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# Constitutional Law: Validity of Attorney Fee Caps in Indigent Cases: Mississippi's Challenge

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# CONSTITUTIONAL LAW: VALIDITY OF ATTORNEY FEE CAPS IN INDIGENT CASES: MISSISSIPPI'S CHALLENGE

## I. INTRODUCTION

The sixth amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy . . . the Assistance of Counsel for his defence."[1] The 1963 case of *Gideon v. Wainwright*[2] held that this guarantee was applicable and obligatory upon the states through the fourteenth amendment.[3] The states responded to this mandate by legislatively enacting statutes to ensure that each indigent defendant was represented by counsel. Compensation for appointed counsel was also provided by statute.[4]

Mississippi Code Annotated, Section 99-15-17, entitled "Compensation of Counsel—Amount," provides that maximum compensation is $1,000, unless the case is capital and two attorneys are appointed; then the maximum compensation is $2,000. The statute also provides for reimbursement of actual expenses.[5]

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1. U.S. CONST. amend. VI.

2. 372 U.S. 335 (1963).

3. Since that time the guarantee of counsel in criminal cases has been extended to include: juvenile proceedings, *In re* Gault, 387 U.S. 1 (1967); persons charged with misdemeanors, Argersinger v. Hamlin, 407 U.S. 25 (1972); and civil actions, State *ex rel.* Scott v. Roper, 688 S.W.2d 757 (Mo. 1985).

4. In Kansas, for example, three methods were established:

(1) Public defender systems in certain counties;

(2) Panel systems in which attorney participation is voluntary; and

(3) Panel systems in which attorney participation is mandatory.

State *ex rel.* Stephan v. Smith, 242 Kan. 336, 349, 747 P.2d 816, 845 (1987). Mississippi's appointment statute is § 99-15-15. It reads as follows:

> When any person shall be charged with a felony, misdemeanor punishable by confinement for ninety (90) days or more, or commission of an act of delinquency, the court or the judge in vacation, being satisfied that such person is an indigent person and is unable to employ counsel, may, in the discretion of the court, appoint counsel to defend him.
>
> Such appointed counsel shall have free access to the accused who shall have process to compel the attendance of witnesses in his favor.
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> The accused shall have such representation available at every critical stage of the proceeding against him where a substantial right may be affected.

MISS. CODE ANN. § 99-15-15 (1973).

5. § 99-15-17 reads as follows:

> The compensation for counsel for indigents appointed as provided in section 99-15-15, shall be approved and allowed by the appropriate judge in any one (1) case may not exceed one thousand dollars ($1,000.00) for representation in circuit court whether on appeal or originating in said court. Provided, however, if said case is not appealed to or does not originate in a court of record, the maximum compensation shall not exceed two hundred dollars ($200.00) for any one (1) case, the amount of such compensation to be approved by a judge of the chancery court, county court or circuit court in the county where the case arises. Provided, however, in a capital case two (2) attorneys may be appointed, and the compensation may not exceed two thousand dollars ($2,000.00) per case. If the case is appealed to the state supreme court by counsel appointed by the judge, the allowable fee for services on appeal shall not exceed one thousand dollars ($1,000.00) per case. In addition,

The constitutionality of this statute is currently being challenged by the attorneys in the case of *Marion Albert Pruett v. State of Mississippi.* [6]

## II. BACKGROUND

On September 17, 1981, an employee of Unifirst Savings & Loan Association in Jackson, Mississippi, Peggy Lowe, was taken hostage during the commission of an armed robbery. [7] She was taken into the State of Alabama and killed. [8] The perpetrator of this crime was Marion Albert Pruett, the self-confessed "mad dog killer." Pruett has undergone two trials in Mississippi for the capital murder of Peggy Lowe. His alleged crime, his capture, and all aspects of his trek through the judicial system have received extensive publicity throughout the state. [9]

The current appeal to the Mississippi Supreme Court in this case comes from Mr. Pruett's second set of attorneys who conducted his second trial, Stephen B. Bright and Palmer Singleton of Atlanta, Georgia. [10] The defense of Mr. Pruett's capital charge included extensive motion practice, investigation, research, and writing. [11] Counsel expended $3,250 of their own funds to engage an expert on the issue of post-hypnotic testimony. [12] There were two interlocutory appeals to the Mississippi Supreme Court prior to trial. [13] The trial lasted from January 25, 1988, to February 25, 1988. [14] Excluding expenses for travel, lodging, meals, and long distance telephone calls, [15] Mr. Bright spent 449.5 hours [16] and Mr. Singleton spent 482.5 hours [17] defending Mr. Pruett. The trial court awarded attorneys' fees in the amount of $1,000 each for a total of $2,000. [18] Calculating this sum into an hourly figure, Mr. Bright received $2.22 per hour for his services; Mr. Singleton received $2.07 per hour for his serv-

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the judge shall allow reimbursement of actual expenses. The attorney or attorneys so appointed shall itemize the time spent in defending said indigents together with an itemized statement of expenses of such defense, and shall present the same to the appropriate judge. The fees and expenses as allowed by the appropriate judge shall be paid by the county treasurer out of the general fund of the county in which the prosecution was commenced.

6. Motion for Permission to Appeal and for Full Briefing and Oral Argument on Denial of Motion for Adequate Compensation of Counsel, Pruett v. State, 431 So. 2d 1101 (Miss. 1983) (No. DP-27) [hereinafter Motion].

7. Pruett v. State, 431 So. 2d 1101, 1103 (Miss. 1983).

8. *Id.*

9. For the extent of press coverage, see Mississippi Publishers Corp. v. Coleman, 515 So. 2d 1163 (Miss. 1987).

10. Motion, *supra* note 6, at 1-2, 11.

11. *Id.* at 4.

12. *Id.* at 6.

13. *Id.* at 3.

14. *Id.* at 4.

15. *Id.* at 6.

16. *Id.* at Exhibit B.

17. *Id.*

18. *Id.* at 6.

ices. Reimbursement for the cost of the expert was denied. [19]

Mr. Bright and Mr. Singleton petitioned the Mississippi Supreme Court for permission to appeal the trial court's ruling on adequate compensation. Permission was granted October 5, 1988. [20] The issue presented by the petition is "whether the statutory limit of $1,000 for compensation of a court-appointed attorney may divest the courts of the authority to authorize a reasonable fee in a highly complex, time consuming capital case, even if the attorney is paid less than federal minimum wage as a result?" [21] The issue as certified by the trial court is "[that a] substantial basis exists for a difference of legal opinion on the question of the constitutionality of Mississippi Code Annotated Section 99-15-17 as applied to this case, and that this issue is of general importance to the administration of justice." [22]

The following discussion clearly shows that the court does have the authority to approve and authorize a reasonable fee in this case. Further, while the statute in question itself may be constitutional, the application of the statute by the trial court was unconstitutional.

