

IN THE XXXX DISTRICT COURT
PARISH OF XXXXXXXXXX
STATE OF LOUISIANA

_____)	
)	
STATE OF LOUISIANA,)	
)	
Plaintiff,)	
)	No. XXX-XXX
v.)	Division X
)	Hon. [Judge], Presiding
[CLIENT])	
)	
Defendant.)	
)	
_____)	

FILED: _____

MOTION TO DETERMINE SOURCE OF FUNDS FOR A COMPETENT DEFENSE OR, ALTERNATIVELY, MOTION TO HALT THE PROSECUTION

Comes now, [CLIENT], by counsel, and moves this Court pursuant to the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution; Article 1, Sections 2, 3, 5, 13, 14, 16, 17, 19, 20, 22, and 24 of the Louisiana Constitution; *State v. Wigley*, 624 So.2d 425 (La. 1993); *State v. Citizen*, 898 So.2d 325 (La. 2005); and other applicable law, to determine a source of funds to provide for competent and compensated defense counsel and expenses, and if no source of funds be available, to halt the prosecution in his case.

In support, counsel state:

1. Mr. [CLIENT] is presently charged with [include details of the charges including the sentencing exposure]. [Also, include facts about the case in a way that inures to your client, e.g., weak evidence, complex case, etc].

2. Mr. [CLIENT] is indigent and XXXXXX, a private attorney, was appointed to represent [CLIENT] and serve as his counsel in the case.

3. Counsel has performed over XXX hours of work on this case between HER appointment and the present date. Undersigned counsel is a solo practitioner. [Details here about the nature of the attorney's practice, i.e., the area of law, how your practice generates revenue]

Counsel does not have the resources to represent XXXXXX for free and certainly does not have the

resources or funds to hire an investigator or retain an expert necessary to effectively defend this case.

4. Counsel has performed over XX hours of work on this case between her appointment and today's date. Using undersigned's normal billing rate in his private practice (\$XX/hr.), counsel is owed \$XXX.XX. If counsel were to agree to be compensated at half her normal rate, counsel would still be owed \$XXX.XX for all work performed thus far. Of course, these numbers do not account for the cases, and revenue, that counsel has declined to make space for her to effectively represent Mr. [CLIENT].

5. Counsel anticipates that much investigation needs to be completed and many issues remained to be litigated. Details of what remains to effectively represent Mr. [CLIENT] has been detailed in an *ex parte* proffer filed under seal with this court on XXXX XX, 2015.

6. Counsel has overhead expenses to maintain and will necessarily forgo other income while representing Mr. [CLIENT] in this case.

The Due Process Rights of Mr. [CLIENT] and Undersigned Counsel

7. Undersigned counsel engages in the private practice of law and is entitled to reasonable compensation for defending Mr. [CLIENT] in this case, as well as reimbursement for all related expenses. *State v. Wigley*, 92-KK-1503 (La. 9/7/93); 624 So.2d 425; U.S. Const. Amend. V; La. Const. Art. 1, § 4. The Supreme Court in *Wigley* held that to require attorneys to represent indigent defendants without recompense or reimbursement was "unreasonable and oppressive." *Wigley*, 624 So.2d at 427. More specifically, the Court held:

To require that attorneys represent indigents with no recompense while bearing the expenses of the representation, when the attorneys must maintain their own practices and continue to meet their other professional and financial obligations in today's changed legal marketplace, "is so onerous that it constitutes an abusive extension of their professional obligations." *Clifton*, 172 So. 2d at 668. This institutionalized "abusive extension" cannot be perpetuated.

Wigley, 624 So.2d at 428-29. It is fundamentally unjust, unconstitutional and unconscionable to expect a solo practitioner to shoulder the expense of defending Mr. [CLIENT] against the State's financial and personnel resources in this case. *Argersinger v. Hamlin*, 407 U.S. 25, 43 (1972) (Burger CJ, Concurring) ("[S]ociety's goal should be 'that the system for providing counsel and facilities for the defense be as good as the system which society provides for the prosecution.'").

Mr. [CLIENT]'s Right to Effective Assistance of Counsel

8. It is also unconstitutional to expect Mr. [CLIENT] to suffer the ineffective

representation at trial that must surely result from this absence of funding. U.S.Const. Amend. VI, La. Const. Art I, §13. In this day and age it can hardly be expected that the Sixth Amendment guarantee to effective assistance of counsel can be met by compelling reluctant counsel to work for free and indeed to pay money out of pocket while doing so. This is not the type of counsel the Sixth Amendment or La. Const. Art I, § 13 envisions.

