

**UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

**DAVID ANTHONY WARE (1),**

**Plaintiff,**

**Vs.**

**Case No. 4:22-CV-76-JFH-CDL**

**STEVE KUNZWEILER (1),** in his  
official capacity as Tulsa County District  
Attorney.

**Defendants.**

**COMPLAINT**

COMES NOW the plaintiff, and for his complaint, states and alleges as follows:

**INTRODUCTION**

1. The ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty cases (Hereinafter “ABA Guidelines”) are one hundred and seventy-eight (178) pages long. They contain, sixty-three thousand and thirteen (63,013) words. Reading at a rate of two hundred and fifty (250) words per minute, it takes just over four hours.
2. To study and truly understand what is required and expected of competent defense counsel in a death penalty case it takes multiple days.
3. It takes many days, if not weeks just for a conscientious lawyer to educate themselves on what is required to provide effective assistance of counsel in a death penalty case, and that lawyer has not even met their client yet, read a single page of discovery or filed a single motion.

4. Conflict Death Penalty counsel in Oklahoma are expected to meet and comply with the ABA Guidelines and effectively advocate for their clients in a system that dictates compensation for Death Penalty counsel “shall not” exceed \$20,000 for lead counsel and “shall not” exceed \$5,000 for co-counsel.
5. It is simply impossible for conflict Death Penalty counsel to comply with the ABA Guidelines in such a system and that is the very definition of “structural error”.
6. In Oklahoma that structural error is “statutory structural error” because the constitutional error is written into the statutes. Oklahoma’s statute for the compensation of conflict death penalty counsel is unconstitutional.
7. Either through intention or neglect Oklahoma has created a system of compensation for conflict death penalty counsel that does not pass constitutional muster and as a result Oklahoma has a death penalty system where it is remarkable that defendants represented by conflict counsel ever escape its deadly grasp.
8. Undersigned counsel are bringing this action on behalf of their client David Ware seeking declaratory relief that Oklahoma statutes Title 19 O.S. § 138.7 and Title 22 § 1355.13 are unconstitutional<sup>1</sup> and seeking an injunction against Defendant Kunzweiler from seeking the death penalty against plaintiff until such constitutional infirmities are remedied.

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<sup>1</sup> Undersigned counsel has drafted and will file a “Notice of Constitutional Question” in accordance with Rule 5.1 of the Federal Rules of Criminal Procedure and serve notice of the Oklahoma Attorney General’s Office.

## **JURISDICTION AND PARTIES**

2. This Court has subject-matter jurisdiction pursuant to 42 U.S.C. §§ 1983 and 1988 and 28 U.S.C. §§ 1331 and 1343. The Court can grant declaratory relief pursuant to 28 U.S.C. §§ 2201(a) and 2202.
3. Venue is proper under 28 U.S.C. § 1391(b) (1) and (2), as Defendant Kunzweiler is the elected District Attorney of Tulsa County which is located within the Northern District of Oklahoma and Mr. Ware's criminal prosecution is occurring within the Northern District of Oklahoma.
4. Plaintiff David Ware is a defendant facing criminal prosecution for First Degree Murder and the state of Oklahoma is seeking the death penalty against Mr. Ware in Tulsa County case CF-2020-2998 Tulsa, Oklahoma.
5. Defendant Steve Kunzweiler is the elected District Attorney of Tulsa County. Pursuant to Oklahoma law, he prosecutes for and on behalf of the state of Oklahoma. He is sued here in his official capacity only.

## **FACTUAL ALLEGATIONS**

6. Plaintiff is currently being prosecuted for first degree murder and is being represented by undersigned counsel.
7. Plaintiff is indigent and is unable to pay for his defense.
8. Plaintiff is facing the death penalty.
9. Plaintiff can not be represented by the Tulsa County Public Defender because that office has a conflict of interest.

10. Pursuant to 22 O.S. §1355(C) and 19 O.S. §138.1a, appointments of counsel for indigent defendants in criminal cases in Tulsa County must be made from the Office of the Tulsa County Public Defender unless there is a conflict of interest between the criminal defendant and the public defender. In such a case, 19 O.S. §138.7 provides that the court may appoint conflict counsel for the defendant by appointing another county indigent defender (the Oklahoma County Public Defender), appointing an indigent conflict contract attorney (there are none presently in Tulsa County), or by appointing a private attorney who has agreed to accept such appointments.
11. Kevin Adams and Robert Gifford are private attorneys who have agreed to accept such an appointment and have been appointed to represent Plaintiff at trial in this matter, presently scheduled to begin on April 4, 2022.
12. Kevin Adams and Robert Gifford will be paid in accordance with Oklahoma law a total of \$20,000 for first chair and \$5,000 for second chair. (See Oklahoma Statutes; Title 19 § 138.1, Title 19 § 138.7 and Title 22 O.S. § 1355.13.)<sup>2</sup>
13. In *Wiggins v. Smith*, 539 U.S. 510 (2003) the United States Supreme Court referenced the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty cases as prevailing professional standards in such cases. Since the *Wiggins* decision, federal courts in numerous decisions (both at the United States Supreme Court and at the Tenth Circuit) have cited the ABA Guidelines as prevailing professional standards in such cases.

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<sup>2</sup> Mr. Adams, lead counsel has agreed to combine and evenly split the fee with Mr. Gifford so both lawyers will be paid, \$12,500. Mr. Adams agreed to this so that he could secure a more qualified lawyer to assist in this case.

14. It is well established in federal law that the ABA Guidelines represent the minimum prevailing professional standards in death penalty cases.
15. ABA Guideline 9.1 Funding and Compensation provisions provides the following:
  - A. The Legal Representation Plan must ensure funding for the full cost of high quality legal representation, as defined by these Guidelines, by the defense team and outside experts selected by counsel.
  - B. Counsel in death penalty cases should be fully compensated at a rate that is commensurate with the provision of high quality legal representation and reflects the extraordinary responsibilities inherent in death penalty representation.
    1. Flat fees, caps on compensation, and lump-sum contracts are improper in death penalty cases.
    2. Attorneys employed by defender organizations should be compensated according to a salary scale that is commensurate with the salary scale of the prosecutor's office in the jurisdiction.
    3. Appointed counsel should be fully compensated for actual time and service performed at an hourly rate commensurate with the prevailing rates for similar services performed by retained counsel in the jurisdiction, with no distinction between rates for services performed in or out of court. Periodic billing and payment should be available.
16. Oklahoma's statutory scheme for limiting compensation of conflict counsel in death penalty cases to a "flat fee" and or "cap on compensation" in death penalty cases is in direct conflict with the ABA Guidelines and does not "ensure funding for the full cost of high quality legal representation", does not ensure counsel are "fully compensated at a rate that is commensurate with the provision of high quality legal representation and

reflects the extraordinary responsibilities inherent in death penalty representation” and does not compensate counsel “at an hourly rate commensurate with the prevailing rates for similar services performed by retained counsel in the jurisdiction” as required by ABA Guideline 9.1.

