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ORIGINAL

No. 2000-IA-01477

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

*filed*

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.

On Appeal From the Circuit Court In and For Quitman County, Mississippi

BRIEF OF *AMICI CURIAE* OF RUSTY FORTENBERRY  
IN SUPPORT OF APPELLEE QUITMAN COUNTY

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IN THE SUPREME COURT OF MISSISSIPPI

NO. 2000-IA-01477

STATE OF MISSISSIPPI, et al.

DEFENDANTS-APPELLANTS,

VS.

QUITMAN COUNTY, MISSISSIPPI

PLAINTIFF-APPELLEE.

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On Appeal from the Circuit Court In and For Quitman County, Mississippi

**I. A STATE-FUNDED FULL-TIME PUBLIC DEFENDER OFFICE  
WOULD INCREASE THE DEPENDABILITY OF THE CRIMINAL  
JUSTICE SYSTEM IN MISSISSIPPI**

The criminal justice system is founded on two basic tenants: (1) Accountability and (2) Due Process. As officers of the court and as public officials, prosecutors are concerned about *both* of these tenants. First, prosecutors have a responsibility to hold individuals accountable for criminal activity and thus to protect the public both by removing guilty defendants from the streets and by providing deterrence for other would-be criminals. Notably, this duty subsumes a duty *not* to convict and incarcerate innocent defendants. Second, and not so apparent, prosecutors have a responsibility to uphold the integrity of the system. This requires prosecutors to respect the defendants' constitutional rights to due process, including where appropriate: lawful searches and seizures based upon lawful probable case; lawful reading of their rights before lawful detention and/or interrogation; speedy arraignment and trial; and lawful access to a competent and adequate defense lawyer and an appeal. If any of these basic

constitutionally mandated rights are violated, it is the *prosecutor's* as well as defender's duty to the Court and public to evaluate whether a conviction based on unlawfully obtained evidence is appropriate.

In *Stringer v. State*, 500 So. 2d 928 (Miss. 1987), the Mississippi Supreme Court admonished that all prosecutors are:

duty bound and sworn by oath to uphold the laws of the State of Mississippi. We are thus entrusted with the responsibility of ensuring that the criminal justice system of this State works to *guarantee that every defendant brought before its tribunals receive a fair and impartial trial.*

*Stringer*, 500 So. 2d at 930 (emphasis added). In *Stringer*, this Court reversed a death penalty sentence and made very clear that prosecutors and trial judges, as well as defense counsel, have solemn responsibility to be mindful of the defendant's rights to due and fair process.<sup>1</sup> This responsibility necessarily becomes heightened when the prosecutor is aware that defense counsel has inadequate resources to provide constitutionally effective assistance of counsel. It is axiomatic that without effective assistance of defense counsel the likelihood of conviction of an innocent defendant increases dramatically. Ineffective assistance of defense counsel also increases the likelihood that illegally obtained evidence can be used against a defendant whose lawyer did not have the time, resources, or competence to move to exclude such evidence. This ultimately undermines the credibility of the system of law enforcement in general. For these reasons, every

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<sup>1</sup> See also *Romley v. Superior Court of Maricopa County*, 891 P.2d 246, 250 (Ariz. 1995). ("The prosecutor speaks not solely for the victim, or the police, or those who support them, but for all the People. That body of "The People" includes the defendant and his family and those who care about him."); *Mississippi Judicial Performance Commission v. Hopkins*, 590 So. 2d 857 (Miss. 1991) (reminding prosecutors of their special duty to defendants and the system).

prosecutor in Mississippi has a unique interest in ensuring that indigent defendants in particular are represented by competent and constitutionally effective counsel.

**A. The Current Method Of Funding The Criminal Justice System In Mississippi Results In Highly Disparate Resources Of The Prosecution And Defense**

In Mississippi, the State provides the lion's share of funding for all prosecution efforts. The State delegates to the counties the responsibility to hire and pay for county prosecutors. These county prosecutors are responsible only for misdemeanors and *sometimes* the very preliminary stages of felony cases. However, the primarily State-funded District Attorneys Office steps in to prosecute all felony cases after arraignment. Moreover, the 100% State-funded Attorney General's office steps in to handle all appeals of felony convictions in the State. The District Attorneys Office is staffed with full-time criminal prosecutors who are prohibited from taking other legal work while employed as State prosecutors. This prohibition ensures that prosecutors are never incentivized to spend less time on their public caseload in order to make money representing private clients.

