

IN THE CRIMINAL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

STATE)
vs.) No.
)
) Judge
)

FILED: _____ DEPUTY CLERK: _____

MOTION TO DETERMINE SOURCE OF FUNDS FOR A COMPETENT DEFENSE

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, §§ 2, 3, 5, 13, 14, 16, 17, 19, 20, 22, and 24 of the Louisiana Constitution, *State v. Citizen*, 898 So.2d 325 (La. 2005), *State v. Wigley*, 624 So.2d 425 (La. 1993) 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 the Accused case.

In support, counsel state as follows:

1. [CLIENT] is presently charged with [include details of the charges including the sentencing exposure]. [CLIENT] is a XXX bill meaning if he is convicted of these charges, he faces XXX [give sentencing exposure under habitual offender statute].
2. [CLIENT] is indigent an undersigned counsel was appointed by this Court to represent [CLIENT] and serve as his counsel in the case on [DATE]. Undersigned counsel is an attorney is private practice and spends XXX% of her practice handling criminal cases. *[Detail here the nature of your practice: primary area of practice, how you generate revenue, number of criminal trials conducted, whether you've handled this type of case and if so, how many and how long ago; etc.]*
3. Undersigned counsel is a solo practitioner. In counsel's current practice, there is *[state the number staff in your office and their job titles.]* Counsel does not have the resources to represent the Accused 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 XXX 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 counsel has declined in order to represent the Accused.

5. Counsel anticipates that much investigation still needs to be completed in this case, and many legal issues remain to be litigated. (*Detail here fairly briefly and cursorily some of the investigation that still needs to be done and/or some other facts depicting complexity of issues and facts that still need to be explored.*) More thorough details of what remains to effectively represent the Accused can be provided to this Court in an *ex parte* proffer filed under seal.
6. Counsel has overhead expenses to maintain and will necessarily forgo other income while representing the Accused in this case.
7. Undersigned counsel engages in the private practice of law and is entitled to reasonable compensation for defending the Accused 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 the Accused 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.’”).

8. It is also unconstitutional to expect the Accused 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 the Accused under the current circumstances, undersigned counsel's representation of the Accused 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 the Accused, 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. In order to keep up with counsel's pending bills, costs and expenses to run a legal practice, counsel will be forced to spend time on her paying cases and her contingency cases in lieu of this non-paying case to which she was appointed. This is not the Accused'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.
11. 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 a case such as this. The La. Supreme Court 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. In order to secure such funding, the La. 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 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).

12. 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.
13. 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.*
14. Pursuant to La. R.S. 15:141 et seq., there are three potential sources of funding for indigent defense representation: the district defender, the Louisiana Public Defender Board, and the judicial expense fund [IF APPLICABLE TO YOUR JURISDICTION]. The district defender in this case 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.
15. The Louisiana Public Defender Board does not have available and adequate funds to assist with the defense of the Accused.
16. Counsel is unclear at this time how much funds reside in the Judicial Expense Fund.
17. 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.

18. 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. [*Detail here what the district defender and the state board is saying as to why the public defender's office has entered into a restriction of services and cannot provide counsel to the Accused.*].
19. The state cannot be allowed to prosecute the Accused 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.
20. Undersigned counsel are aware of the indigent defense crisis in the state of Louisiana and believe that currently neither the public defender's office or the state board can fund the representation of the Accused in this case. However, neither undersigned counsel nor the Accused 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.
21. 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 to halt prosecution in this case. 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, the Accused requests the Court to order an evidentiary hearing to determine 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.

Respectfully Submitted,

Certificate of Service

I hereby certify that I have caused to be served by hand delivery in open court a copy of the foregoing document upon the prosecution on this the day of filing.

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ORDER

Having considered the forgoing MOTION TO DETERMINE SOURCE OF FUNDS FOR A COMPETENT DEFENSE, it is hereby ORDERED that an evidentiary hearing is GRANTED and it shall commence on _____.

SIGNED this _____ day of _____, 2016.

Judge