9. If forced to continue to represent Mr. [CLIENT] under the current circumstances, undersigned counsel's representation of Mr. [CLIENT] will, and has been materially limited by counsel's need to prioritize other paying work and by counsel's lack of motivation to work the long hours required to effectively represent Mr. [CLIENT], in effect violating the rule against conflict of interest. *See* Louisiana Code of Professional Responsibility, Rule 1.7. Any observer must ask whether counsel will apply himself to the fullest in this case, knowing that every hour is uncompensated.

10. [*Brief overview of counsel's practice including the types of cases / law she practices as well as her general plan for generating revenue – be sure to include any contingency fees that are yet to be recovered in person injury / fee shifting cases as well as uncollected fees for prior clients*]. [Provide an idea of the time involved in counsel's practice, i.e., "Counsel devotes almost ALL of his waking hours to his private practice and routinely works both days of the weekend to serve his clients competently." Or "Counsel's sole source of revenue is XXXXX that, along with her spouses fixed income, she uses to support her XXX children."]

11. In order to keep up with his other cases, counsel will be forced to spend time on his paying cases and his contingency cases in lieu of this non-paying case to which she was appointed. This is not Mr. [CLIENT]'s fault and this Court should act to protect his rights under the Sixth and Fourteenth Amendment by finding funding or delaying the prosecution until funding is secured.

Procedures Under *State v. Wigley* & *State v. Citizen*

12. The Supreme Court of Louisiana's decisions in *State v. Citizen*, 2004-1841 (La.4/1/05), 898 So.2d 325 and *State v. Wigley*, 624 So.2d 425 (La. 1993) dictate the procedures that must be followed in this case. The Court in these cases held that private counsel appointed to represent indigents are entitled to recoup their overhead expenses and out-of-pocket expenses, and are entitled to payment of a fee when the services exceed the customary pro bono expectation of all counsel.

13. In order to secure such finding, the Supreme Court does not require the attorneys to file a civil law suit or take any other action wherein they would name parties to a lawsuit and be put to the additional expense of litigating a civil suit while contemporaneously defending this capital prosecution. Rather, the Court promulgated the following procedure:

In order to assure timely representation. . . [a] district judge should appoint counsel to represent an indigent defendant from the time of the indigent defendant's first appearance in court, even if the judge cannot then determine that funds sufficient to cover the anticipated expenses and overhead are likely to be available to reimburse counsel. The appointed attorney may then file a motion to determine funding, . . . and if the trial judge determines that adequate funding is not available, the defendant may then file, at his option, a motion to halt the prosecution of the case until adequate funding becomes available. The judge may thereafter prohibit the State from going forward with the prosecution until he or she determines that appropriate funding is likely to be available.

State v. Citizen, 04-1841 (La. 04/01/2005); 898 So.2d 325, 338-339 (footnote omitted).

14. According to *Citizen*, then, funding issues in cases are resolved pursuant to the following procedure: (1) the court appoints counsel; (2) counsel files a motion to determine funding; (3) a determination regarding a funding source is made; (4) if no funding source is found, the prosecution is halted. That is, counsel must begin by litigating funding, and any further action in the case must halt until this issue is fully resolved.

15. Regarding the specifics of the funding hearing, the Court in *Citizen* reaffirmed its earlier holding in *Wigley*, where it found “. . . that in order to be reasonable and not oppressive, any assignment of counsel to defend an indigent defendant must provide for reimbursement to the assigned attorney of properly incurred and reasonable out of pocket expenses and overhead costs.” *Wigley*, at 429; *Citizen*, at 15-16. The Court is obligated to pay a fee in addition to overhead costs if the defense is required to provide more than a number of hours deemed to be a reasonable amount of pro bono work each year. *Id.*

No Source of Funding Exists to Pay for Mr. [CLIENT]’s Representation

16. Pursuant to La. R.S. 15:141 et seq., there are two potential sources of funding for indigent defense representation: the district defender and the Louisiana Public Defender Board.

17. The district defender in this case, as described above, has stated that it cannot and will not pay for work done on this case. The District Defender has taken this step in consultation with the state board due to a severe budget crisis.

18. The Louisiana Public Defender Board does not have available and adequate funds to assist with the defense of Mr. [CLIENT].

19. The legislature bears responsibility for the adequate funding of indigent defense. La. Const. art I, § 13. (“The legislature shall provide for a uniform system for securing and compensating qualified counsel for indigents.”). The legislature has appropriated funds and entrusted them to the Louisiana Public Defender Board. That board has allocated funds and contracted with the District Defender in to administer indigent defense services in this District.

