

STATE OF TENNESSEE

OFFICE OF THE
ATTORNEY GENERAL
PO BOX 20207
NASHVILLE, TENNESSEE 37202

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Opinion No. 10-75

Constitutionality of Reducing Compensation of Appointed Counsel for Criminal Defendants

QUESTION

An amendment to SB3137/HB3199 would require that appointed counsel who perform professional services for indigent criminal defendants be compensated for those services on a pro rata basis in a particular quarter if the total amount of compensation requested by all attorneys in that quarter exceeds the funds appropriated for compensation in that quarter. Is this amendment constitutional?

OPINION

Yes. The failure to compensate appointed counsel fully for professional services rendered would not necessarily violate a criminal defendant's right to counsel, nor would it amount to an unconstitutional taking of property from the attorney without just compensation. Although the failure to reimburse appointed counsel fully for the expenses actually incurred in the representation would violate the due process rights of the unreimbursed attorney, this amendment only limits the amount of compensation for services rendered and not the amount of reimbursement of expenses.

ANALYSIS

Under present law, attorneys appointed to represent indigent criminal defendants are entitled to (1) "reasonable compensation for their services prior to trial, at trial, and during the appeal of the cause," and (2) "reimbursement for their reasonable and necessary expenses." Tenn. Code Ann. § 40-14-207(a). In Tenn. Code Ann. § 40-14-206, the General Assembly authorized the Tennessee Supreme Court, by rule, to prescribe "the nature of the expenses for which reimbursement may be allowed . . . and the limitations on and conditions of reimbursement as it deems appropriate and in the public interest," as well as the manner of compensation for appointed counsel. Rule 13 of the Rules of the Tennessee Supreme Court delineates the amounts of compensation authorized for appointed counsel and what expenses are reimbursable to counsel. It places various caps on the amount of compensation authorized for certain criminal cases.

The amendment to SB3137/HB3199, if enacted, would limit compensation to appointed counsel as follows:

In the event that funding appropriated in the annual appropriations act is not sufficient to fully pay all orders and attorneys' applications received by the administrative director of the courts in a particular quarter, each attorney shall be entitled to the amount of compensation that bears the same ratio to the entire amount of compensation requested by all attorneys in such quarter, as determined by the administrative director of the court. Compensation and expenses shall not exceed the amounts fixed by the administrative director of the court.

This request asks whether the amendment, if enacted, would be constitutional. In *Huskey v. State*, 743 S.W.2d 609 (Tenn. 1988), the Tennessee Supreme Court held that neither the Fifth Amendment to the United States Constitution nor Article I, Section 21, of the Tennessee Constitution requires any particular amount of compensation to be paid to appointed counsel for an indigent criminal defendant. The Court rejected the argument that statutory limitations on the amount of compensation equated to an unconstitutional taking of property without just compensation. The Court instead found "nothing unconstitutional either in the statutes authorizing compensation to counsel in indigent cases, in the limitations contained in those statutes, or in Rule 13 of this Court dealing with that subject." *Id.* at 610. The Court reaffirmed its prior view and the position adopted by a majority of jurisdictions that "one of the burdens and responsibilities of a professional person holding a license to practice law is to serve the court system as a sworn minister of justice," regardless whether the attorney is compensated for his or her services. *Id.* at 610-11.

In Op. Tenn. Att'y Gen. 92-20 (Mar. 4, 1992), this Office was asked to opine whether a decrease or cessation of state funding for the Shelby County Public Defender's office would constitute (1) a violation of a criminal defendant's right to counsel, or (2) an unconstitutional taking of property from private counsel who would be appointed to represent criminal defendants pro bono in place of the public defender's office. This Office opined that a decrease or cessation of state funding to a public defender's office would not necessarily violate a defendant's right to counsel, since appointed counsel could instead provide the effective assistance of counsel on a pro bono basis.¹ Citing *Huskey*, the Office further opined that requiring private counsel to serve as appointed counsel on a pro bono basis in place of the public defender's office would not be an unconstitutional taking of property without just compensation.

However, this Office noted that the failure to reimburse appointed counsel for expenses incurred in the representation raised a serious due process question, relying on the following analysis from *Williamson v. Vardeman*, 674 F.2d 1211, 1215 (8th Cir. 1982):

Requiring lawyers to pay the necessary expenses of criminal defense work without reimbursement is, however, constitutionally distinct from merely compelling lawyers to provide their services. Expenses might include investigatory services, deposition costs, witness fees, payment of expert witnesses, and similar outlays. While we understand that in many cases, because of lost opportunities and payment of fixed costs, the burden of providing services without compensation is

¹ The opinion further noted that "if the lack of funding this program over time leads to the inability to provide effective assistance of counsel on a systematic basis, then the result may give rise to a claim under the Sixth Amendment." Op. Tenn. Att'y Gen. 92-20, 1992 WL 544994, at *1 (Mar. 4, 1992).

comparable to that of paying expenses, lawyers have no duty to pay expenses. The class of lawyers has no more obligation to pay such expenses than any other class of citizens. Compelling individual attorneys to bear such costs raises serious due process issues.

The Eight Circuit concluded that an appointed attorney's right to due process was violated when he was compelled to bear the expenses involved in his representation of an indigent criminal defendant, and this Office opined that the decrease or cessation of funds to pay reasonable expenses reimbursable under Rule 13 of the Rules of the Tennessee Supreme Court would constitute a due process violation.

This Office affirms its prior opinion that a decrease or cessation of compensation to appointed counsel for indigent criminal defendants would not necessarily violate a defendant's right to counsel under the Sixth Amendment, nor would it amount to an unconstitutional taking of property from an uncompensated or undercompensated attorney appointed to represent an indigent defendant in a criminal case. A failure to reimburse appointed counsel fully for expenses incurred and reimbursable under Tennessee Code Annotated § 40-14-207(a) and Rule 13, Rules of the Tennessee Supreme Court, would constitute a due process violation against the unreimbursed attorney. Since the amendment, if enacted, would only require the pro rata payment of compensation in the event the total amount of compensation requested by all attorneys in a particular quarter exceeds the funds appropriated for compensation and would not abrogate present law requiring the full reimbursement of expenses incurred by appointed counsel, the proposed legislation is constitutionally defensible.

ROBERT E. COOPER, JR.
Attorney General and Reporter

GORDON W. SMITH
Associate Solicitor General

JOHN H. BLEDSOE
Senior Counsel

Requested by:

The Honorable Randy McNally
State Senator
307 War Memorial Building
Nashville, Tennessee 37243-0205