

SUPREME COURT OF WISCONSIN

No. 10-03

In the matter of the petition to amend Supreme
Court Rule 81.02.

FILED

JUL 6, 2011

A. John Voelker
Acting Clerk of
Supreme Court
Madison, WI

This petition¹ asks the court to amend Supreme Court Rule (SCR) 81.02 by increasing the hourly rate of compensation for court-appointed lawyers from \$70 to \$80, indexing that rate to the Consumer Price Index, and specifying that the payment of an hourly rate less than the rate set forth in SCR 81.02(1) for legal services rendered pursuant to appointment by the State Public Defender under Wis. Stat. § 977.08 is unreasonable. The petitioners provided the court with documentation in support of the petition, including: ABA, Gideon's Broken Promise: America's Continuing Quest for Equal Justice, (December 2004); ABA, Findings Concerning Contracting for the Delivery of Indigent Defense Services, (July 1995); and The Spangenberg Group, Rates of Compensation Paid to Court-Appointed Counsel in Non-Capital Felony Cases at Trial: A State-By-State

¹ This rule petition was filed on March 5, 2010, by Attorneys Dean A. Strang, John S. Skilton, and Timothy W. Burns on behalf of Patricia K. Ballman, Thomas J. Basting, Sr., Richard T. Becker, Michelle A. Behnke, Gregory B. Conway, Robert H. Friebert, Janine P. Geske, Franklyn M. Gimbel, Ralph Johnson, E. Michael McCann, Gerald M. O'Brien, Jose A. Olivieri, and G. Lane Ware, all members in good standing of the State Bar of Wisconsin.

Overview, (June 2007).² The petitioners submitted a supplemental filing on September 29, 2010, responding to certain written questions from the court. Written comments from interested parties were also received.

On November 9, 2010, the court conducted a public hearing on this petition.³ Attorney John Skilton presented the petition and a number of individuals spoke regarding the petition.⁴ The testimony presented to the court was often eloquent and very informative. At the ensuing open administration conference the court discussed the matter at length.

This petition requires an understanding of the sometimes complicated interplay of statutes and rules that govern which defendants are sufficiently indigent to qualify for representation,

² All of these documents are available on the court's Web site at: www.wicourts.gov/scrules.

³ Initially, this matter was scheduled for public hearing on October 19, 2010. Immediately prior to the start of the public hearing on October 19, 2010, the State Capitol building was evacuated by Capitol Police for a period of several hours. As a result the administrative conference was cancelled. The matter was rescheduled and conducted on November 9, 2010.

⁴ Attorneys Dean Strang, Robert Frieber, Dave Jones, Ray Dall'Ostro, John Ebbott, Brian Gleason, John Birdsall, and Hank Schultz spoke in support of the petition. Carlo Esqueda, Dane County Clerk of Circuit Court, expressed concern about the proposed use of the Consumer Price Index as a basis for future rate increases. Sara Diedrick of the Wisconsin Counties Association, Mark Wadium, a lobbyist for Outagamie County, and John Barrett, Milwaukee County Clerk of Circuit Court, all spoke in opposition to the petition. Attorney Deb Smith advised the court that the Office of the State Public Defender took no formal position on the petition.

who represents these indigent criminal defendants, how these lawyers are compensated for their services, and who pays the bills.

It is a fundamental cornerstone of our justice system that indigent criminal defendants are constitutionally entitled to effective assistance of counsel. Gideon v. Wainwright, 372 U.S. 335 (1963); In re Gault, 387 U.S. 1 (1967); Argersinger v. Hamlin, 407 U.S. 25 (1972). In Gideon, the United States Supreme Court said:

That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.

372 U.S. at 344. Consistent with this constitutional mandate, Wisconsin law requires the appointment of counsel for all eligible indigent criminal defendants.

The Wisconsin State Public Defender's Office (SPD) provides legal representation to qualified defendants in cases specified by state law.⁵ Applicants for public defender representation are required by state law to meet strict financial guidelines to qualify for appointment of an attorney by the SPD.

⁵ These cases include criminal, civil commitment, protective placement (personal guardianship), revocation of conditional liberty (probation, parole, or extended supervision), termination of parental rights, and juvenile delinquency proceedings and certain other juvenile court matters.