## III. RESPONSE OF OTHER STATES

The idea that attorneys should render services at lower rates, or even for free, is not new; it is a concept that has prevailed for centuries. [23] However, when this concept is utilized as a rationale for establishing maximum amounts for attorney fees in court appointments, with the result that an attorney is deprived of adequate compensation, then the statute's application has reached constitutional proportions and must be addressed. Constitutional challenges to maximum fees for court-appointed counsel are beginning to surface around the nation, and in four states the challenges have been successful. [24] Now, Mississippi has an opportunity to set precedent within her boundaries and to follow an emerging trend.

Each case or statute must stand or fall based on the individual facts surrounding the challenge. Hopefully, the Mississippi Supreme Court will analyze the cases discussed below in reaching a decision in *Pruett*. The cases that follow will be discussed at length so that the reader will be able to understand fully all the arguments made and their ultimate application to the *Pruett* challenge.

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19. *Id.*

20. Pruett v. State, 431 So. 2d 1101 (Miss. 1983), *appeal docketed*, No. DP-27 (Miss. 1988).

21. Motion, *supra* note 6, at 1.

22. Motion, *supra* note 6, at 2.

23. Shapiro, *The Enigma of the Lawyer's Duty to Serve*, 55 N.Y.U.L. REV. 735 (1980).

24. Alaska, DeLisio v. Alaska Superior Court, 740 P.2d 437 (Alaska 1987); Florida, Makemson v. Martin County, 491 So. 2d 1109 (Fla. 1986); Kansas, State *ex rel.* Stephan v. Smith, 242 Kan. 336, 747 P.2d 816 (1987); and New Hampshire, State v. Robinson, 123 N.H. 665, 465 A.2d 1214 (1983). An excellent reference for the ethical issues involved in providing pro bono representation are presented in Shapiro, *supra* note 23.

### A. New Hampshire

New Hampshire addressed the issue of attorney fees and expenses in the 1983 case of *State v. Robinson*[25] and found that courts do have the authority to exceed statutory maximums for attorneys' fees for "good cause." The indigent in that case was charged with a misdemeanor. However, the rationale is equally applicable to felony charges.

New Hampshire's compensation schedule for court-appointed attorneys in effect during the time at question in *Robinson* was Superior Court Rule 104.[26] This schedule provided the following: out-of-court preparation, $20 an hour, with a maximum of $25 an hour; in court, $30, with a maximum of $35 an hour, $200 maximum per day.[27] Effective May 1, 1981, Rule 104 was amended by supreme court order and "provided that the $500 maximum fee for misdemeanor cases 'shall not be exceeded.'"[28] Rule 104 also provided for compensation for "investigative, expert, or other necessary services" upon the court's "finding of necessity and reasonableness."[29]

Counsel submitted a statement for $1,265 in attorney's fees, based on the minimum hourly rates provided, and expenses of $429.38, for a total of $1,694.38.[30] The trial court entered an award of $500, the maximum provided by the rule. Counsel appealed on two grounds: (1) that the maximum limit of $500 was arbitrary and, as such, denied the defendant effective assistance of counsel; and (2) that the maximum limit of $500 violated his right of due process and equal protection. The constitutionality of the rule itself was not challenged.

Addressing the fee limit, the Supreme Court of New Hampshire said:

> A fee for the defense of an indigent criminal defendant need not be equal to that which an attorney would expect to receive from a paying client, but should strike a balance between conflicting interests which include the ethical obligation of a lawyer to make legal representation available, and the increasing burden on the legal profession to provide counsel to indigents.[31]

Concerned that the limit on attorney's fees could "result in unfairness and unreasonableness"[32] and in an effort to "adequately protect both the indigent defense fund and the right of an accused citizen to effective assistance of legal counsel,"[33] the court then amended Supreme Court Rule 47[34] to include the lan-

25. 123 N.H. 665, 465 A.2d 1214 (1983).
26. *Id.* at 667, 465 A.2d at 1215. Superior Court Rule 104 was replaced by Supreme Court Rule 47 in June, 1982. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.* at 667, 465 A.2d at 1216.
31. *Id.*
32. *Id.*
33. *Id.*
34. *See supra* note 26.

guage of Rule 104: "'for good cause shown in exceptional circumstances'" the maximum [for misdemeanors] "'may be exceeded with the approval of the trial justice.'" [35]

In addressing the issue of reimbursement of expenses, the Supreme Court of New Hampshire held that serious due process issues would be raised if lawyers, in a class separate from all other citizens, were required to pay criminal defense expenses. [36] Based on this reasoning, the court concluded that the failure of the trial court to reimburse counsel in this case constituted "a taking of his financial resources which violates the State and Federal Constitutions." [37]

The case was remanded for a determination of whether the expenses incurred were reasonable and "whether the $500 maximum fee should be exceeded for 'good cause.'" [38]

### *B. Florida*

The challenge to Florida's maximum attorney fee statute came in July of 1986 in *Makemson v. Martin County*. [39] This was the first case to hold that maximum fee limitation could be unconstitutional as applied, although the statute itself was constitutional. The challenged statute, Section 925-036, provided for compensation to be fixed by the chief senior judge based upon an hourly rate, not to exceed the hourly rate charged by other attorneys nor the maximums of the statutes: $1,000 for misdemeanors and juvenile cases; $2,500 for noncapital, non-life felonies; $3,000 for life felonies; $3,500 for capital cases; and $2,000 on appeal. [40]

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35. 123 N.H. at 668-69, 465 A.2d at 1216.

36. State v. Robinson, 123 N.H. at 669 (citing Williamson v. Vardeman, 674 F.2d 1211, 1215 (8th Cir. 1982)).

37. Specifically, N.H. CONST. part I, art. 2 and 12, U.S. CONST. amend. V and XIV. *Id.*

38. *Id.*

39. 491 So. 2d 1109 (Fla. 1986).

40. *Id.* at 1111-12. The statute reads:

> (1) An attorney appointed pursuant to s. 925.035 or s. 27.53 shall, at the conclusion of the representation, be compensated at an hourly rate fixed by the chief judge or senior judge of the circuit in an amount not to exceed the prevailing hourly rate for similar representation rendered in the circuit; however, such compensation shall not exceed the maximum fee limits established by this section. In addition, such attorney shall be reimbursed for expenses reasonably incurred, including the costs of transcripts authorized by the court. If the attorney is representing a defendant charged with more than one offense in the same case, the attorney shall be compensated at the rate provided for the most serious offense for which he represented the defendant. This section does not allow stacking of the fee limits established by this section.
>
> (2) The compensation for representation shall not exceed the following:
>
> (a) For misdemeanors and juveniles represented at the trial level: $1,000.
>
> (b) For noncapital, nonlife felonies represented at the trial level: $2,500.
>
> (c) For life felonies represented at the trial level: $3,000.
>
> (d) For capital cases represented at the trial level: $3,500.
>
> (e) For representation on appeal: $2,000.