17. It is not impossible, for any lawyer paid under Oklahoma’s statutory scheme for compensation of conflict counsel in death penalty cases, to provide the level of quality representation that meets the standards outlined in the ABA Guidelines, unless that lawyer is financially independent or has a high tolerance for financial ruin.
18. When lawyers appointed as conflict counsel, under Oklahoma’s statutory scheme of compensation, manage to avoid the death penalty, they do so despite not meeting the standards of representation required by the ABA Guidelines.
19. Oklahoma’s statutory scheme for limiting compensation of conflict counsel in death penalty cases creates a conflict of interest between appointed counsel and their clients facing the death penalty, because private defense counsel are forced to endure severe financial hardship in an attempt to meet as much of their obligations as they can as outlined by the ABA Guidelines.
20. The conflict of interest created by Oklahoma’s statutory scheme for limiting compensation of conflict counsel in death penalty cases, is a “constitutional error” of the greatest magnitude, as the plain language of the statute directly contradicts what has been cited by the United States Supreme Court as the minimum prevailing professional standards in death penalty cases.

21. In accordance with the principles delineated in *Chapman v. California* and its progeny Oklahoma's statutory scheme for compensation of death penalty counsel is "structural error". (See *Chapman v. California*, 386 U.S. 18, 23 (1967), "[T]here are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error.")
22. Oklahoma's statutory scheme for limiting compensation of conflict counsel in death penalty cases is "patently unconstitutional" and is an exception to the *Younger* doctrine.
  - 22.1. Oklahoma's statutory scheme for compensation of conflict death penalty counsel places a \$20,000 cap for lead counsel and \$5,000 cap for second chair.
  - 22.2. The United States Supreme Court has made it clear that the ABA Guidelines reflect the minimum prevailing professional standards in death penalty cases.
  - 22.3. Oklahoma's statutory scheme for compensation of conflict death penalty counsel does not comply with the requirements of ABA Guideline 9.1 for the following reasons:
    - 22.3.1. Oklahoma's statutory scheme places a "flat fee" and or "cap on compensation" in death penalty cases.
    - 22.3.2. Oklahoma's statutory scheme does not "ensure funding for the full cost of high quality legal representation" in death penalty cases.
    - 22.3.3. Oklahoma's statutory scheme does not ensure counsel are "fully compensated at a rate that is commensurate with the provision of high quality legal

representation and reflects the extraordinary responsibilities inherent in death penalty representation” and does not compensate counsel “at an hourly rate commensurate with the prevailing rates for similar services performed by retained counsel in the jurisdiction”

23. Federal intervention is also appropriate in this matter because of a “lack of an adequate state forum”. Plaintiff further alleges:

23.1. On August 26, 2004, D. Gregory Bledsoe, counsel for then death penalty defendant Jeremey Williams filed a Civil Rights lawsuit (42 U.S.C. § 1983) against the Tulsa County District Judges, the Associate Tulsa County Judge, the Special Judges in Tulsa County District Court over funding of death penalty counsel. In paragraph nineteen (19) of that Petition it describes the ABA Guidelines and the Supreme Court’s referencing of them in *Wiggins v. Smith*, 539 U.S. 510, 524-526 (2003). That lawsuit was settled and dismissed on January 5, 2005, but Oklahoma’s unconstitutional process of limiting compensation of conflict counsel in death penalty cases has continued in Tulsa County even until the filing of this lawsuit. (See Exhibit A, Petition in *Williams v. District Judges, et al.*; Tulsa County case no. CJ-2004-5346).

23.2. On April 10, 2014 conflict death penalty counsel Stephen Lee and Mark Cagle filed a **Motion for Attorney’s Fees** in *State v. Darren Price*, CF-2011-3734. In that motion Mr. Lee and Mr. Cagle, who are partners and jointly served as second chair in the successful defense against the death penalty at the trial of Darren Price, detailed to that Court how just using a portion of the hours they had worked over the two years they



represented Mr. Price as appointed counsel, they would be paid an average of \$10.05 per hour and \$10.64 per hour if the Court did not increase their pay. In the attached motion, Mr. Lee and Mr. Cagle requested additional pay, the Court increased their fee awarding Mr. Lee and Mr. Cagle approximately \$20 per hour using the portion of the hours cited in their brief. (See Exhibit B, Motion For Attorney's Fees, *State v. Darren Price*, CF-2011-3734)

23.2.1. On April 17, 2014 the Court entered the following minute denying Mr. Lee and Mr. Cagle's request for an adequate fee, "JUDGE WILLIAM MUSSEMAN: CASE CALLED FOR ATTORNEY'S FEES HEARING. JACK GORDON, MARK CAGLE, STEPHEN LEE PRESENT. COURT REPORTER: CHRISTY SMITH. HEARING HELD; ONE WITNESS SWORN. COURT FINDS \$5,000 REQUEST REASONABLE TO BE PAID TO EACH CO COUNSEL. EXTENDED PAYMENT ABOVE AND BEYOND DENIED. MOTION FOR EXPERT EXTENDED BILLS TO BE PAID DENIED."

23.2.2. Even the increased fee with a hourly rate of \$20 per hour for death penalty counsel is woefully constitutionally inadequate and falls far below the standards demanded by the ABA Guidelines.

**First Claim: Right to Counsel**

23. Oklahoma's statutory scheme for limiting compensation of conflict counsel in death penalty cases violates the rights of plaintiff to be given the assistance of competent counsel

as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and constitutes structural error.

**Second Claim: Due Process of Law**

24. Oklahoma's statutory scheme for limiting compensation of conflict counsel in death penalty cases, results in arbitrary and capricious conduct, and violates the rights of plaintiff to substantive and procedural due process of law under the Fourteenth Amendment to the United States Constitution.

**Third Claim: Equal Protection of the Laws**

25. Oklahoma's statutory scheme for limiting compensation of conflict counsel in death penalty cases violates the rights of the plaintiff to the equal protection of the laws under the Fourteenth Amendment to the United States Constitution.

**Relief Requested**

**WHEREFORE**, Plaintiff respectfully request that this Court:

Issue a judgment, pursuant to 28 U.S.C. §§ 2201(a) and 2202, declaring that:

1. Oklahoma's statutory scheme for limiting compensation of conflict counsel in death penalty cases is unconstitutional.
2. Oklahoma's statutory scheme for limiting compensation of conflict counsel in death penalty cases violates the rights of plaintiff as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

3. Issue a preliminary and permanent injunction prohibiting the Defendant from seeking the death penalty against plaintiff, unless and until the Constitutional violations associated with his legal representation have been remedied.
4. Award plaintiff his costs, including reasonable attorney's fees, pursuant to 42 U.S.C. § 1988 and any other applicable provision of law. Grant plaintiff such other relief as the proof supports and the Court deems to be just and equitable.

