

STATE OF MICHIGAN  
IN THE SUPREME COURT  
(on Appeal from the Michigan Court of Appeals)

IN RE FEES OF MICHAEL J. ATCHINSON  
and DANIEL J. HARTMAN

Supreme Court Docket No 140070

Petitioner-Appellant

(People v Charles Curtis Merriman)

COA Docket No. 292281

Charlevoix County Circuit Case  
No. 07-360-10-FC  
Hon. Michael J. Callahan

**BRIEF OF AMICI CURIAE**

**MICHIGAN CIVIL RIGHTS COMMISSION and**  
**MICHIGAN DEPARTMENT OF CIVIL RIGHTS**

**FILED IN SUPPORT OF NEITHER PARTY**  
**and urging Court to**  
**GRANT APPLICATION FOR LEAVE**  
**or to**  
**REMAND IN LIEU OF GRANTING LEAVE**

Submitted pursuant to MCR 7.306(D)(2)

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## STATEMENT OF INTEREST

Amici are the Michigan Civil Rights Commission (“Commission”) and the Michigan Department of Civil Rights (“Department”). The Commission was created under the Michigan Constitution of 1963 for the purpose of protecting individuals from discriminatory treatment. The Department, established two years later, acts as the investigative arm of the Commission, and is the lead agency that investigates and resolves discrimination complaints. It also works to prevent discrimination through educational programs that promote voluntary compliance with civil rights laws. Together, the Commission and the Department utilize their constitutional and statutorily derived powers to help prevent and prosecute unlawful discrimination.

Amici believe that a criminal defendant’s right to counsel is fundamental and includes the right of indigent defendants to competent appointed counsel. Amici is concerned that if competent counsel believes that they will not be adequately compensated for representing indigents accused of the most serious and complex crimes, many will become unwilling to provide representation the future. Amici thus seek to ensure that the rights of future defendants are protected by requiring that the trial court conduct a hearing to establish an evidentiary record and then EITHER state its basis for finding that the fees rendered were reasonable, OR order that the fees paid be adjusted so that they are reasonable.

The contents of this brief represent the opinions and legal arguments of the Michigan Civil Rights Commission and do not necessarily represent the opinions of any other person or entity within Michigan's government.

While the Attorney General is empowered to provide counsel and represent the Michigan

Civil Rights Commission in matters before this Court,<sup>1</sup> in recognition of the Michigan Civil Rights Commission's constitutional status as an independent entity within Michigan government,<sup>2</sup> the Attorney General has appointed the Michigan Department of Civil Rights Director of Law and Policy to represent the interests of the Commission and Department in this matter as a Special Assistant Attorney General.

Pursuant to MCR 7.306(D)(2), this brief is submitted by an agency of the State of Michigan and no motion for leave to file is required.<sup>3</sup>

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<sup>1</sup> MCL 37.2602 provides that “(t)he attorney general shall appear for and represent the [civil rights] department or the [civil rights] commission in a court having jurisdiction of a matter under this act.”

<sup>2</sup> The Michigan Civil Rights Commission (MCRC) is a constitutionally created body charged with a duty “to investigate alleged discrimination against any person because of religion, race, color or national origin in the enjoyment of the civil rights guaranteed by law and by this constitution, and to secure the equal protection of such civil rights without such discrimination.” (Const 1963, art 5, §29).

<sup>3</sup> “No motion for leave to file an amicus curiae brief is necessary if the brief is presented on behalf of the people of the state of Michigan or the state of Michigan, or any of its agencies or officials, by the Attorney General...”

## **STATEMENT OF FACTS**

Amici Michigan Civil Rights Commission and Michigan Department of Civil Rights accept the statement of facts as contained in Petitioner-Appellant's (appointed criminal defense counsel in trial court) Brief in Support of Application to Appeal as it relates to procedural matters, and take no position on facts alleged relating to the amount or type of work performed by trial counsel.