FLA. STAT. § 925.036 (1981).

Makemson was an attorney appointed to represent a defendant charged with first-degree murder, kidnapping, and armed robbery involving a prominent local family.[41] The representation lasted nine months and included a change of venue which necessitated sixty-four hours spent at trial 150 miles from his home.[42] Makemson spent a total of 248.3 hours on the case.[43] Based on an hourly rate provided by the circuit's chief judge, Makemson asked for and received $9,500 in fees, although he had introduced expert testimony valuing his services at $25,000.[44] The maximum allowed by statute was $3,500. Makemson placed the balance of $6,000 into escrow while the issue of his compensation was appealed.[45]

The trial court found the maximum fee schedule to be impractical and, in addition, violative of the due process clauses of both the United States and Florida Constitutions.[46] Additionally, the trial court held the "statute unconstitutional as an impermissible legislative intrusion upon an inherent judicial function."[47]

The Court of Appeals for the Fourth District of Florida quashed the trial court's findings and certified four questions to the Florida Supreme Court, three of which are pertinent to this comment:

> (1) Whether the statute was "unconstitutional on its face as an interference with the inherent authority of the court to enter such orders as are necessary to carry out its constitutional authority?"
>
> (2) If the answer to issue number one is no, "could the statute be held unconstitutional as applied to exceptional circumstances or does the trial court have the inherent authority, in the alternative, to award a greater fee for trial and appeal than the statutory maximum in the extraordinary case?"
>
> (3) If the answer to issue number two is yes, "should the trial court have awarded an attorney's fee above the statutory maximum for proceedings at the trial level, given the facts presented to it by trial counsel by his petition and testimony?"[48]

The Supreme Court of Florida found the statute to be constitutional on its face as a proper exercise of the legislative power "to appropriate funds for public purposes and resolve questions of compensation."[49] However, the court also found that the inflexibility of the statute interfered "with the defendant's sixth amendment right 'to have the assistance of counsel for his defence.'"[50] As such, the statute provided only "token compensation" which called into question the effectiveness of counsel.[51] The court further found that courts have "inherent

41. *Id.* at 1110-11.
42. *Id.* at 1111.
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.* at 1112.
49. *Id.*
50. *Id.*
51. *Id.*

power to ensure the adequate representation of the criminally accused" and that, when this power is encroached by a statute as applied, the statute is unconstitutional. [52]

Affirming the holding in *Rose v. Palm Beach County* [53] the court reiterated "the proposition that 'the courts have authority to do things that are absolutely essential to the performance of their judicial functions.'" [54] Ensuring competent counsel for indigent defendants within the meaning of the sixth amendment falls within the category of "absolutely essential" functions of the court.

One method of ensuring competent counsel is to provide adequate payment, for "the link between compensation and the quality of representation remains too clear." [55] However, in order to depart from the statute, the trial court must find that the case was extraordinary and unusual "to ensure that an attorney . . . is not compensated in an amount which is confiscatory of his or her time, energy, and talents." The determination of extraordinary or unusual circumstances is best made by the trial judge for they are the ones who "know best those instances in which justice requires departure from the statutory guidelines." [56]

Finding that "[t]oken compensation is no longer an alternative" in determining remuneration for court-appointed counsel, [57] the Supreme Court of Florida found the trial court acted within its authority in ensuring adequate representation for the defendant; quashed the ruling of the Fourth District, thereby reinstating the ruling of the trial court regarding attorneys' fees; and held that the statute was "directory rather than mandatory." [58]

Less than a year later, the question of a trial court departing from the statutory guidelines to award fees in excess of the maximum was once again before the Supreme Court of Florida in the case of *Lyons v. Metropolitan Dade County*. [59] Under the authority of *Makemson* the court upheld the trial court's determination which awarded reasonable compensation in excess of the statutory maximum. [60]

### *C. Alaska*

Can an attorney be compelled to represent an indigent criminal defendant without compensation? This was the question presented in *DeLisio v. Alaska Superior Court*. [61] The answer, at least in Alaska, is "no."

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52. *Id.*
53. 361 So. 2d 135 (Fla. 1978).
54. 491 So. 2d at 1113.
55. *Id.* at 1114.
56. *Id.* at 1115.
57. *Id.* at 1113.
58. *Id.* at 1115.
59. 507 So. 2d 588 (Fla. 1987).
60. *Id.* at 590.
61. 740 P.2d 437 (Alaska 1987).

Stephen DeLisio was appointed to represent an indigent who had been charged with sexual abuse of a minor.[62] DeLisio refused the appointment on the grounds that he was incompetent. Following a hearing regarding his refusal, he was ordered to commence representation by a date certain or go to jail for contempt. DeLisio persisted in his refusal and another attorney was appointed. The Supreme Court of Alaska stayed the contempt citation pending a reconsideration motion. The contempt citation was affirmed on reconsideration and DeLisio appealed.[63]

The first issue on appeal was DeLisio's competence to serve as a criminal attorney. The Alaska Supreme Court summarily rejected the incompetency argument because DeLisio was an active member of the Alaska criminal bar.

The second issue on appeal, however, was upheld. DeLisio claimed that compulsory representation constituted a taking of private property for public use in violation of the fifth and fourteenth amendments of the United States Constitution and article I, section 18, of the Alaska Constitution.[64] Previous rulings of the Supreme Court of Alaska established that broader protection was conferred under the Alaska Constitution than the United States Constitution regarding takings.[65] For this reason the federal constitutional claims were not considered.[66] This decision specifically overruled the long-standing case of *Jackson v. State*[67] which provided: "[A]n attorney appointed to represent an indigent prisoner in a criminal matter has no constitutional right to receive compensation for his services. He has a right to compensation only to the extent that a statute or court rule may so provide."[68] Thus, Alaska is no longer to be counted with the jurisdictions holding there is no unconstitutional taking of property without just compensation when an attorney is required to serve without receiving payment.[69]

What made *DeLisio* different from *Jackson*? The Supreme Court of Alaska concluded that the Alaska Constitution did not exclude attorney services as provided, that, in fact, such a conclusion would be manifestly unreasona-

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62. *Id.* at 438.

63. *Id.*

64. *Id.* at 439. Article I, section 18 of the Alaska Constitution provides: "Private property shall not be taken or damaged for public use without just compensation." *Id.* at 439 n.3.

65. State v. Doyle, 735 P.2d 733, 736 (Alaska 1987); State v. Hammer, 550 P.2d 820, 823-24 (Alaska 1976).

66. 740 P.2d at 439 n.3.

67. 413 P.2d 488 (Alaska 1966).

68. *Id.* at 490.

