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No. 2000-IA-01477

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

STATE OF MISSISSIPPI, RONNIE MUSGROVE, in his official capacity as GOVERNOR, and MIKE MOORE, in his official capacity as ATTORNEY GENERAL

Defendants-Appellants,

vs.

QUITMAN COUNTY, MISSISSIPPI,

Plaintiff-Appellee.

per [unclear]

On Appeal From The Circuit Court of the Eleventh Judicial District In and For Quitman County, Mississippi

BRIEF OF AMICI CURIAE MISSISSIPPI TRIAL LAWYERS' ASSOCIATION AND MAGNOLIA BAR ASSOCIATION

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AND MAGNOLIA BAR ASSOCIATION
IN SUPPORT OF APPELLEE QUITMAN COUNTY**

INTRODUCTION

As organizations composed of members of the Mississippi Bar who are lawyers practicing throughout the State, the Mississippi Trial Lawyers' Association (the "MTLA") and the Magnolia Bar Association are particularly well-suited to address whether an adequate system of indigent defense funded by the State of Mississippi is desirable and necessary for a fair and effective system of justice. The MTLA and the MBA also jointly filed a brief as *amici curiae* in *Wilson v. State*, 574 So. 2d 1338 (Miss. 1990). Both organizations are uniquely concerned about improving the current level of

representation indigent defendants receive from defense counsel. Moreover, because the MTLA includes many criminal defense lawyers, former prosecutors, and the MBA includes a number of lawyers appointed to represent indigent defendants on a piecemeal basis, *amici* can attest to the fact that the current system fails to meet even minimal standards for effective assistance of counsel.

BACKGROUND

Rather than create a system of indigent defense and pay the cost, the State of Mississippi has placed the burden on individual counties. Those counties -- particularly the small, rural counties -- cannot afford the financial price of creating a fair and effective system. In its complaint in the present case, Quitman County points out the economic problems visited upon it because this state responsibility has been shifted to individual counties.

The financial problems affect the ability of public defenders to do their job. In Quitman County, two public defenders represent all indigent defendants.¹ Quitman County pays each attorney a salary of \$1,350 per month. This salary is intended to cover all costs and expenses incurred in such representation, including administrative assistance, legal research, travel, and counsel's time. Accordingly, *every time* the public defender determines an independent investigation is necessary to present an adequate defense, counsel must petition the court for funds to pay the investigator. If the trial court denies the request because it determines that the county is unable to afford the expense, the public defender is left to either pay the investigator out of his own pocket or forego any independent investigation. Likewise, if counsel believes that a forensic or psychiatric

¹ *Amici* have excerpted all statistical and factual information referenced herein from the brief filed by Appellee Quitman County dated April 11, 2001.

expert would be helpful to the defendant's cause, counsel either must pay for such experts from his own salary and hope that the court will see fit to recompense him, or he must ask the court for funds for an expert before retaining an expert. If the court denies the request, the defendant's case simply proceeds without the assistance of an expert retained on his behalf.

The public defenders of Quitman County are responsible for representing indigent defendants in circuit court and on appeals to this Court. By contrast, the District Attorney's office, funded primarily by the State, represents the State in circuit court. The Mississippi Attorney General's office, itself an arm of the State, represents the State on appeals to this Court. Attorneys in the District Attorney's office and the Attorney General's office are paid a salary with benefits, and have available to them the medical and forensic experts from the Mississippi State Crime Lab, as well as the investigative services of the police force.

Quitman County has been unable to afford an adequate system of indigent defense, and its efforts to shoulder the burden placed on it by the State of Mississippi have led to serious financial problems. These problems are not limited to Quitman County, but exist throughout the State. Of the eighty-two counties in Mississippi, only three have full-time public defender's offices. The other counties have part-time public defenders, such as are employed in Quitman County, or appoint counsel on a case-by-case basis.

Quitman County has filed suit against the State of Mississippi seeking relief that will lead to the State assuming the responsibility for indigent defense. The State filed an interlocutory appeal from the Circuit Court's denial of its motion to dismiss Quitman County's claims. This Court granted review of the State's interlocutory appeal.

ARGUMENT

I. THE CURRENT SYSTEM OF FUNDING VIOLATES THE CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

In *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963), the United States Supreme Court held that the United State Constitution charges each state with the obligation to provide assistance of counsel to indigent defendants in all felony cases. Under the United States Constitution, a state's obligation to provide counsel to an indigent defendant charged with a felony "cannot be satisfied by mere formal appointment." *Evitts v. Lucey*, 469 U.S. 387, 395 (1985) (quoting *Avery v. Alabama*, 308 U.S. 444, 446 (1940)). Mississippi has long recognized that the right to assistance of counsel is the right to *effective* assistance of counsel, and that the right "is further secured to the citizens of this state by the Mississippi Constitution of 1890, Article 3, Section 26." See *Read v. State*, 430 So. 2d 832, 837 (Miss. 1983); *Triplett v. State*, 666 So. 2d 1356, 1357 (Miss. 1995). See also *Evitts v. Lucey*, 469 U.S. at 395 (1985) (finding that indigent defendant is entitled to effective assistance of counsel on first appeal as of right).

