1190043

SUPREME COURT OF ALABAMA

KELLY BUTLER, in his official capacity as Director of Finance, and CHRIS ROBERTS, in his official capacity as Director of Alabama Office of Indigent Defense Services,
Appellants and Defendants Below

v.

WILL J. PARKS III and C. CLAIRE PORTER, individually and for all other Alabama lawyers similarly situated,
Appellees and Plaintiffs Below

Interlocutory Appeal of Class Certification Order from Montgomery Circuit Court, CV-18-901008

BRIEF OF APPELLEES & ATTORNEY CLASS

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument is unnecessary.

The Defendants conceded that the Plaintiffs met all Rule 23 factors for class certification. They offered no evidence of the discretion needed to support their immunity defense, and repeatedly insisted they had no discretion.

The Court's recent opinion in ***Barnhart v. Ingalls***, 275 So.3d 1112 (Ala. 2018) fully addresses all of the Defendants' arguments on immunity and standing, as do many other Alabama cases.

Oral argument is unlikely to aid the Court, as there is really nothing to argue about.

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STATEMENT OF JURISDICTION

The Court has jurisdiction of this appeal under Ala.Code §6-5-642 as an order "certifying a class or refusing to certify a class action."

This Court and the trial court have subject-matter jurisdiction over Plaintiffs' claims for retrospective relief. These are not claims for damages and do not arise from any discretionary function of the Defendants, and therefore are not barred by sovereign immunity. ***Barnhart v. Ingalls***, 275 So.3d 1112 (Ala. 2018).

TABLE OF AUTHORITIES

Cases

Constitutional and statutory provisions

Alabama Rules of Civil Procedure

STATEMENT OF THE CASE

This case arises from amendments to Ala.Code § 15-12-21(d) made by Act 2011-678 ("the Act") that became effective on June 14, 2011. The Plaintiffs sued for declaratory, injunctive and class relief as to the Act's fee limitations or "caps" for compensation of defense counsel appointed for indigents.

Prior to the Act's effective date, § 15-12-21(d) included this sentence immediately after its fee limitations: "***Notwithstanding the above, the court for good cause shown may approve an attorney's fee in excess of the maximum amount allowed.***" Although the Act omitted this language as to trial court fees,[1] it did not expressly prohibit a trial court's discretion to approve fees in excess of the caps for good cause. (C. 6-7).

After the Act became effective the Defendants and their predecessors refused to pay any compensation to appointed counsel that exceeded the caps, regardless of a trial court's approval and certification of those fees as reasonable. (C. 7).

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[1] The Act retained the "good cause" exception to caps on appointed fees for appeals and post-conviction work. See §§ 15-12-22 and 15-12-23, Ala.Code.

This action was filed May 31, 2018 after the Office of Indigent Defense Services[2] denied payment to the Plaintiffs of trial court-approved fees that exceeded the $4,000 cap for a murder case to which they were appointed. (C. 7-8).

Plaintiffs alleged a number of grounds for declaratory and corresponding injunctive relief, and also requested class relief for all other Alabama lawyers who were similarly affected. (C. 8-15).

The Defendants filed a "Motion To Dismiss Without Prejudice Or Alternative Motion To Stay Proceedings" on July 3, 2018. This motion did not assert lack of subject-matter jurisdiction, and was based solely on exhaustion of remedies. (C. 30-32).

On July 17, 2018 Plaintiffs filed an Opposition to the motion for stay along with a Motion For Class Discovery (C. 38-52), and also filed a Motion For Status Conference on September 12, 2018, (C. 70).

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[2] The Act created a sub-agency of the Alabama Department of Finance called "Office of Indigent Defense Services" (hereafter "OIDS"), which administers payments of fees to appointed counsel. When this action was filed Mr. Clinton Carter was the Alabama Director of Finance. Mr. Kelly Butler later became Director of Finance and was substituted for Mr. Carter. (C. 87).

The trial court held a status conference on October 10, 2018. (R.1:1).[3] After a general discussion of the case and confirmation the Attorney General had been served (R.1:7), the trial judge informed the parties that he would deny Defendants' requested stay and set the case for a class certification hearing. (R.1:26,32).

The Defendants did not raise sovereign immunity or lack of standing at this conference, and did not seek mandamus review of the denial of their motion to stay.

After the status conference the Defendants filed an Answer on October 22, 2018. (C. 75). They again asserted sovereign immunity as a defense, but again made no mention of the Plaintiffs' alleged lack of standing.

During the remainder of 2018 and early 2019 the Plaintiffs conducted discovery on class issues. The Defendants did not serve any discovery requests.

On March 1, 2019 Plaintiffs filed their Motion For Class Certification (C. 90) with a supporting Memorandum

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[3] Note regarding hearing transcript references: There were three hearings in this case, but the Reporter's Transcript in the record is not sequentially numbered as in Ala.R.App.P. 11(a)(2). Each transcript restarts the page numbering, and is cited R.1 (Oct. 10, 2018), R.2 (Mar. 11, 2019) or R.3 (Jun. 24, 2019), with a colon and the reporter's original page number; e.g., "R.1:1", etc.

and Evidentiary Submissions. (C. 94). This detailed the facts supporting certification with excerpts from depositions of State personnel and document production.

On March 4, 2019 the Defendants filed a Motion To Dismiss Plaintiffs' Claims For Class Certification. (C. 213). This motion alleged "***lack of subject matter jurisdiction because sovereign immunity precludes [Plaintiffs'] claims for retrospective monetary relief.***" (C. 213). However, the Defendants offered no supporting evidentiary material and made no claim that Plaintiffs lacked standing. Their motion further stated:

> "The Defendants do not dispute that this Court has subject-matter jurisdiction over the first two counts, for declaratory and injunctive relief, insofar as they are for prospective relief only. They do dispute that the Court has jurisdiction over the third count, relating to class relief, because Plaintiffs' claims for class relief expand the scope of the injunctive and declaratory relief sought beyond the prospective relief that the law allows, into retrospective relief that violates the State's sovereign immunity." (C. 214).

The trial court held another status conference on March 11, 2019, at which the trial judge stated that the immunity issue would be addressed at the class certification hearing. All counsel agreed with this. (R.3:7-10). Again, there was no mention by Defendants'

counsel of any issue as to Plaintiffs' standing.