## ARGUMENT

The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.<sup>4</sup>

- A. In order to ensure that effective counsel will accept future criminal appointments and that the rights of future defendants are thereby protected, the trial court must meet its statutory obligation to provide “reasonable compensation” to appointed counsel, and if the compensation tendered is challenged as unreasonable the trial court must conduct a hearing to establish an evidentiary record and then either state its basis for finding that the fees rendered were reasonable, or order that the fees paid be adjusted so that they are reasonable.**

Amici, the Michigan Civil Rights Commission (“Commission”) and the Michigan Department of Civil Rights (“Department”) take no position on the ultimate issue of whether defense counsel here were adequately compensated. Amici assert that it is not possible to make this determination because the trial court failed both to create an evidentiary record establishing what services were performed and to relate the basis of its determination that attorney fees paid were adequate. Because the willingness of competent counsel to represent indigent persons accused of serious crimes depends in part on assuring them adequate compensation for doing so, Amici believe it is essential that the Court require creation of a trial court record sufficient for appellate review.

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<sup>4</sup> *Gideon v Wainwright*, 372 US 335, 83 S Ct 792, 9 L Ed 2d 799 (1963).

The right of a person accused of a crime to be represented by counsel is explicitly enshrined in both the Sixth Amendment to the U. S. Constitution<sup>5</sup> and Article I, Section 20 of the Michigan Constitution.<sup>6</sup> Initially the right was interpreted only to guarantee counsel to those who could afford to pay for it. The U.S. Supreme Court first extended this right to those who, like the defendant here, were accused of capital crimes,<sup>7</sup> and later to lesser crimes as well.<sup>8</sup> Concluding that “lawyers in criminal courts are necessities, not luxuries,”<sup>9</sup> the Court enunciated what it called the “obvious truth” that:

[I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.<sup>10</sup>

Reasoning that “the core purpose of the counsel guarantee was to assure ‘Assistance’ at trial,” the U.S. Supreme Court has further recognized that “it has long been recognized that the right to counsel is the *right to the effective assistance of counsel*.”<sup>11</sup> Citing *Powell* and *Gideon*, and noting that “guaranteeing counsel without in turn assuring adequate performance would defeat the ultimate purpose of appointing counsel in the first place, that of giving defendant a fair trial,” this Court has agreed that “[t]he right to counsel means *at least* the right to effective assistance of counsel.”<sup>12</sup>

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<sup>5</sup> “In all criminal proceedings, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense.” *US Const Amend VI*.

<sup>6</sup> “In every criminal prosecution, the accused shall have the right to . . . have the assistance of counsel for his or her defense. . . .” Const 1963, art 1, §20.

<sup>7</sup> *Powell v Alabama*, 287 US 45, 53 S Ct 55, 77 L Ed 158 (1932).

<sup>8</sup> *Gideon v Wainwright*, 372 US 335, 83 S Ct 792, 9 L Ed 2d 799 (1963).

<sup>9</sup> *Gideon* 372 US at 344.

<sup>10</sup> *Gideon* 372 US at 344.

<sup>11</sup> *United States v. Cronin*, 466 US 648, 654-655, 104 S Ct 2039, 80 L Ed 2d 657 (1984), quoting *United States v. Ash*, 413 US 300, 309 (1973), and *McMann v. Richardson*, 397 US 759, 771, n. 14 (1970), emphasis added.