69. Williamson v. Vardeman, 674 F.2d 1211, 1214 (8th Cir. 1982). *See also* 740 P.2d at 445 n.4 (Rabinowitz, C.J., dissenting) listing the following jurisdictions which, as of July 21, 1987, recognized the rule that assigned counsel has no right to compensation "by the public in the absence of a statute or court rule." Noted parenthetically are the years in which this rule was recognized:

> Alabama (1873), Alaska (1966), Arkansas (1876), California (1860), Florida (1972), Georgia (1873), Illinois (1857), Kansas (1868), Kentucky (1946), Louisiana (1891), Michigan (1850), Mississippi (1881), Missouri (1869), Montana (1874), Nevada (1879), New Jersey (1961), New York (1879), North Carolina (1967), Pennsylvania (1879), Tennessee (1871), Utah (1911), Washington (1892), West Virginia (1900).

ble, [70] particularly in light of the fact that "[l]abor is property." [71] Additionally, the court adopted the idea that an attorney's "professional services are no more at the mercy of the public, as to remuneration, than are the goods of the merchant, or the crops of the farmer, or the wares of the mechanic" [72] and declared that an "attorney's services are 'property' within the meaning of Article I, Section 18" of the Constitution of Alaska. [73]

The court relied on the analysis of the Supreme Court of Missouri in the case of *State ex rel. Scott v. Roper* [74] in rejecting the argument that attorneys are required to provide free service on demand as officers of the court. [75] Although *Roper* involved civil appointments, the court reasoned that the analysis pertained to criminal appointments as well. [76]

The argument that there is a traditional professional obligation on the part of attorneys to provide gratuitous services was also discounted. As authority to reject this contention, the court pointed to the Model Rules of Professional Responsibility, which merely encourage pro bono service, but do not require it. [77]

Another rejected argument which had previously been held valid was that the issuance of a license to practice law "carries with it certain conditions, one of which is the obligation to represent indigent criminal defendants gratuitously." [78] In holding that such a construction "would in itself be an impermissible infringement of Alaska's due process clause," [79] the court agreed with the Supreme Court of Utah:

> While the right of personal liberty and the right to earn a livelihood in any lawful calling are subject to the licensing power of the state, a state cannot impose restrictions on the acceptance of the license which will deprive the licensee of his constitutional rights. If states have the power to impose the duty to render gratuitous services on the license of an attorney, that power must be based on more than the mere right of the state to license. [80]

The final argument advanced in favor of requiring compulsory representation without compensation was that of a general duty owed to the state by all citizens equally. This argument was rejected because "[t]he service appropriated in the present action . . . is not one which may be provided by the citizen-

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70. 740 P.2d at 440.
71. *Id.* (quoting Coffeyville Vitrified Brick & Tile v. Perry, 69 Kan. 297, 303, 76 P. 848, 850 (Kansas 1904)).
72. *Id.* at 440-41 (citing Webb v. Baird, 6 Ind. 13, 17 (1854), (quoted in State *ex rel.* Scott v. Roper, 688 S.W.2d 757, 762 (Mo. 1985)).
73. *Id.* at 441.
74. 688 S.W.2d 757 (Mo. 1985).
75. 740 P.2d at 441.
76. *Id.* at 441 n.7.
77. *Id.* at 441-42.
78. *Id.* at 442.
79. *Id.*
80. *Id.* (quoting Ruckenbrod v. Mullins, 102 Utah 548, 553, 133 P.2d 325, 327 (1943)).

ry in general, but only by a specifically identifiable class of persons."[81]

Having decided that attorney services were property within the meaning of the Alaska Constitution and, therefore, could not be taken without just compensation, the court turned to the question of how to determine what "just compensation" is. Drawing from other areas in the law wherein "just compensation is measured by the fair market value of the property appropriated,"[82] the court held that remuneration for attorney services should be calculated in accordance with market value. The court reasoned, however, that this computation would only "reflect the compensation received by the average competent attorney operating on the open market" and not "reflect any specific attorney's normal rate of compensation."[83]

### *D. Kansas*

The most extensive opinion on the compensation issue for attorneys appointed to represent indigent defendants is *State ex rel. Stephan v. Smith.*[84] The opinion arose from mandamus action brought by the State Attorney General against two judges who, contrary to statute, had established county rules regarding indigent defense services.[85]

In addition to statutory provisions providing for the appointment of counsel in indigent cases (Indigent Defense Services Act of 1986), the State Board of Indigents' Defense Services in Kansas promulgates rules and regulations regarding the representation of indigent defendants. These rules and regulations are codified into statutory law.[86] Compensation is allowed at the rate of $30 per hour, with maximums set for certain classes of cases and a maximum of $1,000 in felony cases.[87] Provision is made for awarding of fees in excess of the maximum "only in exceptional cases."[88] The statute then proceeds to define "exceptional cases."[89] Additionally, the statutory law provides for the reimbursement of expenses which were "reasonably incurred" during the appointment.[90]

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81. *Id.* at 442.
82. *Id.* at 443.
83. *Id.*
84. 242 Kan. 336, 747 P.2d 816 (1987).
85. *Id.* at 337-38, 747 P.2d at 816, 822.
86. *Id.* at 340-41, 747 P.2d at 822. For entire statutory language, see 747 P.2d at 823-28.
87. *Id.* at 345-46, 747 P.2d at 826-27.
88. *Id.* at 346, 747 P.2d at 827.
89. *Id.* An exceptional case is defined as:
(1)(A) Any case involving a Class A or Class B felony charge; or
(B) any case tried on a not guilty plea in which there have been 25 or more hours spent in court in defense of the indigent defendant; or
(C) any case not submitted to a judge or jury in which there have been ten hours or more of in-court time spent in defense of the indigent defendant; and
(2) any such case which has been declared an exceptional case by the court due to its complexity or other significant characteristics. Such finding by the court is subject to final approval by the board.
90. *Id.*

On March 5, 1987, Judge Smith of Anderson County, Kansas, entered an order giving effect to his own rules regarding indigent defense services for Anderson County. [91] This order established a panel of attorneys, named by Judge Smith, from which appointments were to be drawn. [92] The order also provided that, unless reasonable compensation was provided, no attorney could be compelled to take an appointment to represent an indigent defendant. [93] Reasonable compensation was set at "$68 or more per hour . . . as is required for effective representation." [94] Additionally, if this reasonable compensation was not available within 30 days after the declaration of indigency so that the defendant might have effective assistance of counsel, all charges against the defendant were to be dismissed without prejudice. [95]

With the exception of the number of attorneys assigned to the panel, the order of Judge Smith was adopted *in toto* on March 6, 1987, by Judge Fromme in Coffey County, Kansas. [96]