The certification hearing was set for June 24, 2019. (C. 224). On June 17, 2019 the Defendants filed a Response To Plaintiffs' Motion For Class Certification (C. 225), reiterating their arguments on sovereign immunity, but again offered no supporting evidence.

Defendants' opposition objected to the Plaintiffs' proposed Class B that would consist of lawyers who worked more hours than the caps would allow, but who had limited their fee requests to the cap amounts.[4] The Defendants also argued that recovery of unpaid fees would violate the State's contract rights with appointed lawyers, but submitted no evidence of any contracts with Plaintiffs or other lawyers.[5] (C. 226-229).

Defendants' June 17, 2019 opposition conceded the Plaintiffs had established all the elements of class certification except as to Plaintiffs' proposed Class B (lawyers who could have but did not file fee claims exceeding the caps), and except for their immunity claim

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[4] The trial court ultimately declined to certify this proposed class.

[5] The State's brief here makes no reference to this defense theory.

as to the proposed Class A for retrospective relief:

> Defendants do not dispute that to the degree this court deems that certification of a prospective relief class is proper, the named Plaintiffs have satisfied the prerequisites of Ala. R. Civ. P. 23(a) sufficient to represent the same. Therefore, apart from the grounds raised in their motion to dismiss the class claim, doc. 63 ¶ 5 [asserting sovereign immunity], Defendants do not contest certification of a prospective relief class as defined in Plaintiffs' Proposed Class C. (C. 226).

At the June 24, 2019 class certification hearing the Defendants' counsel again acknowledged that Plaintiffs' evidence met all requirements for certification of proposed Class C. (R.3:20-21).

After discussion by the trial court and all counsel on the immunity question and other issues, the trial judge stated his intent to certify two of the three classes Plaintiffs proposed: the Class A group for recovery of fees previously denied as over the caps, and Class C for prospective declaratory and injunctive relief going forward. (R.3:52).

On September 18, 2019 the trial court entered an Order denying the Defendants' motion to dismiss the class claims (C. 279) and an Order Granting Class

Certification In Part. (C. 280). That order certified the following two classes:

A. All Alabama lawyers who, at any time between June 14, 2011 and the date of the Court's final order in this case, were appointed to represent an indigent person in a criminal or civil case in any Alabama district or circuit court; and whose fee declaration for such work was approved by the trial judge for an amount over the limits of Ala.Code § 15-12-21(d) and submitted to the Office of Indigent Defense Services ("OIDS") but who were denied payment of fees exceeding the § 15-12-21(d) limits.

B. All Alabama lawyers who, at any time between June 14, 2011 and the date of the Court's final order in this case, were appointed in any Alabama district or circuit court to represent an indigent person in a criminal or civil case that has been concluded but in which case either a fee declaration has not yet been submitted to OIDS, or has been submitted to OIDS and is in process; and such fee declaration is approved by the trial judge for an amount over the limits of Ala.Code § 15-12-21(d).

(C. 315-316)

Plaintiffs filed an Amendment to the complaint on October 11, 2019 adding a count under 42 U.S.C. § 1983 and 42 U.S.C. § 1988, and on October 15, 2019 Plaintiffs filed a Motion to Set Case For Final Hearing. (C. 322).

The Defendants filed their Notice of Appeal on October 17, 2019. (C. 324).

The Plaintiffs filed a Motion To Dismiss Appeal on October 28, 2019 which remains pending in this Court.

STATEMENT OF THE ISSUES

1. Does sovereign immunity under Ala. Const. 1901, Art. I, § 14 prevent the Plaintiffs and a certified class of lawyers appointed to represent indigents at the trial court level from recovering fees approved by a trial court that were denied by the Defendants on the sole ground of exceeding the fee limitations or "caps" of Ala.Code § 15-12-21(d), if the Plaintiffs and class prevail on their claim that some of the changes to this section made by Act 2011-678 are unconstitutional or otherwise invalid?

2. Were the Defendants exercising discretion that would support their sovereign immunity claim where they routinely denied all trial court appointed fees exceeding the § 15-12-21(d) fee limitations, and repeatedly insisted they had no authority to approve such fees?

3. Did the Defendants meet their initial "burden of showing that the plaintiff's claims arise from the officer or employee's performance of a discretionary duty on behalf of the State", where they offered no

testimony or evidence in support of their immunity claims, and repeatedly insisted they had no discretion to pay any trial court fees exceeding the § 15-12-21(d) fee caps?

4. Do the Plaintiffs have standing to assert claims for recovery of unpaid trial court fees for themselves and the certified attorney class, where they have a personal, concrete, and adversarial interest in the outcome of this case?

STATEMENT OF THE FACTS

Ala.Code § 15-12-21(d) provides for the appointment and compensation of counsel for indigent persons in all criminal and certain juvenile cases, and provides that they "...shall be entitled to receive for their services a fee *to be approved by the trial court*." Compensation is based on an hourly rate, subject to various maximums or "caps" depending on the class of offense charged.

Prior to June 14, 2011 when Act 2011-678 ("the Act") became effective, § 15-12-21(d) included this language immediately after the fee limitations:[6] "*Notwithstanding the above, the court for good cause shown may approve an attorney's fee in excess of the maximum amount allowed*." The Act omitted this language as to trial court compensation, but retained the provision that appointed counsel were "*...entitled to receive for their services a fee to be approved by the trial court*".[7] The Act did not expressly prohibit a trial court from approving fees

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[6] The complete text of this subdivision before and after the 2011 amendment is reproduced in Addendum 1.

[7] The Act retained this "good cause" exception for appeals and post-conviction proceedings. See §§ 15-12-22 and 15-12-23, Ala.Code.

over the caps for good cause. Regarding trial court approval, Ala.Code § 15-12-21(e) as amended by Act 2011-678 provides:

> (e) Within a reasonable time after the conclusion of the trial or ruling on a motion for a new trial or after an acquittal or other judgment disposing of the case, not to exceed 90 days, counsel shall submit a bill for services rendered to the office. ***The bill shall be accompanied by a certification by the trial court that counsel provided representation to the indigent defendant, that the matter has been concluded, and that to the best of his or her knowledge the bill is reasonable based on the defense provided.***
> (Emphasis added)

Plaintiffs Will J. Parks III and C. Claire Porter are Alabama lawyers who practice in Scottsboro, Alabama. In March 2016 they were appointed to defend Tammy Keel, an indigent, in the Jackson Circuit Court on a charge of Murder. Mr. Parks and Ms. Porter vigorously defended Ms. Keel, ultimately obtaining a Manslaughter plea for her. (C. 7; Complaint ¶ 5-6).

