STATE OF MICHIGAN

IN THE SUPREME COURT

IN RE:

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

vs

CHIEF JUDGES OF WAYNE COUNTY CIRCUIT COURT and RECORDER'S COURT,

Respondents,

and

COUNTY OF WAYNE,

Intervening Respondent.

_____/

Original Action
Supreme Court No.
86099

PETITIONERS' REPLY BRIEF

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STATEMENT OF QUESTIONS PRESENTED

I. Whether superintending control is an appropriate action to review an administrative order of a trial court which violates the Michigan court rules and violates a statutory duty?

The Special Master answered "Yes"

The Petitioner Answers "Yes"

The Respondents Answer "No"

II. Whether the findings and recommendations of Judge Gillespie that the flat fees in Wayne County are unreasonable and that the flat fee schedule encourages guilty pleas and discourages the exercise of constitutional rights are findings that are clearly erroneous?

The Petitioner Answers "No"

The Respondents Answer "Yes"

III. Whether the Wayne County fee system denies due process and equal protection of the law both to defendants and to attorneys who participate in the system because the system perpetuates duality in the system of justice?

Judge Gillespie did not reach this question

The Petitioner Answers "Yes"

The Respondents Answer "No"

STATEMENT OF FACTS

The record in this cause is voluminous. Because this is an original proceeding, the original transcripts of the court proceedings have been filed directly with the Supreme Court. Pleadings after the evidentiary hearing are also voluminous. Judge Gillespie made specific findings of fact which consume many pages of his report. A statement of facts is truly not necessary in this case, except for the fact that the Respondents in their briefs have claimed that there is no support in the record for matters in which there has been abundant testimony. Rather than rehashing the testimony and referring again to the record, itself, either by reference to Judge Gillespie's findings or reference to the transcripts filed with this Court, the Petitioners refer to the document that we have filed as the Calendar Brief, under blue cover, behind tab 4, the Plaintiffs Proposed Findings of Fact, Conclusions of Law and Recommendations. Particularly noteworthy is the appendix to that document, behind tab 5, with selected quotes from the record which clearly establish support for all of Judge Gillespie's findings regarding unreasonableness of the fee in Wayne County, its effect on other attorneys, origins of the schedule, and his pertinent factual findings relative to this case.

Because of the Respondents' ignoring the record in this case, the Petitioners have filed an Appendix with this Reply Brief. Most noteworthy in the Appendix is the testimony of Judge Kerwin, a Recorder's Court Judge, regarding the low standard of work performed in Recorder's Court by some assigned counsel, and the testimony of Judge Jobes and Judge Kerwin regarding the unreasonableness of the fees established herein. (28a-34a; 54a-106a)

Most worthy of note is the testimony of Judge Jobes, who after much hard work of a committee of judges and attorneys recommended a fee schedule in 1981 that has yet to be adopted. Instead, as Judge Jobes notes, the political

network went to work and has cut into the recommended reasonable fee schedule of Judge Jobes. One of Judge Gillespie's recommendation is to adopt Judge Jobes' 1981 schedule, with adjustment for inflation. Neither the Respondents nor anyone else in their brief have given a good reason why this should not occur in 1992.

SUMMARY OF ARGUMENT

This reply brief is necessary because the Respondents have ignored controlling legal precedent and omitted facts unfavorable to their position. Perhaps the most important principle of appellate advocacy is that the record must be truthfully, accurately and completely represented on appeal. The Respondents have violated this principle in many instances. Another rule of appellate advocacy is that controlling cases must be cited to the Court, whether adverse or not, and authority should be accurately summarized, so the appellate court's decision might be based on a correct view of legal precedent. The Respondents have violated this principle as well.

In considering whether superintending control is appropriate to enforce MCL 775.16; MSA 28.1253, Respondents neglect to cite to this Court Frederick v Presque Isle Judge,[1] wherein this Court specifically held that superintending control is appropriate to review a judge's action which denies attorney fees pursuant to the statute at issue here, because the judge has a clear legal duty pursuant to that statute to pay reasonable attorney fees to appointed counsel. Superintending control is the only remedy for review of a trial court's administrative order which sets attorneys fees for all cases. This Court has already suggested its own jurisdiction in this matter by issuing two orders, one in 1982 dismissing this case without prejudice

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1 439 Mich 1; 476 NW 2d 142, reh den, 439 Mich 1204; 478 NW 2d 445 (1991). The Respondents in the companion case, The Kent County Criminal Defense Bar, No. 91553, did cite the Frederick case to the Court.

because the fees were raised by the chief judge after this action was filed (1a, 2a) and the second ordering hearings on the refiled complaint (54b). The trial court's use of an administrative order is challenged by Petitioners in this case because it's use violated MCR 8.112, which requires that an administrative order may issue "governing only internal management," and because it's contents violate the provision of MCL 775.16; MSA 28.1253 which mandates a reasonable fee. Where a trial court issues an administrative order in violation of the restrictions of a court rule and statute, there is no direct appeal and superintending control is the only action that can be taken. Where a trial court's administrative order or local court rule sets attorney fees to be paid in appointed cases, the order must comply with the statutory directive to pay "reasonable fees" pursuant to MCL 775.16; MSA 28.1253.

