STATE OF MICHIGAN

IN THE SUPREME COURT

In re Attorney Fees of John W. Ujlaky

People of the State of Michigan,
Plaintiff-Appellee,

v.

Shawn Douglas Simpson,
Defendant,
and

John W. Ujlaky,
Appellant.

Supreme Court
Case No. 150887

Court of Appeals
Case No. 316494

Kent County Circuit Court
Case No. 11-002833-FC

People of the State of Michigan,
Plaintiff-Appellee,

v.

Gilberto Delarosa,
Defendant,
and

John W. Ujlaky,
Appellant.

Supreme Court
Case No. 150888

Court of Appeals
Case No. 316809

Kent County Circuit Court
Case No. 05-011853-FH

BRIEF *AMICUS CURIAE* BY STATE APPELLATE DEFENDER OFFICE AND MICHIGAN APPELLATE ASSIGNED COUNSEL SYSTEM IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL AND MOTION TO WAIVE FILING FEES

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INTRODUCTION AND STATEMENT OF INTEREST

Effective September 18, 2014, this Court issued an Administrative Order consolidating the State Appellate Defender Office ("SADO") and the Michigan Appellate Assigned Counsel System ("MAACS"), in order "to promote efficiency and improve the administration of assigned appellate counsel for indigent defendants." Administrative Order No. 2014-18. For the reasons that follow, the consolidated SADO/MAACS agency files this Brief Amicus Curiae in support of Appellant John W. Ujlaky's Application for Leave to Appeal, as well as his Motion to Waive Filing Fees.

BACKGROUND

SADO is the only statewide public defender office in Michigan, and provides representation in no less than 25% of all appointed appeals from felony convictions. See MCL 780.711 *et seq*. SADO's mission is to provide cost-efficient, high-quality, timely, public appellate defense services to indigent criminal defendants in cases assigned by the courts. SADO also provides legal resources and training materials to support private criminal defense practitioners assigned to represent indigent criminal defendants, in order to enhance the quality and effectiveness of that representation.

MAACS administers the roster of private attorneys who have agreed to provide representation in the remainder of appointed criminal appeals in Michigan—up to 75% of cases. MAACS is responsible for attracting, retaining, and regulating sufficient numbers of qualified lawyers in each of Michigan's 57 circuit courts, as well as engaging in activities to enhance the ability of the private bar to render effective assistance of appellate counsel to indigent defendants.

Although MAACS's ability to fulfill its mission depends largely on the attorney fees paid for court appointed appeals, MAACS has traditionally played little to no role in the setting or payment of attorney fees. Instead, attorney fees are determined by the circuit courts and the counties in which they operate. As explained by the Court of Appeals below, the Kent County Circuit Court has adopted a fee schedule allowing for a standard hourly rate of $55, up to a maximum of $660 in

guilty-plea appeals—representing 12 hours of work. Apparently recognizing that some assignments require more effort, however, Kent County allows for "[e]xtra fees with written justification & approval." Slip Op. at 2-3. Fee schedules of this nature are common among Michigan's circuit courts, though they vary significantly as to the hourly rates paid and maximum fees allowed. See Michigan Appellate Assigned Counsel System, *Appellate Assigned Counsel Fees and Roster Membership at Levels by Circuit* <http://www.sado.org/content/pub/10332_MAACS-Fee-Survey---February--2014.pdf> (accessed January 27, 2015).

This case arises out of two separate Kent County guilty-plea appeals handled by the appellant in the instant case, attorney John W. Ulaky, who has been a MAACS roster attorney in good standing since 1985. The first involved Defendant Shawn Douglas Simpson, who entered a guilty plea conditioned upon an opportunity to appeal the denials of his motion in limine regarding other acts evidence and his motion to suppress inculpatory statements. After Mr. Ujlaky was appointed, he reviewed the appropriate trial court record, including a lengthy evidentiary hearing transcript, and filed a 31-page Application for Leave to Appeal on Mr. Simpson's behalf, arguing that the trial court erred in its denials of the motion in limine and the motion to suppress. The Court of Appeals denied leave to appeal. Slip Op. at 2.

Mr. Ujlaky then submitted to the Kent County Circuit Court a Statement of Service and Order for Payment of Court Appointed Counsel, requesting attorney fees of $2,150.05, which represented 39.1 hours of work at $55 per hour, Kent County's standard rate. He provided a detailed description of his time. And he indicated that he was requesting "extraordinary fees" beyond the standard $660 maximum applicable to plea-based appeals. The circuit court denied the request and paid a total of $660 in attorney fees, plus costs. Slip Op. at 3.