The State Attorney General brought a mandamus action against these judges asking that they be required to comply with the statutes regarding appointments and compensation for attorneys in indigent cases. [97] In a lengthy, well-reasoned opinion by Justice Miller of the Supreme Court of Kansas, discussed in depth below, the statutory system of indigent appointments and compensation was held unconstitutional, the orders of Judges Smith and Fromme were set aside, and mandamus was denied. [98]

The court initially found that mandamus was the proper procedure to present the issues. [99] Justice Miller next addressed the issue of the state's obligation to provide counsel to indigent defendants. The court held that, pursuant to *Gideon v. Wainwright,* [100] the state does have such an obligation. [101]

The next issue discussed was the duty of judges to appoint counsel in indigent cases. In concluding that judges do have a duty to appoint, Justice Miller said that "while the *selection* of counsel" in indigent cases "is discretionary, the *appointment* of counsel is nondiscretionary." [102]

Concurrent with the question of the duty of the judge to appoint is the question of the duty of the attorney to accept an appointment. Based on Rule 6.1

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91. *Id.* at 339-40, 747 P.2d at 822.
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.* The panel of Coffey County consisted of five (5) attorneys.
97. *Id.*
98. 242 Kan. 336, 747 P.2d 816 (1987).
99. *Id.* at 349, 747 P.2d at 828-29.
100. 372 U.S. 335 (1963).
101. 242 Kan. at 349, 747 P.2d at 829-32.
102. *Id.* at 353, 747 P.2d at 832.

of the Model Rules of Professional Conduct,[103] Canon 2 of the Code of Professional Responsibility,[104] and the statutory law of Kansas,[105] the state argued that attorneys have a duty to represent indigents "for little or no compensation."[106] The respondents countered that the Canon and Model Rules regarding representation are not mandatory and, therefore, do "not require attorneys in private practice to represent indigent defendants for less than a reasonable fee."[107]

Following a summary of the history of attorney duty in indigent appointments, the court held that the duty of attorneys, at least those attorneys who were members of panels from which appointments were to be made, was clear and found in the Kansas statutes.[108] As for those attorneys not on panels, the duty was more troublesome. Justice Miller articulated the problem:

> Attorneys generally have an *ethical* obligation to provide pro bono services for indigents. Such services may only be provided by attorneys. The individual attorney has a right to make a living. Indigent defendants, on the other hand, have the right to effective assistance of counsel. The obligation to provide counsel for indigent defendants is that of the State, not of the individual attorney. The adjustment of these rights and obligations presents the primary difficulty of the present statutory system. The burden must be shared equally by those similarly situated. In the final analysis, it is a matter of reasonableness.[109]

The next issue discussed was the duty, if any, of the state to compensate appointed counsel. The state clearly articulated and argued its position: it is the duty of attorneys to provide representation for little or no compensation and, therefore, the state "has no obligation to pay for such representation."[110] This position was rejected by the court. Relying on the New York case of *Menin v. Menin*[111] that says "[n]owhere in the right-to-counsel cases does the Supreme Court state that counsel must be assigned to serve without compensation,"[112] the court held that the State was obligated "to compensate attorneys appointed to represent indigent defendants."[113]

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103. Rule 6.1 reads in part: "A lawyer should render public interest legal service." *See also Pro Bono Publico*, 73 A.B.A.J. 55-73 (1987); Shapiro, *The Enigma of the Lawyer's Duty to Serve*, 55 N.Y.U.L. REV. 735 (1980).

104. 242 Kan. at 356, 747 P.2d at 833.

105. *Id.* Kansas Statute 22-4501(b) reads, in part: "Each member of the panel for indigents' defense services shall be available to represent indigent defendants upon the appointment of any judge of the district court of the judicial district in which such member maintains an office for the practice of law, or any adjacent judicial district." *Id.*

Kansas Statute 22-4503(d) reads, in part: "It is the duty of an attorney appointed by the court to represent a defendant, without charge to such defendant . . . ." *Id.* at 342, 747 P.2d at 824.

106. *Id.* at 356, 747 P.2d at 833.

107. *Id.* at 357, 747 P.2d at 834.

108. *Id.* at 359, 747 P.2d at 835. *See supra* note 105.

109. *Id.* at 359-60, 747 P.2d at 835-36.

110. *Id.* at 360, 747 P.2d at 836.

111. 79 Misc. 2d 285, 359 N.Y.S.2d 721 (Sup. Ct. 1974).

112. *Id.* at 288, 359 N.Y.S.2d at 725.

113. 242 Kan. at 361, 747 P.2d at 836.

Having held that the State has an obligation to provide indigent defendants with counsel and to compensate appointed counsel, that judges have a duty to appoint counsel, and that certain counsel have a duty to serve, the next step was an examination of the system designed to apply these findings. Specifically, did the system of appointing and compensating attorneys for indigent criminal defendants violate the fifth amendment of the United States Constitution[114] The answer in Kansas is "yes."[115]

Applying the due process test of "whether the legislation has a real and substantial relation to the objective sought, whether it is reasonable in relation to the subject, and whether it was adopted in the interest of the community,"[116] the court held that "[r]equiring attorneys to donate a reasonable amount of time to indigent defense work bears a real and substantial relation to the legitimate government objective sought—protection of indigent defendants' Sixth Amendment right to counsel."[117] Based on this test, the court held that on its face, the statute did not violate the due process clause of the fifth amendment.[118]

The court, however, found the takings clause issue of the fifth amendment troublesome: "If the property at issue is services, then it is not tangible property and is not protected by the clause. On the other hand, if the property taken is viewed as the attorney's money, it is tangible property and may be protected by the clause."[119] In a lengthy look at how other states had addressed this issue, the court found a trend: "[T]he duty to provide free legal services . . . no longer exists in modern America."[120]

Based on this trend, the court reasoned that "it is the professional knowledge which goes into the practice of the profession which is valuable."[121] Finding professional knowledge to be the essence of the practice of law, the court held that attorney services are property within the meaning of the fifth amendment. Additionally, the court held that "when attorneys are required to donate funds out-of-pocket to subsidize a defense for an indigent defendant, the attorneys are deprived of property in the form of money."[122] In Kansas, then, the fifth amendment is violated whenever an attorney is not fully reimbursed for his expenses or "when an attorney is required to spend an unreasonable amount of time on indigent appointments so that there is genuine and substantial interference with his or her private practice."[123]

The Kansas appointment and compensation system allowed reimbursement only for certain "reasonably incurred" expenses. The fees established were sub-

114. *Id.* at 361, 747 P.2d at 837.
115. *Id.* at 370, 747 P.2d at 842.
116. *Id.* at 362, 747 P.2d at 837.
117. *Id.* at 363, 747 P.2d at 838.
118. *Id.*
119. *Id.* at 364, 747 P.2d at 838.
120. *Id.* at 368, 747 P.2d at 841.
121. *Id.*
122. *Id.* at 370, 747 P.2d at 842.
123. *Id.*

ject to being reduced.[124] For this reason the court found the system unconstitutional as a violation of the fifth amendment.

