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~~SUPREME COURT~~
COURT OF APPEALS

IN THE SUPREME COURT OF MISSISSIPPI

Per Order of 12/8/04

QUITMAN COUNTY, MISSISSIPPI,
Plaintiff-Appellant,

vs.

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SUPREME COURT
COURT OF APPEALS

STATE OF MISSISSIPPI, Haley Barbour,
in his official capacity as GOVERNOR,
and James Hood, in his official capacity as
ATTORNEY GENERAL,
Defendants-Appellees.

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

AMICUS CURIAE BRIEF of MISSISSIPPI STATE LEGISLATORS
IN SUPPORT OF THE STATE OF MISSISSIPPI, ET. AL.

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2004-3819

IN THE SUPREME COURT OF MISSISSIPPI

QUITMAN COUNTY, MISSISSIPPI, Plaintiff-Appellant, vs. STATE OF MISSISSIPPI, Haley Barbour, in his official capacity as GOVERNOR, and James Hood, in his official capacity as ATTORNEY GENERAL, Defendants-Appellees.	No. 2003-SA-02568

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

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* MISSISSIPPI STATE LEGISLATORS IN SUPPORT OF APPELLEES, STATE OF MISSISSIPPI, ET AL.

Pursuant to Supreme Court Rule 29(a), the following named current members of the Mississippi State Legislature ("Mississippi Legislators") respectfully move this Court for leave to file the attached *amicus curiae* brief in support of Defendants-Appellees State of Mississippi, Haley Barbour, in his official capacity as Governor, and James Hood, in his official capacity as Attorney General.[1]

[1] Defendants-Appellees State of Mississippi, Haley Barbour, in his official capacity as Governor, and James Hood, in his official capacity as Attorney General have consented to the filing of this brief by the amici curiae.

Senator Mike Chaney
District 23

Senator Merle Flowers
District 19

Senator Charlie Ross
District 20

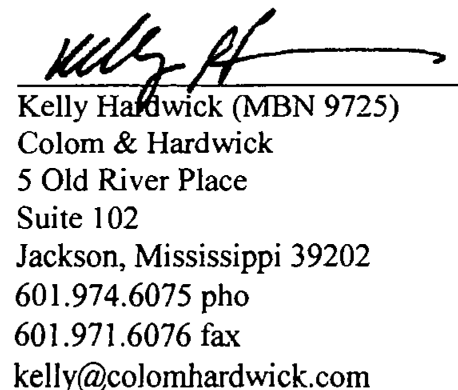
Senator Dean Kirby
District 30

It is the belief of the *Amici* that the Legislature has properly balanced the issue of indigent defense with all of the constitutionally mandated issues that are before the Legislature. *Amici* believes that their brief will assist this honorable Court in rendering their decision.

INTEREST OF THE AMICI

Amici implores this Court to uphold the ruling of the Circuit Court in this matter. The Appellants have requested, *inter alia*, that this Court mandate the creation and funding of a statewide indigent defense system. *Amici*, as Legislators, have an interest in the outcome of this appeal whereas they are amongst the constitutionally mandated officials charged with appropriating funds generated by the State of Mississippi.

Respectfully submitted this the 1st day of December 2004.



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IN THE SUPREME COURT OF MISSISSIPPI

QUITMAN COUNTY, MISSISSIPPI, Plaintiff-Appellant,	)	
vs.	)	No. 2003-SA-02568
STATE OF MISSISSIPPI, Haley Barbour, in his official capacity as GOVERNOR, and James Hood, in his official capacity as ATTORNEY GENERAL, Defendants-Appellees.	)	

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

BRIEF OF *AMICI CURIAE*
MISSISSIPPI STATE LEGISLATORS
IN SUPPORT OF APPELLEES, STATE OF MISSISSIPPI, ET AL.

INTRODUCTION

Amici advocate that any perceived deficiencies in indigent defense are not the result of chronic under-funding. The statutes requiring each county to provide counsel for indigent defendants in non-capital cases are not in conflict with Art. 3, § 26 of the Mississippi Constitution of 1890. And further, the current legislative state, hampered with a general lack of requested state funds, is clearly unable to undertake the process of funding a statewide system of indigent defense.