There is abundant authority in Michigan that an action for superintending control in the Supreme Court is the proper vehicle by which to challenge the generalized practices of an inferior court, although much of the authority is ignored by the Respondents. The fact that individual attorneys may wish to seek individual appeals from the denial of fees on a case by case basis, or attorneys may wish to pursue petitions for extraordinary fees in certain cases, does not deprive this Court of jurisdiction in a complaint for superintending control brought by several bar associations over an inferior court as a result of an administrative order or generalized practice which violates constraints imposed by statute or court rule.

The Respondents in their briefs give no deference to the findings of the Special Master, Judge Gillespie, nor do they suggest a standard of review for his findings. Judge Gillispie, a retired Judge who was appointed Special Master in this matter, presided over three weeks of evidentiary hearings, with cross examination of witnesses and the presentation of almost a hundred documents. His findings of fact, recommendations and comments are contained

in a document in excess of 200 pages. Certainly Judge Gillespie's findings should be considered binding on the parties in this matter unless they are clearly erroneous. The Respondents ask this Court to review his findings by whether or not they are supported by the evidence; then the Respondents totally ignore voluminous evidence which supports Judge Gillespie's findings. The Respondents ignore that three sitting judges and one former judge of Recorder's Court and Wayne County Circuit Court testified for Petitioners and against Respondents, and all testified that the fees set by Joint Administrative Order 1988-1 are not reasonable. No judges testified for the Respondents, other than the Respondents themselves.

Judge Gillespie's findings that the fees provided in Wayne County are unreasonable and hence in violation of the statute is supported by the record and is not a finding that is clearly erroneous. The fees paid in Wayne County are among the lowest in the country for certain offenses, lower than most other counties in the State of Michigan, lower than fees paid to private counsel for criminal cases, lower than the hourly rate charged for legal assistants, and lower than the federal standard for appointed counsel fees. The evidence reveals that the purpose for establishing the fee schedule in Joint Administrative Order 1988-1 was <u>not</u> to pay a reasonable fee, but merely to "expedite the disposition of cases, foster administrative efficiency and alleviate the problem of jail overcrowding." Brief of Wayne County Judge, p 6. The enactment of the joint administrative order was done without any regard for the setting of a reasonable fee as the statute mandates. Judge Gillespie's finding that the flat fee schedule provides a disincentive to perform work is supported by the bare fact that the fee schedule pays the same for a case whether it is a guilty plea or a trial, and does not consider the

amount of work performed in each case.[2]

Judge Gillespie's conclusion that the fees paid in Wayne County are likely to lead to ineffective assistance of counsel because those fees provide a disincentive to work and may encourage guilty pleas is not clearly erroneous. The statistics reveal that jury trials have fallen, the rate for filing pretrial motions have fallen, and the testimony of current and former judges support Judge Gillespie's conclusion that the fee schedule is likely to encourage guilty pleas. There was abundant testimony by attorneys and judges who have witnessed ineffective assistance of counsel and the taking of shortcuts by attorneys, which supports the conclusion that a fee schedule which provides an incentive to perform less work will endanger defendants in Recorder's Court and Wayne County Circuit Court.

The evidence produced in the record below, and some of the admissions of the Respondents, clearly established that there is duality in the Michigan justice system. There is one justice system for defendants who can afford counsel, and another one for those who cannot, there is one justice system for lawyers who practice civil law, and another justice system for lawyers who practice criminal law. One of the Respondents, himself, as well as a witness for the Respondents, admitted that they performed more work on retained cases than lawyers do on appointed cases, since the fees now paid on appointed cases do not permit lawyers to perform the amount of work necessary on an appointed case. The Respondent Kaufman also admits to authorizing the payment of more attorney fees for attorneys who perform civil work, and economic testimony

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2 The Respondents argue in their briefs that since the setting of the rates in the schedule were based on average amounts historically paid, that the amount of work actually performed on these type of cases was considered when the rates were set. This argument is fallacious because it suggests only that the <u>average</u> rates of pay for certain types of cases were considered, not the actual work performed in each case.

presented by the Petitioners, which has been totally ignored by the Respondents, has established that criminal defense lawyers in State have one of the lowest rates of pay of all lawyers who practice law within the State. And the rates of pay for appointed counsel in Wayne County is less than half the average fees paid to criminal lawyers in Michigan, and less than half the appointed counsel rates in Federal court. These unequal systems of justice violate the equal protection rights of both attorneys and defendants. The record was replete with testimony that attorneys who represent defendants often have to subsidize cases from their own pocket, not only because attorney fees in complex cases seldom pay enough to compensate the attorney for his or her overhead, but also because costs are often not reimbursed, and the attorney has to subsidize the case by the payment of costs out of his or her own pocket. This payment of costs constitutes a "taking" of property of the attorney, which under the current system is necessary in order to provide effective assistance of counsel and as such, the system violates the United States and Michigan Constitutions.