Respectfully Submitted,

/s/ Kevin D Adams

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**IN THE DISTRICT COURT FOR THE FOURTEENTH JUDICIAL DISTRICT  
TULSA COUNTY, STATE OF OKLAHOMA**

**JEREMY ALAN WILLIAMS**, individually  
and on behalf of all other persons similarly  
situated,

**Plaintiffs,**

**vs.**

**THE DISTRICT JUDGES, ASSOCIATE  
DISTRICT JUDGE and SPECIAL  
DISTRICT JUDGES of the Fourteenth  
Judicial District, Tulsa County,  
State of Oklahoma**, in their official capacity;

**and**

**THE TULSA COUNTY DISTRICT COURT  
CLERK**, in her official capacity as a member  
Of the Court Fund Board of Tulsa County,

**Defendants.**

**DAVID PETERSON**

**CJ 2004 05346**

**No.**

**DISTRICT COURT  
FILED**

**AUG 26 2004**

**SALLY HOWE SMITH, COURT CLERK  
STATE OF OKLA. TULSA COUNTY**

**PETITION**

**I. Preliminary Statement**

1. Plaintiff is an indigent individual who has been charged, *inter alia*, with first degree murder in the District Court of Tulsa, County, Oklahoma, Case No. CF-2004-2805. The Tulsa County District Court has announced its conclusion that this prosecution will proceed as a capital murder case. This action is a civil rights class action for declaratory and injunctive relief challenging the constitutionality of Local Rule CR 10 of the Fourteenth Judicial District, as applied through the practices and customs of the defendant judges, as violative of the rights of plaintiff and the plaintiff class under the First, Sixth and Fourteenth Amendments to the United States Constitution and under the Constitution and laws of the State of Oklahoma. It is also an alternative writ of mandamus and/or prohibition seeking to require the appointment of competent counsel and to prohibit the practices and customs of defendant judges in applying Local Rule CR 10.

2. Plaintiffs seek prospective declaratory, injunctive and extraordinary relief to require the defendant judges to appoint to the named plaintiff and other similarly situated persons competent conflict counsel and to stop defendant judges from applying the limitations of Local Rule CR 10 to the named plaintiff in his capital criminal case and prospectively in the cases of other persons similarly situated. Plaintiff and the plaintiff class do not seek to interfere in any other way with any aspect of any pending state criminal prosecutions.

## **II. Jurisdiction**

3. Plaintiffs' cause of action for equitable relief is authorized by 42 U.S.C. §1983, which provides redress for deprivations under color of state law of rights, privileges, and immunities guaranteed by the Constitution and laws of the United States and is also authorized by the common law and the Oklahoma Constitution. Plaintiffs' request for declaratory relief is authorized by 12 O.S. §§1551, *et seq.* Plaintiffs' request for mandamus is authorized by 12 O.S. §§1451 *et seq.* Plaintiffs' request for prohibition is authorized by the common law and the Oklahoma Constitution.

## **III. Parties**

4. Plaintiff is a citizen of the United States and a resident of the State of Oklahoma. Plaintiff is currently charged with a criminal offense in the District Court of Tulsa County, Oklahoma.

5. Defendant judges are collectively the District Judges, Associate District Judge and Special District Judges of the Fourteenth Judicial District, Tulsa County, Oklahoma. Among these defendant judges, the Presiding District Judge and the Associate District Judge are two of the members of the Tulsa County Court Fund Board that administers the payment of conflict counsel who are appointed for indigent defendants in Tulsa County criminal cases. All are sued solely in their official capacity. At all times material to this action, the defendant judges were and are persons acting under color of state law by virtue of the authority they exercise as state judicial officers.

6. Defendant Tulsa County District Court Clerk is the court clerk for Tulsa County and is a member of the Tulsa County Court Fund Board that administers the payment of counsel who are appointed for indigent defendants in Tulsa County criminal cases. The court clerk is sued solely in her official capacity as a member of the Court Fund Board and for the purpose of securing complete relief. The court clerk is a person that acts under color of state law.

#### **IV. Class Action**

7. Plaintiff brings this action on his own behalf and on behalf of all other persons similarly situated, pursuant to 12 O.S. §§2023(A) and (B)(2). The class consists of all indigent individuals who are now or who may be in the future charged with capital murder in the District Court of Tulsa County, Oklahoma and who come before defendant judges for appointment of conflict counsel.

8. The class is so numerous that joinder of all class members is impracticable. The transitory nature of criminal proceedings makes it impracticable to join all members of the class.

9. There are questions of fact or law common to the class, including: (1) whether or not Local Rule CR 10 is unconstitutional as applied by defendant judges; (2) whether the practices and customs of defendant judges of not appointing two death-qualified conflict counsel and of limiting their compensation violates the Sixth and/or Fourteenth Amendments to the United States Constitution; and (3) whether said practices and customs of defendant judges violate the Constitution and laws of the State of Oklahoma.

10. The claims of the plaintiff are typical of the claims of the class, and the named plaintiff will fairly and adequately protect the interests of the class. The plaintiff has no claims antagonistic to the claims of the class. Plaintiff's counsel is experienced in class action civil rights litigation.

11. Defendant judges have acted and refused to act on grounds generally applicable to the class, thereby making appropriate final declaratory and injunctive relief and extraordinary relief with respect to the class as a whole.

**V. Statutory and Regulatory Scheme for Appointment of Counsel in Tulsa County**

12. 20 O.S. § 55 provides that the Oklahoma Court of Criminal Appeals shall adopt rules for the appointment of counsel in criminal cases. The Court of Criminal Appeals has adopted such rules and they are set forth in Rule 1.14 of the Rules of the Court of Criminal Appeals. Rule 1.14(A)(1) establishes non-exhaustive criteria for the appointment of counsel. Under Rule 1.14(A)(3), the court is required to hold a hearing to determine eligibility for court-appointed counsel upon the criminal defendant's request.

13. Pursuant to 22 O.S. §1355(C) and 19 O.S. §138.1a, appointments of counsel for indigent defendants in criminal cases in Tulsa County must be made from the Office of the Tulsa County Public Defender unless there is a conflict of interest between the criminal defendant and the public defender. In such a case, 19 O.S. §138.7 provides that the court may appoint conflict counsel for the defendant by appointing another county indigent defender (the Oklahoma County Public Defender), appointing an indigent conflict contract attorney (there are none presently in Tulsa County), or by appointing a private attorney who has agreed to accept such appointments. Prior to May 7, 2003, this statute also provided that where the defendant is subject to the death penalty and a conflict of interests exists between the public defender and the indigent criminal defendant the court was permitted to appoint the Oklahoma Indigent Defense System (OIDS) for not more than one defendant in a case. Prior to May 7, 2003 it was defendant judges' policy and custom to appoint OIDS as the first conflict defender in cases where a conflict of interest existed. This option was removed by an amendment to 19 O.S. §138.7. See Okla. Session Laws 2003, SB 772, c. 200, § 1, emerg. eff. May 7, 2003.

