STATE OF MICHIGAN
IN THE SUPREME COURT

WAYNE COUNTY CRIMINAL
DEFENSE BAR ASSOCIATION, and
THE CRIMINAL DEFENSE ATTORNEYS OF MICHIGAN
Plaintiffs

SC No. 122709

v

CHIEF JUDGES OF WAYNE CIRCUIT COURT
Defendants.

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with more than 10,000 members nationwide and 28,000 affiliate members in 50 states, including private criminal defense attorneys, public defenders, and law professors.[1] Among NACDL's objectives are to promote the proper administration of justice and to ensure justice and due process for persons accused of crime or wrongdoing. NACDL monitors the quality of indigent defense services across the country and actively supports the improvement of systems that fail to provide meaningful representation to the poor. This matter presents the question of whether officials in Wayne County, Michigan,

will fulfill their duty to provide competent and effective counsel to indigent criminal defendants. It implicates both the fundamental due process rights of accused persons and the proper administration of our system of justice, which are issues of the greatest importance to NACDL.

[1] The Criminal Defense Attorneys of Michigan is an organizational affiliate of NACDL.

ARGUMENT

Although the United States Supreme Court mandated forty years ago, in *Gideon v. Wainwright*, 372 U.S. 335; 83 S.Ct. 792; 9 L.Ed.2d 799 (1963), that the government must provide counsel to persons facing imprisonment who cannot afford a lawyer, many jurisdictions across this country have failed to implement and fund indigent defense systems that fulfill this requirement. The facts stated by the Plaintiffs reveal that Wayne County is one of those jurisdictions. Reasonable compensation for attorneys assigned to defend indigent persons accused of crime is essential for ensuring a fair and constitutionally adequate justice system.

Michigan recognizes the need for appointed counsel to receive "reasonable compensation for the services performed" in representing indigent criminal defendants. MCL 775.16. National standards have likewise emphasized the importance of adequate resources. The American Bar Association's *Ten Principles of a Public Defense Delivery System* (Feb. 5, 2002), described as the "fundamental criteria to be met for a public defense delivery system to deliver effective and efficient, high quality, ethical, conflict-free representation to accused persons who cannot afford to hire an attorney," state in Principle Number Eight that a system should have "parity between defense counsel and the prosecution with respect to resources." The commentary elaborates:

> There should be parity of workload, salaries and other resources (such as benefits, technology, facilities, legal research, support staff, paralegals, investigators, and access to forensic services and experts) between prosecution and public defense. Assigned counsel should be paid a reasonable fee in addition to actual overhead and expenses.

Id. *See also* American Bar Association Standards for Criminal Justice, *Providing Defense Services*, Standard 5-2.4 (3rd ed. 1992); National Legal Aid & Defender

Association, *Standards for the Administration of Assigned Counsel Systems*, Standard 4.7.3 (1989).

These national standards recognize that without adequate compensation for appointed counsel, defendants are deprived of an effective advocate and meaningful representation. Lawyers who are not adequately compensated often accept an impossibly large number of cases in order to make a living from low per-case fees. See, Spangenberg Aff. 18, filed as an exhibit by the Plaintiffs. Wayne County's low and inflexible[2] fee schedule, which does not even cover attorneys' overhead expenses (Stiffman Aff. 1, filed with Plaintiffs' Complaint), creates a disincentive for lawyers to put in more than a minimal amount of time on cases and instead encourages them to seek an early guilty plea. Spangenberg Aff. 17. *See also Zarabia v. Bradshaw*, 912 P.2d 5, 7 (Ariz. 1996) ("A compensation scheme that allows lawyers significantly less than their overhead expense is obviously unreasonable . . . ."); *Jewell v. Maynard*, 383 S.E.2d 536 (W.Va. 1989) ("It is counter-intuitive to expect that appointed counsel will be unaffected by the fact that after expending 50 hours on a case they are working for free. Inevitably, economic pressure must adversely affect the manner in which at least some cases are conducted."). Experienced criminal defense attorneys are unwilling to accept court appointments, leaving those cases to inexperienced and less qualified lawyers. Spangenberg Aff. 18. Reportedly, appointed lawyers in Wayne County also do not have sufficient access to essential tools of the defense, such as investigators and experts, and must choose whether to pay out of pocket to secure these critical resources or give their