Mr. Parks worked 310.4 hours in Ms. Keel's defense, of which 57.1 hours were submitted on an interim bill for which he was paid $4,000 (the maximum for a Class A non-capital felony). The trial judge certified Mr. Parks' remaining balance of 253.3 hours as reasonable

and his remaining bill of $17,731 was sent to OIDS for payment.

Ms. Porter worked 148.5 hours in Ms. Keel's defense, and she also submitted an interim bill for which she was paid $4,000. The trial judge certified Ms. Porter's remaining balance of 91.4 hours as reasonable and her remaining bill of $6,398 was sent to OIDS for payment. (C. 7-8; Complaint ¶ 7-8, and C. 18-22, Ex. A and B to the Complaint).

OIDS refused payment of any additional fees to either Mr. Parks or Ms. Porter on the sole ground that there was no authority to pay any amount above the fee cap. Defendant Roberts' letters to the Plaintiffs said "...*Section 15-12-21 contains no statutory authority for the Office of Indigent Defense to exceed the fee caps*..." (C. 47-48).

The Plaintiffs requested class relief because the Defendants and their predecessors have refused to pay any fees that exceed the caps to any appointed lawyers for trial court work, regardless of the trial court's approval of the fee as reasonable. (C. 8). Defendant Roberts confirmed this at his deposition: "*Q: ...you're*

just saying the statute says what it says, and we don't have any authority to pay above the limit; is that correct? A. Yes. 15-12-21 doesn't have exception for it." (C. 175; Roberts p. 51).

The Defendants never submitted any testimony or documentary evidence that they or OIDS ever paid any over-the-cap fees as a matter of administrative discretion. Their first motion to dismiss made it clear that OIDS did not exercise any discretion in denying all over-the-cap fees, and had only paid some when ordered to do so:

> "...OIDS has paid (and will continue to pay) appointed attorneys' fee petitions in excess of the fee caps ***where directed so to do by the Board of Adjustment.***"
> (C. 31, Defendants' Motion to Dismiss ¶ 4; emphasis added)

> "...***the Board of Adjustment has directed OIDS to pay attorney fee petitions*** in excess of the statutory caps on numerous occasions..."
> (C. 36-37, Roberts aff. at ¶ 8; emphasis added)

OIDS records obtained in discovery show that at least 1,150 lawyers were denied full payment of fees approved by trial judges for indigent representation since the Act took effect in 2011, and the total of all such fees was approximately $2,764,616 as of Defendants'

October 2018 discovery responses. (C. 136-138; Ellen Eggers depo. p. 41-51).

The Complaint (C. 8-12) alleged these grounds[8] for relief:

1. That the OIDS "Dispute Resolution Process" of Ala. Admin. Code 355-9-1-.05 was futile due to the Defendants' position that the trial court fee caps are absolute.

2. That filing a claim with the Alabama Board of Adjustment as provided in Reg. 355-9-1-.05 is beyond the statutory jurisdiction of the Board, and contrary to the appeal process of the Alabama Administrative Procedure Act ("AAPA") which OIDS has no power to modify by regulation or otherwise.

3. That omission of the "good cause" provision does not limit a trial court's inherent judicial power, independent of any legislative act, to order payment of defense fees necessary to meet its constitutional duty to assure a fair trial and effective assistance of counsel for an indigent person.

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[8] There are no individual-capacity claims against the Defendants.

4. That omission of the "good cause" provision was a drafting error that is curable by supplying the omitted sentence, because the Act states no legislative intent to bar trial courts from awarding fees over the cap for good cause, and supplying the omitted language is consistent with the identical provisions in §§ 15-12-22 and 15-12-23 for appeal and post-conviction work.

5. Alternatively, Plaintiffs alleged that if the Legislature did intend to eliminate the good-cause exception, then the affected parts of the Act are unconstitutional because:

a. The Act violates the "single subject, clearly expressed" rules of Ala. Const. § 45 by making substantive changes in the law that its title does not disclose.

b. Because the Act's title does not mention eliminating the "good cause" exception, and affirmatively states its purpose as "***... to provide further for compensation of appointed counsel***", the title leads to the negative inference that the good-cause exception was unaffected and violates the "clearly expressed"

rule of Ala. Const. § 45.

c. Abolition of a trial court's discretion to exceed the caps is a separate subject not stated in the title, much less "clearly expressed", because it attempts to limit the inherent jurisdiction of trial courts to award fees for indigent representation.

d. Omission of the good-cause provision silently abolishes the constitutional, case law, and AAPA statutory rights of appointed attorneys to judicial determination and review of an indigent defense fee award, which is a separate subject not stated in the title and not clearly expressed.

6. Trial courts cannot meet their constitutional duty to assure a fair trial and effective representation for an indigent accused if the fee caps are absolute.

7. Omitting the good-cause provision violates Ala. Const. §§ 42 and 43 separation of powers by usurping to the legislature the inherent judicial power to determine how much time is necessary for effective representation.

8. Omitting the good-cause provision makes the

Act's fee caps unconstitutionally arbitrary and capricious, in violation of the due process provisions of U.S. Const. Amend. 5 and 14, and Ala. Const. Art. 1, §§ 6 and 13.

9. Omitting the good-cause provision violates the "taking" and due process provisions of Ala. Const. §§ 6, 13 and 23.

10. Omitting the good-cause provision violates the effective assistance requirement of U.S. Const. Amend. 6 and Ala. Const. § 6 by its "chilling effect" on the availability of experienced appointed counsel.

11. OIDS Reg. 355-9-1-.05 is unlawful and void. It purports to require submission of a fee "dispute" to OIDS for "reconsideration", and then to the Alabama Board of Adjustment as a "claim". But OIDS is an "agency" as defined in the Alabama Administrative Procedure Act ("AAPA"), § 41-22-3, and is specifically subject to the AAPA under Sec. 10 of the Act, which makes OIDS decisions subject to circuit court review under § 41-22-20 like any other agency, and OIDS has no power to confer review jurisdiction on another agency. The Act does not mention the Board of Adjustment and

does not grant it jurisdiction to review OIDS actions.