14. Pursuant to Local Rule CR 10, whenever there is a conflict of interest between two or more defendants in a capital murder case, the Court is authorized to appoint separate counsel from a list of private attorneys who have agreed to accept such appointments (the other two options set forth in the rule are not available to the Court either because of operation of law as set forth above and because there are no contract attorneys for capital murder cases in Tulsa County).

15. Under the provisions of Local Rule CR 10(4), “[t]otal compensation shall not exceed three thousand dollars (\$3,000) in capital cases.” Sub-paragraph 5 of the Rule provides that fees and expenses in excess of this maximum may be approved by the Trial Judge upon application, and subject to further approval by the Presiding Judge.

#### **VI. Factual Statement**

16. Plaintiff Williams is indigent and at the time this action was filed was incarcerated in the Tulsa County Jail, having had no bail set on his murder charge. Plaintiff Williams has been subjected to the practices of defendant judges alleged herein.

17. Plaintiff Williams, along with two other individuals, was charged with first-degree murder on June 22, 2004. The Court has announced its conclusion that this prosecution will proceed as a capital murder case against all three defendants. Upon information and belief, the State of Oklahoma will announce its decision to seek the death penalty against Williams and his two co-defendants. He made his initial appearance in Tulsa County District Court on this charge on June 30, 2004, at which time no bail was set. On July 1, 2004 Williams executed a pauper’s affidavit asserting his indigency and requested that counsel be appointed. Plaintiff’s request was granted and the Tulsa County Public Defender was appointed to represent him.

18. On July 2, 2004 the Tulsa County Public Defender filed an application to withdraw from representing Williams, asserting that an irreconcilable conflict of interest had arisen that would prevent continued representation. The Court allowed the public defender to withdraw and appointed Nancy Coppola to represent plaintiff. Coppola entered an appearance in the case and executed an agreement to be bound by the fee provision of Local Rule CR 10, which has no provisions for more than one counsel in capital murder cases and limits payment of fees to not more than \$3,000.00. Coppola was admitted to practice law on September 3, 2003 and at the time of her appointment had never tried a felony jury trial and had never handled a capital murder case. Coppola was not qualified to represent plaintiff or the class in capital murder cases.



19. On July 8, 2004, Coppola requested to withdraw from the case. The Court granted this request and appointed Debbie Maddox as plaintiff William's conflict counsel. Maddox, an attorney since 1989, is a former capital public defender with eleven years of capital litigation experience. She has tried more than 20 capital murder cases to a jury and has represented almost 50 clients charged with capital murder while practicing as a capital public defender for OIDS. Maddox refused to execute the agreement to be bound by the fee limitation provision of Local Rule CR 10 and on July 20, 2004 filed a Conditional Entry of Appearance setting forth her assertion that the practices and customs of defendant judges and Local Rule CR 10 were unconstitutional and a violation of the laws of Oklahoma. She requested that her fee be set at up to \$20,000.00 and that a second counsel be appointed to assist her with that fee set at up to \$5,000.00 and requested that there also be provision for additional necessary expenses, such as the services of an investigator and expert witnesses. She asserted that these fee provisions were the same as other capital conflict defenders employed by OIDS, (See 22 O.S. §1355.13), and appointed in Oklahoma County District Court and in the other 76 counties of Oklahoma. She asserted that United States Supreme Court rulings required that in death penalty cases that courts must apply the guidelines of the American Bar Association. These guidelines require two counsel for each capital defendant, one of which must be death qualified by background, training and experience. OIDS and the Oklahoma County District Court appoint counsel in death penalty conflict cases in compliance with the ABA guidelines. They also compensate these counsel by paying them up to \$25,000 and provide for additional expenses and fees if necessary, pursuant to 22 O.S. §1355.13. Maddox is competent to represent plaintiff and the class under the ABA guidelines if a second counsel is also appointed. A copy of her Conditional Entry of Appearance is attached hereto and is incorporated herein by reference.

20. On July 21, 2004, the Court denied Maddox's request and on July 23, 2004 Maddox was removed by the Court as plaintiff William's conflict counsel. Attorney Steve Hjelm was appointed in her place. Hjelm has been an attorney since 1998, but has never conducted a felony jury trial, nor, on information and belief, has he ever represented a capital

murder defendant prior to this case. Hjelm executed the agreement that he would be bound by the fee limitations of Local Rule CR 10. Hjelm is not qualified to represent plaintiff or the class in capital murder cases.

21. The \$3,000 fee and expense limitation of Local Rule CR 10, together with the conditional and speculative nature of any additional fees or expenses, serves to significantly deter competent and death qualified counsel from agreeing to accept appointments as conflict counsel in Tulsa County.

22. On information and belief, since at least May 7, 2003, and perhaps before, defendant judges in capital cases have not appointed competent and death qualified conflict counsel in compliance with the Constitution and the ABA guidelines. Unless defendant judges are restrained and enjoined they are likely to continue this practice. Unless competent counsel is appointed for plaintiff and the class they will suffer irreparable harm in the loss of their constitutional rights and prejudice in their criminal cases.

## **VII. Statement of Claims**

### **First Claim: Right to Counsel**

23. Local Rule CR 10, as applied through the practices and customs of defendant judges, violates the rights of plaintiff and the class of indigent criminal defendants to the assistance of competent counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article II, § 20 of the Oklahoma Constitution.

### **Second Claim: Due Process of Law**

24. Local Rule CR 10, as applied through the practices and customs of defendant judges, results in arbitrary and capricious conduct, and violates the rights of plaintiff and the plaintiff class to substantive and procedural due process of law under Fourteenth Amendment to the United States Constitution and Article II, § 7 of the Oklahoma Constitution.

### **Third Claim: Equal Protection of the Laws**

25. Local Rule CR 10, as applied through the practices and customs of defendant judges, violates the rights of the plaintiff and the class of indigent criminal defendants to the

equal protection of the laws under the Fourteenth Amendment to the United States Constitution and Article II, § 7 of the Oklahoma Constitution

**Fourth Claim: First Amendment**

26. By claiming indigency and asserting his right to competent court-appointed counsel, plaintiff Williams, through attorney Maddox, was speaking out on a matter of vital public concern.

27. The Court's decision to remove Maddox as plaintiff's attorney after she asserted William's right to competent counsel constitutes retaliation and punishment for speaking out on a matter of public concern, and violates the rights of the plaintiff under the First Amendment to the United States Constitution and Article II, §22 of the Oklahoma Constitution.