However, SPD staff attorneys cannot represent all the people who are entitled to representation. The law provides that if the SPD has a conflict of interest or is otherwise unable to represent an eligible indigent defendant, the SPD will appoint and pay for a private attorney to provide representation. See Wis. Stat. §§ 977.05(4)(i), (j), (jm); 977.05(5)(a); 977.07; 977.08.⁶ Because of the budget constraints imposed on the SPD, private attorneys currently handle approximately 40%-45% of all indigent representations.

These appointed lawyers are paid \$40 per hour.⁷ See Wis. Stat. § 977.08. This is the same rate Wisconsin paid private attorneys for these services 15 years ago and only \$5 more per hour than the original rate established in 1978, over thirty years ago. We are advised that this is the lowest such hourly rate in the nation.

By comparison, during the same time span the rate of compensation for attorneys serving in the federal system has doubled from \$65 (1995) to \$125 (2010).⁸

⁶ The legislature requires that the SPD handle 67% of all felony and juvenile indigent representation, and the private bar therefore no more than 33% of indigent clients in those cases. Wis. Stat. § 977.08(5)(c).

⁷ In 1978, when the legislature established the SPD's role in circuit courts, the hourly rate of compensation for appointed lawyers was \$35 (\$25 for travel time). In 1992 the legislature increased private bar compensation to \$50 for in-court time and \$40 for out-of-court time; travel time remained unchanged at \$25. However, in 1995, the legislature reduced the in-court rate to create a uniform \$40 hourly rate. The \$25 hourly rate for travel remained unchanged. The rate has not changed since 1995.

⁸ See <http://www.ca7.uscourts.gov/cja/cjarates.htm>.

The petitioners assert that the low hourly rates have increasingly caused qualified and/or experienced lawyers to decline SPD appointments. For many lawyers, their basic office overhead costs (such as malpractice insurance, rent, staffing costs, work-related travel, law school loan payments) exceed the compensation rate that is paid by the SPD. In short, they lose money if they agree to represent these criminal defendants. SPD appointed lawyers may feel pressure to resolve cases early with a plea because they cannot afford the time to prepare for a trial even if their client wants one. SPD attorneys are managing increasingly heavy caseloads which affects the amount of time they can spend on each case.

If lawyers are unavailable or unwilling to represent indigent clients at the SPD rate of \$40 per hour, or when clients do not qualify under existing SPD eligibility standards but nonetheless are unable financially to retain counsel, judges then must appoint lawyers at county expense. See State v. Dean, 163 Wis. 2d 503, 471 N.W.2d 310 (Ct. App. 1991).

These court-appointed lawyers are compensated at a rate that is established by the supreme court in SCR 81.02. Since 1994 SCR 81.02 has set compensation for court-appointed lawyers at \$70 per hour.⁹

⁹ In 1994 the supreme court increased the hourly compensation under SCR 81.02 from \$60 to \$70 after hearing argument and evidence that the \$60 rate (a) was significantly lower than the average hourly rate charged by Wisconsin lawyers; (b) was not much higher than the office overhead rate for most lawyers; (c) reduced the number of experience lawyers taking court-appointed cases; and (d) impeded the provision of and reduced the quality of legal services to persons in need of these services.

Counties are thus required to reimburse court-appointed counsel at the \$70 per hour rate.¹⁰

This admittedly simplified background brings us to the petition pending before this court. The petition asks the court to raise the rate for court-appointed attorneys from \$70 per hour to \$80 per hour, adopt a provision tying the compensation rate to the Consumer Price Index, and, perhaps most significantly, adopt a newly created SCR 81.02(3), which would state the "payment of an hourly rate less than the rate set forth in Supreme Court Rule 81.02(1) for legal services rendered pursuant to appointment by the State Public Defender under Wisconsin Statutes section 977.08 is unreasonable."

Adopting proposed 81.02(3) would constitute a challenge to the compensation rate set by the legislature in Wis. Stat. § 977.08. The petitioners have repeatedly tried to persuade the legislature to address the issue of compensation rates for SPD appointed attorneys. Although the legislature recently acted to expand eligibility for SPD representation and has approved additional staff positions to cover

¹⁰ The petition states that in calendar year 2008 alone, "Wisconsin's counties expended at least \$5,965,186 on court-appointed counsel for indigent defendants, according to figures that the SPD maintains. Especially in less populous counties, that expense can be significant."

the anticipated increase in cases,¹¹ the last action taken by the legislature on compensation rates was in 1995 and was to reduce the rate to \$40 per hour in court or out of court and \$25 per hour travel time. Then State Public Defender Nick Chiarkas stated in a written submission to this court:

Each biennium since [1996], the Wisconsin State Public Defender Board has requested a private bar rate increase. We have made every argument for the rate increase that our collective intelligence and experience could generate. The agency's budget request has never been included in the Governor's budget bill.