It is time for this Court to face squarely, again, the issues faced in In Re: Meizlish.[3] Since Meizlish, the appellate courts of many states have refused to enforce a system wherein a small number of attorneys who perform criminal defense work are imposed upon to subsidize the system by working at low rates or paying costs out of their own pockets. The trend of the law has changed since Meizlish, and this Court should follow the trend and not allow a small number of attorneys to work at subsistence wages in order to subsidize a government system. Meizlish should be overruled.

Although Wayne County claims they cannot afford an increase of 3.05

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3 387 Mich 228; 196 NW 2d 129 (1972) In that case, the Michigan Supreme Court declined to hold that an attorney's rendering of free services to indigent defendants violated due process rights.

million that it claims an increased fee schedule would provide, a review of their budget discloses that the increase would amount to less than 1% of the 1989 general fund. Governmental entities seem never to be able to afford to pay for constitutionally mandated services, particularly where provided to the criminally accused. It is up to the courts to enforce the constitutions which require such services and to enforce statutes which safeguard those rights.

I. SUPERINTENDING CONTROL IS AN APPROPRIATE ACTION TO REVIEW AN ADMINISTRATIVE ORDER OF A TRIAL COURT WHICH VIOLATES THE MICHIGAN COURT RULES AND VIOLATES A STATUTORY DUTY.

The Respondents argue in their briefs that superintending control is not appropriate because the Respondents have not violated any clear legal duty and because the Petitioners have another remedy other than superintending control. While superintending control is not an appropriate remedy if there is no violation of a clear legal duty, nor is it appropriate if there are appeals, in the instant case it is clear that, as Special Master Gillespie found, the Joint Administrative Order establishing a fee schedule for payment of attorneys who represent indigent defendants violates the Chief Judges' statutory duties because the fees set are unreasonable and in violation of a Michigan statute, MCL 775.16; MSA 28.1253, which provides that a reasonable fee be paid to attorneys who are appointed to represent indigent defendants in the courts of this State.

In Frederick v Presque Isle Judge, supra, this Court held that superintending control was appropriate to enforce MCL 775.16; MSA 28.1253 against a Judge who refused to pay any funds for the representation of indigent defendants on appeal, after the attorney had been appointed by the Court. This Court had no difficulty finding that there is a clear legal duty under MCL 775.16; MSA 28.1253 to order payment for assigned counsel. This case is a corollary of Frederick, in the sense that there is a clear legal

duty, pursuant to the explicit language of the statute, to order reasonable compensation. If a chief judge advocates this duty by providing for an unreasonable fee, superintending control lies as if the judge had not provided for any fee. Certainly the Presque Isle Judge in Frederick would have been violating his clear legal duty had he ordered that each appellate attorney receive one dollar for his or her representation of a defendant on appeal. His statutory duty would have been abandoned as surely as if he paid nothing. The argument of the Respondents goes to the merits of the complaint for superintending control, rather than its availability. If the attorney fees provided in Wayne County are unreasonable, than the writ shall lie, but if this Court should hold the findings of Judge Gillespie clearly erroneous, and find the fees reasonable, then the relief requested in the writ should not be granted, but the action for superintending control is still appropriate.

The Respondents, when they argue that there is an adequate remedy at law because each individual attorney can seek extraordinary fees in each case where the fees are considered unreasonable, and then presumably appeal each of those decisions, do not understand the nature of this case. First of all, Petitioners are not individual attorneys but Bar Associations whose members practice in the court.[4] Second of all, the Petitioners are not attacking the findings in any individual case by any judge, rather, the Petitioners are attacking the provisions of an administrative order of a court. There is no

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4 One of the Respondents (Recorder's Court Judge) initially argued that the Petitioners did not have standing to challenge the administrative order. That argument was implicitly denied by this Court when it issued its first order setting a hearing, and by Judge Gillespie. That Respondent seems to have abandoned that argument. Intervening Respondent Wayne County concedes in its Brief that Petitioners do have standing. Wayne County's Calendar Brief, p 3 and p 50, fn 18.

appeal from an administrative order. The attack is based on two grounds: (1) the use of the administrative order instead of a local court rule to set fees violates the administrative order court rule adopted by the Michigan Supreme Court (MCR 8.112) and (2) the administrative order, on its face, provides for fees which are clearly in violation of MCL 775.16; MSA 28.1253. The fact that the Court may remedy the defects of its Joint Administrative Order by, in some cases, providing for more attorney fees is not a defense to an attack on a Joint Administrative Order.

The evidence in the trial court below showed that few attorneys filed petitions for extraordinary fees because they are seldom granted in whole and because there is a perception among attorneys that seeking extraordinary fees frequently may result in an attorney being removed from the assignment list because he or she is costing the county too much money.

Also, filing extraordinary fee petitions in cases where the fees are not reasonable, which would be the vast majority of all cases in the Wayne County Circuit Court, would clog the Court's docket, as well as the appellate docket, and therefore is not an adequate remedy at law for attacking an administrative fee schedule which sets those low fees that violate the statutory requirement of reasonableness.