ARGUMENT

Quitman County seemingly misunderstands the relationship between the Legislature and the individual counties. Each county is "a subdivision of the state, created for administration and other public purposes, and . . . is subject at all times to legislative control and change." *State v. Board of Sup'rs of Grenada County*, 105 So. 541, 546 (Miss. 1925) (also describing counties as "agencies of the state government" that were "created by the Legislature for political and civil purposes"). The State of Mississippi, acting through its Legislature, "simply [has] creator power to control the county," including the control of funds in the possession of counties. *State v. Hinds County Board of Sup'rs*, 635 So.2d 839, 843 (Miss. 1994). Any funds that belong to a county also belong to the state: "The revenues of a county are subject to the control of the Legislature, and when the Legislature directs their application to a particular purpose or to the payment of the claims of particular parties, the obligation to so pay is thereby imposed on the county." *Jackson County v. Neville*, 95 So. 626, 629 (Miss. 1932); *see also Hinds County*, 635 So.2d at 841, 843.

Quitman County has no authority to support its assertion that the State is constitutionally prohibited from directing counties to assist in the provision indigent defense. *Hinds County*, 635 So.2d at 843. Indeed, counties were in fact "created by the Legislature for political and civil purposes as **agencies of the state government.**" *Grenada County*, 105 So. at 546 (emphasis supplied).

Moreover, the State's "creator's power" extends to the control of funds in the

possession of counties.[1] "The revenues of a county are subject to the control of the Legislature, and when the Legislature directs their application to a particular purpose or to the payment of the claims of particular parties, the obligation to so pay is thereby imposed on the county." *Jackson County v. Neville*, 95 So. 626, 629 (Miss. 1932). In *Hinds County*, the board of supervisors asserted that the State should bear the cost of housing State prisoners in county facilities. *Hinds County*, 635 So.2d at 841. The Supreme Court, reiterating that "the revenues of a county are subject to the control of the Legislature," found no merit in the complaint. 635 So.2d at 843. Importantly, the *Hinds County* court also rejected the claim that statutes which result in "unequal tax burdens" between counties are "unconstitutional." *Id.* at 845.

With respect to indigent defense, the Legislature has decided to create statewide, state-funded offices to handle capital litigation, while requiring individual counties to organize and pay for non-capital indigent defense in the manner that they think best. The importance of local control is emphasized in the Task Force report, which relied on a survey of senior circuit court judges. Even if the burden affects the counties unequally, that fact would not be relevant to the legal analysis here. *Hinds County*, 635 So.2d at 845.

Quitman County filed this lawsuit because it disagrees with the Legislature's allocation of responsibilities. The County wants Mississippi courts to take the extraordinary step of issuing an injunction to the Legislature and ordering legislators to pass laws that

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[1] "Constitutionally, budget-making is a legislative prerogative and responsibility in Mississippi." *Alexander v. State by and through Allain*, 441 So.2d 1329, 1339 (Miss. 1983).

would relieve the counties of all financial burdens associated with indigent defense in non-capital cases. Quitman County would rather spend revenue on discretionary programs or lower its tax levy rate rather than abide by its statutory and constitutional duty to assist in funding indigent defense.

Because this case is ultimately a dispute over the allocation of state fiscal responsibilities, this Court's issuing an injunction to the Legislature would be contrary to prior decisions holding that the Legislature is the appropriate branch of government to deal with the problem of indigent defense: "While the legislature can view the full spectrum of the problem, the courts do not have the means or facilities to adequately study the problem or provide the remedy, can only deal with the problems on a case by case basis." *Young v. State*, 255 So.2d 318, 321-322 (Miss. 1971); *see also Wilson v. State*, 574 So.2d 1338, 1340 (Miss. 1990). The trial court found insufficient evidence of widespread ineffectiveness in Quitman County specifically, and virtually no evidence of ineffectiveness throughout the State as a whole.

Even if Quitman County had presented sufficient proof that its part-time pubic defenders were not providing constitutionally adequate legal representation, it still would not follow that a statewide injunction is an appropriate remedy. If Quitman County is not meeting its obligations, then a court could have ordered the County to increase funding or otherwise reform its system of providing indigent defense services. (For example, the County could be required to earmark the funds it receives in fines and forfeitures from the State for indigent defense.) This Court held in *Hosford v. State*, 525 So.2d 789, 798 (Miss. 1988), that a court could issue such an injunction to the county government in "cases of

absolute necessity." In *Hosford*, a county courthouse was in such disrepair that it interfered with the administration of justice, and the county was in such bad financial condition that it was "impossible for them to spend the money it would take to correct the situation." *Id.* at 796, 797. Because the Legislature imposes the duty on individual counties to keep the courthouses within its boundaries "in good repair," the injunction was issued against the county government. Despite the county's poor financial condition, the Court did not seek to reapportion the financial burden between the State and counties for courthouses.

Moreover, there is no reason to believe that a full-time, public defenders' office is the only constitutionally permissible system of indigent defense. If the evidence had warranted it, and if Quitman County had requested it, the trial court could have issued a narrow injunction to address specific flaws in the indigent defense system.