**VIII. Relief Requested**

WHEREFORE, plaintiff requests the following relief from the Court:

A. Certify this action as a class action as soon as practicable, pursuant to 12 O.S. §§2023(A) and (B)(2).

B. Issue a judgment, pursuant to 12 O.S. §§1551, *et seq.* declaring that:

(1) Defendant judges' practices and customs as applied violate the rights of plaintiff and the class of indigent criminal defendants as guaranteed by the First, Sixth and Fourteenth Amendments to the United States Constitution, and Article II, Sections 7, 20 and 22 of the Oklahoma Constitution.

(2) Local Rule CR 10, as applied through the practices and customs of the defendant judges, violates the rights of the plaintiff and the plaintiff class under the First, Sixth, and Fourteenth Amendments to the United States Constitution, and Article II, Sections 7, 20 and 22 of the Oklahoma Constitution.


C. Issue a preliminary and permanent injunction and/or a writ of mandamus or an alternative writ of prohibition requiring defendant judges, their agents, employees, and persons acting in concert with them, including defendant Tulsa County Court Clerk and the persons that make up the Tulsa County Court Fund Board, to:

(1) appoint plaintiff Williams and the plaintiff class competent conflict counsel, including a second attorney to assist primary counsel; and.

(2) compensate said counsel, at a minimum, in the same manner that capital conflict counsel are compensated in the other 76 counties of Oklahoma by OIDS and the Oklahoma County District Court.

D. Award plaintiff and the class their costs, including reasonable attorney's fees, pursuant to 42 U.S.C. § 1988 and any other applicable provision of law.

E. Grant plaintiff and the class such other relief as the proof supports and the Court deems to be just and equitable.

  
\_\_\_\_\_  
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*Attorneys for Plaintiff*

IN THE DISTRICT COURT OF TULSA COUNTY

STATE OF OKLAHOMA

DISTRICT COURT  
**FILED**

JUL 20 2004

SALLY HOWE SMITH, COURT CLERK  
STATE OF OKLA: TULSA COUNTY

THE STATE OF OKLAHOMA,

Plaintiff,

v.

JEREMY WILLIAMS,

Defendant.

Case No: CF-04-2805

**DEFENSE COUNSEL'S CONDITIONAL ENTRY OF APPEARANCE**

COMES NOW defense counsel, Debbie Maddox and conditionally accepts the district court's appointment to represent Jeremy Williams in his criminal trial where he is charged with one count of first degree murder. The State of Oklahoma has announced its intent to seek the death penalty. Mr. Williams is also charged with one count of robbery with a firearm and two counts of shooting with intent to kill. Counsel is more than willing to represent Mr. Williams in this case but only if she is guaranteed reasonable payment by Tulsa County. In further support of this motion, appointed counsel states the following facts, arguments and authorities:

1. On July 8, 2004, the undersigned counsel was contacted by the Tulsa County Public Defender's Office regarding an appointment to a capital murder case. The Office explained that if counsel had interest in the case she should contact Judge Chappelle. The undersigned counsel contacted Judge Chappelle that same afternoon and expressed her interest in representing Mr. Williams as long as fair compensation for my work was included. The following morning, counsel received a facsimile from Judge Chappelle which contained an *Order Appointing Conflict Defender*.

This Order required my signature as evidence of my agreement to accept the case and it also contained an explanation of legal fees. The Order contained the following statement: *"The Conflict Defender understands that a sum not exceeding \$500.00 is all-inclusive and he or she waives any claims for extraordinary expenses or any hourly expense claim authorized under the Oklahoma Statutes or any claim pursuant to State v. Lynch, 796 P.2d 1150 (Okla. Cr. 1990)."*

2. While counsel is more than willing to accept this conflict appointment, counsel is simply unable to commit to this case without reasonable compensation. The fact of the matter is that counsel, like any other professional must meet the financial demands of monthly overhead and this occurs when counsel is paid for her work. Payment for work permits counsel to pay attention to the cases and clients she is handling. Any distraction from the work at hand does not serve the client. Capital case representation is difficult enough without the added stress of financial difficulties. And because capital cases take the better part of one year to prepare and try to a jury, interim billing would also be required. Counsel is a former capital public defender with eleven years of capital trial experience and she understands the overwhelming expense associated with capital litigation, and while she does not expect compensation for every hour worked, or to be paid for her travel time, she does expect compensation for the majority of her work. Counsel is also aware that in all of the other 76 counties in Oklahoma, conflict capital contractors receive payment for their work up to a statutory limit of \$20,000.00. The statutory rate is a bargain for all counties, including Tulsa County. Most capital cases require 500 to 750 hours of attorney time which means that with the \$20,000.00 fee cap, the attorney is making anywhere from \$25.00 to \$50.00 per hour. Moreover, capital litigation is so time consuming that appointed conflict lawyers are also required to forego the acceptance of other

work to fulfill their professional obligation in capital representation cases.

3. In every county except Tulsa County, capital conflict counsel is also permitted to hire a second chair counsel with attorney fees capped at \$5000.00. The Oklahoma State Legislature set the first-chair and second-chair counsel rate for legal services in 1991 when it created the Oklahoma Indigent Defense System (hereinafter referred to as OIDS) to administer a statewide program charged with providing indigent criminal defendants with competent legal counsel in capital and non-capital cases. OIDS originally provided legal representation services in conflict capital cases to all seventy-seven counties in Oklahoma. However, during the 2004 legislative session, OIDS sponsored a bill which would alter capital conflict representation in capital cases. This bill was passed and enacted in the spring of 2004. With this change, OIDS is no longer required to appoint and pay for conflict representation in capital trial cases filed in either Oklahoma County or Tulsa County. Since the passage of that legislative amendment, the Oklahoma County Public Defender's Office has instituted the same fee schedule for conflict representation in capital cases previously set by the Oklahoma Legislature. *See: Title 22 O.S. § 1355 et seq. generally, and 1355.7, 1355.13 specifically; and Oklahoma County Court Rules. See Also: Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792 (1963).*

4. While the undersigned counsel is sensitive to the realities and constraints of county budgeting problems, she is simply unable to commit to such a tremendous undertaking for either \$500.00 or \$3000.00 as authorized by Tulsa County District Court Rule *CR 10*. While *Rule CR 10* of the Tulsa County District Court Rules provides that attorney's may receive up to \$3000.00 for capital conflict representation, this amount is substandard and counsel cannot commit to such a compromised fee. And apparently, *Tulsa District Court Rule CR 10* is not administered in a uniform manner because this rate varies from case to case and lawyer to lawyer. Despite the stated fee of



\$3000.00 found in the court rules, Tulsa County is only willing to pay undersigned counsel \$500.00 for my representation. Why the undersigned is worth \$2500.00 less than other lawyers is not clear. Counsel was told that she could submit her complete post-trial billing to the district judge assigned to the case to see if additional fee payments were warranted, but there is no guarantee that additional fees will be approved.