In addition, the State provides full-time Investigators to each District Attorneys' Office in Mississippi *and funds* 100% of the State Crime Lab's annual budget. The State Crime Lab, which is available to all state prosecutors, without prior leave of court, has state-of-the-art technology for blood and DNA analysis, gunpowder analysis, fingerprinting and handwriting analysis (to name just a small sample of its capabilities).

In sharp contrast, the Quitman County public defenders who represent indigent defendants against these State-paid prosecutors are paid a substandard living wage of \$16,200 a year for their services. Consequently, the Quitman County public defenders

must take on substantial additional private employment to make a living. Quitman County's public defenders are not provided with *any* of the resources provided to State prosecutors. Rather, the "part-time" public defenders are expected to find, fund, and staff their own office accommodations and research facilities. While they have limited hours of access to public libraries, it is unrealistic to expect Quitman County public defenders to drive hours each time they need access to State-funded public resources. In short, the current system, under which the State funds most of the prosecution efforts and only plans to fund defense efforts in capital cases, results in a huge disparity of resources between the State-funded prosecution and the county-funded defense. This result is inevitable in poor rural counties such as Quitman which have very little money and are thus forced either to forego other necessary services raise county taxes to support such activities, or inevitably, to under-fund their public defender programs.

Indeed, this Court repeatedly has recognized the seriousness of the disparity in resources caused by county-funded public defenders and this Court has urged the State to implement a State wide public defender system to ensure that defendants receive effective assistance of counsel regardless of the financial plight of the county in which they are tried. *See e.g., Mease v. State*, 583 So. 2d 1283, 1285 (Miss. 1991) ("the problem of indigent representation [should be addressed] on a statewide basis, rather than thrust. . . on financially-strapped counties"); *Wilson v. State*, 574 So. 2d 1338, 1341 (Miss. 1990) (questioning State decision to fund prosecution and not defense). As public servants, prosecutors have the same interest in the overall integrity and *dependability* of the system as this Court. Regrettably, the "real-life" result under Mississippi's current funding scheme is that part-time over-burdened and under-compensated public defenders:

often are not aware of recent legal authority; rarely hire investigators or utilize forensic expertise; may spend insufficient time interviewing and counseling their clients; and as a result clients are often forced to enter plea agreements and consequently may be unable to provide constitutionally adequate assistance of counsel. As prosecutors in Mississippi, amici have seen these results first-hand and are intimately aware of the difference State-funded full-time representatives would make.

**B. Prosecutors Are Not Just Advocates, But Are “Ministers Of Justice” With Special Duties To Ensure Defendants Receive Effective Assistance of Counsel**

As an officer both of the Court and the State, every prosecutor in the State of Mississippi must take a special oath of office and solemnly swear (or affirm) to faithfully support the Constitution of the United States and Constitution of the State of Mississippi. Moreover, each such prosecutor then becomes bound by several codes of ethical conduct, including the Mississippi Rules of Professional Conduct, “Special Responsibilities of a Prosecutor.” The Federal and State Constitutions as well as each of the ethical cannons of professional responsibility to which prosecutors are bound require them to be mindful of defendants’ rights – including their Constitutional right to receive effective assistance of defense counsel. The official commentary to the Mississippi Rules regulating prosecutors sets forth that:

*A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice.*

*Comment*, Mississippi Rules of Court, Rule 38. Special Responsibilities of a Prosecutor (2001) (emphasis added).<sup>2</sup>

This express *duty* to look out for the public defenders' clients puts prosecutors in an untenable situation when defendants are not provided with effective assistance of defense counsel. When defense counsel does not provide adequate, competent assistance, the prosecution is not free to zealously present the State's case, confident that the defense will zealously and competently present its case and the jury will make an informed decision. Rather, when defense counsel is burdened with too great a caseload, inadequate (or no) staffing and administrative support, inadequate compensation and resources, and/or a lack of proper training and supervision, the prosecution *must* step in and be *both* prosecutor and defender.

