1980 WL 121160 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
April 10, 1980

***1** Honorable L. Edmund Atwater, III
Director
South Carolina Court Administration
P. O. Box 11788
Columbia, SC 29211

Dear Ed:
You have requested an Opinion from this Office as to whether or not the provisions of Section 16-3-26(B) and (C), 1976 Code of Laws of South Carolina limiting the total payment to $1,500.00 attorney's fees and costs and $2,000.00 expert or investigative services in a death penalty case applies where a defendant on direct appeal is granted a new trial or a resentencing proceeding.

In a previous opinion this Office stated that the $1,500.00 limit applied irrespective of whether there was one or two attorneys, that is to say the figures in the statute were the maximum amounts payable by the State per defendant irrespective of the number of attorneys or the extent of services involved. Your question now concerns whether or not that limit also includes any new trial ordered by the Supreme Court.

The general rule with respect to a new trial after appeal has been stated as follows:
. . . the case generally stands in the trial court in the same position as though no previous trial had been had. The new trial is governed and controlled by the same principles, practices, and procedure as in the original trial; and the constitutional and statutory rights of accused must be observed on the new trial, and he must be given ample opportunity to prepare for the new trial and to have adequate representation. 24B C. J. S. Criminal Law § 1952(8)(b).

It is, therefore, certain that in a situation where the Supreme Court reverses the conviction and judgment of the trial court and remands the case for a new trial in full, the defendant is entitled to the full benefit of the statutory provisions and the statute would commence to run again, that is to say the defendant would again be entitled to the maximum amount permitted for his new trial.

When the Court only vacates the sentence imposed and remands to the trial court for a new sentencing proceeding, it would appear that the same rule should apply. A recent decision of the United States Court of Appeals for the Fourth Circuit has indicated that, frequently, an attorney in order to provide an effective defense for a client, requires the assistance of an expert witness. Williams v. Martin, —— F.2d ——, Opinion No. 77-1058 and 78-6569, decided March 6, 1980. That Court citing the American Bar Association standards and analogizing the situation to other factual situations previously decided in the federal courts, indicated that some provision for expert assistance reasonably necessary for indigents is essential to the operation of a just judicial system. The Court stated that the determination of an indigent defendant's need for such assistance was within the sound discretion of a trial judge.

If, in our situation, an indigent defendant in a death penalty case were faced, after remand by the Supreme Court for a new sentencing proceeding, with a need for expert assistance to his attorneys and the attorneys requested such assistance from the court; denial by the Court of that assistance on the ground that the defendant had exhausted all funds allotted pursuant to the statute would, in our opinion, be subject to reversal under the reasoning of the Williams case.

***2** Of course, the defendant's entitlement to such assistance would depend entirely on the finding of the trial court as to his need. The same rule applicable in the situation of providing transcripts for indigent defendants would apply, that is to say, if an adequate alternative is available, then there would be no constitutional requirement to provide the assistance in that particular situation. Britt v. North Carolina, 404 U.S. 226; Attorney General's Opinion dated December 6, 1978.

The same rule would also apply with respect to Section 16-3-26(B). If no adequate alternative is available and the defendant needed the assistance of counsel at the proceeding on remand, the fact that he had exhausted the funds allocated could not be used as a basis for denying him this assistance without being subject to successful attack. It does not appear, however, that this would pose as critical a problem in view of the fact that an attorney has a duty under the Code of Professional Responsibility to accept court appointment without compensation EC2-25, Cannon 2, Code of Professional Responsibility.

In sum, it is the conclusion of this Office that the language of subsections (B) and (C) of Code Section 16-3-26 should not be construed to include a new trial, either in full or for the sentencing stage of the death penalty proceeding, within the statutory maximum allowed to be paid. The proceeding is, in fact, a new trial and the statute commences to run again. The defendant would be entitled to the full benefits of the statutory provisions.

Very truly yours,

Emmet H. Clair
Deputy Attorney General

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