Mr. Ujlaky then filed a motion for extraordinary fees, seeking the balance of his original request or some other reasonable amount. After holding a hearing on the matter, the circuit court

denied the request in its entirety. The circuit court made no finding that Mr. Ujlaky did not perform the work he claimed, or that the work was not reasonably necessary to the representation. Rather, the circuit court's only basis for denying the fee request was that Mr. Ujlaky's agreement to take the appointment for less than his normal $180 per hour rate operated as an implicit waiver of any right to dispute the fees paid. The circuit court "acknowledge[d]" Mr. Ujlaky for "honor[ing] part of his professional obligations assumed upon admission to practice law in this state." Slip Op. at 3.

Mr. Ujlaky sought reconsideration of the circuit court's decision, pointing out that he had not sought fees anywhere close to his normal $180 per hour retained rate, but merely sought fair and reasonable compensation pursuant to Kent County's own fee schedule. The circuit court denied his request to reconsider.

The second appeal involved Defendant Gilberto Delarosa, who pled guilty to a probation violation as a fourth-habitual offender, was sentenced to 3-15 years in prison, and was ordered to pay $30,368.13 in restitution. After Mr. Ujlaky was appointed to represent Mr. Delarosa, he filed a motion in the circuit court to withdraw the plea or for resentencing. Following the circuit court's rejection of that motion, Mr. Ujlaky filed a 25-page Application for Leave to Appeal, arguing that the fourth-habitual offender designation was incorrect and that the restitution order was in error. The Court of Appeals agreed as to both claims and remanded to the circuit court, where Mr. Ujlaky continued his representation. On remand, the circuit court agreed that one of Mr. Delarosa's prior offenses was improperly scored, but nevertheless reimposed a sentence of 3-15 years imprisonment. The circuit court reduced the restitution order, however, to $27,257.13. Slip Op. at 6.

At the conclusion of those proceedings, Mr. Ujlaky requested attorney fees of $4,207.50, which represented 76.5 hours of work at $55 per hour. As in the *Simpson* matter, Mr. Ujlaky supported his request with a detailed accounting of all time spent on the representation, and indicated that he was requesting "extraordinary fees" beyond the normal $660 "cap." The court

denied this request and paid a total of $660 in attorney fees, plus costs. Perhaps due to his experience in the *Simpson* matter—which had concluded just a week earlier, in front of the same judge—Mr. Ujlaky did not move for reconsideration. Slip Op. at 6.

Mr. Ujlaky then sought leave to appeal in both cases on the issue of attorney fees. To do so, he was required to pay another $750 of his own money in filing fees, and to spend considerable additional time at additional expense to himself and his law practice—likely eclipsing the monetary relief he could hope to obtain under even the most favorable ruling.

The Court of Appeals affirmed the circuit court's denial of Mr. Ujlaky's attorney fee requests. As to the *Simpson* matter, the court did not endorse the circuit court's reasoning, and even noted that the circuit court had "failed to explicitly address" the relevant question, "whether the fees sought were both extraordinary and reasonable." Nevertheless, and without remanding the case, the Court of Appeals approved the denial of Mr. Ujlaky's fee request. The court relied on a dictionary definition of "extraordinary" to reason that Mr. Ujlaky had "failed to explain how the services rendered in the appeal . . . were of a character and an amount beyond those normally required in a guilty-plea appeal." Slip Op. at 7.

As to the *Delarosa* matter, the Court of Appeals acknowledged that "the circumstances . . . suggest that an award of extraordinary fees might have been in order," but nevertheless declined to grant relief because Mr. Ujlaky had failed to explain "beyond a recitation of his proposed billing" why his services had been extraordinary and his requested fee was reasonable. The court explained that Mr. Ujlaky had failed to "attach a motion to the MAACS form as required"—even though that "requirement" was found only on the MAACS form rather than any Kent County regulation, and even though this had not been the circuit court's reason for denying the fee request. Again, the court declined to remand the case for correction of this alleged defect.

Mr. Ujlaky sought reconsideration in the Court of Appeals, which was denied.

ARGUMENT

Amicus Curiae fully supports Mr. Ujlaky's Application for Leave to Appeal, as well as his Motion to Waive Filing Fees, for several reasons. First, the work performed in the instant cases was, in fact, extraordinary, particularly given that Kent County has chosen to define an "ordinary" plea appeal as one in which counsel can reasonably be expected to complete the work in twelve hours. Second, the denial of Mr. Ujlaky's requests for extraordinary fees violated his right to reasonable compensation for his work. Finally, the reasoning employed by both the circuit court and the Court of Appeals makes it extremely difficult for Amicus Curiae, or for this Court, to ensure that Michigan lives up to its obligation under the Sixth Amendment to the United States Constitution.