Of course, the overriding reasons the prosecutor must be mindful that the defendant is receiving effective assistance of counsel is to reduce the likelihood that an innocent defendant is convicted. However, prosecutors are constantly aware of at least two other very pertinent reasons effective assistance of defense counsel is essential. First, the public's faith in the system depends on strict adherence to the due process rights of every defendant. When defense lawyers do not challenge illegal searches and seizures or unlawful confessions, every individual's constitutional rights are diminished at that moment. Second, when prosecutors secure convictions against counsel that are constitutionally inadequate, there often is an enormous waste of resources when the

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<sup>2</sup> Mississippi Prosecutors are also bound to the National District Attorneys Association Prosecution Standards and the ABA Standards for Criminal Justice, each of which are devoted exclusively to criminal justice and the heightened ethical standards to which criminal prosecutors should adhere. These canons also stress a prosecutor's duties to the Court, the public and due process.

matter is taken on appeal. The unworkability of this situation is obvious and cannot be sustained long term. Yet, this untenable result is exactly what now exists in counties throughout Mississippi which cannot afford to adequately compensate public defenders, who in turn must maintain substantial private practices and often spend significantly less time and resources on their indigent defense cases.

Moreover, as public servants, prosecutors generally enjoy special deference from jurors who are comfortable with the “knowledge” that it would be highly unlikely for the police and prosecution to be pursuing conviction without very good cause. Even though jurors are clearly instructed that a defendant’s guilt must be demonstrated “beyond a reasonable doubt,” if an indigent defendant is provided an ineffective lawyer who does not pursue forensic evidence, potential witnesses and alibis, the jury is likely to go with its gut instinct and assume the prosecution has a good case. Again, no prosecutor wants a conviction that is not based on a real showing of evidence establishing guilt beyond a reasonable doubt.

**II. A STATE-FUNDED FULL-TIME PUBLIC DEFENDER OFFICE WOULD REDUCE FISCAL WASTE BY INCREASING THE LIKELIHOOD THAT DEFENDANTS MOVE THROUGH THE SYSTEM IN THE MOST COST-EFFECTIVE, TIMELY MANNER**

Because prosecutors are mindful of their duties to the court, public, and even to the defendant, when resources are highly disparate they must spend more time evaluating the defense’s case and cannot focus on prosecution. Being a successful prosecutor is not to “win a case, but [to ensure] that justice [is] done.” *Berger v. United States*, 295 U.S. 78-88 (1935). Given the burdens placed on law enforcement to make quick arrests when crimes are committed, the natural desire of potential witnesses to want criminal



accountability, and the incentives often placed on persons with criminal records to “make deals,” inevitably in some cases the wrong person will be tried on criminal charges.

It is never a state prosecutor’s job or desire to convict the wrong person.

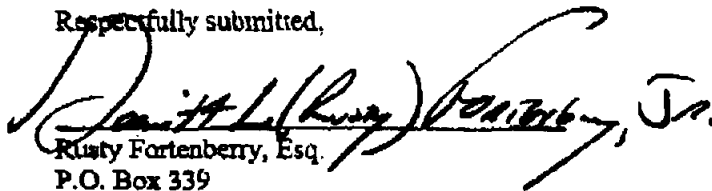
Accordingly, when defendants are represented by counsel with inadequate resources or time to explore every possible defense, interview potential witnesses, and evaluate whether there are procedural grounds for dismissal, the prosecution also *must* fill the role of assistant defense counsel. This takes time, resources and energy away from the prosecutor’s duty to represent the state zealously in *prosecuting*. If the State implements a State-funded full-time public defender office, and prosecutors throughout the State can focus on presenting their cases, ultimately, this would save the State enormous resources. Over the years we personally have regretted the resources wasted both when cases are reversed on appeal because of ineffective counsel and even more frequently when cases are given extra scrutiny by the appellate courts because of questionable assistance of counsel, even when ultimately found “harmless.”

**CONCLUSION**

As set forth above, I unqualifiedly submit that a State-funded full-time Public Defender's Office is in the best interest of every prosecutor in Mississippi, as well as in the best interest of the Courts, defendants tried on criminal charges, financially-strapped counties currently finding indigent defense, underpaid and over-burdened public defenders, and the public at large.

Dated: April 18, 2001

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 18<sup>th</sup> day of April, 2001, I caused to be served by U.S. Mail a copy of the foregoing Motion for Leave to File Brief of Amici Curiae Of Rusty Fortenberry In Support of Appellee Quitman County on the following:

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