<sup>12</sup> *People v. Strodder*, 394 Mich 193, 211-212, 229 N.W.2d 318, emphasis added (1975)



Michigan was one of the first states to recognize that ensuring appointment of effective counsel for indigent defendants required that the attorneys be reasonably compensated. Since 1857 Michigan has statutorily mandated reasonable compensation, the current provision stating:

Upon proper showing, the chief judge shall appoint or direct the magistrate to appoint an attorney to conduct the accused's examination and to conduct the accused's defense. *The 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.*<sup>13</sup>

Charlevoix County uses a “flat-rate contract” appointment system. At the time this case went to trial the Charlevoix County indigent defense contract covering “indigents on all criminal cases, felony and misdemeanor” was held by a four attorney “consortium” that was paid approximately \$15,000 per month.<sup>14</sup> The contract also provided that “[i]n the event that a Consortium member is assigned a case that is extraordinary in its nature, severity, complexity, or duration, said attorney may petition the appropriate Court for additional compensation, which may be granted by the Court in its’ discretion, and if so ordered, shall be paid by the County.”<sup>15</sup>

The premise of the flat-rate contract is that while individual cases differ significantly and unpredictably, the amount of time required to provide representation in all typical cases is relatively predictable. Attorneys can therefore bid for the contract based upon what compensation they believe would be reasonable for all such cases. The exception for additional compensation in “extraordinary” cases recognizes that such cases cannot be predicted and thus cannot reasonably be included in the bidding process.

This flat-rate structure means that participating attorneys can profit only by keeping the amount of time spent on contract cases to a minimum, thus providing them with additional time

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<sup>13</sup> MCL 775.16. Emphasis added.

<sup>14</sup> “Agreement for Legal Representation of Indigents, Charlevoix County, Michigan, January 1, 2007 – December 31, 2009” attached as appendix C to Petitioner-Appellant’s Application for Leave to Appeal.

<sup>15</sup> *Agreement* at Section 9-c.

to work on “paying” cases. Amici question whether a system that essentially rewards attorneys for the work that they do not do creates a conflict between the interests of attorney and client such that it can never be consistent with each defendant’s individual right to effective representation. However, because this case involves only fees sought under the Charlevoix County indigent defense contract’s provision for “extraordinary” cases, this Court presently need not address the issue of the interests of defendants in ordinary cases.

Here, defendant stood accused of a murder for which no body was discovered. Trial took place on fourteen days over a four-week period and included over sixty witnesses.<sup>16</sup> Appointed counsel petitioned the trial court seeking additional compensation for at least 903 hours, indicating that this time was required due to the length of the trial as well as trial preparation that included the filing and arguing of over fifty pretrial motions (over a total period of 18 weeks).<sup>17</sup> Counsel also petitioned for reimbursement of \$3,475.00 in “out of pocket expenses” related to the case.<sup>18</sup>

The trial court evidently agreed that this case was “extraordinary in its nature, severity, complexity or duration” as it did grant the petition “in part.”<sup>19</sup> The trial court ordered payment of additional attorney fees in the amount of \$5,000.00 and reimbursement of \$641.14 in expenses. But the trial court did not hold an evidentiary hearing and did not offer any explanation for its ruling.

Amici do not argue that the additional payments ordered are unreasonable. Amici do however contend that absent any explanation as to how the attorney fees were determined, it

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<sup>16</sup> *Ex Parte Petition for Additional Compensation and Reimbursement of Expenses*, attached as appendix D to Petitioner-Appellant’s Application for Leave to Appeal.

<sup>17</sup> *Ex Parte Petition for Additional Compensation and Reimbursement of Expenses*.

<sup>18</sup> *Ex Parte Petition for Additional Compensation and Reimbursement of Expenses*.

<sup>19</sup> May 29, 2008, *Order Re: Pettition for Additional Compensation and Reimbursement of Expenses*, attached as appendix B to Petitioner-Appellant’s Application for Leave to Appeal.

appears that appointed counsel was paid approximately \$5.50 per hour for work performed<sup>20</sup>, and that well over 50% of that amount would have gone to cover unreimbursed expenses.

Amici are concerned that the Court of Appeals holding will negatively impact the quality of counsel that indigent criminal defendants receive in Charlevoix, and perhaps other Michigan counties. The holding could be viewed as sanctioning attorney fee determination without an evidentiary hearing, or without stated factual or legal basis for the determination. Moreover, failure to overrule the trial court's fee determination may be seen as approving the payment of less than minimum wages on a particular case as "reasonable compensation for the services performed."