20. The present situation makes it clear that, in violation of La. Const. Art. I, § 13, the state of Louisiana has failed to provide for a system for securing and compensating counsel. The District Defender and the state board have indicated that they have no capacity to compensate counsel.

21. It is not the responsibility of Mr. [CLIENT] or his counsel to identify exactly why the State of Louisiana has failed so abysmally – whether it be a lack of funds, mismanagement, misdirected priorities or some other cause. What is clear, however, is that the state of Louisiana is in violation of our constitution and accepted principles for the provision of effective indigent defense services.

22. *The ABA Ten Principles of a Public Defense Delivery System* establish “[t]he fundamental criteria necessary to design a system that provides effective, efficient, high quality, ethical, conflict free legal representation for criminal defendants who are unable to afford an attorney.” Principle 8 demands that “[t]here is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system.” The commentary to that principle states that “[t]here 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.)”. *See also ABA Standards on Providing Defense Services, Standard 5–4.1* (“The chief defender and staff should be compensated at the rate commensurate with their experience and skill sufficient to attract career personnel and comparable to that provided for their counterparts in prosecutorial offices.”)

23. Louisiana’s failure to meet this standard has been previously noted:

Finding #10: In violation of ABA Principle 8, the failure to ensure adequate funding and independence of the indigent defense system results in the lack of resource parity between the prosecution and defense in Louisiana.

In Defense of Public Access to Justice (NLADA 2004).

24. The ABA Guidelines for Death Penalty Cases specifically provide:

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.”

ABA Guidelines for Death Penalty Cases, Guideline 9.1(B).

25. The state of Louisiana cannot profit from its own violation of La. Const. Art. I, § 13. This is certainly true where the State has failed to put forth evidence to support the instant charges against Mr. [CLIENT] despite having *eleven months to do so*. The state cannot be allowed to prosecute Mr. [CLIENT] under these circumstances while failing to fund the indigent defense system, leaving him with a single compelled and unassisted attorney to defend against the state’s efforts. Were this Court to endorse such a course it would turn the constitutionally articulated responsibility for providing for an indigent defense system on its head and endorse both the defunding of indigent defense and the abusive practice of government compelled, uncompensated servitude.

26. Undersigned counsel are aware of the indigent defense crisis in the state of Louisiana and believe that currently neither the OPD nor the state board can fund the representation of Mr. [CLIENT] in this case. However, neither undersigned counsel nor Mr. [CLIENT] should bear the burden of this shortfall in indigent defense funding. The Supreme Court made clear in *Citizen* that “budget exigencies” could not serve as an excuse for the oppressive or abusive extension of attorneys’ professional responsibilities. *Citizen*, 898 So.2d at 336; *see also Reeves*, 11 So. 3d at 1046.

27. By this present motion, counsel moves for this court to determine an adequate source of funds and, anticipating that such a source will not be readily identified, moves for a halt. Pursuant to *Citizen*, it is now incumbent on this court to determine whether adequate funding is available and make a formal finding in this regard on the record.

WHEREFORE, for the foregoing reasons and any others that may appear to this Honorable Court, Mr. [CLIENT] requests the Court to order an evidentiary hearing to prove the allegations in this motion, to determine whether there is an adequate source of funding in this case and, anticipating that such a source of funds will not be identified, halt the prosecution until such time as such funding is available.

DATED this ____ day of _____, 2015.

Respectfully Submitted,

ATTORNEY NAME
La. Bar No. XXXXXXXX
ADDRESS
XXXXXXXX, LA 70XXX

Counsel for [CLIENT]

Certificate of Service

I hereby certify that I have caused to be served by mail a copy of the foregoing document upon the Office of the District Attorney on this the _____ day of _____, 2015.

IN THE XXXX DISTRICT COURT

PARISH OF XXXXXXXXXX

STATE OF LOUISIANA

_____)	
)	
STATE OF LOUISIANA,)	
)	
	Plaintiff,)	
)	No. XXX-XXX
v.)	Division X
)	Hon. [Judge], Presiding
[CLIENT])	
)	
	Defendant.)	
)	
_____)	

FILED: _____

ORDER

The foregoing *Motion to Determine Source of Funds and Halt the Prosecution* being considered, IT IS HEREBY ORDERED that:

The following adequate and available source of funds has been identified:

_____.

OR

The prosecution is halted until an adequate and available source of funds should become available.

SIGNED this ____ day of _____, 2015. XXXXXX, Louisiana.

HON. XXXXXXXXXXXX, JUDGE, SEC. X
XXXXXXXXX DISTRICT COURT