The appellate courts of this State have consistently addressed whether superintending control is appropriate to review administrative actions of the court and have held that superintending control is the appropriate action, and that general administrative policies of the court should be addressed by superintending control in the Supreme Court, not in the Court of Appeals.[5]

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5 The Respondents do not argue that we are in the wrong Court, but simply that superintending control is not appropriate under any circumstance. This Court, by issuance of its original order in 1982 and subsequent order directing a hearing and appointing a Special Master in 1989, seems to suggest that this complaint has been filed in the correct court.

See, Morcum v Recorder's Court Judges, 15 Mich App 358; 166 NW 2d 540 (1968); People v Blachura, 390 Mich 326; 212 NW 2d 182 (1973), (concurring and dissenting opinion by Levin, J); Library Board v 70th District Judges, 118 Mich App 379; ____ NW 2d ____ (1982) (superintending control is the proper vehicle by which to challenge the generalized practices of an inferior court.); Detroit v Recorder's Court Judge, 85 Mich App 284; 271 NW 2d 202, lv den, 404 Mich 808 (1978). See also Frederick v Presque Isle Judge, supra.

The Respondents suggest that this Court should review the Joint Administrative Order in this action for superintending control by the standard as to whether or not the chief judge abused his discretion in setting the attorney fees pursuant to that, because that has been the standard for case by case review of attorney's appeals when their attorney fees have been denied or reduced to lower than is acceptable in certain cases. However, abuse of discretion is not the standard that should be applicable to the review of a trial court's administrative actions by superintending control. In a hearing a complaint for superintending control, this Court is acting in its supervisory capacity, has broad discretion, and is not limited to reviewing the record for an "abuse of discretion."

II. THE FINDINGS AND RECOMMENDATIONS OF JUDGE GILLESPIE THAT THE FLAT FEES PAID TO ASSIGNED COUNSEL IN WAYNE COUNTY ARE UNREASONABLE AND THAT THE FLAT FEE SCHEDULE ENCOURAGES GUILTY PLEAS AND DISCOURAGES THE EXERCISE OF CONSTITUTIONAL RIGHTS ARE FINDINGS THAT ARE NOT CLEARLY ERRONEOUS AND ARE SUPPORTED BY ABUNDANT EVIDENCE IN THE RECORD.

Judge Gillespie, as a Special Master who presided over three weeks of evidentiary hearings wherein witnesses were cross examined and documents were presented by the Petitioners and Respondents was in a unique position to make findings of fact and recommendations. It is submitted that his findings and recommendations should be adopted unless this Court finds them clearly

erroneous. This is the standard of review in place for most factual findings of finders of fact in the trial court. See e.g., Beason v Beason, 435 Mich 791; 460 NW 2d 207 (1990).

Two of Judge Gillespie's findings--that the flat fees provided in Wayne County are unreasonable and that the flat fee schedule encourages guilty pleas and discourages the exercise of constitutional rights--are findings that are not clearly erroneous and are supported by abundant evidence in the record. Judge Gillespie specifically found that the present system of paying for assigned counsel on a flat fee basis "encourages attorneys who are not conscientious to persuade clients to plead guilty as attorney's compensation is not improved materially by trial." Report of Special Master, p 208. Judge Gillespie also specifically found that the system "discourages use of full panoply of constitutional rights." Id, p 208-209. The Judge went on to state that he specifically recommended "[t]hat the fixed fee schedule based on maximum possible sentence be found unreasonable ****" Id, p 221. These findings and recommendation are not clearly erroneous and are based on ample evidence adduced at the hearing, some of which was presented by the Respondents.

The evidence produced at the hearing in this case established that the fees in Wayne County are among the lowest in the country for certain offenses, and lower than most other counties in the State of Michigan (Pl Ex 23, 33 and 34). Judge Gillespie found Wayne County's fee system "unique in Michigan." Report, p 214. The fees paid in Wayne County and Recorder's Court are lower than fees paid to private counsel for criminal cases (Pl Ex 12), lower than fees billed for legal assistants (Pl Ex 16), and lower than the fees paid to appointed counsel in federal court (Pl Ex 55). The Respondents have never contested the fact that the fees paid are lower than that paid to private counsel in both civil and criminal matters, but insist, rather, that another

standard of reasonableness should be imposed--that a fee is reasonable if it is at a de minimus level, that is, fees are "reasonable" if the fees are not so low that services are unable to be obtained. It is clear Judge Gillespie did not accept this definition of reasonableness, and this Court should not accept it either.[6]

The argument that a de minimus fee is "reasonable" is a difficult argument to square with the judge's duties to insure the provision of the constitutional rights of the criminally accused. What the judges are saying in this case is that they can continue to lower the fees until such point as they have difficulty obtaining counsel. This puts upon lawyers the choice of continuing to work at subsistence pay or withdrawing from the system. The number of lawyers in existence for the provision of services is already low, in the sense that the 589 lawyers now on the roster for Recorder's Court are but a small percentage of the lawyers available in the Detroit metropolitan area for assignments.[7] According to Exhibit 60 introduced in this matter (15a), there were 14,347 laywers in the metropolitan area who can provide services to indigents. 589 is 4% of those lawyers, and it is 2% of lawyers licensed to practice in this state. (15a) In other words, 96% of the lawyers in the Detroit metropolitan area are not on the assignment list.