A. This Court Already Has Urged the Legislature to Meet Its Constitutional Obligation to Provide Effective Assistance of Counsel to Indigent Defendants in Mississippi

Rather than fulfill the constitutional mandate of providing effective assistance of counsel itself, the Mississippi Legislature has chosen to delegate this duty to the resource-starved counties of the State of Mississippi. Even worse, the Legislature has known since at least 1990 that, regardless of its efforts to sidestep the issue, the problem of inadequate defense permeates every county in the State that cannot afford to adequately fund a public defender's office. This Court already has called upon the Legislature to provide statewide, state-funded indigent defense, instead of imposing the obligation on counties

that clearly cannot handle the financial burden. *Mease v. State*, 583 So. 2d 1283, 1285 (Miss. 1991) (“the Legislature [should] address the problem of indigent representation on a statewide basis, rather than thrust the burden on financially-strapped counties”). This Court has recognized the unfairness of funding the prosecution in indigent defendant cases when the defense must rely on the substantially smaller county coffers. *See Wilson v. State*, 574 So. 2d 1338, 1341 (Miss. 1990) (“we would encourage the Legislature to review the system and provide funds for the representation of indigent defendants in capital cases from State funds rather than county funds. Since the State funds the prosecution in these cases, why not the defense?”). Indeed, this Court recently found – yet again – that the Legislature has failed to fulfill its constitutional duties and has ordered adequate compensation of defense counsel and payment of reasonable litigation expenses, including investigation and expert costs, in capital post-conviction proceedings. *Jackson v. State*, 732 So. 2d 187, 188-89, 191 (Miss. 1999).

B. The Mississippi Legislature Recognizes the Problems Inherent in Delegating Its Constitutional Duties to the Counties But Has Chosen to Ignore Its Responsibility to Provide Effective Assistance of Counsel

Even the Mississippi Legislature has recognized the inherent problems in the current system of defense. In 1998, the Legislature enacted the Mississippi Statewide Public Defender System Act of 1998 (the “MSPDS Act”), which authorized a full-time statewide public defender’s office. *See* Miss. Code Ann. §§ 25-32-33.² The Legislature found that the current system does not protect the State’s “defense interest” of “guaranteeing to each accused person the effective assistance of competent, loyal, and

² As is discussed below, no funding was provided for implementation of the Mississippi Statewide Public Defender System Act of 1998. The statute has since been repealed.

independent counsel, and assuring that each such person is prosecuted and punished only as may be found consistent with due process of law.” Miss. Code Ann. §§ 25-32-33 (1)(c); (2). The Legislature also found that the current system does not adequately protect the State’s “justice interest” in fair “administration of its criminal justice system so as to secure the just, fair, speedy and efficient adjustment and final adjudication of each charge formally made, to protect the innocent and to punish offenders.” Miss. Code Ann. §§ 25-32-33 (1)(d); (3).

Despite its clear findings that the system of funding indigent defense on a county-by-county basis failed to fulfill the State’s constitutional duty to provide effective assistance of counsel, the Legislature failed to fund the MSPDS Act and eventually repealed it. The Legislature instead has created and funded an office solely dedicated to representing indigent defendants in capital post-conviction proceedings. Miss. Code Ann. §§ 99-39-103. This partial relief, while helpful, is an inadequate solution to the problems inherent in the current system of providing indigent defense.

II. THE CURRENT SYSTEM OF FUNDING DOES NOT MEET THE NEEDS OF DEFENSE COUNSEL WHO REPRESENT INDIGENT DEFENDANTS

As this Court has indicated and the Legislature has recognized, the current system of funding does not adequately meet the needs of defense counsel representing indigent defendants. The system does not permit the routine use of investigators. They are authorized by circuit courts only in exceptional cases. The same is true for expert witnesses.

Given the inadequate compensation they receive under the current system, the part-time public defenders may supplement their income by representing other criminal

defendants on a private basis, as well as parties in civil matters. Unfortunately, the lack of adequate compensation for their indigent defense work creates an incentive to spend proportionally less time on indigent cases and more time on private, *paying* clients. This inevitably results in the substantial risk that an attorney may, consciously or unconsciously, fail to devote the time required to ensure that an indigent defendant receives effective representation. Between two criminal defendants competing for an attorney's time, an attorney may, again consciously or unconsciously, more zealously represent the interests of the paying client while sacrificing those of the indigent client.

Moreover, the defense lawyer who receives such a minimal amount of compensation in representing an indigent defendant faces the agonizing decision of spending his own money, which he would otherwise use to support his family, instead to defend his client. An attorney cannot reasonably be expected, and should not be compelled, to choose between performing functions he believes are necessary to preserve the liberty of his client and ensuring the economic well-being of his family. This untenable state of affairs highlights the problems inherent in the existing county-based system of indigent defense.

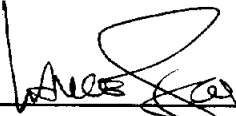
CONCLUSION

The State's decision to delegate its constitutional obligations to financially strapped counties has created an inadequate and unconstitutional system of indigent defense. This is a matter for which the State is responsible, and it ultimately must bear the burden to create a fair, efficient and constitutional system. Quitman County should be permitted to proceed with its case, and the decision of the Circuit Court denying the State's motion to dismiss should be affirmed.

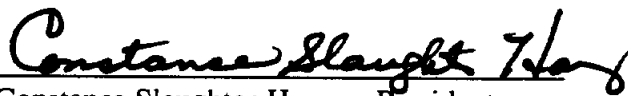
Dated: April 17th, 2001.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I, Constance Slaughter-Harvey, have caused to be served by hand on
Mail on this 17th day of April, 2001 a true and correct copy of the following Motion to
Leave to File Brief of *Amici Curiae* Mississippi Trial Lawyers' Association and Magnolia Bar
Association and accompanying Brief of *Amici Curiae* on the following:

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