

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

FILED

April 3, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

IN RE:)
)
RULE 13)
SUPREME COURT RULES)

O R D E R

After due consideration, Rule 13 of the Rules of the Supreme Court of Tennessee is hereby amended by striking the present text in its entirety and replacing it with the following:

Rule 13. Appointment, Qualifications, and Compensation of Counsel for Indigent Defendants.

Section 1. Right to counsel and procedure for appointment of counsel.

(a) The purpose of this rule is to establish qualifications and procedures for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel for indigent defendants in trials, direct appeals, and post-conviction proceedings. This rule is intended to meet the standards set forth in Section 107 of the Antiterrorism and Effective Death Penalty Act of 1996.

(b) There shall be maintained for each trial court exercising criminal jurisdiction a roster of attorneys who have demonstrated the commitment and proficiency necessary for providing effective assistance of counsel from which roster appointments will be made, provided, a court may appoint attorneys whose names are not on the roster if necessary to obtain competent counsel according to the provisions of this rule.

(c) All general sessions, trial, and appellate courts shall appoint counsel to represent indigent defendants and other parties who have a constitutional or statutory right to representation (herein "indigent

defendant" or "defendant") according to the procedures and standards set forth in this rule.

(d) In the following cases and in all other cases required by law, the court shall advise any party who is without counsel that he or she has the right to be represented by counsel throughout the case and that counsel will be appointed to represent the party if he or she is indigent and requests the appointment of counsel.

(1) Cases in which an adult is charged with a felony or a misdemeanor and is in jeopardy of incarceration;

(2) Cases in which a juvenile is charged with juvenile delinquency by the commission of an act which if committed by an adult would be a misdemeanor or a felony;

(3) In contempt of court proceedings in which the defendant is in jeopardy of incarceration;

(4) In proceedings initiated by a petition for habeas corpus, early release from incarceration, suspended sentence or probation revocation;

(5) In post-conviction proceedings in non-capital cases, subject to the provisions of Rule 28, Supreme Court Rules;

(6) In all post-conviction proceedings in capital cases;

(7) In cases under Title 37 of Tenn. Code Ann. in which allegations against the parents could result in finding the child dependent or neglected, or in which there is a petition for termination of parental rights.

(e) Whenever a party to any case in Section 1(d) states to the court that he or she is financially unable to obtain counsel and requests the appointment of counsel, the party shall be required to complete an Affidavit of Indigency Form provided by the Administrative Office of the Courts. The court shall upon inquiry make a finding as to the indigency of the party pursuant to the provisions of Tenn. Code Ann. § 40-14-202. The court shall enter an order appointing counsel upon a finding that the defendant is indigent and accepts the offer of appointed counsel, or is

unable competently to decide whether to accept or reject the offer. The court shall not appoint counsel upon finding that the party rejected the offer of counsel with an understanding of the legal consequences of the rejection, or upon finding that the party is not indigent.

(f) The court shall appoint separate counsel for indigent defendants having interests that cannot be properly represented by the same counsel or when other good cause is shown.

(g) The court shall not make an appointment which creates a total work load on counsel so excessive that it effectively prevents the rendering of effective representation for the defendant in accordance with constitutional and professional standards.

(h) The court shall designate the public defender, the post-conviction defender, their staffs or other attorneys employed by the state for that purpose (hereinafter "public defender") as appointed counsel if available and qualified pursuant to this rule; and, if the public defender is not available or qualified, the court shall designate counsel from a roster of private attorneys approved by the court. The defendant shall not have the right to select counsel to be appointed. If a competent defendant refuses to accept the services of appointed counsel, such refusal shall be written and signed by the defendant in the presence of the court, which shall acknowledge thereon the signature of the defendant and make the written refusal a part of the record in the case. In that event, the defendant may act pro se without the assistance or presence of counsel.

(i) Counsel appointed shall continue to act for the defendant throughout the proceedings in the court in which the appointment is made and in any subsequent proceedings or appeals until the case has been concluded or counsel has been relieved by the court.