I. The Court should waive Appellant's filing fees in this matter

As an initial matter, this Court should waive the $750 filing fee in this matter. As explained above, Appellant John W. Ujlaky has already spent considerable time and money litigating what has become an important public interest case. In addition to the significant uncompensated work he performed on behalf of the individual criminal defendants, he has briefed the attorney fee issue twice, expending considerable time and effort in addition to the $750 in filing fee required by the Court of Appeals. Like most MAACS roster attorneys, Mr. Ujlaky is a solo practitioner without the resources to support or the means to underwrite an endeavor such as this, which will, at most, result in his compensation for work performed in the underlying criminal cases. Because the imposition of additional filing fees would cause further financial harm, and would discourage future appeals of this nature which serve an important public service, this Court should waive the filing fee.

II. The effort involved in these cases was "extraordinary"

Both of the criminal appeals underlying this case were "extraordinary" when viewed in light of the average guilty plea appeal, and particularly so when viewed in light of the twelve-hour "cap" on attorney fees imposed by the Kent County Circuit Court.

SADO represents hundreds of clients appealing no contest or guilty plea convictions each year. In a standard guilty plea appeal, appellate counsel pursues one of four options:

- dismissal of the appeal with client's consent;
- a trial court sentencing guidelines challenge based on the record;
- a plea withdrawal motion based on the record; or
- an application for leave to appeal based on the record or following the denial of trial court motions.

Each of these options requires significant work: client consultation, record review, and in the case of an application or trial court motion, a brief in support of the argument.

With these options in mind, an attorney with a plea caseload receives approximately six plea assignments each month. At SADO, it is not unusual for a plea case to require additional work—either through an evidentiary hearing, complex legal issues, or continued litigation in the Court of Appeals and Supreme Court. When this happens, the case weight is adjusted accordingly.

For both Mr. Simpson and Mr. Delarosa, Mr. Ujlaky offered far more than the standard representation of a client appealing a guilty plea. At SADO, each of these cases would have received additional weight, above the standard starting point.

In *Simpson*, Mr. Ujlaky filed a 31-page appellate brief, rather than a more standard plea or sentencing argument, averaging about 15 pages. The case involved two legal issues much more common in a trial appeal—suppression of a statement and admission of bad acts evidence—rather than the guidelines-based sentencing arguments in a typical plea appeal. Mr. Ujlaky's total work of 39.1 hours is more typical of a short trial appeal at SADO, and significantly more than the typical amount of time spent on one of six guilty plea appeals each month.

In *Delarosa*, Mr. Ujlaky's work included a trial court motion and a leave application on plea withdrawal and restitution issues—all expected in a standard plea case. What sets the case apart

from most others is that this court remanded for further fact-finding and an evidentiary hearing in the circuit court. Ultimately, Mr. Delarosa had a resentencing hearing, after which his restitution was reduced. Again, the work involved in this appeal is far more typical of a short trial than a plea appeal.

Thus, in each of these cases, Mr. Ujlaky sufficiently established that the effort required was "extraordinary" when compared with a typical guilty plea appeal.

At least as important, however, is that what represents an "extraordinary" case is *relative*—and depends upon the ordinary fee maximum imposed by a particular circuit court. As noted above, the $660 cap represents only twelve hours of work at Kent County's rate of $55 per hour. While many plea appeals can be completed in fewer than twelve hours, it should come as no surprise that others will require significantly greater effort. Not all of those cases will be "extraordinary" when compared with the typical plea appeal—as the Court of Appeals seems to have concluded as to *Simpson*. But that answers the wrong question. Even where an appeal is not extraordinary in relation to the typical appeal (both *Simpson* and *Delarosa* were), what matters more is whether it was extraordinary *in relation to the limit on attorney fees*. If attorney fees were capped at $5000 rather than $660, neither of these cases would justify an award of "extraordinary" fees. But a cap of $660, representing only twelve hours of work, means that "extraordinary" cases will be relatively more commonplace.

In sum, *Simpson* and *Delarosa* justified the payment of extraordinary attorney fees not just because they required more work than the typical plea appeal, but because they required substantially more than the twelve hours that Kent County had allotted them. By any measure, the cases were "extraordinary."

III. Inflexible adherence to a fee maximum violates counsel's right to reasonable compensation and conflicts with the state's obligation to provide effective representation

To be sure, trial courts have wide discretion to deny, in whole or in part, requests for extraordinary fees, and the same is true of requests for fees that fall within a permissible maximum. But when a court declines to pay appointed counsel for services, it must base its decision on a valid reason, such as a finding that counsel has failed to substantiate his request with adequate proof, or that the effort put into the case was beyond what a reasonable attorney would have deemed appropriate. But the trial court did not make any such finding in these cases. Instead, the court applied the fee cap inflexibly and thanked Mr. Ujlaky for his pro bono service. This rationale represents a troubling misunderstanding of the State's obligation to provide attorneys for indigent defendants as well as reasonable compensation to those attorneys.