Amici contend that if counsel appointed to represent indigent defendants are to be guaranteed no more what for practical purposes amounts to \$2.40 an hour, finding competent counsel will be difficult at best. Would any attorney spend hundreds of hours on pretrial motions and trial preparation? Absent a finding that some of the pre-trial motions in this case were unwarranted, the financial disincentive will unquestionably have a chilling effect on the level of advocacy provided by those attorneys who do take appointments. If the present trial court order is permitted to stand without either an evidentiary basis or legal justification, finding attorneys competent to provide effective representation in complicated, lengthy, or otherwise "extraordinary" cases will not be possible. What responsible attorney would accept such an appointment if they could learn after the case is completed that they will not even be reimbursed their legitimate expenses? Or perhaps the better question is; what appointed attorney is going to

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<sup>20</sup> At the time of trial legal minimum wage was \$5.85 an hour. It is currently \$7.25. US Department of Labor, *History of Federal Minimum Wage Rates Under the Fair Labor Standards Act, 1938 – 2009*, available at <http://www.dol.gov/whd/minwage/chart.htm>.

be willing to incur such expenses in the first place (no matter how much they are in the interests of the client) if they are not guaranteed reimbursement?

This Court last examined the question of reasonable indigent defense compensation on the merits in 1993. *In re Recorder's Court Bar Ass'n v Wayne Circuit Court (RCBA)*<sup>21</sup> addressed the question in the context of a "fixed fee" that was paid to attorneys for a case regardless of the specific services performed. An attorney appearing received the same fee whether the defendant entered a plea at the first appearance or the case proceeded to a multiple day jury trial after several motions were first filed and heard. This fee schedule was found to be "systematically" unreasonable.<sup>22</sup>

The principles in *RCBA* necessitate a remand here for development of a record and determination of the reasonableness of attorney fees and costs awarded.<sup>23</sup> *RCBA* involved a complaint for superintending control with no record or opinion below to be reviewed. This Court determined that it was "[u]nable to resolve this case without the aid of a factual record" and it appointed "a special master and directed him to conduct an evidentiary hearing and to propose findings of fact..."<sup>24</sup> Here, as in *RCBA*, this Court is "unable to resolve this case without the aid of a factual record."

The special master appointed by this court in *RCBA* made several findings that *Amici* fear also apply here, and which help to explain *Amici's* interest in this case. As described by the Court, the special master concluded that:

...perhaps the most determinative factor in the realization of income under the fixed-fee system is the complexity of the assigned case. In this regard, Judge Gillespie observed an "inverse relationship" between effort expended and fees

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<sup>21</sup> *In re Recorder's Court Bar Ass'n v Wayne Circuit Court*, 443 Mich 110, 503 NW2d 885 (1993).

<sup>22</sup> *RCBA*, 443 Mich at 116.

<sup>23</sup> *Amici* do not argue that the fees paid here are, or are not, reasonable, only that they are presently unsupported by the record.

<sup>24</sup> *RCBA*, 443 Mich at 113.

paid under the fixed-fee system. Although noting that the system had the meritorious effect of speeding up the docket, [the master] found that the system tends to encourage assigned counsel to persuade their clients to plead guilty.”<sup>25</sup>

The special master continued, stating:

In short, the system of reimbursement of assigned counsel as it now exists creates a conflict between the attorney's need to be paid fully for his services and obtaining the full panoply of rights for the client. Only the very conscientious will do the latter against his or her own interests.<sup>26</sup>

The Court also noted that “In addition to encouraging counsel to pressure clients to plead guilty and discouraging the filing of even serious motions” the fixed fee system had other faults including that it “discourages plea bargaining in that the prosecutor is aware that the defense attorney has no financial incentive to go to trial and will assent to a guilty plea to a higher charge...”<sup>27</sup>

In *RCBA*, this Court based its opinion upon the statutory requirement for reasonable compensation, finding:

[The] inverse relationship between effort expended and fees paid is completely at odds with the statutory requirement to pay assigned counsel for the services they performed.<sup>28,29</sup>

While *RCBA* did not find that the failure to provide reasonable compensation would make it difficult to secure competent counsel for indigent defendants, *Amici* ask that this obvious truism be recognized if leave is granted in the present case. Indisputably, as a case become more complex and time consuming, the need for more experienced and skilled counsel also increases.

