chief judge that the services have been rendered, the amount which the chief judge considers to be reasonable compensation for the services performed." On the basis of this statutory authority, this Court has explained that the "[f]ailure to compensate appellate counsel for advocacy in the appellate courts is simply outrageous." *People v Edgley*, 187 Mich App 211, 213; 466 NW2d 296 (1990).

Although the statute has since been amended to reflect the enactment of the Michigan Indigent Defense Commission Act, MCL 780.981 *et seq.*, and no longer contains an explicit reference to the reasonableness of attorney fees, it remains just as outrageous—and unlawful—for a trial court to refuse to compensate assigned appellate counsel. Even in the absence of a clear statutory

requirement, a reasonable attorney fee is necessary to protect indigent defendants' rights under the Sixth Amendment Assistance of Counsel Clause and the Fourteenth Amendment Equal Protection Clause, as well as appointed counsel's rights under the Fifth Amendment Takings Clause.

The Michigan Supreme Court has previously addressed some of these constitutional questions. In *In re Meizlish*, 387 Mich 228, 240; 196 NW2d 129 (1972), which involved Wayne County's payment of inflexible flat fees regardless of case complexity, the Court found "that an indigent defendant is not deprived of his constitutional rights by the appointment of unpaid counsel," and that appointed counsel also was not deprived of his rights to due process and equal protection. But *Meizlish* is not controlling here for a number of reasons.

First, *Meizlish* may no longer remain good law. In *In re Attorney Fees of Mullkoff*, 176 Mich App 82, 88-89; 438 NW2d 878, 881 (1989), this Court explicitly "recognize[d] that the constitutional guarantees to counsel . . . and equal protection . . . may be compromised by an unreasonable refusal to compensate for essential services of appointed defense counsel," but declined to "address such constitutional issues given the then-"statutory right to reasonable compensation for assigned appellate counsel." And in *Frederick v Presque Isle County Circuit Judge*, 439 Mich 1, 28; 476 NW2d 142 (1991), the Michigan Supreme Court narrowly described the issue in *Meizlish* as "not whether assigned attorneys could be paid no compensation, but rather whether $50 was generally reasonable, and not arbitrary and capricious so as to violate the attorney's rights to due process and equal protection." *Id.* at 28 n 9. While the Court ultimately "decline[d] to discuss these constitutional issues" in *Frederick*, it found for other reasons that "paying assigned appellate attorneys no fees is not reasonable." *Id.* Thus, while MCL 775.16 has (until recently) made it unnecessary for Michigan courts to revisit the unfortunate *Meizlish* decision, both the Supreme Court and this Court have all but admitted its lack of precedential significance.

Second, and more to the point (which *Meizlish* failed to appreciate), "the defendant's right to effective representation [and] the attorney's right to fair compensation" are "inextricably interlinked." *Makemson v Martin Co*, 491 So 2d 1109, 1112 (Fla 1986). Under the Sixth Amendment, it is the responsibility of the *government* to provide effective legal assistance to indigent defendants on appeal. *Gideon v Wainwright*, 372 US 335, 342–345; 83 SCt 792; 9 LEd2d 799 (1963); *Halbert v Michigan*, 545 US 605, 610; 125 SCt 2582; 162 LEd2d 552 (2005); *People v Jackson*, 483 Mich 271, 278; 769 NW2d 630 (2009). "When the United States Supreme Court[] in *Gideon* . . . found fundamental the right to effective counsel and established the state's duty to provide representation to the indigent, it by no means intended to place the weight of this duty upon the shoulders of a few individual practitioners appointed by the court." *Makemson*, 491 So 2d at 1114. The trial court's refusal to compensate counsel matters because "[t]he link between compensation and the quality of representation remains too clear," *id*, and as other courts have recognized, policies which discourage zealous representation can easily "interfere[] with the defendant's sixth amendment right to counsel."' *Id.* at 1112 (discussing strict adherence to attorney fee cap). See also *Simmons v State Pub Defender, 791 NW2d 69, 89 (Iowa 2010)* (invalidating an attorney fee cap "that has a chilling effect on the constitutional rights of criminal defendants").

Third, this case is easily distinguishable from *Meizlish* because it does not simply involve an *unreasonable* fee, but something much worse—a *contingent* fee. *Meizlish* involved a policy that limited appointed counsel's payment to $50 regardless of the merit or complexity of the case. In fact, defense counsel in *Meizlish* did what the trial court in this case presumably would have preferred of Mr. Foster—he filed a motion to withdraw based on the lack of meritorious issues pursuant to *Anders v California*, 386 US 738; 87 SCt 1396; 18 LEd2d 493 (1967). *In re Meizlish*, 387 Mich at 240. This case is much different. It involves an attorney fee policy that refuses payment for the litigation of claims that are later deemed to lack merit. It was designed to discourage vigorous representation

on behalf of indigent defendants, and it unquestionably forces appointed counsel to practice under an actual conflict of interest. In the 23rd Circuit, MAACS roster attorneys must litigate questions of arguable (or even strong) merit at their own financial peril. Sadly, many will decline to take this risk.