[2] While the judges may authorize extraordinary fees above the amounts set in the fee schedule, such fees are rarely granted. *See* Spangenberg Affidavit at 18. This Court has previously held that the existence of possible extraordinary fees does not remedy a fee schedule that is unreasonable in violation of MCL 775.16. See, *In re: Recorder's Court Bar,* 443 Mich. 110, 135; 503 N.W.2d 885 (1993).

clients a lesser defense. Spangenberg Aff. 17-18. With the increasing complexity and cost of criminal defense practice, meaningful representation cannot be provided with compensation rates twenty years or more old. *See Makemson v. Martin County*, 491 So.2d 1109 (Fla. 1986) ("[T]he increasing complexity of some of today's cases calls for the investment of more time and effort in order to effectively represent one's client.")

Ultimately, the efficiency, accuracy, and integrity of the entire criminal justice system – along with the public's confidence in the system – are compromised. *See* Editorial, *Defense Lawyers: Low pay buys only injustice for poor defendants*, Detroit Free Press, Nov. 12, 2002 ("Scandalously low pay for court-appointed attorneys in Michigan is making a sham of the constitutional right to legal counsel. The criminal justice system works when truth emerges from the adversarial efforts of a competent prosecutor and a vigorous defense attorney. It doesn't work when an outgunned and underpaid defender is effectively encouraged to cut corners and coax guilty pleas from poor defendants.") Moreover, competent defense counsel is the most important safeguard against wrongful convictions. According to the Innocence Project (http://www.innocenceproject.org/causes/index.php), 23 of the first 70 DNA exonerations in the United States were cases involving incompetent defense counsel.

Other courts have found it necessary to order declaratory and injunctive relief where officials responsible for providing meaningful indigent defense services have failed to implement constitutionally and statutorily sufficient assigned counsel fees. In New York City, for example, Supreme Court Justice Lucindo Suarez recently issued a permanent injunction and declared that New York's assigned counsel rates[3] are unconstitutional. *New York County Lawyers' Association v. State of New York and City*

of New York, No. 102987/00, at 2 (N.Y. Sup. Ct. Feb. 5, 2003). Justice Suarez directed the City of New York to pay assigned counsel the rate of $90/hour for in-court and out-of-court work. The court wrote:

> The true administration of justice is the firmest pillar of good government. The courts of this state cannot be true to George Washington's conviction when the most vulnerable in our society, children and indigent adults, appear in courts without advocates to champion or defend their causes. The pusillanimous posturing and procrastination of the executive and legislative branches have created the assigned counsel crisis impairing the judiciary's ability to function. This pillar is essential to the stability of our political system. . . . Equal access to justice should not be a ceremonial platitude, but a perpetual pledge vigilantly guarded. (*Id.* at 1)

Litigation regarding resources for public defense is also pending in Montana, Mississippi, and Oregon,[4] and previous lawsuits in places like Connecticut, Pennsylvania, Arizona, Illinois, and Georgia,[5] among others, have been successful in increasing resources for public defense services, either through court decision or consent decree.

Forty years after *Gideon* promised equal justice for all persons accused of crime, the state of affairs in Wayne County and many jurisdictions across this country leaves that promise largely unfulfilled. Wayne County's assigned counsel fee schedule is neither statutorily reasonable nor constitutional because it interferes with the ability of appointed attorneys to provide meaningful representation to indigent defendants. The $90/hour rate proposed by Plaintiffs would bring Wayne County in line with the current rates paid in federal court and would ensure that competent and experienced defense