(j) The failure of any court to follow the provisions of this rule shall not constitute grounds for relief from a judgment of conviction or sentence. The failure of appointed counsel to meet the qualifications set forth in this rule shall not be

deemed evidence that counsel did not provide effective assistance of counsel in a particular case.

Section 2. Qualifications and compensation of counsel in non-capital cases.

(a) Before counsel is appointed for an indigent defendant the court shall be satisfied that the attorney to be appointed is capable of providing the defendant with effective assistance of counsel.

(b) Appointed counsel, other than public defenders, shall be entitled to reasonable compensation for their services rendered as provided in this rule. Reasonable compensation shall be determined by the court in which services are rendered, subject to the limitations set forth in this rule, which limitations are declared to be reasonable. The limitations apply to compensation for services rendered in each court, municipal or general sessions; criminal, circuit, or chancery; Court of Appeals or Court of Criminal Appeals; the Tennessee Supreme Court; and the United States Supreme Court.

(c) The hourly rate for appointed counsel in non-capital cases shall not exceed forty dollars (\$40) per hour for time reasonably spent in trial preparation and fifty dollars (\$50) per hour for time reasonably spent in court.

For the purposes of this rule, "time reasonably spent in court" means time spent in courtroom proceedings before a judge.

(d) Except as provided in Section 2(e) of this rule, the compensation allowed appointed counsel for services rendered in a non-capital case shall not exceed the amounts indicated. The maximum compensation allowed shall be determined by the original charge in the case.

(1) Five hundred dollars (\$500) in:

(A) Cases in which an adult or a juvenile is charged with a misdemeanor and is in jeopardy of incarceration;

- (B) Dependent or neglected child cases;
- (C) Termination of parental rights cases;
- (D) Contempt of court cases where an adult or juvenile is in jeopardy of incarceration.
- (E) Cases in which a juvenile is charged with a non-capital felony, provided the maximum compensation for this category of cases is further limited to one hundred dollars (\$100) per day as provided in Tenn. Code Ann. § 37-1-150(e) (3);

(2) One thousand dollars (\$1,000) in:

- (A) Preliminary hearings in general sessions and municipal courts in which an adult is charged with a felony;
- (B) Cases in trial courts in which the defendant is charged with a felony;
- (C) Direct and interlocutory appeals;
- (D) Cases in which a defendant is applying for early release from incarceration or a suspended sentence;
- (E) Non-capital post conviction and habeas corpus proceedings;
- (F) Probation revocation proceedings;
- (G) All other non-capital cases in which the defendant has a statutory or constitutional right to be represented by counsel.

(e) If the court in a non-capital case shall certify to the director of the Administrative Office of the Courts that the case requires extended or complex representation within the meaning of Tenn. Code Ann. § 40-14-207(a) (2) or an amount in excess of the maximum amount allowed by section 2(d) is necessary to provide reasonable compensation to appointed counsel, the compensation shall be limited to the amount stated in this subsection. In addition, all payments under this section 2(e) must be submitted to the director for approval; but, if a payment under this section 2(e) is not approved by the director, the director shall transmit the claim to the chief justice for approval or disapproval.

(1) One thousand dollars (\$1,000) in those categories of cases described in section 2(d)(1) of this rule;

(2) Two thousand dollars (\$2,000) in those categories of cases described in section 2(d)(2)(A), (C), (D), (E), (F), and (G) of this rule; and

(3) Three thousand dollars (\$3,000) in that category of cases described in section 2(d)(2)(B).

Section 3. Minimum qualifications and compensation of counsel in capital cases.

(a) For the purposes of this rule, a capital case is a case in which an indigent defendant is being tried for first degree murder and the state has filed and not withdrawn notice to seek the death penalty as provided in Tenn. Code Ann. § 40-14-204; and a capital case on appeal and in post-conviction proceedings is a case in which the defendant is under a sentence of death.

