ORIGINAL

IN THE SUPREME COURT OF MISSISSIPPI
NO. 2000-IA-01477

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

V.

QUITMAN COUNTY, MISSISSIPPI APPELLEE

FILED
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COURT OF APPEALS

per Order of 5/1/01

ON PETITION FOR INTERLOCUTORY APPEAL FROM THE CIRCUIT COURT OF QUITMAN COUNTY, MISSISSIPPI

BRIEF OF *AMICUS CURIAE* THE MISSISSIPPI BAR

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INTEREST OF AMICI

The mission of the Mississippi Bar is "to serve the public good by promoting excellence in the profession and in our system of justice." Composed of all persons holding a license to practice law in the State, the Bar counts among its goals "to ensure the highest standards of professional competence and ethical conduct of the membership" and "to promote the availability and delivery of legal services." The Bar has substantial and varied legitimate interests in the issues raised in this litigation. It can offer this Court a unique perspective on the issues presented in the State of Mississippi's interlocutory appeal from the denial of its motion to dismiss. For these same reasons, the Bar was granted leave to file as *amicus curiae* in *Wilson v. State*, 574 So. 2d 1338 (Miss. 1990), this Court's seminal case involving the provision of legal services to indigent persons charged with felonies.

. It is of vital importance to the Bar that this Court take significant steps in improving the system for providing effective assistance of counsel to indigent defendants, which is a function assigned to the States by the Sixth and Fourteenth Amendments to the United States Constitution. In *Wilson*, this Court attempted to establish guidelines for such a system based on existing statutes. It is now unfortunately clear that *Wilson* did not succeed in this task. The Mississippi Bar established a Criminal Justice Task Force which, among other things, recommended the establishment of a full-time public defender's office in each Circuit Court district, to be funded by the State of Mississippi. The Task Force's recommendations were adopted by the Board of Bar Commissioners and continue to be the policy of The Mississippi Bar. The Bar thus has substantial legitimate interests that may otherwise escape the Court's attention if the Bar's Amicus Brief is not considered on this appeal.

ARGUMENT

Over ten years ago, this Court considered the provision of legal services to indigent defendants in *Wilson v. State*, 574 So. 2d 1338 (Miss. 1990). In *Wilson*, two attorneys who represented an indigent charged with capital murder expended 779.2 and 562 hours, respectively, on the defendant's case, but were only compensated $1,000 apiece, pursuant to the provisions of Miss. Code Ann. §99-15-17. The Court recognized that issues of constitutional proportion were presented by the severe disparity between the reasonable and necessary work expended by the attorneys and the compensation to the attorneys for that work. Thus the Court was required to "construe [the statute] to enable it to withstand the constitutional attack and to carry out the purpose embedded in the statute." *Wilson,* 574 So. 2d at 1340.

Of great concern to the Court in *Wilson* was the division of Constitutional authority between the judicial and the legislative branches of government. From the Constitutional establishment of an independent judiciary the *Wilson* Court derived two foundational principles. The first was "the duty on the part of the Legislative branch to provide sufficient funds and facilities for them to operate independently and effectively." *Wilson,* 574 So. 2d at 1339, *quoting Hosford v. State*, 525 So. 2d 789, 797-98 (Miss. 1988). Because the primary responsibility for the fiscal management of government resides with the Legislature, the judiciary grants the legislative branch broad discretion to provide the funds and facilities with which the judicial system operates. *Id.*

But, although "[t]his discretionary authority of the Legislature is wide indeed . . . it does not cover the entire spectrum." *Id.* Thus, "if [the Legislature] fails to fulfill a constitutional obligation to enable the judicial branch to operate independently and effectively, then it has violated its Constitutional mandate, and the judicial branch has the authority and the duty to see that courts do

not atrophy." *Wilson*, 574 So. 2d at 1339-40, *quoting Hosford*, 525 So. 2d at 797-98. And this leads to the second principle of *Wilson* – that where the Legislature has not provided a means for the "independent and effective" operation of the judiciary, it is the "absolute duty" of the courts "to act, and to act promptly."

The balance between these two mandates was certainly not novel to *Hosford* or *Wilson*. This Court's approach to cases on the borderline between the realms of the judiciary and legislative branches of government is characterized as follows: a ruling which establishes the constitutionally-mandated standards for an independent and effective judiciary, but which allows the legislative branch an opportunity to exercise its discretion to implement those standards. Thus, in *Jackson v. State*, 337 So. 2d 1242, 1253 (Miss. 1976), this Court interpreted the then-existing capital sentencing statute to establish guidelines for bifurcated trials in capital murder cases, so as to meet the standards of the Eighth Amendment to the United States Constitution. The statute interpreted by the Court in *Jackson* had no such guidelines; shortly thereafter, the Legislature enacted the present version of Miss. Code Ann. §99-19-101, for the most part following this Court's leadership.