5. Undersigned counsel has tried more than 20 capital murder cases to a jury and represented almost 50 clients charged with capital murder while practicing as a capital public defender for OIDS, and she is fully aware of the time commitment involved in capital murder cases and the complexities of trial which mandate experienced trial lawyers. However, if the undersigned counsel was representing a similarly situated indigent criminal defendant facing capital murder charges in any other county in the State of Oklahoma she would receive fair compensation. Such a discrepancy in compensation for capital representation seems to violate fundamental precepts of procedural and substantive due process guaranteed to lawyers by the *Fifth & Fourteenth Amendments*, and this scheme also violates the promise of equal protection and due process guaranteed to indigent criminal defendants by *Article 2, § 20 of the Oklahoma Constitution*, and the *Fifth & Fourteenth Amendments of the United States Constitution*.

6. Several concerns come into play when appointing counsel to an indigent facing capital murder charges. First, the indigent defendant must receive court appointed counsel, at the state's expense, at all stages of criminal proceedings. *See: Gideon, supra*. Second, the indigent criminal defendant is entitled to competent counsel who is attentive to all aspects of the investigation and trial of the case. And three, the administration of the court-appointment system must be fair and uniform in order to maintain the integrity of representation and satisfy the prevailing professional standards



for capital representation guaranteed by the *Sixth & Fourteenth Amendments* of the United States' Constitution. Effective representation at the cost of the state, and the availability of competent representation for all defendants is the overriding concern in any court appointment system. All administrative policies developed to effectuate the court-appointment system must be geared to achieving these goals. Part and parcel of the state's duty to provide competent counsel necessarily includes promulgating a schedule of fees setting fair compensation for participating lawyers. In capital murder cases, effectiveness of representation takes on heightened importance because of the dire jeopardy of the case. Recent United States Supreme Court decisions suggest that all capital murder defendants, regardless of indigency, are entitled to the *super competent lawyer* because of the nature and special gravity of the case. The United States' Supreme Court has repeatedly addressed the issue of effective assistance of counsel, and the absence of effective counsel in capital cases is responsible for the vast majority of appellate reversals. *See: Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984); *United States v. Cronin*, 466 U.S. 648, 104 S.Ct. 2039 (1984).

7. In *Wiggins v. Smith*, 539 U.S. \_\_\_, 123 S.Ct. 2527 (2003), the United States' Supreme Court addressed the prejudice which resulted to the defendant when the trial attorney violated the prevailing professional standards for capital trial representation. The Supreme Court reversed the conviction and death sentence on grounds that defense counsel ignored prevailing professional standards during the course of their investigation of the case. The Court comments on the importance of counsel's attention to all relevant aspects of investigating and litigating capital issues. Defending the life of another is so difficult because the demands of ordinary life naturally interfere with counsel's ability to devote full time and attention to the numerous tasks at hand. The undersigned counsel has found that the real problem with the death penalty is that no lawyer has the

kind of life that permits the type of attention required to save another person's life. At the end of the day, there is always more that could have been done in the effort to save a person from the death penalty. Enforcing the prevailing professional standards in the legal system is important because those standards create the *minimum* level of services that should be provided. The Tulsa County capital appointment system violates prevailing professional standards, and long-standing Oklahoma law. There is simply no legal exception which permits Tulsa County the luxury of ignoring Oklahoma statutes. And there is no legal principle that permits capital defendants to be subjected to the vagaries of the court-appointment system. The concepts of due process and equal protection are not enacted by way of county option. The guarantee must be vindicated by defendants in all seventy-seven counties in Oklahoma. All other counties of Oklahoma have set prevailing professional standards for representation and fair compensation because both have a direct relationship to competent representation and investigation.

8. In the case of *State v. Lynch*, 796 P.2d 1150 (Okla. 1990) the Oklahoma Supreme Court addressed the State's obligation to represent all indigents charged with a felony pursuant to the United States' Constitution, *Gideon* and the Oklahoma Constitution. The Court ruled that "the State also has an obligation to pay appointed lawyers sums which will fairly compensate the lawyer, not at the top rate which a lawyer might charge, but at a rate which is not confiscatory, after considering overhead and expenses. **The basis of the amount to be paid for services must not vary with each judge; rather there must be a statewide basis or scale for ascertaining a reasonable hourly rate in order to avoid the enactment of a proscribed special law.**

9. The *Lynch* opinion also invited the Oklahoma Legislature to consider the myriad of problems presented by the *Lynch* case. As Justice Opala pointed out, the operation of defense

services is a function properly to be performed by the executive department of government. Justice Opala considered the decision in *Lynch* **“to be a stopgap measure to remedy constitutional infirmities in the present system,”** noting that the Legislature is free to adopt a better solution to this problem and suggesting a statewide public defender system.

10. The Oklahoma Supreme Court further explained that the State “must also adopt guidelines for the trial courts to follow in setting fees for representation of indigent defendants in all cases where the state of Oklahoma is required to provide such representation in order to avoid the unequal, erratic, unconstitutional taking of private property which might occur if fees are set by a different formula in each of the state’s seventy-seven counties. We find that our constitutional duties are met by assuming this responsibility rather than by delegating it to administrative personnel who are answerable neither to the constitution nor the people.”

11. In direct response to the concerns raised in the *Lynch* ruling, and the crisis created by the unfair and unreasonable payment practices for legal representation of indigent defendants facing criminal charges, the Oklahoma Legislature created the Oklahoma Indigent Defense System. OIDS was created in 1990 to provide competent legal representation to accused persons and to provide fair compensation to court-appointed lawyers. Over the course of the last 14 years, OIDS, a state agency belonging to the executive branch of state government, has administered the indigent defense services on a statewide basis. Part of the duties assumed by OIDS included the setting of guidelines for the payment of professional attorney fees associated with court-appointed counsel contracts. (The rate to be paid trial lawyers qualified to represent defendants in capital murder cases is found in the OIDS enabling statute and formally sets the rate of \$20,000.00 for first-chair capital counsel and \$5000.00 for second-chair counsel.) See *Title 22 O.S. § 1355.7 and § 1355.13*. The OIDS enabling

statute has also set the professional standard and practice that indigent persons charged with capital murder are entitled to two lawyers for pre-trial and trial phase of criminal proceedings. *Also See: Wiggins, supra; & the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases .*

12. And simply because OIDS is no longer administering and enforcing the payment schedule in Tulsa County conflict cases, Tulsa County is not relieved from following the fee schedule passed by the legislature. Tulsa County may consider seeking indemnification from the State of Oklahoma, but Tulsa County cannot refuse to follow the law and penalize the indigent criminal defendant. The recent legislation which relieved OIDS from paying conflict lawyers in Oklahoma and Tulsa counties did not create a loophole for these two counties to deny fair compensation to lawyers and effective representation to indigent criminal defendants. After the passage of the legislative amendment, Oklahoma County quickly addressed the new legislation amending the duties of OIDS by following the schedule of fees found in the OIDS enabling statute.