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); *People v Edgley*, 187 Mich App 211, 213; 466 NW2d 296 (1991). When Mr. Ujlaky accepted the appointments at issue here, 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." In assessing the reasonableness of an attorney fee, courts should consider, among other factors, "(1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client." *In re Atchison*, unpublished opinion per curiam of the Court of Appeals, issued January 19, 2012 (Docket No. 292281), p 6 (quoting *Wood v Detroit Auto Inter-Ins Exch*, 413 Mich 573, 588; 321 NW2d 653 (1982)).

In these cases, however, the circuit court considered none of these factors. Instead, the court in *Simpson*—and presumably *Delarosa* as well—denied extraordinary fees not based on the unreasonableness of the request, but based on its own belief that the "purpose" of the reasonable compensation statute "was not to provide full compensation but, rather, to relieve members of bar of at least some of their professional obligation to provide free legal services to [the] indigent." Slip. Op. at 3. Legal lore aside,[1] the court's failure to consider any factors is equivalent to *refusing* to exercise discretion, and resulted in a denial of Appellant's right to be reasonably compensated.

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 attorney fees, the case law recognizing courts' ability to exercise discretion, and ensure the reasonableness of fees, is not obsolete. To the contrary, a trial court's discretion to award reasonable attorney fees remains necessary to ensure compliance with both the Fifth Amendment Takings Clause and the Sixth Amendment Assistance of Counsel Clause, as well as their state constitutional counterparts.

As the South Carolina Supreme Court recently recognized, "the Takings Clause of the Fifth Amendment to the United States Constitution 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

[1] Historical arguments about obligation on the part of the legal profession to represent indigents upon court order, without compensation, have been seriously discredited by modern scholars. See *Simmons v State Pub Defender, 791 NW2d 69, 86 (Iowa 2010)* (citing Shapiro, *The Enigma of the Lawyer's Duty to Serve,* 55 NYU LRev. 735, 740-49 (1980) ("[n]oting that the duty in English law was limited to the very group of officers who had extraordinary privileges at court and did not apply to ordinary attorneys.") *See also Makemson v Martin Co*, 491 So 2d 1109, 1114 (Fla 1986) ("[W]e may not allow the guarantee of effective representation in today's courtrooms to be diluted by reference to the state of affairs at the common law."); *People v Edgley*, 187 Mich App 211, 213; 466 NW2d 296 (1990) ("Failure to compensate appellate counsel for advocacy in the appellate courts is simply outrageous.")

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). The reasonableness of an attorney fee must be left to the discretion of a trial court. *Id.*

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). "[W]hen an attorney is required to spend an unreasonable amount of time on indigent appointments so that there is genuine and substantial interference with his or her private practice, the system violates the Fifth Amendment." *Id.* See also *Armstrong v United States*, 364 US 40, 49; 80 SCt 1563; 4 LEd2d 1554 (1960) (explaining that the Takings Clause 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").

But this is not just a case about fair pay for lawyers. Reasonable compensation is also necessary to protect the constitutional rights of defendants. Under the Sixth Amendment, it is the responsibility of the *state* to provide effective legal assistance to indigent defendants. *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.

Where, as here, an attorney fee "cap" is "inflexibly imposed in cases involving unusual or extraordinary circumstances," it "interfere[s] with the defendant's sixth amendment right . . . ." *Id.* at 1112. See also *Simmons*, 791 NW2d at 89 (invalidating a fee cap "that has a chilling effect on the constitutional rights of criminal defendants . . . ."). It is the duty of both this Court and Amicus Curiae to avoid such scenarios.

None of this is to say that trial courts can *never* decline a request for extraordinary fees, or even that they must always pay in full a request for ordinary fees. Rather, the point is that trial courts must use their discretion to grant or deny fee requests, and in doing so must rely on permissible factors such as whether counsel has substantiated the fee request and whether his or her efforts were reasonably appropriate. Importantly, it is the *trial* court that must conduct this inherently fact-bound analysis in the first instance.

In these cases, the trial court refused to exercise its discretion, and made no findings whatsoever to suggest that the case was not extraordinary or that the requested fees were unsubstantiated or unreasonable. As such, there was no valid basis to reject the request. This Court should remand these cases for payment of extraordinary fees as requested, or at least remand with instructions that the trial court must reconsider the fee request under the appropriate standard.

CONCLUSION AND RELIEF SOUGHT

Amicus Curiae respectfully requests that this Court GRANT the Motion to Waive Filing Fees and the Application for Leave to Appeal, REVERSE the trial court and Court of Appeals decisions denying Appellant John W. Ujlaky's requests for extraordinary fees, and ORDER the payment of fees as requested or REMAND these cases for further proceedings.

Respectfully submitted,

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