¹¹ In 2010 the Legislature enacted 2009 Wisconsin Act 164, which expanded financial eligibility for public defender representation from the previous level set in 1987 (based on Aid to Families with Dependent Children limits) to current W-2 limits. It authorized 45 new SPD staff positions to handle the anticipated increased caseload that will result from the expanded eligibility guidelines. In April 2011 the Joint Finance Committee (JFC) voted to approve funding for 45 new SPD positions to handle the workload generated by expanded eligibility standards for criminal defendants that will take effect June 19, 2011.

The JFC also approved Governor Walker's budget proposal to increase funding to help fill the hole in the perennially under-funded SPD private bar appropriation, which has repeatedly run out of money during the second year of the biennium. The SPD budget as approved by JFC increases the private bar appropriation by \$3.6 million. This will not cover the entire shortfall in the next biennium because it will not address a projected shortfall of \$3.5 million for the current 2009-11 biennium, which ends June 30, 2011. The remaining shortfall this year will be carried forward into the next biennium and added to the projected shortfall in fiscal year 2013.

A threshold question for this court is whether this court has the authority to effectively declare a legislative mandate "unreasonable." The petitioners urge that we do. The petitioners state:

This Court has inherent power to ensure the effective administration of justice in the State of Wisconsin, which necessarily includes the power to set reasonable attorneys' fees and, conversely, to declare inadequate fees "unreasonable." See, e.g., State ex rel. Friedrich v. Circuit Court for Dane Cnty, 192 Wis. 2d 1, 531 N.W.2d 32 (1995) (discussed in answer to the second question below). This is particularly true in instances involving the appointment of defense counsel for indigents charged with crimes where the right to the effective assistance of counsel is constitutionally guaranteed. See Gideon v. Wainwright, 372 U.S. 335 (1963). Assuming that the legislature has the power to set rates, even if that power is a shared one, and it fails to set a "reasonable" rate, this Court may, indeed it must, act. Here, a rate which is essentially confiscatory, was set more than 15 years ago, and has not been changed despite, for example, the Consumer Price Index having risen by 52%, is prima facie "unreasonable" and because of legislative inaction, this Court has the duty to step in and make the necessary adjustments. Indeed, § 751.12(2), Stats., expressly authorizes the Supreme Court to modify or suspend "statutes relating to pleading, practice and procedure." For a rate as to which "reasonableness" is time-dependent, determination, periodic adjustment is inherently necessary as this Court itself recognizes in existing SCR 81.02(1).

We agree that this is an area of shared authority for the court and the legislature, but we decline at this time to use our administrative regulatory process to effectively circumvent a legislative enactment.

However, we express sincere concern because we recognize that indigent criminal defense programs in Wisconsin are inadequately funded. While it can be difficult to demonstrate a clear correlation

between inadequate funding and legal representation that falls below constitutional requirements the petitioners have provided extensive anecdotal evidence that supports their assertion that funding shortfalls may compromise the right to effective assistance of counsel.

This funding crisis is not unique to Wisconsin. Across the nation, there are reports of systemic issues where inadequate funding has compromised the ability of the adversary system to function properly, including disturbing reports of innocent people incarcerated because of ineffective legal representation. Several states have faced court challenges related to inadequate funding for criminal representation.

Yet we also recognize and acknowledge that this is a particularly challenging budgetary environment. Legislators are required to make difficult funding decisions with inadequate resources while striving to support many worthy programs. Several counties have advised us that they oppose this petition because they simply cannot afford it.

However, our criminal justice system is reaching a breaking point. The resources available for the defense of poor people accused of crime has fallen alarmingly, potentially compromising our constitutional responsibility to ensure that every defendant stands equal before the law and is afforded the right to a fair trial guaranteed by our constitution. If this funding crisis is not addressed we risk a constitutional crisis that could compromise the integrity of our justice system.

IT IS ORDERED that the petition is denied.

Justice David T. Prosser concurs in the result.

Dated at Madison, Wisconsin, this 6th day of July, 2011.

BY THE COURT:

A. John Voelker
Acting Clerk of Supreme Court