(b) At least two attorneys must be appointed to represent a defendant at trial in a capital case. At least one of the attorneys appointed must maintain a law office in the state of Tennessee and have significant experience in Tennessee criminal trial practice. The counsel appointed shall be designated "lead counsel" and "co-counsel."

(c) Lead counsel must:

(1) be a member in good standing of the Tennessee bar or be admitted to the practice pro hac vice;

(2) have for at least three years regularly represented defendants in criminal jury trials;

(3) have had a minimum of twelve hours of specialized training in the defense of defendants charged with a capital offense; and

(4) have at least one of the following:

(A) experience as lead counsel in the jury trial of at least one capital case;

(B) experience as co-counsel in the trial of at least two capital cases;

(C) experience as co-counsel in the trial of a capital case and experience as lead or sole counsel in the jury trial of at least one murder case; or

(D) experience as lead counsel or sole counsel in at least three murder jury trials; or one murder jury trial and three felony jury trials.

(d) Co-counsel must:

(1) be a member in good standing of the Tennessee bar or be admitted to practice pro hac vice;

(2) have had a minimum of 12 hours of specialized training in the defense of defendants charged with a capital offense; and

(3) have at least one of the following qualifications:

(A) qualify as lead counsel under (c) above;

(B) experience as sole counsel, lead counsel, or co-counsel in a murder jury trial.

(e) The attorneys who represented the defendant in the trial court in a capital case may be designated by the trial court to represent the defendant on direct appeal, provided either of the trial attorneys qualifies as new appellate counsel under section 3(g) of this rule and both attorneys are available for appointment. However, new counsel will be appointed to represent the defendant if the trial court, or the court in which the case is pending, shall determine that the appointment of new counsel is necessary to provide the defendant with effective assistance of counsel or that the best interest of the defendant requires the appointment of new counsel.

(f) If new counsel are appointed to represent the defendant on direct appeal, at least one attorney must be a member in good standing of the Tennessee Bar and maintain a law office in the state of Tennessee. If the other attorney appointed is not a member of the

Tennessee Bar, he or she must be admitted to practice pro hac vice;

(g) Counsel in cases on direct appeal, regardless of any prior representation of the defendant, must have three years of litigation experience in criminal trials and appeals; and they must have at least one of the following qualifications: experience as counsel of record in the appeal of a capital case; or experience as counsel of record in the appeal of at least three felony convictions within the past three years and a minimum of six hours of specialized training in the trial and appeal of capital cases.

(h) Counsel eligible to be appointed as post-conviction counsel in capital cases must have the same qualifications as new appellate counsel; or have trial and appellate experience as counsel of record in state post-conviction proceedings in three felony cases, two homicide cases, or one capital case. They also must have a working knowledge of federal habeas corpus practice, which may be satisfied by six hours of specialized training in the representation in federal courts of defendants under the sentence of death imposed in state courts; and they must have not previously represented the defendant at trial or on direct appeal in the case for which the appointment is made, unless the defendant and counsel expressly consent to continued representation.

(i) Appointed counsel, other than public defenders, in capital cases shall be entitled to compensation as set forth in section 3(j) for services rendered and reasonably necessary for effective representation.

(j) Appointed counsel in capital cases shall be compensated on hourly rates which shall be at least the following:

- (1) Lead counsel out-of-court - seventy-five dollars (\$75);
- (2) Lead counsel in-court - one hundred dollars (\$100);
- (3) Co-counsel out-of-court - sixty dollars (\$60);
- (4) Co-counsel in-court - eighty dollars (\$80);

(5) Post-conviction counsel out-of-court - sixty dollars (\$60);

(6) Post-conviction counsel in-court - eighty (\$80).

Section 4. Payment of expenses incident to representation.

(a) Appointed counsel shall be reimbursed for certain necessary expenses incurred directly in the representation of indigent defendants.

(1) Expenses for long distance telephone calls, copying, printing, and travel within the state, approved by the court as reasonably necessary, will be reimbursed. Claims for reimbursement for long distance telephone calls must be supported by a log showing the date the call was made, the person or office called, the purpose of the call, and the duration of the call stated in one-tenth (1/10) hour segments. Travel within the state will be reimbursed in accordance with Judicial Department travel regulations.