Depositions of Defendant Roberts and Mrs. Ellen Eggers (OIDS' accounting manager) established the following facts submitted in support of class certification, and uncontroverted by the Defendants:

The State Finance Department keeps records of all payments to lawyers for indigent defense services, with one account per lawyer. (C. 130; Eggers p. 18-19).

For about a year after the Act became effective, OIDS manually adjusted attorney hours on fee declarations that exceeded the maximum down to whatever the limit was for the particular class of case. OIDS can identify these cases either from electronic or paper records. (C. 132-134; Eggers p. 28-33).

Sometime in 2012 all indigent representation records became electronic, and from that time on OIDS can electronically identify all claims made, including all claims made for fees exceeding the caps. The ability to identify these payments continues up through the present time. (C. 134; Eggers p. 33).

From the Act's effective date in June 2011 through the discovery response date in October 2018, there were

at least 1,150 lawyers who filed over-the-cap fee declarations. All these lawyers were denied full payment solely because of the caps, and not because of any deficiency in their fee claims. (C. 136; Eggers p. 42-43). There may be an additional 130 lawyers similarly denied full payment. (C. 137; Eggers p. 47).

The fee declarations of Mr. Parks and Ms. Porter were accurate, and denied only because they exceeded the statutory maximums. (C. 175; Roberts p. 51-52).

Total fees paid from inception of the Act through the production response date were $217,649,240. (C. 138; Eggers p. 51). Total fees denied by OIDS as over-the-cap were $2,764,616 but this figure may not include an additional $126,749 for claims that were not recorded electronically. (C. 141; Eggers p. 63-64).

All lawyers who were denied over-the-cap payments during this period were denied for the same reason, in the same way, under the same OIDS practice; ***i.e.***, only because of the fee caps. (C. 143; Eggers p. 69-70).

A lawyer may work just as much on a Class C felony [with a lower fee cap] as on a Class A case depending on the circumstances. The fee caps make no distinction

between what it takes to defend a case with clear evidence (for example, if the defendant is on videotape) or one with questionable evidence (for example, where the main prosecution witness has poor eyesight. (C. 166; Roberts p. 13-16).

There are many things a lawyer would need to do in defending a serious class A felony case, and a lawyer could easily max out at $4,000 in a serious case. Even if it was a C felony, a lawyer would do all those thing as well - "it's the most important case in the world" for the defendant charged and facing prison time. (C. 168-171; Roberts p. 23-36).

A defendant facing a 10-year sentence is as much constitutionally entitled to a fair trial as someone facing a capital murder charge. (C. 172; Roberts p. 37).

The trial judge is in a better position than OIDS to judge the reasonableness of a fee declaration, with firsthand knowledge of the case and evidence. OIDS does not know the facts. (C. 167; Roberts p. 18-20).

The Defendants' position is that because there is no "good cause exception" in the statute, OIDS will not pay anything over the fee caps. (C. 168; Roberts p. 21-22).

STANDARD OF REVIEW

Class Certification

Although Rule 23, Ala.R.Civ.P. requires a "rigorous analysis", a court need not review Rule 23 elements that are not disputed. ***Barnhart v. Ingalls***, 275 So.3d 1112, 1127 (Ala. 2018), citing ***CIT Commc'n Fin. Corp. v. McFadden, Lyon & Rouse, L.L.C.***, 37 So.3d 114, 123 (Ala. 2009) (Defendant did not dispute numerosity or adequacy, and the Court limited review to disputed factors).

Because the Defendants here conceded the evidence satisfied Rule 23, no review of class certification is necessary. The merits of the action are not before the Court. ***Barnhart, supra,*** at 1127, citing ***Eufaula Hosp. Corp. v. Lawrence***, 32 So.3d 30, 34 (Ala. 2009).

Subject-matter Jurisdiction

Subject-matter jurisdiction may be raised at any time and is reviewed ***de novo***. ***Barnhart***, ***supra***, at 1121.

A ruling on a motion to dismiss for lack of subject-matter jurisdiction has no presumption of correctness. This Court accepts the complaint's allegations as true and will not ask if the pleader will ultimately prevail but only whether the pleader may possibly prevail. Any

doubts as to the complaint's sufficiency are construed in the plaintiff's favor. ***Ex parte Alabama Dep't of Transp.***, 978 So. 2d 17, 21 (Ala. 2007), citing ***Nance v. Matthews,*** 622 So.2d 297, 299 (Ala. 1993) and others.

Standing

Cognizability of a plaintiff's legal theories or claims is not a "standing" issue but a "cause of action" issue. Whether a plaintiff has a right of action goes to the viability of the plaintiff's legal theories, not to "standing" to assert those theories. ***Ex parte MERSCORP***, Inc., 141 So.3d 984, 991-92 (Ala. 2013).

If the viability of a plaintiffs' legal theory is assumed, and the plaintiff will personally benefit from favorable resolution of that theory, then the plaintiff has the "personal stake and concrete adverseness" necessary for standing. ***Wyeth, Inc. v. Blue Cross & Blue Shield of Ala.***, 42 So.3d 1216, 1220 (Ala. 2010).

Class representatives have standing to bring a claim that may not personally benefit them, if resolution of that claim will benefit or determine other claims from which they will personally benefit. ***Barnhart v. Ingalls***, 275 So.3d 1112, 1133 (Ala. 2018).

SUMMARY OF ARGUMENT

This appeal should be dismissed on the authority of ***Barnhart v. Ingalls*** and the numerous authorities cited in that very recent opinion of this Court. ***Barnhart*** fully answers each of the Defendants' contentions here.

The trial court properly certified the Plaintiffs' claims for class treatment, including their claims for recovery of unpaid fees for representation of indigent persons at the trial court level. Although the Defendants asserted § 14 sovereign immunity, they conceded that except as to this defense the Plaintiffs had established all of the prerequisites for class certification under Rule 23.

The Defendants failed to support their claim of discretionary function immunity in the trial court with any testimony or evidence. In fact the evidence submitted to the trial court in support of certification establishes that the Defendants unequivocally stated they had no discretion to approve trial court fees that exceeded the fee caps of § 15-12-21(d).

The Defendants' claim that Plaintiffs lack standing is not well taken. It is beyond dispute that the

pleadings and evidence submitted by the Plaintiffs to the trial court in support of class certification show that they have the requisite personal and "*concrete*" stake in each of their claims, and standing to pursue them for themselves and on behalf of the classes they represent.