13. The statutory fee set by OIDS and approved by the state legislature is the fee utilized in seventy-six counties in Oklahoma and this statutory fee has set the professional standard and effectively, the “prevailing wage” for qualified trial lawyers appointed to represent indigent criminal defendants in capital trials. Tulsa County may refuse to pay this statutory amount to appointed lawyers in capital cases, but by doing so they are violating the rights of equal protection guaranteed to all lawyers appointed to represent indigent criminal defendants. And, in turn, this leads to serious compromise in the representation of the indigent defendants facing the ultimate jeopardy.

14. It has now been fourteen years since the Oklahoma Supreme Court unequivocally determined that a uniform system must be developed to fairly compensate court appointed attorneys

and in response, the Oklahoma Legislature passed laws effectuating the ruling in *Lynch*. Yet despite the clear judicial mandate of *Lynch*, and the clear legislative mandate of 22 O.S. §1355 *et seq.*, Tulsa County continues to ignore the law and prejudice criminal defendants facing the ultimate punishment of death. Tulsa County officials are acting under color of state law when they fail to administer the court-appointment system properly and uniformly. This ongoing and intentional failure to adhere to longstanding law constitutes *deliberate indifference* which exposes Tulsa County to civil rights litigation as described by 42 U.S.C.A. § 1983. Discriminatory state action against a particular class of people can be remedied by filing an action in the federal courts pursuant to Title 43 U.S.C.A. § 1983 which permits persons who are subject to state action, like indigent criminal defendants, to sue in federal court for money damages. A showing of *deliberate indifference* by the indigent defendant/federal plaintiff would not be difficult when considering the fact that every other county in Oklahoma follows Supreme Court and legislative mandate in the court-appointment system.

15. This discriminatory practice may also open the door to state-induced ineffective assistance of counsel claims by defendants on appeal as described by the United States' Supreme Court in *Cronic*, (*supra*.) That is to say, *but for* the improper action or policy of the State, the defendant would have received effective assistance of counsel as guaranteed by the *Sixth Amendment, Article 2, § 7 & 20*, of the *Oklahoma Constitution* and Oklahoma Statutes. State-induced ineffective assistance of counsel claims are dramatically easier to prove because Supreme Court decisions relieve the defendant/appellant from showing prejudice which is required by the more typical ineffective assistance of counsel claim caused by defense counsel's deficient performance. State action which impacts fundamental rights of criminal defendants which falls outside the control of the defendant is presumptive proof of prejudice. Tulsa County's refusal to

acknowledge the statutes, and their ongoing resistance to honor prevailing professional standards is the kind of state action that impacts fundamental fairness.

16. This kind of error is the type of error that leads to reversals of capital cases on appeal. And for a court system so devoted to the rights of victim's families in homicide cases, the actions of Tulsa County are surprisingly cavalier and disrespectful. When death penalty cases are tried right the first time appellate reversal is never an issue. Traditional notions of fair play and substantial justice not only protect the indigent criminal defendant, they also guarantee that the family members of both the homicide victim and the defendant's family must endure the pain of the tragic events at issue only once. And in the undersigned counsel's experience, enduring this pain on one occasion is too much for many family members. Tulsa County's position on this issue even seems to fly in the face of *Article 2, § 34* of the *Oklahoma Constitution* which requires that important issues impacting the prosecution of a case require consultation with the victim of the crime at issue or the surviving family members of the victim of the crime. Ultimately, Tulsa County's self-serving policy of unfair compensation and fundamentally unfair representation serves no one.

**WHEREFORE**, premises considered, counsel offers her conditional entry of appearance and respectfully requests that Tulsa County pay the statutory rate for her services in accordance with Oklahoma law.

Respectfully submitted,

15/ Debbie Maddox  
DEBBIE MADDOX, OBA #13166  
114 East Main Street  
Norman, Oklahoma 73069  
Telephone: 405.701.5205

Facsimile: 405.701.5833

**CERTIFICATE OF SERVICE**

This is to certify that on the 20 day of July, 2004, a true and correct copy of the foregoing *Conditional Entry of Appearance* was mailed by the U.S. Mails, postage prepaid, to Mr. Doug Drummond, Tulsa County District Attorney's Office, Tulsa County Courthouse, 500 South Denver, Tulsa, Oklahoma.

/s/ Debbie Maddox  
DEBBIE MADDOX

IN THE DISTRICT COURT IN AND FOR TULSA COUNTY  
STATE OF OKLAHOMA



THE STATE OF OKLAHOMA,

Plaintiff,

-vs-

JERARD DAVIS

and

DARREN PRICE

Defendant.

No. CF-2011-3734

DISTRICT COURT  
**FILED**

APR 10 2014

SALLY HOWE SMITH, COURT CLERK  
STATE OF OKLA. TULSA COUNTY

**MOTION FOR ATTORNEY'S FEES**

COMES NOW, Stephen W. Lee and Mark J. Cagle, and moves this Honorable Court for an *Attorney's Fees* hearing and to order such fees as the court deems reasonable and proper.

**FACTS**

Darren Price was charged with two (2) counts of 1st degree Felony Murder, Eluding and Possession of a Firearm AFCF on October 3, 2011. A Bill of Particulars was filed against Mr. Price on March 27, 2014. Jack Gordon Jr., Stephen Lee and Mark Cagle were appointed as trial counsel for Darren Price on April 24, 2012. Darren Price's jury trial began on January 27, 2014 and concluded on February 13, 2014 when the jury having found him guilty, and finding all aggravators, recommended a sentence of life without parole.



## ARGUMENT AND AUTHORITY

### 1. STATUTORY COMPENSATION

In *State v. Lynch*, 1990 OK 82, 796 P.2d 1150 the Court addressed the issue of statutory compensation allowed for the representation of indigent defendants. The *Lynch* court held that a law practice is a property interest and that failing to adequately compensate attorneys undertaking the representation of indigent defendants could result in a taking under the law. The *Lynch* court further held that the State has an “obligation to pay appointed lawyers sums which fairly compensate the lawyer, not at the top rate at which a lawyer might charge, but at a rate which is not confiscatory, after considering overhead and expenses.” *State v. Lynch*, 1990 OK 82, 796 P.2d 1150. The Court reiterated its holding that attorneys are entitled to a reasonable fee in *Nichols v. Jackson*, 2002 OK 65, 55P.3d 1044 stating that “counsel is entitled to a reasonable fee consistent with the teachings *State v. Lynch*, 1990 OK 82, 796 P.2d 1150.” “Providing for adequate funding for indigent representation is a matter for legislative action.” *State v. Lynch*, 1990 OK 82, 796 P.2d 1150.

22 O.S. 1355.13 sets out the statutory maximum payments for attorneys representing indigent clients in a capital case. 22 O.S. 1355.13 declares that compensation for “lead counsel in a capital case shall not exceed Twenty Thousand Dollars (\$20,000) per case” and that total compensation for co-counsel shall not exceed Five Thousand Dollars (\$5,000). The *Lynch* court addressed the constitutionality of the statutory maximums in capital cases by holding that “while Oklahoma’s statutorily mandated cap may not be facially defective, and that in some instances payment of the statutory fee might even be an excessive rate of compensation, there is a

substantial probability that it will be defective in application.” *State v. Lynch*, 1990 OK 82, 796 P. 2d 1150.