In addition to the discretion entrusted to the Legislature by the separation of powers doctrine, Section 261 of the Mississippi Constitution of 1890 explicitly allows the State to rely on county funds for indigent defense, stating that "expenses of criminal prosecutions shall be borne by the county in which such prosecution shall be begun; and all fines and forfeitures shall be paid into the treasury of such county." *See Board of Sup'rs of George County v. Bailey*, 236 So.2d 420, 422 (Miss. 1970). As the Supreme Court has recognized in the context of indigent defense,

> One of the fundamental constitutional provisions is the division of governmental powers. The Mississippi Constitution specifically enjoins each department from exercising the powers vested in either of the others. The authority to empower payment of attorneys who are required by court order to defend indigents . . is a legislative matter or a judicial matter; it cannot be both. . . . Sections 1 and 2 of our Constitution are clear on this point. The appropriation of public funds is traditionally within the exclusive province of

> the legislature. While the judiciary possesses the inherent power to appoint counsel to defend indigents, it does not follow that courts can order the expenditure of public funds to pay their fees.

The legislature is the appropriate branch of government to deal with this matter because it can conduct hearings to determine the extent of the need, the amount of funds required, and the numerous related factors involved. While the legislature can view the full spectrum of the problem, the courts do not have the means or facilities to adequately study the problem or provide the remedy, can only deal with the problems on a case by case basis. *Young v. State*, 255 So.2d 318, 321-322 (Miss. 1971); *see also Wilson*, 574 So.2d at 1340.

This is not the first instance in which a county has alleged "financial ruin" at the hands of the Legislature and in each such instance courts have properly noted that the judiciary does not sit to second guess the spending priorities set by the Legislature for the counties. *See e.g., Hinds County*, 635 So.2d at 843 (not unconstitutional to require counties to house State prisoners at cost to county); *see also Mississippi Municipal Assoc. Inc. v. State*, 390 So.2d 986 (Miss. 1980) (refusing to review "fairness" of statute setting distribution of gasoline tax to various municipalities). As the Supreme Court noted in *State ex rel. Patterson v. Board of Sup'rs of Prentiss County*, even when the county alleges that a financial obligation will

> destroy local government in the counties and municipalities, that is a question to be settled at the ballot boxes between the people and the Legislature. And whether the law is needed or not, or whether it is wise or not, cannot be settled here. Our functions are to decide whether the Legislature has the power to act in passing the law and not whether it ought to have acted in the manner it did. The Court will uphold the Constitution in the fullness of its protection, but it will not and cannot rightfully control the discretion of the Legislature within the field assigned to it by the Constitution.

105 So.2d 154, 159-160 (Miss. 1958).

The legislators who have exercised their lawful authority to set the spending priorities of the counties are elected by and from the taxpayers of all 82 counties and stand accountable to the taxpayers at the ballot box in regular elections. It is the electors and elected legislators who determine the wisdom of statutes and set the relative tax burdens, not the judiciary. While the County has failed to present to this Court evidence regarding the financial situation of counties other than Quitman County, the legislators elected from those counties are much more informed as to the budget conditions of the counties and the State.

Indeed, the *Hosford v. State* case, presents the same facts as the case at bar and sets forth the proper outcome of this matter. In *Hosford*, the county courthouse was found to be in such disrepair as to interfere with the administration of justice. 525 So.2d 789, 797 (Miss. 1988). By statute, the Legislature requires counties to "erect and keep in good repair" the courthouse. *Id.* The trial court even concluded that it was convinced of that due to the financial condition of the county "it's impossible for them to spend the money it would take to correct the situation." *Id.* at 796. Rejecting the contention now advanced by Quitman County, the Court did not seek to reapportion the financial burden between the State and counties for courthouses. Instead, the a unanimous Supreme Court reached factual and legal conclusions fatal to Quitman County:

a. Counties are authorized by State law "to levy taxes necessary to meet the demands of their counties." *Id.* at 797.

b. The Legislature has created "a clear statutory duty of a board of supervisors to provide adequate court facilities" *Id.*

c. "It follows, of course, that county board of supervisors, which have imposed upon them the statutory duty of furnishing adequate courtroom facilities, are subject to appropriate court orders requiring them to do so when they adamantly **fail** or **refuse** to do so." *Id.* at 798 (emphasis supplied).