ARGUMENT

I. Sovereign immunity does not bar the Plaintiffs' claims, and this Court has subject-matter jurisdiction.

A. Defendants' sovereign immunity claims are refuted by Barnhart v. Ingalls and numerous other opinions of this Court.

In all material respects this appeal is factually indistinguishable from this Court's recent opinion in *Barnhart v. Ingalls*, 275 So.3d 1112 (Ala. 2018). Neither *Barnhart* nor this appeal involves any issue the Court has not addressed many times before.

The *Barnhart* plaintiffs were former employees of the Alabama Space Science Exhibit Commission who sued ASSEC officers in their official capacities and individually,[9] alleging their holiday and longevity pay had not been properly calculated under a statute that the ASSEC officials claimed disputed as not applicable.

The plaintiffs requested class certification for all present and former ASSEC employees, seeking declaratory

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[9] The Plaintiffs' claims here are made only against the Defendants in their official capacities.

relief as to the statute's application and requirements; injunctive relief requiring the defendants to abide by the statute ("prospective relief"); and recovery of unpaid compensation ("retrospective relief") calculated according to the statute. 275 So.3d at 1116-1118. The ***Barnhart*** defendants argued the plaintiffs had not established commonality, typicality, or adequacy, and asserted sovereign immunity, standing, and statute-of-limitations defenses. 275 So.3d at 1118.

The trial court certified the declaratory, back pay ("retrospective") and individual capacity claims for class treatment, but declined to certify the prospective injunction claim since it would benefit only present and future ASSEC employees and the named plaintiffs were not current employees of the Commission. The defendants then filed a mandamus petition which this Court treated as an appeal under Ala.Code § 6-5-642. 275 So.3d at 1119-1120.

The ***Barnhart*** defendants argued, as the Defendants do here, that the plaintiffs' claims for "retrospective" relief were claims for damages and barred by sovereign immunity under Ala. Const. 1901, Art. I, § 14. This Court rejected that argument, quoting extensively from

Ex parte Bessemer Board of Ed., 68 So.3d 782 (Ala. 2011), as summarized in ***Alabama State Univ. v. Danley***, 212 So.3d 112, 125-26 (Ala. 2016):

> ***Ex parte Bessemer Board*** stands for the proposition that a claim for backpay will be allowed where it is undisputed that sum-certain statutorily required payments should have been made. In such instances, the defendant State officials had a legal duty to make those payments all along and, in finally doing so, they are not exercising discretion; rather, they are merely performing a ministerial act. 68 So.3d at 790. Accordingly, such a claim is not truly a claim asserted against the State and is not barred by § 14. See ***Harbert***, 990 So.2d at 845-46 (explaining that a court order requiring State officials to pay funds undisputedly owed by the State does not actually affect the financial status of the State because the funds at issue do not belong to the State and the State treasury is in no worse a position than if the State officials had originally performed their duties and paid the funds).

Barnhart, supra, 275 So.3d at 1123.

In an effort to avoid this principle the ***Barnhart*** officials argued that ***Bessemer Board*** was distinguishable because it was ***undisputed*** that the plaintiff there was entitled to her statutory pay, whereas whether ASSEC was subject to the benefits statute was ***disputed*** based on an "apparent conflict" with its enabling legislation. The ***Barnhart*** officials claimed that this conflict gave them

"a reasonable statutory basis for their decision", citing ***Woodfin v. Bender***, 238 So.3d 24 (Ala. 2017) for its holding that payments to which the plaintiffs there claimed to be entitled was not merely a ministerial act. ***Barnhart*** at 1123-24. This Court disagreed, and said:

> [T]he facts in the instant case are more akin to ***Ex parte Bessemer Board*** than to ***Woodfin***. At its core, Woodfin was a dispute regarding a school-board policy and how and whether that policy applied to the plaintiff school employees. ... In contrast, the issue in this case, as in ***Ex parte Bessemer Board***, is one of statutory interpretation -- does a statute entitle the plaintiffs to compensation they did not receive.
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> [I]f the benefit statutes obligated the Commission officers to pay the named plaintiffs compensation they were not paid, ***the Commission officers had no discretion to avoid that requirement; obedience to the statute is mandatory. Any confusion the Commission officers might have had regarding the interpretation of the benefit statutes, however reasonable, is ultimately immaterial because that confusion cannot serve as the basis for avoiding a statutory requirement.*** In sum, if it is ultimately determined that the named plaintiffs should have received additional compensation pursuant to the benefit statutes, the Commission officers had a legal duty to make those payments all along, and in finally doing so they are merely performing a ministerial act. ***Accordingly, the named plaintiffs' retrospective-relief claim is not barred by § 14.***

Barnhart, supra, 275 So.3d at 1124-1125 (emphasis added).

Thus ***Barnhart*** expressly rejects the contention here that § 14 bars retrospective relief where there is a subsequent determination of what the law required in the first place. As in ***Barnhart*** and ***Bessemer Board***, the Plaintiffs here seek recovery of compensation which they say should have been paid all along but for the omission by Act 2011-678 of the "good cause" exception to the fee caps on appointed trial court work.[10]

The logical fallacy of the Defendants' argument is obvious: if they are right, then State officers who withhold compensation or other funds under an invalid statute, or one they erroneously interpret, could never be compelled to pay that money even though the courts rule that it should have been paid to begin with. The Defendants never explain why this is a just result.

Numerous prior opinions of this Court provide for "retrospective" relief where State officers act under an

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[10] Therefore the Defendants are wrong when they argue that "***§15-12-21 does not contain a ministerial duty to pay any specific amount.***" Their duty to pay is the amount specified in Ala.Code § 15-12-21(d) as "approved by the trial court", which duty was not changed by Act 2011-678. See Addendum No. 1 to this brief, showing that this language was not changed by the Act.

incorrect understanding or "interpretation" of law. For example, in ***Wright v. Childree***, 972 So.2d 771, 781 (Ala. 2006) this Court unanimously affirmed the trial court's order requiring the State Comptroller to pay office-overhead expenses that were withheld from appointed lawyers on the basis of an Attorney General's opinion the Court determined to be erroneous. ***Wright*** included an extensive discussion of the statutory history and why the Comptroller could have been uncertain as to its proper application, but there was not the slightest indication in the opinion that the Court was concerned that § 14 immunity would prevent payment of the funds to which the lawyers there were determined to be entitled. See ***Wright***, 972 So.2d at 780-781.