The appellate courts in other states have taken upon themselves to step in and not allow fees as low as the fees in this case to persist. As Judge Gillespie noted in his recommendations, the Supreme Court of West Virginia in

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6 Judge Gillespie specifically found that a "reasonable fee" on an hourly basis would be $60.00 to $70.00 an hour. Report, p 221. His definition of the standard for a reasonable fee was the standard enunciated by Wood v DAIIE, 413 Mich 573, 588; 321 NW 2d 653 (1982).

7 As Judge Gillespie correctly finds in his report, the number of lawyers who actually accept assignments in Recorder's Court/Wayne County is less than 500 lawyers. See Report, p 209-210; Petitioners' Exhibit 52(10a)

Jewell v Maynard, 181 WV 571; 383 SE 2d 536 (1989), held that the state must pay $45.00 an hour for out-of-court work and $60.00 an hour for in-court work in spite of a statute which had provided for a lower rate. Report, p 222. As Judge Gillespie found, based on the testimony of Chief Judge Kaufman, Wayne County Circuit computes extraordinary fees based on the rate of $35.00 an hour. Report, p 213.

The purpose of the fee schedule in this case was not to pay reasonable fees, but, to quote from one of the Respondent's briefs, to "expedite disposition of cases, foster administrative efficiency and alleviate the problem of jail overcrowding." (Wayne County Judge's Brief, p 6)

The Respondents conveniently overlook in their briefs the fact that four current or former judges testified for the Petitioners that the fees paid pursuant to the fee schedule are unreasonable. Current Judges Jobes and Kerwin of Recorder's Court and Judge Thomas of the Wayne County Circuit Judge, along with former Judge Ravitz of Recorder's Court all testified that, in their opinion, the fees paid pursuant to the schedule at issue were low and unreasonable. No judges appear for the Respondents to support their schedule, other than the Respondents themselves. Some of the Respondents' own witnesses, attorneys that they were calling to attempt to support the fee schedule, admitted on cross examination that the fees paid were inadequate. See, testimony of Sowell, 2/12/90, p 105-106. Mr. Sowell also referred to the rates of pay in Recorder's Court as "pure unadulterated slavery." (2/12/90, p 111)

Judge Gillespie's suggestion of the adoption of the standard of reasonableness of Wood v DAIIA, supra is an attempt to adopt a principle or method by which fees could be determined reasonable. Such an adoption is vitally necessary for the resolution of this case, as well as all of the other cases involving the reasonableness of assigned counsel fees. The government

clearly will pay a de minimus fee in this area and attempt to ask lawyers to continue to subsidize the criminal justice system as long as the courts will permit it. This case is an example of why we have the Constitution, and why the courts must enforce Constitution.

The Wood v DAIIE standard is an appropriate standard. Other courts have found that a standard of reasonableness is that the fee awarded must reimburse the attorney for overhead costs and expenses, in addition to providing an hourly rate to the attorney which provides direct compensation to counsel for work performed. Respondent Wayne County's Brief suggests that the formula of an attorney fee which provides something for the attorney's overhead and something in addition for the attorney is not a formula that has been accepted. However, the Illinois appellate court has accepted such a standard in People v Johnson, 93 Ill App 3rd 848; 417 NE 2d 1062 ( ) another standard of reasonableness has been "the customary charge for similar services." Parrish v Denato, 262 NW 2d 281 (Iowa, 1978). Michigan has accepted that a reasonable attorney fee must be "based on a reasonable hourly or daily rate." Temple v Kelel Distributing, 183 Mich App 326; 454 NW 2d 610 (1990).

Recently, the Congressional Committee reviewing compensation under the Criminal Justice Act for attorneys appointed in federal court have accepted the formula for compensation that involves payment for overhead plus payment to the attorney in an additional amount. CJA Review Committee Interim Report, 127a-129a. The Committee, in its Interim Report, has accepted $25.00 an hour as an overhead figure and suggested $50.00 per hour as an additional compensation to the overhead amount, requiring an attorney to receive no less than $75.00 per hour for both in-court and out-of-court work. This is the same standard of pay now in force in Federal Court in Detroit. (14a)

Judge Gillespie's findings that the fee system encourages attorneys to

plead their clients guilty and discourages the exercise of constitutional rights was supported by the record. There was abundant testimony that such shortcuts already occurred, including the testimony from one of the Respondents himself, Judge Roberson, that he recognized that such shortcuts occurred. (126a) Another witness for Respondents also admitted to taking shortcuts in appointed cases. (108a) Another witness for Respondents admitted the fees encourage pleas (2/12/90, p 98).

The Respondents argue that a potential for violation of constitutional rights or ineffective assistance of counsel is insufficient on which to premise the relief that Judge Gillespie recommends. However, courts have shown a willingness to increase fees or find a system unreasonable where there has been a concern that the fees or where the system might cause a violation of constitutional rights or a difficulty in securing competent and effective counsel. The United States Supreme Court in In Re: Berger, 498 US ____; 111 S Ct 628; 112 L Ed 2d 710 (1991) raised the maximum fee for appointed counsel in death penalty cases before the Supreme Court from $2,500 to $5,000 stating:

> It could be reasonably argued, on the basis of our practice to date, that there is no need to award attorney's fees in an amount greater than the $2,500 cap in order to induce capable counsel to represent capital defendants in this Court. But we think this argument is outweighed by the possibility that the cap of $2,500 may, at the margins, deter otherwise willing and qualified attorneys from offering their services to represent indigent capital defendants. Given the rising costs of practicing law today, we believe that appointed counsel in capital cases should be able to receive compensation in an amount not to exceed $5,000, twice the limit permitted under our past practice.