As Quitman County has not, and could not, prove beyond a reasonable doubt that it lacks the ability to raise revenue or trim discretionary spending in order to fulfill its statutory and constitutional obligation to fund indigent defense, this Court is not free to rewrite the statutes or the Constitution and the County is subject to appropriate court orders if it "fails or refuses" to fund indigent defense. For this Court to do otherwise would be to invite the judiciary to become a roving arbiter of "financial burdens" between the Legislature and its agent the counties. As the former Chief Justice Pittman expressed, this would "open the door to a floodgate of lawsuits on many subject matters where a County Board of Supervisors disagrees with state law. . . . . State-aid roads, law enforcement, and the like. . . . These requirements are imposed by state statute. Will we next be called on to judicially weigh their desirability or proper funding." *Quitman County*, 807 So.2d at 412 (Pittman, C.J., dissenting). Indeed, as the financial conditions of individual counties change from year-to-year, there would be challenges from separate counties seeking financial relief through application to the Courts regarding different statutes on an annual basis. The Legislature when considering new legislation could never be sure of the constitutionality of such measures if the judiciary stood to second guess the relative financial burden on one county or all counties in future years.

Finally, it is the confusion over the relief requested by Quitman County which

underscores that such a role is not proper for the judiciary. The complaint seeks a declaration that a statewide, State-funded public defender program is mandated by the Constitution, thereby relieving counties of **any** financial responsibility for indigent defense. At trial, Quitman County officials changed their request, stating that they would contribute the same amount to indigent defense, but desired an order whereby the County was required to pay no more than the current less than 1% of its budget. The County officials, now conceding there is a financial role to be played by counties, requests this Court to devise a county-by-county "cap," determining whether 1%, 3% or 5% of a county budget is proper for indigent defense but that a burden in excess of such is "unconstitutional." Clearly, if the legislature has the constitutional authority to require counties to spend any of its budget on indigent defense then it is for the legislature to determine what the proper amount is.

Another important aspect in this matter is the fiscal state of the State. The State of Mississippi's fiscal operations are normally classified into three groups: General Fund agencies, Special Fund agencies, and earmarked or diverted funds. A General Fund agency is any department, institution, board, or commission of the State of Mississippi that is supported in whole or in part by appropriations from the General Fund. A Special Fund agency is any agency, department, institution, board, or commission of the State of Mississippi that does not receive an appropriation from the General Fund. A Special Fund agency is supported wholly by sources outside the General Fund. Earmarked or diverted funds are those that are collected by the State but go directly to other entities usually by virtue of statutory direction. Earmarked or diverted funds include those that go directly to counties. *State of Mississippi Joint Legislative Budget Report, FY 2005.*

A statewide system of indigent defense would usually be funded in a manner that derived from one of the aforementioned methods. As will be demonstrated herein, it would be literally impossible to implement any new agency by virtue of using General Funds. Further, creating Special Funds or earmarked or diverted funds would entail generating additional sources of revenue by raising taxes.

So the question becomes, if a statewide system of indigent defense is created where do the funds come from? There are two answers and neither are very palatable. One: take the money from someone else. Two: raise taxes.

It is common knowledge that raising taxes will be virtually impossible to accomplish in the near future. According to both the House and Senate Appropriation Committee Chairmen there will not likely be a tax increase this year even though there is a budget crunch. According to Representative Johnny Stringer, "[a]lthough the session likely won't involve a tax increase, . . . people might support one if they knew how much the budget must be cut." *The Clarion Ledger, November 28, 2004, Page 10A*. Further, Senator Jack Gordon said "the Senate won't consider a tax increase." *Id.*

In addition to any Legislative desire Governor Haley Barbour has indicated that he would veto any tax increase. *The Sun Herald, November 28, 2004.*

And as has been alluded to and will be discussed more, the State is facing a budgetary situation that must be considered difficult at best. The fact is that the State cannot even continue to pay for the current level of state employees.

"If we can't come up with new revenue, we'll have to have a reduction in work force," said Senate Appropriations Committee Chairman Jack Gordon. "We'll have to cut

down numbers in work force to what an agency can afford." *The Clarion Ledger, November 28, 2004, Page 1A*. This sentiment is also confirmed by the House Appropriations Committee Chairman. Chairman Johnny Stringer said "I think we're going to have to eliminate some programs." "We're probably going to have to agree (with the Senate) on laying people off." *Id.* Further, respected legislative leaders see additional methods to reduce General Fund appropriation for state employees. Former State Fiscal Officer and current Representative Cecil Brown has stated that he would " hope to do a hiring freeze." *Id.*

Mississippi is facing a budget shortfall of anywhere from $600 million to $1 billion. New growth is only expected to generate an additional $135 million in funds that can be used to cover any shortfalls. With a potential budget shortfall of 25% of the overall General Fund budget of approximately $4 billion, any cuts of the extent required would have to be draconian. *The Sun Herald, November 28, 2004.*

Notwithstanding the foregoing, the assertions that the Legislature is not willing or able to deal with the matter of indigent defense are simply not accurate. As has been noted by all parties to this appeal, the Legislature created two separate entities to absolve the counties of the cost of indigent defense of capital cases: the Office of Capital Defense Counsel and the Office of Capital Post-Conviction Counsel[2]. Both of these agencies are part of the Judicary and Justice General Fund category for agency appropriation.