Other such cases include ***White v. Sims***, 470 So.2d 1191 (Ala. 1985) (affirming class action recovery for taxpayers whose property was incorrectly assessed); ***Eagerton v. Williams,*** 433 So.2d 436 (Ala. 1983) (same, affirming class action as appropriate to recover taxes wrongly collected); ***Thorn v. Jefferson County***, 375 So.2d 780 (Ala. 1979) (same; class action was appropriate remedy to recover unlawfully assessed taxes); ***Nelson v.***

Megginson, 165 So.3d 567 (Ala. 2014) (class action upheld as to teachers' contract claims against school board); ***Parks v. Dep't of Youth Servs.***, 439 So.2d 690 (Ala. 1983) (class action for recovery of back pay raises upheld). Lastly, as recently as last year in ***Swindle v. Remington***, Ms. 1161044, 2019 WL 1090393; ___ So.3d ___ (Ala. Mar. 8, 2019), ***reh'g denied***, 2019 WL 2240140 (Ala. May 24, 2019), this Court affirmed a circuit court order for retrospective relief by refunds to members of the Public Education Employees' Health Insurance Program (PEEHIP) for improper insurance premium charges. As a state agency PEEHIP is clearly within the scope of § 14 immunity, yet this was not even mentioned in the opinion.

B. There is no "first time to legitimately dispute a statute" rule for § 14 immunity of State officers.

The Defendants are dead wrong when they cite ***Woodfin v. Bender***, 238 So.3d 24 (Ala. 2017) and ***Williams v. Hank's Ambulance Serv., Inc.***, 699 So.2d 1230 (Ala. 1997) for the outlandish claim that "***...if a court interprets a legitimately disputed statute for the first time,***

retrospective payments are barred by sovereign immunity." (Dfdts. brief, p. 12).

This was precisely the situation in *Barnhart*, where the defendant officials disputed the application of the benefit statute for the first time, and this Court said:

> *Any confusion the Commission officers might have had regarding the interpretation of the benefit statutes, however reasonable, is ultimately immaterial because that confusion cannot serve as the basis for avoiding a statutory requirement.*

Barnhart, supra, 275 So.3d at 1125.

In making this assertion the Defendants seriously misstate the facts in *Woodfin*. There was no statute at issue there, but a school-board policy, and the issue was "*how and whether that policy applied to the plaintiff school employees*". *Barnhart, supra*, 275 So.3d at 1124. Indeed, *Barnhart* makes it crystal clear that *Woodfin*'s holding cannot be extrapolated to a case involving the construction or application of a statute:

> ... if the benefit statutes obligated the Commission officers to pay the named plaintiffs compensation they were not paid, *the Commission officers had no discretion to avoid that requirement; obedience to the statute is mandatory.*

275 So.3d at 1125 (emphasis added).

The Defendants' citation to ***Williams v. Hank's Ambulance Serv., Inc.***, 699 So.2d 1230 (Ala. 1997) for this argument is likewise wrong. After quoting from numerous Alabama cases in line with the principles reiterated in ***Barnhart***, the ***Williams*** opinion stated:

> The common thread running through the cases discussed above is the unfairness that would have occurred from allowing the State to arbitrarily avoid its financial obligations. ***There was, and is, no legitimate reason to allow State department heads to avoid their clear contractual or ministerial obligations (once those obligations are determined)***, even if the performance of those obligations ultimately touches the State treasury. Such avoidance of legal and moral responsibility by the State was not the intent of the framers of the [Alabama] Constitution.

699 So.2d at 1237 (emphasis added).

The phrase "***once those obligations are determined***" refutes the Defendants' immunity argument, because it necessarily describes a "first time" determination, and plainly says there is no immunity in that event.

Williams involved a unique set of circumstances arising from a federal appellate ruling that mandated a different application of the Medicare and Medicaid Acts, which the Williams court described as "torturous reading and not easily decipherable, even by those trained in

the law." 699 So.2d at 1237. To the extent ***Williams*** might be read (as the Defendants attempt to do here) to limit or defeat the principles reiterated in ***Barnhart, Bessemer Board***, and the other authorities those opinions cite, Williams is inconsistent with the great weight of this Court's opinions, and should be expressly limited to its unusual circumstances.

C. Sovereign immunity for State officials claiming the exercise of discretion is fact-specific. The Defendants failed to offer any evidence of this, repeatedly insisting they had no discretion.

The Defendants argue in brief (p. 6) that they were "strictly interpreting" § 15-12-21(d) as amended by Act 2011-678, but as shown in the preceding discussion of ***Barnhart*** a State official's "interpretation" of a statute, "however reasonable, is ultimately immaterial because that confusion cannot serve as the basis for avoiding a statutory requirement." 275 So.3d at 1125.

It is elementary that a State official claiming sovereign immunity "bears the burden of showing that the plaintiff's claims arise from the officer or employee's

performance of a discretionary duty on behalf of the State." ***Ryan v. Hayes***, 831 So.2d 21, 28 (Ala. 2002); ***Ex parte Alabama Dep't of Transp.,*** 764 So.2d 1263, 1268-69 (Ala. 2000). This burden of proof is the same when immunity claims are asserted in a motion to dismiss (which the Defendants did here) as for any other defenses. As this Court said in ***Ex parte Alabama Dep't of Transp.,*** 978 So.2d 17, 21-22 (Ala. 2007):

> ALDOT, as the party asserting the defense of immunity, bore the burden of demonstrating that Good Hope can prove no set of facts establishing one of the exceptions to the State's sovereign immunity. See ***Ex parte Butts***, 775 So.2d 173, 177 (Ala. 2000) ("As a general rule, a motion to dismiss for failure to state a claim is properly granted only when it appears beyond a doubt that the plaintiff can prove no set of facts entitling him to relief." (quoting ***Patton v. Black***, 646 So.2d 8, 10 (Ala. 1994), quoting in turn ***Winn-Dixie Montgomery, Inc. v. Henderson***, 371 So.2d 899 (Ala. 1979)).

Although the word "discretion" appears 18 times in the Defendants' brief, none of their trial court filings ever asserted any "discretionary duty" to deny over-the-cap fees to the Plaintiffs and the class. No evidence was ever submitted that would permit even an inference of discretion, and in fact the Defendants unequivocally asserted they had no discretion under § 15-12-21(d):

> "...*Section 15-12-21 contains no statutory authority for the Office of Indigent Defense to exceed the fee caps...*"
> Defendant Roberts' letters to the Plaintiffs, (C. 47-48).