The court found that the statutory scheme of compensation did not violate the separation of power doctrine. The respondents had argued that the executive branch of government was compelling judges to require attorneys to accept appointments, thus acting as an infringement on the judicial authority of the court to regulate the practice of law. Additionally, respondents had argued that the determination of reasonable fees was exclusively within the province of the courts.[125] The court rejected these arguments because the system in Kansas was "quite flexible": the executive branch estimated need and presented a budget to the legislature for the appropriation of funds, the Board of Indigents' Defense Services established an hourly rate, and the judges ultimately determined the amount of fees to be awarded in any case.[126]

The court held that application of the Kansas system violated the equal protection clause of the United States Constitution because Kansas had "imposed a classification which affect[ed] two or more similarly situated groups in an unequal manner."[127] Basically, there were different burdens placed on attorneys based on where they practiced: most judicial districts made participation in appointments for indigents voluntary; others required participation on an appointments panel. There were exceptions to the appointment requirements, resulting in "about 65% of the attorneys in private practice . . . not being subject to appointment."[128] This placed a greater burden on attorneys in sparsely populated areas. The court found no rational basis for this distinction and held that the system, as administered, violated equal protection.[129]

Finally, the respondents argued that the system of indigent appointments violated the thirteenth amendment and resulted in involuntary servitude.[130] Finding that no attorney had ever been placed in jail for not accepting an appointment, this argument was rejected.[131]

In conclusion, the court found that compensation for appointed counsel was to be calculated "not at the top rate an attorney might charge, but at a rate which is not confiscatory, considering overhead and expenses" and that such rate must be based on a "statewide basis or scale," thereby eliminating any variations from judge to judge.[132] Additionally, the court held that all out-of-pocket expenses were to be fully reimbursed.[133]

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124. *Id.* at 370, 747 P.2d at 837.
125. *Id.* at 371-73, 747 P.2d at 842-43.
126. *Id.* at 373, 747 P.2d at 843.
127. *Id.* at 375, 747 P.2d at 845.
128. *Id.*
129. *Id.*
130. The statutory scheme of appointment and compensation was found to violate the Kansas Constitution but is not discussed herein. For a review of that discussion, see *id.* at 378, 747 P.2d at 847-49.
131. *Id.* at 378, 747 P.2d at 846-47.
132. *Id.* at 383, 747 P.2d at 849.
133. *Id.*

## IV. ANALYSIS

The Mississippi Supreme Court is faced with three choices in deciding the *Pruett* case: holding Section 99-15-17 unconstitutional on its face and awarding appropriate attorney fees; holding Section 99-15-17 constitutional and denying the fees requested; or holding Section 99-15-17 constitutional on its face but unconstitutional as applied to the facts of this case, and awarding appropriate attorney fees.

To hold Section 99-15-17 unconstitutional on its face and award appropriate attorney fees would create unnecessary unrest within the judicial system; there would be no constitutional guidelines for judges to follow in awarding attorney fees in appointed cases. As a practical matter, the courts would probably follow the current statutory scheme, making adjustments where deemed appropriate, until the legislature formulated a new, constitutionally acceptable method for determining compensation. As will be seen, however, Section 99-15-17 is constitutional on its face. Therefore, such a holding would be in error.

The court could by-pass the issue altogether by holding Section 99-15-17 constitutional and denying the fees requested. In doing so, however, the Mississippi Supreme Court would be passing up an opportunity to align itself with the jurisdictions discussed above on the cutting edge of this new development in criminal law. Additionally, such a ruling would, in all likelihood, result in additional appeals by Bright and Singleton.

The logical choice, then, is to hold Section 99-15-17 constitutional on its face, but unconstitutional as applied to the facts of this case. This ruling would allow the court to fashion a new system for compensation of attorneys in exceptional cases without the necessity of legislative mandate.

Counsel for Pruett have presented their case before the Mississippi Supreme Court on the grounds of a taking of services without due process of law, equal protection, and the defendant's right to effective assistance of counsel.[134] The due process argument lends itself more readily to the outcome presented in this analysis. Additionally, should the court decide the issue presented on this ground, there would be no necessity to consider the other grounds. For these reasons, the due process challenge will be the only ground discussed.

Due process has been described as "an elusive concept" with undefined boundaries.[135] However, "[t]he essence of due process is protection against *arbitrary* government action."[136] The due process test "is whether the legislation has a real and substantial relation to the objective sought, whether it is reasonable in relation to the subject, and whether it was adopted in the interest of the community."[137]

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134. Motion, *supra* note 6, at 11.

135. Smith v. Miller, 213 Kan. 1, 7, 514 P.2d 377, 383 (1973) (quoting Hanna v. Larche, 363 U.S. 420, 442 (1960)).

136. 242 Kan. 336, 362, 747 P.2d 816, 837 (1987).

137. *Id.*

The Mississippi Legislature responded to *Gideon* by passing Section 99-15-15, Appointment of Counsel for Indigents. The matter of compensation for appointed counsel was provided by the passage of Section 99-15-17, Compensation of Counsel—Amount. The objective sought by the passage of this legislation was the protection of sixth amendment rights of indigent defendants. To ensure that indigent defendants have counsel, it was reasonable for the legislature to provide for payment to such counsel. The interest of the community is served when the judicial system functions in an orderly fashion and in compliance with federal mandates. The adoption of Section 99-15-15 brought Mississippi into compliance with *Gideon*; Section 99-15-17 ensured that the system of appointments would be effective. The due process test had been met.

In Mississippi "[t]he matter of compensation of an attorney appointed to represent an indigent defendant is a matter that rests solely with the legislature as a legislative function."[138] Clearly, then, the adoption of Section 99-15-17 was within the legislative authority and power "to appropriate funds for public purposes and resolve questions of compensation."[139] From the standpoint of due process, then, Section 99-15-17 is constitutional.

A taking occurs when private property is appropriated for public purpose without providing just compensation.[140] Under the analysis required to determine whether property has been taken, the Mississippi Supreme Court must consider its position regarding attorney services as property.

Mississippi is one of the states holding "that requiring counsel to serve without compensation is not an unconstitutional taking of property without just compensation."[141] Mississippi's position is clear: "the representation of indigents . . . is a condition under which lawyers are licensed to practice . . . and attorneys can be required to make a reasonable contribution of their time and services as an aid to the effective administration of justice."[142] In this respect Mississippi is currently in the same position as Alaska before *DeLisio*. With *Pruett*, the Mississippi Supreme Court has the opportunity to reevaluate its position and join the states of Alaska, Kansas, New Hampshire, and Florida in formulating and solidifying a new trend.