For Fiscal Year 2005, the General Fund appropriation increased by approximately $140 million. However, this increase was driven by the $ 183 million increase in Public

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2 *Amici* would show that both of these entities were created in the next legislative session after a legislative finding regarding the tremendous and unpredictable drain that indigent defense in capital cases had on Mississippi counties resources.

Education funding which had an overall increase in General Fund appropriation of 12.07%. *FY 2005 Appropriations comparison to FY 2004, Joint Legislative Budget Committee, State of Mississippi Budget, FY 2005, Compiled June 15, 2004.*

Of the nineteen (19) separate General Fund categories, ten (10) saw a decrease in appropriation in Fiscal Year 2005. Seven (7) saw either no increase or an increase of less than 1.32 %. *Id.* Said another way nearly 90 % of all of the separate General Fund categories saw either a reduction in appropriation or minuscule growth.

However, The Office of Capital Defense Counsel had a 12.67 % increase in appropriation in Fiscal Year 2005. *House Bill No. 1731, 2004 Regular Session.* The Office of Capital Post-Conviction Counsel had a 6.0 % increase in appropriation in Fiscal Year 2005. *House Bill No. 1732, 2004 Regular Session.* The total Judiciary and Justice General Fund category Fiscal Year 2005 appropriation showed an 8.36% increase. *Page 6, FY 2005 Appropriations comparison to FY 2004, Joint Legislative Budget Committee, State of Mississippi Budget, FY 2005, Compiled June 15, 2004.* This is critical evidence that the Legislature is sensitive to the plight of the indigent in need of counsel.[3]

What is particularly troubling is the insistence that under-funding is the culprit for perceived problems with indigent defense. Equating funding with effectiveness is not in line with modern legislative thinking. The creation of a statewide system of indigent defense does not address many of the concerns raised by the Appellants. And surely increased bureacracy is

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[3] Only one bill was filed during the 2004 Regular Session dealing with the establishment of a statewide system of indigent defense. The bill, House Bill 1121, had only one author and died in Committee. When such is the fate of potential legislation, the common indication is that no group, within or without the legislative body, believes that the potential legislation currently has merit.

not necessarily the answer to the problems identified. It is a well worn out notion that there is a direct correlation between funding and results. No one can accurately predict that full-time indigent defense counsel, with supposedly unlimited access to resources, will be anymore dedicated than those that perform that function now.

Much is made of the fact that the system currently employed by the State of Mississippi, and over half of the State's, is that of a part-time Public Defender. Appellant's have argued that part-time public defender shirks their duty as a public servant because of the allure of their private law practice. Such assertion is dumbfounding. This logic would assume that all part-time public servants do a disservice to their constituents. To follow the reasoning of Appellants', then all Legislators and like part-time public servants[4], should become full-time public servants.

What Appellants actually do is make a broad-based indictment of the legal profession. All the while, there has been no showing that there are vacancies or a lack of attorneys willing to be counsel for indigents on a part-time basis. There is no evidence that there has been a mass exodus of attorneys willing to represent indigent defendants.

One must assume that indigent counsel is paid based upon an arm's length transaction. If the compensation for indigent defense counsel is inadequate one would expect a chronic shortage of attorneys willing to do the work. As has been said, their has been no indication to the legislature that such is a problem. *Amici* will acknowledge incompetency in all professions, but cannot make the blind leap tying such incompetency to a lack of funding.

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[4] Especially those individuals that also happen to be members of the Mississippi Bar and therefore face the same alluring scenarios as part-time indigent defense counsel.

For the foregoing reasons, *Amici* respectfully request that this Honorable Court deny the relief sought by Appellants.

Respectfully submitted this the 1st day of December 2004.

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CERTIFICATE OF SERVICE

I, the undersigned attorney, hereby certify that I have this day caused to be mailed, via USPS, a true and correct copy of this Motion for Leave to File Brief of *Amici Curiae* Mississippi State Legislators in Support of Appellees, State of Mississippi, et al., on the following:

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Done this the 1st day of December, 2004.

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