

No. 12-10, 430

IN THE SUPREME COURT OF THE
UNITED STATES

RUSSELL EARL BUCKLEW,
Petitioner,

v.

AL LUEBBERS,
Respondent.

On Petition for a Writ of Certiorari to
the United States Court of Appeals
For the Eighth Circuit

**BRIEF OF *AMICUS CURIAE*
MISSOURI ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS
IN SUPPORT OF PETITIONER**

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Question Presented

Do legal fee caps and post-work reductions in earned legal fees and costs infringe upon a Defendant's right to counsel, as authorized by 18 U.S.C. §3599 and *Harbison v. Bell*, by putting executive clemency counsel in the untenable position of choosing between sacrificing their practices and livelihood as un(under)compensated conscripted counsel, or potentially delivering substandard representation to death row defendants facing their last chance at life?

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Statement of Interest¹

The Missouri Association of Criminal Defense Lawyers (MACDL) is an organization dedicated to protecting the rights of persons accused of crimes in Missouri, and to fostering and enhancing the ability of Missouri lawyers to effectively represent those persons. MACDL also works to improve the criminal justice system to those ends. MACDL is an affiliate organization of the National Association of Criminal Defense Lawyers.

¹Counsel of record for the amicus served timely notice on each party's counsel of record under U.S. S.Ct. R. 37.2(a), and each consented to the filing. No party or counsel for a party authored any part of this brief or contributed money intended to fund its preparation or submission. Amicus paid all costs associated with preparing and submitting it. U.S. S.Ct. R. 37.6.

Summary of Argument

Arbitrary limitations on attorney compensation for executive clemency work threaten the ability of criminal defense lawyers to perform their work within the established ethical standards while still maintaining a viable law practice and maintaining their livelihood. Such a practice equates to uncompensated conscription of legal counsel. This practice, if allowed to continue, will result in immeasurable damage to death row defendants in their last bid for life.

Argument

Much of the habeas work in the State of Missouri is performed by solo practitioners and small firm attorneys (like Petitioner's counsel). Like any business, solo practitioners and small firm attorneys need revenue to pay overhead and costs, and to pay themselves and their staff a salary. While *pro bono* work is a component of many practices, without subsidies or grants, private attorneys cannot maintain a practice on *pro bono* work alone – they must be compensated for their work.

In the context of capital punishment, clemency represents the “fail safe” of our criminal justice system.” *Herrera v. Collins*, 506 U.S. 390, 415 (1993). The executive clemency work of habeas counsel is specialty work. There are only a select number of attorneys in Missouri who possess the experience, skill, and expertise to effectively present a clemency case to the executive, and who present such petitions to the Governor's office with any degree of frequency. Counsel must be appropriately compensated to ensure that executive clemency work in Missouri, and elsewhere, continues to be performed by qualified attorneys.

Instituting caps on clemency work, or unpredictably slashing legal

fees and costs *post-facto* places an enormous economic hardship on the average solo and small firm habeas practitioner – many of whom simply cannot afford to donate the time required to effectively advocate for executive clemency. It sets up a Morton’s fork: counsel can: (a) perform the clemency work to the best of their ability, but risk a fee cut which could jeopardize their practice and livelihood, and thereafter make them unwilling or unable to perform clemency work, or (b) try to make up the expected loss of revenue from the clemency work by taking on additional paying work, which could leave counsel overextended and put them at risk of failing their ethical obligation of competence and diligence to their clients.

Static caps on legal fees and costs, or worse, unexpected *post facto* discounting of performed legal work will discourage qualified counsel from seeking and accepting such appointments. This, in turn, will lead to a decrease in the quality of representation provided to indigent defendants, or worse, will force upon counsel an economic uncertainty which threatens to materially affect counsels’ ability to effectively and ethically perform the duties which they have been assigned.

■ Ethical Requirements

Like all jurisdictions, Missouri has ethical cannons that govern the conduct of all attorneys in the state, and which mandate that a lawyer provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. Missouri Rule of Professional Conduct 4-1.1.²

In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include: the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, ***the preparation and study the lawyer is able to give the matter***, and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. *Id.* In many instances, the required proficiency is that of a general practitioner. *Id.* (emphasis added).

² Missouri Rule of Professional Conduct 4-1.1 is substantially similar to the Model Rules of Professional Conduct (Rule 1.1) promulgated by the American Bar Association.

Expertise in a particular field of law may be required in some circumstances. Missouri Rule of Professional Conduct 4-1.1, Comment 1. Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. Missouri Rule of Professional Conduct 4-1.1, Comment 5.

The Missouri ethical mandate on competence is complemented by Missouri Rule of Professional Conduct 4-1.3³, mandating diligence on the part of attorneys: “[a] lawyer shall act with reasonable diligence and promptness in representing a client.” A lawyer must act with commitment and dedication to the interests of the client

³ Missouri Rule of Professional Conduct 4-1.3 is substantially similar to the Model Rules of Professional Conduct (Rule 1.3) promulgated by the American Bar Association.

and with zeal in advocacy upon the client's behalf.