What, then, are attorney services? Attorney services consist of, in part, professional knowledge consisting of time, advice, and counsel; "learned and reflective thought, . . . recommendations, suggestions, directions, plans, diagnoses, and advice . . . ."[143] These are intangible items, but it is through these intan-

138. Young v. State, 255 So. 2d 318, 322 (Miss. 1971).

139. Makemson v. Martin County, 491 So. 2d 1109, 1112 (Fla. 1986). *See also* Young v. State, 255 So. 2d 318 (Miss. 1971).

140. U.S. CONST. amend. V. *See also* State *ex rel.* Stephan v. Smith, 242 Kan. 336, 367, 747 P.2d 816, 837 (1987).

141. Williamson v. Vardeman, 674 F.2d 1121, 1141 (8th Cir. 1982). *See also supra* note 67.

142. 255 So. 2d at 321.

143. 242 Kan. at 369, 747 P.2d at 841.

bles that an attorney earns a living. When these services "are conscripted for the public good, such a taking is akin to the taking of food or clothing from a merchant or the taking of services from any other professional for the public good." [144]

Attorneys, along with other professionals, must be licensed by the state in order to practice their skills. "One who practices his profession has a property interest in that pursuit which may not be taken from him or her at the whim of the government without due process." [145] Moreover,

> a state cannot impose restrictions on the acceptance of the license which will deprive the licensee of his constitutional rights. If states have the power to impose the duty to render gratuitous services on the license of an attorney, that power must be based on more than the mere right of the state to license. [146]

Attorneys have the same right as everyone else to earn a living. Mississippi, however, bases its position of gratuitous legal services on the "mere right of the state to license." [147]

The issue of licensing becomes irrelevant when based on the theory that it is not the practice of law which is at issue, but rather the labor of the attorney. [148] Labor has long been recognized as property; attorney services and work are labor; therefore, under this analysis, attorney services are considered "property" within the constitutional realm. [149]

The historical tradition of providing free services as a condition of licensing and the practice of law is falling in the face of constitutional challenges. "[T]radition alone, regardless of its venerability, cannot validate an otherwise unconstitutional practice." [150] It is insufficient to uphold a practice simply on the basis that "it has always been done that way." In effect, this is exactly the current position of the Mississippi Supreme Court.

Based on the reasons articulated in the above analysis, the Mississippi Supreme Court should hold that attorney services are "property" within the meaning of the fifth amendment. Once it has been established that attorney services are property, the question becomes: has there been a taking of that property without just compensation?

Bright and Singleton were appointed to represent Marion Albert Pruett. Their services were conscripted for the benefit of the State of Mississippi. The answer to whether there was a taking is clearly "yes." To fully answer the question, however, "just compensation" must be defined.

The law in Mississippi regarding compensation for appointed counsel seems

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144. *Id.* at 370, 747 P.2d at 842.
145. *Id.* at 370, 747 P.2d at 841. *See also* 740 P.2d at 440.
146. Ruckenbrod v. Mullins, 102 Utah 548, 553, 133 P.2d 325, 327 (1943).
147. *Id.*
148. 740 P.2d at 440.
149. *Id.*
150. *Id.* at 441. For a complete analysis of the historical background of uncompensated appointment of counsel, see State *ex rel.* Scott v. Roper, 688 S.W.2d 757, 759-69 (Mo. 1985). For an analysis of the current trend in this area, see State *ex rel.* Stephan v. Smith, 242 Kan. 336, 747 P.2d 816 (1987).

to hold that legislatively proscribed limits on attorney compensation are controlling and cannot be modified. This view is reflected in the fact that the trial court, apparently thinking that Section 99-15-17 is mandatory and inflexible, was unwilling to exceed the statutory maximum attorney fee of $1,000.

A finding that the statute is inflexible would reduce appointed counsels' fees in *Pruett* to nothing more than "token compensation."[151] But is "token compensation" which results in an hourly rate far below minimum wage "just compensation" within constitutional meaning? The answer is "no." "Token compensation" is that "which is confiscatory" of an attorney's "time, energy and talents."[152] Providing services to the public for less than minimum wage is confiscatory, not "just" within constitutional interpretation, and therefore constitutes a taking.

The analysis to this point shows that the State of Mississippi has taken the services of Bright and Singleton without just compensation in violation of the fifth amendment. Assuming the Mississippi Supreme Court follows this analysis in reaching its decision, the next logical question is how to resolve the situation. The obvious answer is for the court to award compensation that *is* just. In determining what compensation would be "just" in the *Pruett* case, the Mississippi Supreme Court would be wise to look to some of the other jurisdictions that have dealt with similar issues.

Just compensation has been approached and defined by several methods. Alaska measures just compensation "by the fair market value of the property appropriated, or the 'price in money that the property could be sold for on the open market under fair conditions between an owner willing to sell and a purchaser willing to buy with a reasonable time allowed to find a purchaser.'"[153] Fair market value reflects only "the compensation received by the average competent attorney operating on the open market" and not an attorney's "normal rate of compensation."[154] Nevada, Oregon, and Arkansas hold that legislatively proscribed limits control and cannot be abandoned.[155] West Virginia allows exceptions to the legislatively mandated compensation scheme under extraordinary conditions found by the judge,[156] as does Illinois,[157] New Hampshire,[158] Georgia,[159] and Florida.[160] Nebraska, a state with no statutory scheme, defines just compensation as "reasonable compensa-

151. 491 So. 2d at 1113.
152. *Id.* at 1115.
153. 740 P.2d at 443.
154. *Id.*
155. Daines v. Markoff, 92 Nev. 582, 555 P.2d 490 (1976); Keene v. Jackson County, 3 Or. App. 551, 474 P.2d 777 (1970); State v. Ruiz & Van Denton, 269 Ark. 331, 602 S.W.2d 625 (1980).
156. State *ex rel.* Partain v. Oakley, 227 S.E.2d 314 (W. Va. 1976).
157. People *ex rel.* Conn v. Randolph, 35 Ill. 2d 24, 219 N.E.2d 337 (1966).
158. State v. Robinson, 123 N.H. 665, 465 A.2d 1214 (1988).
159. *In re* Whatley, 256 Ga. 289, 347 S.E.2d 602 (1986).
160. Makemson v. Martin County, 491 So. 2d 1101 (Fla. 1986).

tion."[161] Missouri holds that "fair compensation" is the guide.[162]

For the purpose of deciding the *Pruett* appeal, the court should award attorneys' fees in such an amount as would reflect "reasonable compensation" for the services provided. This rate may be calculated based on the average hourly rate for similar services in Mississippi. If the Mississippi Supreme Court is reluctant to make such a valuation, the court should remand the case to the trial court and allow the trial court to assess "reasonable compensation." The Mississippi Supreme Court should also consider the adoption of a permanent method for the valuation of attorneys' fees in appointed cases in an effort to prevent this type of challenge in the future. At the very least, the court should formulate a plan and request the legislature to codify the plan.