In the matter at hand, as in *State v. Lynch*, the application of the statutory maximum payments would be inadequate and result in an unconstitutional taking under the law. Were Mr. Lee and Mr. Cagle required to split the statutory maximum fee of \$5,000 they would each receive \$2500 for almost two (2) years of work.

Mr. Lee submitted a bill to the court documenting 248.8 hours that he worked on the above captioned case. Under the statutory maximum, of which Mr. Lee would receive half, he would be making \$10.05 per hour.

Mr. Cagle submitted a bill to the court documenting 234.9 hours that he worked on the above captioned case. Under the statutory maximum, of which Mr. Cagle would receive half, he would be making \$10.64 per hour.

## 2. LOCAL COURT RULE

Local court rule 10(5) allows that “an attorney’s fee and expense in excess of the above amounts may be compensated upon application to and approval by the Trial Judge, subject to the approval of the Presiding Judge.” Clearly the district court has the authority to exceed the statutory caps on payment for indigent defense in a capital case.

## 3. OKLAHOMA COMPENSATION V. OTHER DEATH PENALTY STATES

Currently 32 of the 50 states in the United States, including Oklahoma, employ the use of capital punishment. Of the remaining 31 states, other than Oklahoma, using capital punishment

18 have no statutory cap, 10 have a cap higher than Oklahoma and 3 are unknown.<sup>1</sup> Oklahoma is woefully behind the times in compensating attorneys in capital cases as is reflected by the lack of adjustment in the statutory maximum in the last 16 years.

#### 4. COMPENSATION FOR OVERHEAD AND EXPENSES

In *State v. Lynch*, 1990 OK 82, 796 P.2d 1150 the court addresses the issue of compensation to cover the appointed attorneys overhead and expenses; holding that the State has an “obligation to pay appointed lawyers sums which fairly compensate the lawyer, not at the top rate at which a lawyer might charge, **but at a rate which is not confiscatory, after considering overhead and expenses.**” *State v. Lynch*, 1990 OK 82, 796 P.2d 1150.

Several State’s have addressed the issue of overhead and expenses for individuals undertaking the representation on an indigent defendant in a capital case. Alabama addressed this issue in *James W. May v. State*, CR-92-350, 672 So. 2d 1307 (1993) holding, as the Court in *Lynch* did, that an attorney should be compensated for overhead and expenses while undertaking the representation of an indigent defendant. The presumptive hourly overhead in Alabama is \$30.00 per hour.<sup>2</sup>

Mississippi is another state that addresses the issue of overhead and expenses for attorneys under taking the representation of indigent defendants in capital cases. In Mississippi and individual appointed to represent a defendant in a capital case is awarded Two Thousand

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<sup>1</sup> According to the Spangenberg Group: Rates of Compensation for Court Appointed Counsel in Capital Cases at Trial, 2007. This report was prepared for , and submitted to, the American Bar Association.

<sup>2</sup> The Spangenberg Group: Rates of Compensation for Court Appointed Counsel in a Capital Case at Trial, 2007. Footnote 1 on the table of compensation rates.

Dollars (\$2,000) plus a presumptive rate of Twenty-Five Dollars (\$25.00) per hour for overhead and expenses.<sup>3</sup>

Taking an average of Alabama's and Mississippi's presumptive hourly rate for overhead and expenses would result in \$27.50 per hour for overhead and expenses. At this rate alone, without any compensation for the attorneys time itself, Mr. Lee would be due \$6,842 for the 248.8 hours that he devoted to this matter and Mr. Cagle would be due \$6,459.75, exceedingly in excess of the proposed \$2,500 payment for services.

##### 5. TAKING

The court in *Lynch* citing *Bias v. State*, 568 P.2d 1269 (Okla. 1977) recognized that certain "circumstances may constitute a taking of private property without compensation. In order to harmonize conflicting interests, the Court authorized payment in excess of statutorily prescribed norms for extraordinary expenditures of time and expense." *State v. Lynch*, 1990 OK 82, 796 P.2d 1150.

In the case at hand, as stated above, Mr. Lee is set to to earn \$2,500 for 248.8 hours of work for an average of \$10.05 per hour. Current presumptive rates for overhead and expenses, in Alabama and Mississippi, are approximately \$27.50 per hour. If paid only at the presumptive overhead and expenses rate Mr. Lee would stand to earn \$6,842 for the 248.8 hours of work he performed in this case. Under the current payment scheme in Oklahoma Mr. Lee would pay \$4342.00 for the "privilege" of trying a capital murder case.

Mr. Cagle is set to to earn \$2,500 for 234.9 hours of work for an average of \$10.64 per hour. Current presumptive rates for overhead and expenses, in Alabama and Mississippi, are

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<sup>3</sup> The Spangenberg Group: Rates of Compensation for Court Appointed Counsel in Capital Cases at Trial, 2007.

approximately \$27.50 per hour. If paid only at the presumptive overhead and expenses rate Mr. Cagle would stand to earn \$6,579.75 for the 234.9 hours of work he performed in this case. Under the current payment scheme in Oklahoma Mr. Cagle would pay \$3,959.75 for the “privilege” of trying a capital murder case.

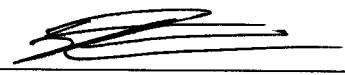
Combined, Mr. Lee and Mr. Cagle would be deprived of \$8,301.75 due to trying the above captioned case at the current statutory rate.

### **CONCLUSION**

In *State v. Lynch*, 1990 OK 82, 796 P.2d 1150 the court stated “[o]ur holding today would prohibit **both** the appointment of counsel to represent indigents without a post-appointment opportunity to show good cause why the appointment should not be accepted and the appointment of counsel without just compensation.” It is clear from the Court’s holding, and Tulsa County Local Rule 10(5)), that the Court intended that attorneys who undertake the representation of indigents be justly compensated for their time and that the statutory maximums are simply advisory in these matters.

Under the current statutory maximums, counsel Stephen W. Lee and Mark J. Cagle would be deprived of just compensation for their time and expenses in this matter which would be in direct conflict with the Court’s holding in *Lynch*.

**WHEREFORE**, Defendant requests that the Court hold a hearing and and award Mr. Lee and Mr. Cagle just compensation for the time and expenses expended in the representation of Darren Price.




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*Attorney for Defendant*

**CERTIFICATE OF HAND DELIVERY**

I hereby certify that on this 10 day of April, 2014, I hand delivered a true and correct copy of the within and foregoing instrument, following parties:

Tulsa County District Attorney's Office  
Tulsa, Oklahoma



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Stephen W. Lee, *Attorney for Defendant*