While *Wilson* teaches that the exercise of judicial authority to ensure the independence and efficiency of the judiciary, and the promotion of justice, should be limited to the "cases of absolute necessity," *Wilson*, 574 So. 2d at 1350, this Court does not hesitate to enter the fray when needed. Most famously, in 1981, the Supreme Court promulgated the current Mississippi Rules of Civil Procedure pursuant to its constitutional authority "to promote justice, uniformity, and the efficiency of courts" as declared *Newell v. State*, 308 So. 2d 71 (Miss. 1975). This Court will recall that ruling was controversial at the time, *see, e.g.,* W.H. Page, "*Constitutionalism and Judicial Rulemaking: Lessons from the Crisis in Mississippi,*" 3 Miss. Coll. L. Rev. 1 (1992); P.B. Herbert, "*Process,*

Procedure and Constitutionalism: A Response to Professor Page," 3 Miss. Coll. L.Rev. 45 (1992). However, ultimately the Legislature responded by reaffirming this Court's rulemaking responsibility. Miss. Code Ann. §9-3-61 (Rev. 1996).

Similarly, after patiently enduring the legislative response to *Pruett v. City of Rosedale*, 421 So. 2d 1046 (Miss. 1982) which abrogated the judicially created doctrine of sovereign immunity, this Court required the Legislature to create a system to compensate persons injured by State-employed tortfeasors in *Presley v. Miss. State Hwy Comm'n*, 608 So. 2d 1288 (Miss. 1992). The Legislature did so, by enacting the Mississippi Tort Claims Act, Miss. Code Ann. §11-46-1.

This Court returned to the issue of indigent defense services in *Jackson v. State*, 732 So. 2d 137 (Miss. 1999), in the limited context of provision of post-conviction counsel in death penalty cases. The Court went so far as to amend Miss.R.App.P. 22 to promulgate a system for appointment and compensation of post-conviction counsel under *Jackson*. And again, the Legislature rose to its share of the responsibility by enacting legislation to provide a full-time, State-funded office to meet part of the *Jackson* mandate. Miss. Code Ann. 99-15-18 (Supp. 2001).

Thus the substantive questions[1] posed by Quitman County's lawsuit are: (1) can the county state a claim that it is now necessary to the independence and effective operation of the Mississippi judiciary that a change in funding for indigent defense representation be ordered by the courts? And (2) can the county state a claim that, at a minimum, the courts should enter an order which gives the legislative branch an opportunity – and a deadline – for using its discretion to improve funding for

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[1]Regarding the third potential question – that of the county's standing to sue – the Bar notes that, consistent with the arguments presented by the county in its brief, in *Wilson* the defense lawyers had standing to raise the constitutional separation-of-powers issue decided in that case. That the subdivision paying these lawyers has at least the same standing would seem to be dictated by *Wilson*, if not by principles of subrogation.

indigent defense representation in Mississippi Courts? The Bar submits that these questions must be answered in the affirmative.

In the years after *Wilson* was decided, it has become all too clear that this Court's interpretation of Miss. Code Ann. §99-15-17 is not sufficient to ensure the delivery of effective counsel to indigent defendants and thereby promote the independence and effectiveness of the criminal justice system in our State. In 1992 the Mississippi Bar appointed a Criminal Justice Task Force, led by Chairman, Justice Fred L. Banks, Jr. of the Mississippi Supreme Court, and Vice-Chairman Circuit Judge R.I. Prichard III; the Task Force included prosecutors and defense counsel. In November 1993, the Indigent Defense Subcommittee of the Task Force engaged The Spangenberg Group of West Newton, Massachusetts to conduct a statewide study of Mississippi's indigent defense system and provide recommendations on how to improve the quality of indigent defense. The Spangenberg Group is a nationally recognized research and consulting firm specializing in the study of indigent defense services; it has been engaged in studies in every State in the Union and in several countries overseas.

The Spangenberg Group's first report was issued in January 1995. The Spangenberg Group, *Indigent Defense In Mississippi: Final Report* (January 1995).[2] As the Bar expected, the Spangenberg Groups researchers and experts found that there are numerous dedicated Mississippi lawyers serving as counsel for the indigent accused. *1995 Report* at 52. These dedicated lawyers were forced to struggle with the demands of an underfunded and overworked system. As the 1995 Report found:

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[2]Cited hereinafter as "*1995 Report*" or "*Spangenberg Report* (1995)."