(2) Appointed counsel may be reimbursed for other expenses, including travel outside the state, incurred directly in the representation, only upon prior approval by the court in which the services are rendered. Such expenses may be approved only upon a finding by the court that the purpose for which the expenses are to be incurred are necessary to the effective representation of the defendant and upon the administrative approval by the director. Applications for authorization shall be made by motion to the court, and the court shall enter an order showing the action taken on the motion. Orders authorizing expenditures shall be communicated directly to the director for the director's approval of payment. If payment of the expenses is not approved by the director, the director shall transmit the claim to the chief justice for disposition.

Section 5. Expert services.

(a) In the trial and direct appeals of all criminal cases in which the defendant is entitled to appointed counsel and in the trial and appeals of post-conviction proceedings in capital cases, the court in an ex parte hearing may in its discretion determine that investigative or expert services or other similar services are necessary to ensure that the constitutional rights of the defendant are properly protected. If such determination is made, the court may grant prior authorization for these necessary services in a reasonable amount to be determined by the court. The authorization shall be evidenced by a signed order of the court. The order shall provide for the payment or reimbursement of reasonable and necessary expenses by the administrative director of the courts. (See Tenn. Code Ann. § 40-14-207(b); State v. Barnett, 909 S.W.2d 423 (1995); and Owens v. State, 908 S.W.2d 923 (1995).)

(b) Counsel for the defendant must seek authorization for the services considered necessary by motion delivered to the judge of the court setting forth the nature of the services, the name and location of the person proposed to provide the services, an explanation for not obtaining the services in Tennessee if the person proposed to furnish the services is not located in Tennessee, the means, the date, and time and the location at which the services are to be provided, a statement of the itemized costs of the services and the amount of any expected additional or incidental costs, such as court appearances by experts. If the trial court finds that the defendant has satisfied these threshold requirements, the trial court must conduct an ex parte hearing on the motion and determine if the requested services are necessary to ensure the protection of the defendant's constitutional rights.

(c) If the total expected costs exceed five thousand dollars (\$5,000) or the charge per hour of any person or entity furnishing these services exceeds one hundred and fifty dollars (\$150) per hour, the proposed expenditures, if authorized by the court in which the case is pending, must also be submitted to the director of the Administrative Office of the Courts for approval by the chief justice before the expenses can be incurred.

(d) Payment may be made directly to the person, agency, or entity providing the services upon certification by counsel for the defendant that the

services authorized by order of the court have been rendered. Requests for payment will be supported by a copy of the court order authorizing the expenditure, approval by the chief justice where required, and counsel's certification.

Section 6. Review of claims for compensation and reimbursement of expenses.

(a) Claims for compensation, expert services, and litigation expenses shall be filed by counsel with the Administrative Office of the Courts on forms approved by that office. Time spent by counsel on a single case or proceeding shall be included in a single claim for compensation. Counsel will be held to a high degree of care in the keeping of records supporting all claims and in the application for payment.

(b) Any party aggrieved by the final action taken with regard to the award of compensation for appointed counsel, the authorization for expenses, or the authorization for services may petition the Supreme Court for review of that action within thirty (30) days from the date thereof, which petition the court may grant or deny. Upon grant of the petition to review, that portion of the record relevant to the issue raised shall be forwarded to the clerk of the Supreme Court at Nashville within thirty (30) days of the date on which the petition was granted. Review shall be de novo upon the record unless the court requests additional information.

(c) There shall be a presumption that the action taken by the court is correct.

(d) The provisions of this rule will be followed where by their terms they are applicable regardless of the agency of the state against whose budget the payments are charged.

It is so ORDERED this the ____ day of _____,
1997.

CHIEF JUSTICE ADOLPHO A. BIRCH, JR.

JUSTICE FRANK F. DROWOTA, III

JUSTICE E. RILEY ANDERSON

JUSTICE LYLE REID

JUSTICE JANICE M. HOLDER