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<sup>25</sup> *RCBA*, 443 Mich at 114.

<sup>26</sup> *RCBA*, 443 Mich at 115.

<sup>27</sup> *RCBA*, 443 Mich. at 116, fn 7. Interior quotation marks in original.

<sup>28</sup> *RCBA*, 443 Mich at 132.

<sup>29</sup> Subsequent to *RCBA*, this Court was asked on at least one additional occasion to invalidate an indigent counsel compensation system. However, in *Wayne County Criminal Defense Bar Association v Chief Judges of Wayne Circuit Court*, 468 Mich. 1244, 663 N.W.2d 471 (2003), this court denied the complaint for superintending control. Justice Corrigan noted in her concurrence to the Court’s order that this was at least in part because the claims were anecdotal and did not show that fees were unreasonable as applied to either an extended period or an individual case.

Likewise, the greater the skill level of counsel, the greater the financial disincentive to accept lengthy and time consuming appointments.

Moreover, the Court found that a provision like the one here allowing attorneys to petition for extraordinary fees could not save the system in *RCBA* because attorneys would be hesitant to apply for such an exception and feared it would be futile to do so. This Court also expressed its opinion that such a provision was not reasonable where it did not also provide a mechanism for ensuring that counsel was not *over* compensated.

*Amici* assert that the governing principle is simple and can not be stated more clearly or succinctly than this Court did in *RCBA*:

We simply hold that, whatever the system or method of compensation utilized, the compensation *actually* paid must be reasonably related to the representational services that the individual attorneys *actually* perform.<sup>30</sup>

*Amici* appear in this matter, not to ensure that any one attorney is reasonably compensated for services he or she rendered in the past, but to assure that competent counsel is made available to protect the rights of future indigent defendants. This can only be assured if trial courts accused of failing to provide reasonable compensation, create a record and opinion that establish an attorney was reasonably compensated for the work they “actually” performed.

This case should be remanded to the trial court with instructions that it specifically determine whether fees paid were reasonable for the work performed, and that it create a record that would allow this Court to review the issue.

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<sup>30</sup> *RCBA*, 443 Mich at 131. Emphasis in original.

## RELIEF SOUGHT

Amici request that this court either:

- **Grant the Application for Leave**, articulate standards for determining what compensation is adequate for counsel assigned to represent indigent defendants, and then remand to the trial court for an evidentiary hearing and determination of whether those standards were met, or
- **In Lieu of granting leave**, remand this case to the trial court and order that it both conduct a hearing to establish an evidentiary record, and either state its basis for concluding that the fees rendered were reasonable or order that the fees paid be adjusted so that they are reasonable.

Respectfully submitted,

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STATE OF MICHIGAN  
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IN RE FEES OF MICHAEL J. ATCHINSON  
and DANIEL J. HARTMAN

Supreme Court Docket No 140070

Petitioner-Appellant

(People v Charles Curtis Merriman)

**PROOF OF SERVICE**

Camille Vandegrift, being first duly sworn, deposes and says that on the \_\_\_\_ day of  
January, 2010, she did serve a copy of:

**BRIEF OF AMICI CURIAE  
MICHIGAN CIVIL RIGHTS COMMISSION and  
MICHIGAN DEPARTMENT OF CIVIL RIGHTS**

to the following parties by first class mail to the indicated address:

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\_\_\_\_\_  
Date

\_\_\_\_\_  
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