> "*Q: ...you're just saying the statute says what it says, and we don't have any authority to pay above the limit; is that correct? A. Yes. 15-12-21 doesn't have exception for it.*"
> (C. 175; Roberts depo. 51).

> "...OIDS has paid (and will continue to pay) appointed attorneys' fee petitions in excess of the fee caps ***where directed so to do by the Board of Adjustment.***"
> (C. 31, Defendants' Motion to Dismiss ¶ 4; emphasis added)

> "...***the Board of Adjustment has directed OIDS to pay attorney fee petitions*** in excess of the statutory caps on numerous occasions..."
> (C. 36-37, Roberts aff. at ¶ 8; emphasis added)

The last two statements above ***do not say*** the Defendants were performing some discretionary duty to deny all over-the-cap fees. On the contrary, they reiterate that the Defendants routinely denied all such fees and would not pay any such fees unless directed to do so by some other authority, which cannot credibly be called the "performance of a discretionary duty on behalf of the State." ***Ryan v. Hayes*** and ***Ex parte Alabama Dep't of Transp., supra***. As Defendant Roberts wrote to the Plaintiffs, "Section 15-12-21 contains no statutory

authority for the Office of Indigent Defense to exceed the fee caps." (C. 47-48). This is not a statement of discretion but of ministerial obedience to the statute, and it is subject to an ultimate judicial determination of what the statute requires, and therefore what the official's duty actually was and is. ***Barnhart, supra***, 275 So.3d at 1125.

The Defendants failed to meet their burden of proof on this issue.

II. The Plaintiffs have standing to assert the claims certified by the trial court.

A. The Plaintiffs have the requisite "concrete stake" in the claims certified for class treatment, and therefore have standing to bring them.

The Defendants cite ***Kowalski v. Tesmer***, 543 U.S. 125, 134 (2004) for the proposition that lawyers lack standing to assert claims that "hypothetical future indigent defendants' constitutional rights will be violated." As a stand-alone proposition this would be true, but the Defendants again miss a critical holding in ***Barnhart v. Ingalls, supra***:

In its order certifying the declaratory-relief claim for class-action treatment, the trial court stated that "the prevailing question in this lawsuit -- and the declaration plaintiffs ask this court to make -- is whether the Commission is bound by the [benefits] statutes." The Commission officers argue that resolving that question will have no effect on the named plaintiffs because the named plaintiffs are not current Commission employees and they would therefore receive no benefit even if the trial court ultimately held that the Commission was bound by the benefits statutes. The Commission officers accordingly argue that the named plaintiffs lack standing to bring the claim on their own behalf or on behalf of anybody else. See ***Alabama Alcoholic Beverage Control Bd. v. Henri-Duval Winery, L.L.C.***, 890 So.2d 70, 74 (Ala. 2003) (noting that a party seeking to establish standing must demonstrate that his or her injury will be redressed by a favorable decision); and ***Kid's Care, Inc. v. Alabama Dep't of Human Res.***, 843 So.2d 164, 167 (Ala. 2002) (explaining that a party without a concrete stake in the outcome of the court's decision lacks standing and may not sue on his or her own behalf or on behalf of a class). ***The named plaintiffs counter by arguing that they do have a stake in the resolution of the declaratory-relief claim because their other claims are dependent on whether the Commission is to be bound by the benefits statutes; that is, if that question is answered in the negative, then their other claims necessarily fail.***

When the trial court considered the adequacy requirement of Rule 23(a), it concluded that the named plaintiffs had not demonstrated that they could adequately represent the interests of current Commission employees with regard to the prospective-relief claim because the remedy sought -- an injunction requiring the Commission to henceforth abide by the benefits

> statutes -- would in no way benefit the named plaintiffs and they might accordingly focus on recovering past damages as opposed to pursuing that prospective injunctive relief. Accordingly, the trial court declined to certify the named plaintiffs' prospective-relief claim. ***The Commission officers argue that the logic of that holding applies just as much to the declaratory-relief claim and that that claim similarly cannot be maintained by the named plaintiffs. We disagree.***
>
> ***Although it is true that the named plaintiffs would receive no benefit from an injunction requiring the Commission to henceforth abide by the benefits statutes because they no longer work for the Commission, the named plaintiffs would benefit from a declaration that the Commission is bound by the benefits statutes because only then can they prevail on their retrospective-relief claim. That declaration is, in fact, a prerequisite to them obtaining any relief on their claims***, and they have no incentive not to expend every effort in pursuit of that declaration because, if it is determined that they are not entitled to that declaration, the rest of their case becomes moot. ***The named plaintiffs accordingly have a concrete stake in the declaratory-relief claim and standing to pursue it, Kid's Care,*** 843 So.2d at 167, ***and they have established that they can adequately represent the interests of other class members, whether current or former employees of the Commission, with regard to the retrospective-relief claim and the declaratory-relief claim.***

275 So.3d at 1132-33 (emphasis added)

This Court's opinion in ***Wyeth, Inc. v. Blue Cross & Blue Shield of Alabama***, 42 So.3d 1216, 1220 (Ala. 2010) states a similar standing analysis:

> Thus, although questions may exist regarding the viability under Alabama law of the particular legal theory asserted by BCBSAL ... ***if we assume that theory to be viable for purposes of our standing inquiry, it is easy to see that BCBSAL has "the required personal stake" to assert that theory.*** If BCBSAL's legal theory is viable, i.e., if BCBSAL's payment for unused Duract capsules resulted in the unjust enrichment of Wyeth at BCBSAL's expense, BCBSAL's effort to recover the funds it paid for the unused Duract reflects the "personal stake and concrete adverseness" necessary for standing.
>
> Nor do we see that the consideration of the legal theory asserted by BCBSAL is outside the subject-matter jurisdiction of either the trial court or this Court.
>
> (Emphasis added)

It is beyond dispute that the Plaintiffs here have a personal, concrete, adversarial stake in all of the claims they have asserted, because their success (or not) depends on the declaratory and retrospective relief they seek. Further, they have standing to assert the prospective injunction claims because that relief will personally benefit them in accepting indigent defense appointments.

B. The Defendants' standing argument was never raised in the trial court, and should first be presented and ruled on there.

It is true of course that standing can be raised at any time, but it was never presented to or argued in the trial court as a basis for denying class certification as to any claim. In fact when the Defendants conceded the adequacy of the Plaintiffs as representatives, it would seem they implicitly (if not expressly) conceded the Plaintiffs' standing.