The ethical requirements that counsel perform their work competently and diligently, mean that the work that must be performed on an executive clemency petition is unchanged by the compensation paid. A lawyer is required to put the exact same effort into the petition no matter what rate is attached. If a particular matter requires more hours than the fee-cap covers, that work must nonetheless be performed to comply with the ethical requirements.

■ **Compensation of Death Penalty Counsel**

The Missouri and ABA ethical canons are complemented in this case by the American Bar Association "Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases", (revised 2003). Guideline 9.1 specifically addresses the issue of funding and compensation of counsel in death penalty cases:

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.

Commentary to this section goes on to specify that “[g]overnment has the responsibility to fund the full cost of

quality legal representation. This means that it must ‘firmly and unhesitatingly resolve any conflicts between the treasury and the fundamental constitutional rights in favor of the latter.’” It goes on to specify that, “each jurisdiction is responsible for paying not just the direct compensation of members of the defense team, but also the costs involved in meeting the requirements of these Guidelines for high quality legal representation.” Low fees make it economically unattractive for competent attorneys to seek assignments and to expend the time and effort a case may require to provide high quality legal representation. ABA GUIDELINES, Commentary.

As noted by the Spagengberg Group in its 1993 study of representation in capital cases in Texas, “more and more experienced private criminal attorneys are refusing to accept court appointment in capital cases because of the time involved, the substantial infringement on their private practices, the lack of compensation for counsel fees and experts/expenses and the enormous pressure that they feel in handling these cases.” THE SPAGENBERG GROUP, A STUDY OF THE REPRESENTATION IN CAPITAL CASES IN TEXAS (1993).

As the ABA Guidelines highlight, it is “inmates – and the justice system – rather than lawyers (who can always move to more lucrative fields) that are victimized when jurisdictions fail to fulfill their financial responsibilities. What is ‘most important [is that] the quality of the representation often suffers when adequate compensation for counsel is not available’”. ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-2.4 cmt. (3d ed. 1992).

“It is demonstrably the case that, by discouraging more experienced criminal defense lawyers from accepting appointments in capital cases, inadequate compensation has often left criminal defense representation to inexperienced or outright incompetent counsel.” ABA GUIDELINES, Commentary, p.987.

The Guidelines are explicit that “compensation should be based on the number of hours expended plus the effort, efficiency, and skill of counsel.” *Id.* p.987. “When assigned counsel is paid a predetermined fee for the case regardless of the number of hours of work actually demanded by the representation, there is an unacceptable risk that counsel will limit the amount of time invested in the representation in order to

maximize the return on the fixed fee.”
See, e.g., *Bailey v. State*, 424 S.E.2d
503, 506 (S.C. 1992):

“It would be foolish to ignore the very real possibility that a lawyer may not be capable of properly balancing the obligation to expend the proper amount of time in an appointed criminal matter where the fees involved are nominal, with his personal concerns to earn a decent living by devoting his time to matters wherein he will be reasonably compensated. The indigent client, of course, will be the one to suffer the consequences if the balancing job is not tilting in his favor.”

The Commentary to the Guidelines takes the problem head on when it states:

“Moreover, any compensation system that fails to reflect the extraordinary responsibilities and commitment required of all members of the defense team in death penalty cases, that does not provide for extra payments when unusually burdensome representation is provided, or that does not provide for the periodic payment of fees to all members of the defense team

will not succeed in obtaining the high quality legal representation required by these Guidelines. For better or worse, a system for the provision of defense services in capital cases will get what it pays for.”

The alternative is the conscription of counsel.⁴ If habeas counsel, including those seeking executive clemency, face uncompensated conscription, it will result in fewer practitioners who are willing or able to perform this high-level and critical work. Death row defendants will be left with unqualified counsel who are willing to work for little or no money, or conscripted counsel who are required to work in an atmosphere in which each hour they work on behalf of a death row defendant threatens to bankrupt their practice – how the ethical standards of diligence can be met under such circumstances is dubious at best.

As former Attorney General Janet Reno once observed, if justice is available only to those who can pay for a lawyer, “that’s not justice, and that

⁴ See Court Appointed Counsel: The Constitutionality of Uncompensated Conscription, 3 Geo. J. Legal Ethics 503 1989-1990

does not give people confidence in the legal system.”⁵

⁵ Janet Reno, Address to the American Bar Association Criminal Justice Section 6 (Aug. 2, 1997)(transcript on file with *Annual Survey of American Law*).

Conclusion

WHEREFORE, the amicus prays the Court for its order issuing a writ of certiorari and reversing the judgment of the court below.

Respectfully submitted,

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