- **Funding for indigent defense in Mississippi is totally inadequate.** "Mississippi is one of only eight states in the country that does not provide any state funds for indigent defense services . . . By every measure, total funds for indigent defense in Mississippi are near the bottom in the nation, including cost per capita and cost per case." *1995 Report* at 51 (emphasis added)

- The lack of adequate resources for indigent defense services in Mississippi **results in poor quality services and representation**. "Every aspect of defense representation is compromised. Specifically there is **very little: early representation provided, investigation conducted, attorney/client contact, or use of experts. . . . Case preparation is often late**, and frequently preliminary hearings are waived and defendants are held in jail three to six months without counsel until arraignment in circuit court." *Id.* at 51-52 (emphasis added).

The systemic cause of the breakdown in delivery of legal representation to poor persons charged with crime was not hard to discern. In the years after this Court's *Wilson* decision abrogated (*de facto*, though not *de jure*) the $1,000 per-case cap for case-by-case appointed counsel, 61 of Mississippi's 82 counties had chosen to appoint a "part-time public defender" to represent indigent defendants. *Spangenberg Report* (1995) at 15-16 and Table 3-1. There are, however, no statutory guidelines to govern the appointment of part-time public defenders. *Id.* at 18. The 1995 Report details the usual arrangement for part-time county defenders:

> **In practice, counties contract with one or more part-time public defenders to do all of the indigent defense work in the county for a fixed annual amount** . . . In some counties, separate contracts are created for Youth Court, Justice Court, lunacies and/or Circuit Court. In many instances, the contracting attorney does not receive additional funds for support staff, overhead costs, etc. **Thus, the contract attorneys agree to represent an unlimited number of indigent defendants, regardless of the complexity of the cases and without guarantees of full reimbursement for support services, for a year based upon a fixed annual fee.**

Id. at 19 (emphasis added)

While a contract public defender handling all the felony cases in the county may be relieved of the burdens of defending in Youth Court, lunacies, or Justice Court, he or she is still far

outmatched by the resources available to the State. This is because there are "vast differences in the responsibilities of prosecutors and public defenders." *Id.* at 39. That is to say:

> Public defenders, whether they are part-time or full-time, are responsible for felony cases originating in the lower courts at initial appearance, and on through any appeals. In contrast, the county attorney's involvement with a felony case ends after the preliminary hearing at which point the district attorney assumes responsibility from indictment through [trial] disposition. The attorney general [defends] all appeals of criminal convictions. Thus, part-time county defenders shoulder enormous workloads with no guarantees of adequate resources while their prosecutorial counterparts are provided resources governed by legislation and funded by both county and state revenues.

Id. To be sure, such an arrangement drives down costs, and may be the only financially viable option for counties forced to provide 100% of the expense for indigent defense services. And this is no doubt the reason why Mississippi had the lowest per capita expenditure of 27 geographically proximate or demographically similar states surveyed in the Bar's study. *Id.* at 35-36 and Table 3-4. But such parsimony is not likely to result in an "independent, effective" judicial system.

The results of the counties' response to *Wilson* are detailed in the 1995 Spangenberg Report. The report, which was based on comprehensive written and in-person interviews throughout the State, discussed the effect of this arrangement on the quality of legal services provided to impoverished defendants:

> We were told by part-time public defenders that the vast majority of their indigent clients accept pleas; very few go to trial. The unrelenting assignment of new cases combined with low compensation create a disincentive for public defenders to take cases to trial. The possibility of an appeal is also something a public defender has to consider: there is no extra compensation provided for appellate cases. **This situation raises grave concerns about the quality of representation available in many counties for indigent defendants. One part-time public defender admitted, "There is not much lawyering going on.** I get them through the system and get them out of here."

Id. at 26.

Time and again the part-time public defenders interviewed during the Bar's study discussed the negative impact of their excessive caseloads on the judicial system as a whole. The 1995 Report found that "many defendants are detained without assistance in a bond reduction hearing or the preliminary hearing" because defense attorneys pressed with the need to prepare the merits of too many cases had no time to devote to these auxiliary matters. *Id.* at 28. As a result, "these **defendants are incarcerated for four and sometimes five months prior to indictment, without any attorney contact**." *Id.* This, in turn, has a negative impact on other parts of the justice system:

> **Jail overcrowding** is a problem for some of Mississippi's counties, and jail populations are impacted by the timeliness of public defender appointments and the ability of public defenders to first visit their incarcerated clients. Overcrowding can increase if public defenders are unable to meet with clients to arrange for the posting of bond or bond reductions. **One public defender told us that in his county, felony defendants routinely remain in custody for three months before seeing a public defender.** Another part-time public defender who works in a county with jail overcrowding avoids seeking continuances for defendants "willing to do time."