The easiest method to implement and follow, and the method that Mississippi should adopt, is that which allows a judge to deviate from legislatively-mandated attorneys' fees when there is a finding of extraordinary circumstances. "Extraordinary circumstances" can be readily determined. If an appointment deprives an attorney of an inordinate amount of time away from his or her practice; involves traveling of great distances; involves certain felonies, including death penalty cases; or other such undue burdens or hardships, extraordinary circumstances may be found. A finding of "extraordinary circumstances" should be fully articulated on the record and in any order awarding compensation to ensure proper consideration if the matter is appealed.

This method could be adopted by the Mississippi Supreme Court simply by pointing to the language of Section 99-15-17 and applying the "plain meaning" rule. Section 99-15-17 provides that appointed counsel seeking compensation *shall* present the appropriate judge with an itemized statement of expenses and time spent on the appointed case. This provision is mandatory for every appointment. Since judges are currently reviewing requests for attorney fees in appointed cases, no additional provision would be necessary to provide this aspect of individual review at the trial level.

A plain reading of the statute shows that compensation, in accordance with the itemized statement, *shall be approved and allowed* by the appropriate judge. This provision is clearly mandatory for judges; all fees must be judicially approved before being submitted for payment. Once approved, the fees shall be allowed. The language establishing the maximum fees, however, says "*may* not exceed," clearly a discretionary term. Since discretion may be found in the language of the statute, language which the legislature chose, the implication that judges may exceed the statutory limits on a finding of extraordinary circumstances is a logical conclusion which would not violate the substance of the statute itself. Additional support for this argument can be articulated in a finding that courts have a duty to appoint counsel; they also have a duty to

161. Kovarik v. County of Banner, 192 Neb. 816, 224 N.W.2d 761 (1975).
162. State *ex rel.* Wolff v. Ruddy, 617 S.W.2d 64 (Mo. 1981).

allow compensation for such appointments. The authority to allow "just compensation" to ensure effective assistance of counsel is "absolutely essential to the performance" of a court's judicial function.[163]

No doubt the court will be concerned that the above interpretation of the statute seems to stretch the language to fit a particular ruling. If concerned that such an interpretation would violate the intended purpose of the statute, the court can direct the legislature to amend Section 99-15-17. The amendments would be minor. The insertion of one sentence prior to the sentence mandating reimbursement of actual expenses would be sufficient. By way of illustration, such an insertion would change the language of Section 99-15-17 in the following manner:

> The compensation for counsel for indigents . . . . If the case is appealed to the State Supreme Court by counsel appointed by the judge, the allowable fee for services on appeal shall not exceed_____; *provided, however, compensation for appointed counsel in excess of the maximums stated above shall be approved only in exceptional cases. A detailed finding of the exceptional circumstances shall be made on the record and in the order allowing attorney fees.*

Such an amendment would inject flexibility into the statute.

Further, since the Mississippi Supreme Court has said that the legislature is the appropriate forum to provide compensation in appointed cases, it would be necessary for the legislature to reconsider and amend the valuation of just compensation. The most effective method for this valuation would be a set hourly rate for attorney services with maximums established within statistical averages for each class of case for which a maximum fee is statutorily provided. This method of valuation could carry an added benefit to the taxpayer and the judicial system as a whole by actually saving on attorneys' fees currently being expended. This benefit would come from allowing attorneys to be compensated on an hourly rate only for the hours actually expended on a case, rather than receiving the maximum for each appointment regardless of time spent. Additionally, by establishing an hourly rate for attorney services, fees across the state would be the same, thereby eliminating the possibility of different rates for different jurisdictions. Another benefit to be derived from the adoption of such a method of valuation would be the flexibility and ease of future amendments to ensure that attorney fees do not become confiscatory in the future.

The actual amendment required to enact the hourly rate provision would be fairly simple. By way of illustration, inserting the words "at the hourly rate of_____, but" in the first sentence of Section 99-15-17 would change the statute in the following way:

> The compensation for counsel for indigents appointed as provided in Section 99-15-15, shall be approved and allowed by the appropriate judge *at the hourly*

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163. 491 So. 2d at 1113.

*rate of* _____, *but* in any one (1) case, may not exceed _____ for representation in circuit court whether on appeal or originating in said court.

As previously stated, the legislature should provide the appropriate hourly rate and maximums. Further amendments could be expeditiously handled by simply changing the hourly rate and maximums when necessary. Using this method of amendment would eliminate the need to rewrite the statute in the future.

Should the above amendment be adopted or should the Mississippi Supreme Court adopt the ideas presented in this comment, the issue of funding would be raised. Where will the funds come from to support attorney fees in excess of the maximums currently allowed by the statute? Funding is a matter for the legislature, not the judiciary. This is a matter beyond the scope of this comment. For that reason, the issue of funding will be left solely to the discretion of the legislature and will not be addressed here.

Does a taking occur when expenses are not reimbursed? A plain reading of the statute clearly shows that the answer is "yes." The specific language of Section 99-15-17 is mandatory: "[T]he judge shall allow reimbursement of actual expenses." There is "no requirement of either law or professional ethics which requires attorneys to advance personal funds in substantial amounts for the payment of either costs or expenses of the preparation of a proper defense of the indigent accused." [164]

The issue of *reimbursement* of expended funds to an attorney in a court appointed case should not be confused with the issue of a *request* for funds with which to hire an expert. In the latter instance, unlike the *Pruett* case, no personal funds of the attorney have been expended. [165] The facts in *Pruett* are clear: reimbursement of funds expended by counsel to employ an expert was denied. [166] This denial was unconstitutional and the Mississippi Supreme Court should so hold.

## V. CONCLUSION

The attorneys for Marion Albert Pruett have presented the Mississippi Supreme Court with an issue which is on the cutting edge of criminal law: the constitutionality of attorney fee caps in indigent cases. The Mississippi Supreme Court should resolve this issue in a way that will benefit the entire criminal justice system in Mississippi. Such a solution has been presented in this comment.

*Tracy L. Morris*

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164. Williamson v. Vardeman, 674 F.2d 1211, 1216 (8th Cir. 1982)(quoting State *ex rel.* Wolff v. Ruddy, 617 S.W.2d 64, 67 (Mo. 1981)). *See also* State *ex rel.* Stephan v. Smith, 242 Kan. 336, 747 P.2d 816 (1987); State v. Robinson, 123 N.H. 665, 465 A.2d 1214 (1983); Wolff v. Ruddy, 617 S.W.2d 64 (Mo. 1981), *cert. denied*, 454 U.S. 1142 (1982); People v. Randolph, 35 Ill. 2d 24, 219 N.E.2d 337 (1966).

165. *See, e.g.*, Pinkney v. State, 538 So. 2d 329, 343-44 (Miss. 1988) and cases cited therein.

166. Motion, *supra* note 6, at 6.