In any event this is a non-issue given the explicit holding of *Barnhart* and its clear statement on why the plaintiffs there, like the Plaintiffs here, have the requisite personal stake in the outcome of their claims.

III. The Defendants conceded that Plaintiffs met all requirements of Rule 23 for class certification, and no review of those factors is needed.

As noted earlier the Defendants conceded the Plaintiffs had established all the elements of class certification except as to Plaintiffs' proposed Class B (lawyers who could have but did not file fee claims

exceeding the caps), and except for their immunity claim as to the proposed Class A for retrospective relief:

> Defendants do not dispute that to the degree this court deems that certification of a prospective relief class is proper, the named Plaintiffs have satisfied the prerequisites of Ala. R. Civ. P. 23(a) sufficient to represent the same. Therefore, apart from the grounds raised in their motion to dismiss the class claim, doc. 63 ¶ 5 [asserting sovereign immunity], Defendants do not contest certification of a prospective relief class as defined in Plaintiffs' Proposed Class C. (C. 226).

Defendants' counsel again acknowledged this at the class certification hearing (subject to the Defendants' stated objections based on immunity). (R.3:20-21). Since the Plaintiffs established all Rule 23's factors as to their proposed Class C (re-designated by the trial court as Class B in its certification order), those factors are also met as to Class A (again, subject to the Defendants' claims and now, presumably as to standing).

Accordingly, because all Rule 23 factors were undisputed, no review of them is necessary. ***Barnhart v. Ingalls***, 275 So.3d 1112, 1127 (Ala. 2018), citing ***CIT Commc'n Fin. Corp. v. McFadden, Lyon & Rouse, L.L.C.***, 37 So.3d 114, 123 (Ala. 2009)

CONCLUSION

The Defendants have conceded that Plaintiffs met their burden of proof on class certification, and the trial court's order fully complies with § 6-5-641's "rigorous analysis" standard.

The Court should dismiss this appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have e-filed this document by ACIS, and served all counsel of record by email this March 2, 2020.

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Addendum No. 1

Ala.Code § 15-12-21(d) Before And After Changes Made By Act No. 2011-678

[Source: Westlaw "Alabama Statutes Annotated – Historical"]

§ 15-12-21(d) (2010 edition) as it read before amendment by Act 2011-678	*§ 15-12-21(d) (2011 edition) as it read after amendment by Act 2011-678*
(d) Counsel appointed in cases described in subsections (a), (b), and (c), including cases tried de novo in circuit court on appeal from a juvenile proceeding, shall be entitled to receive for their services a fee to be approved by the trial court. The amount of the fee shall be based on the number of hours spent by the attorney in working on the case and shall be computed at the rate of fifty dollars ($50) per hour for time expended in court and thirty dollars ($30) per hour for time reasonably expended out of court in the preparation of the case. Effective October 1, 2000, the amount of the fee shall be based on the number of hours spent by the attorney in working on the case and shall be computed at the rate of sixty dollars ($60) per hour for time expended in court and forty dollars ($40) per hour for time reasonably expended out of court in the preparation of the case. The total fees paid to any one attorney in any one case, from the time of appointment through the trial of the case, including motions for new trial, shall not exceed the following: (1) In cases where the original charge is a capital offense or a charge which	(d) If the appropriate method for providing indigent defense services is by appointed counsel in a case described in subsections (a), (b), and (c), including cases tried de novo in circuit court on appeal from a juvenile proceeding, appointed counsel shall be entitled to receive for their services a fee to be approved by the trial court. The amount of the fee shall be based on the number of hours spent by the attorney in working on the case. The amount of the fee shall be based on the number of hours spent by the attorney in working on the case and shall be computed at the rate of seventy dollars ($70) per hour for time reasonably expended on the case. The total fees paid to any one attorney in any one case, from the time of appointment through the trial of the case, including motions for new trial, shall not exceed the following: (1) In cases where the original charge is a capital offense or a charge which carries a possible sentence of life without parole, there shall be no limit on the total fee. (2) Except for cases covered by subdivision (1), in cases where the original charge is a Class A felony,

carries a possible sentence of life without parole, there shall be no limit on the total fee.

(2) Except for cases covered by subdivision (1), in cases where the original charge is a Class A felony, the total fee shall not exceed three thousand five hundred dollars ($3,500).

(3) In cases where the original charge is a Class B felony, the total fee shall not exceed two thousand five hundred dollars ($2,500).

(4) In cases where the original charge is a Class C felony, the total fee shall not exceed one thousand five hundred dollars ($1,500).

(5) In juvenile cases, the total fee shall not exceed two thousand dollars ($2,000).

(6) In all other cases, the total fee shall not exceed one thousand dollars ($1,000).

Notwithstanding the above, the court for good cause shown may approve an attorney's fee in excess of the maximum amount allowed. Counsel shall also be entitled to be reimbursed for any expenses reasonably incurred in the defense of his or her client, to be approved in advance by the trial court. Preapproved expert fees shall be billed at the time the court is notified that all work by the expert has been completed, and shall be paid forthwith. Once an expert has been paid for services on a particular case, that expert shall not be allowed to receive further payment on the case. Retrials of any case shall be considered a new case.

the total fee shall not exceed four thousand dollars ($4,000).

(3) In cases where the original charge is a Class B felony, the total fee shall not exceed three thousand dollars ($3,000).

(4) In cases where the original charge is a Class C felony, the total fee shall not exceed two thousand dollars ($2,000).

(5) In juvenile cases, the total fee shall not exceed two thousand five hundred dollars ($2,500).

(6) In all other cases, the total fee shall not exceed one thousand five hundred dollars ($1,500).

Counsel shall also be entitled to be reimbursed for any nonoverhead expenses reasonably incurred in the representation of his or her client, with any expense in excess of three hundred dollars ($300) subject to advance approval by the trial court as necessary for the indigent defense services and as a reasonable cost or expense. Reimbursable expenses shall not include overhead expenses. Fees and expenses of all experts, investigators, and others rendering indigent defense services to be used by counsel for an indigent defendant shall be approved in advance by the trial court as necessary for the indigent defense services and as a reasonable cost or expense. Retrials of any case shall be considered a new case for billing purposes. Upon review, the director may authorize interim payment of the attorney fees or expenses, or both.