Appointed counsel must also choose between working for free and adhering to their legal and ethical obligations under the Minimum Standards for Indigent Criminal Appellate Defense Services and the Michigan Rules of Professional Conduct. Minimum Standard 3, which was promulgated by Michigan Supreme Court Administrative Order 2004-6, requires appointed counsel to "raise those issues, recognizable by a practitioner familiar with criminal law and procedures on a current basis and who engages in diligent legal research, which offer *reasonable prospects* of meaningful postconviction or appellate relief . . . ." (emphasis added). And Michigan Rule of Professional Conduct 1.5(d) provides that a "lawyer shall not enter into an arrangement for, charge, or collect a contingent fee in a . . . criminal matter." The trial court's contingent fee policy forces counsel to practice under an intolerable conflict of interest and in violation of their legal obligations.

Even more important than the hardships it causes to attorneys, the contingent fee policy structurally deprives indigent defendants of their constitutional right to conflict-free appellate counsel. Regardless of how many cases the policy actually affects, it will taint all of them, potentially giving rise to significant constitutional claims in untold future criminal cases. Perhaps not all claims will lead to relief, as the courts are split on whether the presence of a contingent fee arrangement in criminal matters is per se prejudicial. Compare, e.g., *People v Meyers*, 46 Ill 2d 149; 263 NE2d 81 (1970) (presuming prejudice and ordering the opportunity to withdraw the guilty plea), with *People v Winkler*, 71 NY2d 592; 523 NE2d 485 (1988) (allowing relief only where the defendant can show that the conflict of interest affected the representation). But this Court need not take sides in that debate today, because Mr. Boudrie is not (yet) raising a constitutional challenge based on the trial court's assigned counsel fee policy. For the moment at least, the question is not whether Mr. Bourdrie is

entitled to a new appeal, but rather whether the trial court's policy is improper. MAACS is aware of *no* cases actually approving of an attorney fee agreement or policy such as this. The Court should address this problem now, in this civil dispute over attorney fees, rather than waiting for the state or federal courts to do so later.

At bottom, the refusal to compensate appointed counsel in unsuccessful plea-based appeals is not much different than denying counsel altogether, which used to be commonplace in Michigan until the Supreme Court rejected it in *Halbert*, 545 US at 610. *Halbert* carved no exceptions for cases in which appellate relief was ultimately denied, or cases arising out of "poor counties." Simply put, the trial court's refusal to provide appellate counsel in this matter is incompatible with the Sixth and Fourteenth Amendments.

Finally, even if *Meizlish* were controlling as to the Sixth and Fourteenth Amendment arguments, it did not even consider whether the denial of compensation for assigned counsel violates the Takings Clause of the Fifth Amendment. That provision was "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v United States*, 364 US 40, 49; 80 SCt 1563; 4 LEd2d 1554 (1960). As the South Carolina Supreme Court recently recognized, "the Takings Clause . . . is implicated when an attorney is appointed by the court to represent an indigent litigant. In such circumstances, the attorney's services constitute property entitling the attorney to just compensation." *Ex Parte Brown*, 393 SC 214, 216; 711 SE2d 899 (2011). The court explained that although appointed counsel "'should not expect to be compensated at market rate,'" they are entitled to "'a reasonable, but lesser rate, which reflects the unique difficulty these cases present as balanced with the attorney's obligation to defend the indigent.'" *Id.* at 225 (citation omitted). Similarly, the Kansas Supreme Court has explained that "certainly when attorneys are required to donate funds out-of-pocket to subsidize a defense for an indigent defendant, the attorneys are

deprived of property in the form of money," a process which is "subject to Fifth Amendment protection." *State v Smith*, 242 Kan 336, 370; 747 P2d 816 (1987).

In conclusion, the trial court's ill-considered contingent fee policy raises a host of problems. As a matter of constitutional law, it casts doubt on the validity of countless criminal convictions and gives rise to new civil claims by attorneys. As a matter of ethics, it creates unnecessary conflicts of interest and invites potential disciplinary proceedings. And as a matter of public policy, it discourages quality assigned counsel representation and exacerbates MAACS's persistent difficulty in recruiting and retaining competent attorneys willing to work under hostile conditions and extremely low pay. This Court should not tolerate it for a moment longer.

CONCLUSION AND RELIEF SOUGHT

For the reasons discussed above, this Court should reverse the trial court and remand this case with instructions to reimburse Appellant Mitchell T. Foster for services and expenses related to the filing of the application for leave to appeal in this matter.

Respectfully submitted,

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