The Supreme Court of Arizona has struck down a system for providing indigent defense counsel because of its potential for violating constitutional rights. See, State v Smith, 140 Ariz 355; 681 P 2d 1374 (1984)

Petitioners in this case have demonstrated more than a potential for the deprivation of constitutional rights. Judges and lawyers alike testified

that lawyers who are appointed are taking shortcuts in Recorder's Court and Wayne County Circuit Court because of the fees.

Since the briefs have been filed in this case, there has been one sensational case brought to the attention of counsel which involves an incident where an appointed attorney, because of lack of preparation, caused an innocent man to be convicted of a crime he did not commit and spend over three years in prison. In the Appendix is a copy of the article as it appeared in the Detroit Free Press/Detroit News Saturday Edition of October 3, 1992, wherein Knox King was convicted of a crime he did not commit because his appointed attorney who appeared at trial was unprepared for trial, and the court would not grant a postponement. (130a) After Mr. King's erroneous conviction, he hired counsel who, on appeal, convinced the prosecutor's office that an innocent man had been convicted of a crime he did not commit, and secured Mr. King's relief. (130a-131a) Mr. King notes that the only way to receive justice is to hire an attorney who works hard for you. The Respondents' fee schedule does not pay for trial preparation.

The attorney in Mr. King's case would have been poised to collect a maximum fee of $750.00 for his case, whether it was tried or not. This fee is hardly adequate to cover one day of trial, let alone trial preparation, all trial proceedings and a trial which lasts more than one day, based on the average rate charged by criminal defense attorneys of $75.00 an hour, according to the State Bar Economics Survey. (5a) While Mr. King's attorney's apparent malpractice and violation of ethical standards cannot be excused by a low fee schedule, who can be surprised that attorneys do not perform the work they are required to do at these rates of pay? Mr. Hall, Mr. King's attorney is on the list of attorneys filed by the Respondent in Wayne County Judge in his brief, and is certified for capital cases.

III. THE WAYNE COUNTY FEE SYSTEM DENIES DUE PROCESS AND EQUAL PROTECTION OF THE LAW BOTH TO DEFENDANTS AND TO ATTORNEYS BECAUSE THE SYSTEM PERPETUATES DUALITY IN THE SYSTEM OF JUSTICE.

If there is any systemic conclusion to be drawn from the evidence adduced in this case, it is that there are two systems of justice for defendants--one for the rich and one for the poor--and two systems of justice for attorneys--one for civil attorneys and one for criminal attorneys. Witnesses, including one of the Respondents, confessed that lawyers do not provide the same level of services to appointed clients than to retained clients. Judge Roberson stated:

> See, when I practiced law, when I charged about $5,000.00 to come over to the circuit court with him, I didn't meet him at the court. I met him in my office, and I gave him coffee in the morning, and I walked him over to the court building with him and whoever was with him. But I recognize that the lawyers who are receiving assignments in recorder's court cannot do that because of the sheer economics and the resources that are put up on the County budget to pay them. (126a)

Charles Lusby, also a witness for the defendant, conceded that he was not able to provide the same level of services for clients in appointed cases that he provided to clients in retained cases. Mr. Lusby stated that he only makes frequent jail visits in retained cases. Mr. Lusby said:

> Well, often -- most of the cases that I -- most of the assigned cases that I have are capital cases, which means often the person has not made bond, or assuming that there is a bond. I will satisfy myself after talking with the person two or three times before -- certainly before trials, but once before the exam, at least once before the exam and probably once or twice before the final conference and I accept collect calls from all my clients if they're locked up. But, I don't run back and forth to the jail each time the client wants to -- wants me to. However, if the person has paid me $15,000.00, if his mother or father or father or whoever, I am not only more prone to run back and forth, I do run back and forth. (108a)

Judge Kerwin, a Recorder's Court Judge who testified for the Petitioners, noted that there are "waivers and pleaders" in Recorder's Court who provide service to their clients by waiving all their rights and pleading

them guilty. Judge Kerwin's direct examination and partial cross-examination testimony has been placed in Petitioner's Appendix. 54a-106a

Attorneys who attempt to provide the same quality of representation in appointed cases that are provided in retained cases are attorneys who are victimized by the system because the rates then paid to them for the hours of work they need to perform are so low so as not to allow the attorneys to capture their overhead. The testimony was abundant in the record below that many attorneys received pay less than $30.00 an hour on an average basis, and some less than $20.00 per hour, for serious work in complex cases, even in some cases where extraordinary fees had been granted. See Report, p 214. The testimony is abundant in the record below that many attorneys have unreimbursed costs for providing first class services to their clients, including unreimbursed costs for copying, postage, and routine office expenses expended in connection with indigent cases. See Report, 213-214