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[3] New York's rates are currently $40/hour in court and $25/hour out of court. N.Y. County Law § 722-b.
[4] *White v. Martz*, No. CDV-2002-133 (Mon. 1st Jud. Dist. Ct. filed Feb. 14, 2002); *Quitman Co. v. State*, No. 99-0126 (Miss. Cir. Ct. 11th Jud. Dist. filed Dec. 15, 1999); *Shepard v. Bearden*, No. 03-6075-HO (D. Or. filed April 7, 2003).
[5] *Rivera v. Rowland*, No. CV-95-0545629S (Conn. Super. Ct. filed Jan. 5, 1995); *Doyle v. Allegheny Co. Salary Bd.*, No. GD96-13606 (Pa. Ct. of Common Pleas filed Sept. 18, 1996); *Zarabia v. Bradshaw*, 912 P.2d 5, 7 (Ariz. 1996); *Arizona v. Rivas*, No. CR1995011372 (Ariz. Super. Ct. Jan. 29, 2001); *Green v. Washington*, 917 F. Supp. 1238 (N.D.Ill. 1996); *Bowling v. Lee*, No. 01-V-802 (Ga. Super. Ct. filed Aug. 10, 2001).

lawyers accept court appointments and have the resources to provide meaningful representation. Plaintiffs' request for a Writ of Superintending Control from this Court to the Chief Judges of the Wayne County Circuit Court ordering them to enact a fee schedule that provides increased legal fees for counsel appointed to represent indigent criminal defendants should be granted.

RELIEF REQUESTED

The National Association of Criminal Defense Lawyers requests that this court allow it to appear in this action as *Amicus Curiae,* accept this brief for filing, and grant the relief requested by the plaintiffs.

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MOTION OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS TO APPEAR AS AMICUS CURIAE

The National Association of Criminal Defense Lawyers, through its counsel, Martin S. Pinales, asks this Court for permission to file a brief as *amicus curiae* in this matter pursuant to MCR 7.306(C). The interests of the organization in the outcome of these proceedings is stated in the brief, which is filed simultaneously with this Court.

Respectfully submitted,

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NOTICE OF HEARING

PLEASE TAKE NOTICE that the motion of the National Association of Criminal Defense Lawyers to appear as *amicus curiae* shall be heard by this court on Tuesday, May 20, 2003.

_____ _____

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PROOF OF SERVICE

I hereby certify that the MOTION OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS TO APPEAR AS AMICUS CURIAE, THE BRIEF OF AMICUS CURIAE, NOTICE OF HEARING, AND MOTION TO APPEAR PRO HAC VICE was served by first-class mail, this 8th day of May, 2003, upon:

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MOTION FOR ADMISSION PRO HAC VICE

Plaintiffs respectfully request that attorney Martin S. Pinales be admitted to practice in this Court *pro hac vice* for purposes of this case.

1. Martin S. Pinales is a partner with the law firm of Sirkin Pinales Mezibov & Schwartz. He was admitted to the Ohio bar on November 2, 1968 and has been since that time a member in good standing. His Ohio bar number is 00024570. Mr. Pinales is also admitted to practice in the United States District Courts in the Southern District of Ohio (Dec. 2, 1969), Eastern District of Kentucky (Apr. 30, 1974), District of Hawaii (Oct. 6, 1982), Western District of Pennsylvania (Dec. 28, 1994), Northern District of Ohio (Jan. 22, 1996), Western District of Kentucky (Feb. 24, 1998), Western District of Michigan (July 9, 1998), and Eastern District of Michigan (July 14, 1999); the U.S. Court of Appeals for the 6th Circuit (Oct. 5, 1979), 9th Circuit (Apr. 21, 1983), 4th Circuit (Aug. 26, 1987), 10th Circuit (Apr. 6, 1994), and 3rd Circuit (Sept. 20, 1995); and the United States Supreme Court (Oct. 29, 1984).

2. Mr. Pinales asks to appear pro hac vice solely for the purpose of filing a motion and brief as amicus curiae. Michigan counsel have already appeared in this case for the plaintiffs and the defendants, and this Court has granted admission pro hac vice to Illinois counsel for the plaintiff.

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