Id. at 28.

The Spangenberg Group conducted a follow-up study for the Bar and submitted a further report two years later. The Spangenberg Group, *Update: The State of Indigent Defense Services in Mississippi* (January 1997).[3] The 1997 Report found that:

> The problems identified in the statewide report remain much the same today. As of Fall 1996, only three of Mississippi's 82 counties provide indigent defense services by means of full-time public defender offices. The majority of counties rely on poorly funded contract public defenders to represent indigent defendants. Mississippi's counties seldom provide these part-time public defenders with office space, support staff or ready access to investigators, experts or expenses necessary for litigation. Contract public defenders typically work on fixed price contracts which require them to accept an unspecified number of cases in the given contract period.

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[3]Cited as "*1997 Report*" or "*Spangenberg Report* (1997)."

1997 Report at 2.

The last of the three Spangenberg Group Reports, issued in December 1998, showed a new and disturbing trend – despite an increase in spending of 16% between fiscal year 1996 and 1998, "Mississippi's cost per capita in FY 1998 remains below that reported by any of the comparable states *for FY 1996*." 1998 Report at 20.

In response to the first of these reports, the Criminal Justice Task Force proposed, and the Board of Bar Commissioners adopted, several recommendations for the improvement of the representation of poor persons charged with crimes in Mississippi. They included:

- Establishment of a full-time public defender office for representation of indigents in criminal cases, organized, like the District Attorneys, at the Circuit Court District level;
- Funding for these district defender offices from State general funds, not county funds;
- Parity in the level of funding and salaries to those provided to the District Attorneys' Offices;
- Provision of expert and investigative services where necessary; and
- A full-time office of appellate defenders, comparable to the Criminal Litigation Division of the Attorney General's Office.

With the support of The Mississippi Bar, the 1998 Legislature passed the Mississippi Statewide Public Defender Act, a statute which met the goals established by the Bar and its Task Force. This statute, however, was repealed two years later. At the current time, according to the Record in this case to date, indigent defense representation in Quitman County suffers from the exact problems detailed in the Bar's studies:

- Part-time salaries to two lawyers (approximately $16,200 per lawyer per year, ARE 1705) with the expectation that the lawyers will handle all non-conflict criminal defense cases in the county;
- No meeting between lawyer and client until indictment and arraignment (ARE 1705);

- Little or no background investigation of witnesses called by the State at trial (ARE 1716-17);
- Little or no use of investigators or experts in non-capital cases (ARE 1715-16, 1738-40; 1580-81);
- Use of the lawyer's personal funds to hire investigators or experts in non-capital cases (ARE 1726).
- Failure of communication between the lawyer and the client (ARE 1733).

And as the Bar's studies showed, the problem is not with the men and women who practice law in locales such as Quitman County. The Quitman County defenders testified that, with more funds and lower caseloads, they would have been pleased to devote more time and energy to individual cases. ARE 1725-27. Rather, the problem is with a long-broken mechanism for providing legal representation to poor persons charged with felony offenses. This Court already decided in *Wilson* that the judiciary has the power – and the duty – to fix this mechanism. By virtue of this litigation, facts can be explored to the end of proposing a true solution to the problem that evaded *Wilson*'s prescription.

CONCLUSION

At this juncture, this Court need not decide on whether the Legislature has failed to meet its Constitutional mandate to provide an independent and effective judiciary. Nor need this Court decide what form any relief might take -- indeed, ultimately the relief granted might be, as in so many of the Court's separation-of-powers cases, a prospective one, with additional time for the Legislature to craft a solution to this problem. So does the Record support a **claim** for relief under *Wilson*'s standard? Because the Bar believes that the current system for providing counsel to indigents charged with crime is woefully inadequate to do justice, the conclusion is equally simple:

it is now absolutely necessary – more than ever – to give the Bar's Members the tools they need to do their jobs when asked to represent indigent defendants.

Respectfully Submitted,

THE MISSISSIPPI BAR, et al.

By: _____

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CERTIFICATE OF SERVICE

I do hereby certify that I have this day caused to be delivered by regular mail, a true and correct copy of the above and foregoing document to the following:

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