The record is also clear that if these attorneys who provide assistance in indigent criminal cases should decide to go into civil work, their pay would be demonstrably higher. Judge Kaufman, himself, admits in his testimony in the hearing that civil attorneys are paid more partly because those attorneys are better:[8]

> Q: So doesn't it make sense that the five hundred or so lawyers who take assignments are doing it not out of economic choice, they're doing it because they may like doing what they do?
>
> A: I don't believe that is the case, not to say it's not true for anyone.
>
> Q: Then tell me why anyone would work from thirty to fifty dollars an hour doing criminal assignments when they can make two hundred dollars an hour at Hinderman, Miller, Schwartz and Cohen?

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8 After this admission, and after Judge Kaufman had concluded his testimony, he requested an opportunity to retake the witness stand to attempt to correct this statement, but the statement still stands as made by Judge Kaufman.

> A: Because they can't, they can't get the job there, they don't have the ability or the expertise to move into that area of the law. There may be a few that do, because they choose to practice criminal law because they like it, but the answer is, most of them, if they could, I think they would. (123a)

Lawyers who subsidize the system by working at rates that do not permit recovery of their overhead are thereby donating their overhead to the defense of cases. Lawyers who have their costs unreimbursed in criminal cases are also donating money from their own pocket and subsidizing the cost of the cases. This amounts to a governmental "taking" of money from lawyer's pockets and expenses so as to violate the Federal and Michigan Constitution.

IV. THIS COURT SHOULD EXPRESSLY OVERRULE IN RE: MEIZLISH.

When this Court decided In Re: Meizlish, supra, in 1972, the fee schedule then effect was a Wayne County Circuit Court local rule, 14.13. That rule, in 1972, provided for a trial fee for a capital case for $150.00. 387 Mich at 234. The current fee system is based on the same trial rate, $150.00 per day. The flat fee schedule was, as the Respondents admit in both of their briefs, an attempt to institutionalize the previous fee system which was an event system. The previous fee system, Plaintiff's Exhibit 2, pays for attendance in court for trial per day or fraction thereof $150.00. (Pl Ex 2) Thus, 20 years after Meizlish was decided, the trial courts are basing their fees on the same fee for trial. To suggest that the cost of living has not changed in 20 years is too ludicrous to address.

The decision in In Re: Meizlish has partly made all of this possible. The court turned to a New Jersey case, State v Rush, 46 NJ 399; 217 A 2d 441; 21 ALR 3rd 804 (1966) wherein the New Jersey Supreme Court held that lawyers could be required to render services to indigents without pay. The Rush decision, however, almost stands alone among the decisions of the Supreme Courts or Appellate Courts of the United States in its holding. The Meizlish

court also relied on Jackson v State, 413 P 2d 488 (A L A S, 1966), wherein a similar holding was returned. Jackson v State has now been overruled by the Alaska Supreme Court in Delisio v Alaska Superior Court, 740 P 2d 437 (A L A S, 1987).

Also, the supreme courts or appellate courts of many states have held that the constitutional requirement of providing assigned counsel as guaranteed by Gideon v Wainwright, 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 (1963), requires the payment of a reasonable rate to counsel representing indigent defendants. In Jewell v Maynard, supra, the Supreme Court of West Virginia held that a minimum of $45.00 an hour for out-of-court work and $60.00 an hour for in-court work was required to fullfill the constitutional guarantee of assigned counsel. In People v Johnson, supra, the Illinois Court of Appeals held that an attorney who represented an indigent defendant in Illinois was entitled to receive as compensation reimbursement on an hourly basis which covered that attorney's hourly overhead as well as some additional funds for the attorney himself or herself.

Pehaps most importantly, the New Jersey Supreme Court, according to an article in the New York Times on September 5, 1992, is now prepared to order the state or the counties to come up with additional money for payment of assigned counsel fees, since the state has cut the budget applicable to assigned counsel. Thus, State v Rush may no longer be the rule of law even in New Jersey.

Judge Gillespie notes many cases in his legal bibliography where Supreme Courts or Appellate Courts of many states have acted to ensure that appointed counsel are paid reasonable compensation. In addition to the cases already cited in this Brief, see Makemson v Martin County, ____ Fla ____; 491 So 2d 1109, 1115 (Fla, 1986); State Ex Rel Stephan v Smith, 242 Kans 336; 742 P2d 816 (1987); State v Lynch, 796 P2d 1150 (Okla, 1990)

The Supreme Court faced, in 1972, a petition by the State Bar as well as other local bar associations requesting a rule that court appointed counsel be compensated for their services in accordance with the State Bar Minimum Fee Schedule then in existence. The court declined to adopt that position, but warned that the failure to address the question might result in the matter coming back before the court in the future. The court stated:

> Appellant has demonstrated the difficult problems that courts face in insuring an efficient administration of criminal justice, combined with the concern for defendants' constitutional rights. Our Court will continue to work for improvement of our present system, agreeing with appellant that it must be improved.
>
> To this end the State Bar as well as a number of local bar associations have recently petitioned the Court to adopt a rule requiring that court appointed counsel be compensated for their services in accordance with the State Bar Minimum Fee Schedule. Because of these increasingly insistent demands for such a uniform schedule of fees, and in view of the present dialog regarding improved methods of financing the entire judicial system, we shall doubtless review the question again in the future, but for the present we are relunctant to take such action as would plunge the counties into a position of responsibility for the payment of attorneys' fees more than double those presently paid. Such a burden we are not yet prepared to thrust upon them. 357 Mich at 241

Because the court was relunctant to impose upon the counties at that time the burden of paying assigned counsel fees, the counties, with full cooperation of the trial courts, have persisted in continually lowering their fees, despite the increased cost of living, to the point where they have reduced the trial fee back to the rates that were in existence 20 years ago. This Court must join the appellate courts and supreme courts of other states that have stepped in to ensure that assigned counsel are adequately paid. This state, unlike some of the other states where the courts have acted, has a statute which imposes upon the trial courts a duty to pay a reasonable fee. It is time the statute was enforced.

The dissent by Justice Black in Meizlish joined by Justice Adams, scathingly criticize the majority for failure to insure adequate pay for assigned counsel. Its reasoning is applicable today.

V. THE FINANCIAL IMPACT ON THE COUNTY OF WAYNE OF INSTITUTING THE JOBES' SCHEDULE AS ADJUSTED FOR INFLATION WOULD BE MINIMAL.

Judge Gillespie in his findings notes that the financial situation of Wayne County has, historically, been fragile. Report, p 210-211. The Special Master also notes that the indigent attorney fees paid by Wayne County represent only 3 1/2% of the general fund of the county. Id The testimony and exhibits also revealed that indigent attorney fees are less than 1% of the entire budget of Wayne County. (Pl Ex G) Thus, to increase the assigned counsel budget by 3.05 million is to increase an expenditure in the general fund less than 1%, and to infinitesimally increase the entire budget of Wayne County. As Judge Gillespie notes in his findings, the county has been, in the past, able to absorb an overrun in excess of $3,000,000.00 without showing a deficit. Because of its ability in the past to adjust its budget to pay assigned counsel fees by $3,000,000.00 or more, the county would be able to pay the increased fees in the Jobes' schedule.

Wayne County has often been reluctant to pay any costs or expenses for services or court costs, even where constitutionally mandated, without court action.

The first time the County of Wayne was sued was by an attorney who did not get paid for appointed counsel work. In Bacon v Wayne County, 1 Mich 461 (1850), an attorney sued Wayne County and asked to be paid for his services to an indigent defendant. A trial judge had ordered that he be paid. However, the Supreme Court upheld the County's refusal to pay, citing no authority for a Judge to order payment of attorney fees by the County. Subsequent to Bacon v Wayne County, supra the legislature passed the

first version of MCL 775.16; MSA 28.1253, which provided that a judge could order payment of fees for attorneys who performed in the court on behalf of indigent defendants. The Michigan Supreme Court upheld attorneys who had to file suit against counties to collect attorney fees pursuant to the new statute. See, e.g., People v ex rel Schmittdiel v Wayne County, 13 Mich 233 (1865)

Wayne County has also been sued by the Wayne County Judges, when the County refused to appropriate money for salary for Court staff. Wayne County Judges v Wayne County, 386 Mich 1; 190 NW 2d 228 (1971). The Supreme Court ordered the County to pay staff. Wayne County has also been used by jail inmates because of the failure to adequately fund the jail to provide for humane conditions for incarcerated prisoners. Wayne County Jail Inmates v Wayne County, 391 Mich 359; 216 NW 2d 910 (1974)

One of the most important cases occurred when several Wayne County divisions, including the Wayne County Prosecutor's Office, sued the County in Wayne County Prosecutor v Wayne County Board of Commissioners, 93 Mich App 114; 286 NW 2d 62 (1979). In that case, the Court of Appeals held that the County must fund statutorily mandated services at a "serviceable" level and that across-the-board decreases of 15% in five county departments could not be justified, since two departments were reduced to provide services at below a serviceable level.

Most recently, Wayne County employees have had to sue Wayne County to maintain cost of living increases or other contractual benefits, and twice the County of Wayne has been held to have cut pay or changed working conditions in such a manner as to be guilty of an unfair labor practice. AFSCME Council 25 v Wayne County, 152 Mich App 87; 393 NW 2d 889 (1986); Wayne County Government Bar Association v Wayne County, 169 Mich App 480; 426 NW 2d 750 (1988). In the last cited case, the lawyers of the Corporation Counsel of

Wayne County who were defending this lawsuit in the trial court on behalf of Wayne County, had to bring action against the County on behalf of their association to maintain their cost of living increases.

RELIEF REQUESTED

For all the reasons expressed in this Brief, the transcripts filed with this Court, and all pleadings filed by Petitioners, the Petitioners request that this Court accept the findings of the Special Master, find the present flat fee schedule unreasonable and in violation of the statute, and order that the county pay attorney fees in accordance with the schedule recommended by Judge Jobes and her committee, as adjusted for inflation.

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