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CONSTITUTIONAL LAW—INDIGENT DEFENSE—ARKANSAS STATUTORY FEE AND EXPENSE LIMITATIONS UNCONSTITUTIONAL. *Arnold v. Kemp*, 306 Ark. 294, 813 S.W.2d 770 (1991).

On November 30, 1990, the prosecuting attorney of Independence County, Arkansas, charged Suzan A. Jernigan with the capital murder of her husband and her mother.[1] The local circuit court determined Jernigan was indigent and on December 11, 1990, appointed Blair Arnold and Thomas E. Allen to represent Jernigan.[2] Both Arnold and Allen objected to the appointment, claiming the statutory fee and expense limitations for court-appointed counsel[3] were unconstitutional.[4]

Counsel filed a motion on behalf of defendant asking that the Arkansas fee cap statute be declared unconstitutional.[5] Additionally, the attorneys filed motions for money to hire a forensic pathologist,[6] a psychiatrist,[7] a chemical expert,[8] an investigator,[9] and an arson or fire ori-

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1. Arnold v. Kemp, 306 Ark. 294, 295, 813 S.W.2d 770, 771 (1991).

2. *Id.*

3. ARK. CODE ANN. §16-92-108 (Michie 1987) provides in relevant part:

> The amount allowed for investigation expenses shall not exceed one hundred dollars ($100), and the amount of the attorney's fee shall be not less than twenty-five dollars ($25.00) nor more than three hundred fifty dollars ($350).
>
> The amount of attorney's fees for attorneys who defend indigents accused of capital murder or murder in the first degree shall be not more than one thousand dollars ($1000).

4. 306 Ark. at 295-96, 813 S.W.2d at 771.

5. Appellant's Brief and Abstract at 11, Arnold v. Kemp, 306 Ark. 294, 813 S.W.2d 770 (1991) (No. 91-60).

6. *Id.* at 15. Counsel asked for $2000 in order to employ a forensic pathologist. Their reason for requesting the funds was that the state medical examiner initially could not determine the cause of death of the victims, but later amended his findings and stated that their deaths resulted from homicide. *Id.*

7. *Id.* at 15-16. Counsel requested $1500 to be used to employ a psychiatrist to offer evidence of mitigation and guilt. *Id.*

8. *Id.* at 17. Counsel believed that the State would introduce testimony at trial that Jernigan used some kind of chemical for refinishing furniture to commit the arson. The Arkansas State Police had taken three quart cans from the defendant's home and turned them over to the Arkansas State Crime Lab for analysis. The lab was unable to find any identifiable volatile accelerants which would be consistent with the expected testimony. Counsel requested $1500 to hire a chemical expert to inspect the same cans to determine if they contained clues to the possible origins of the fire. *Id.*

9. *Id.* at 18. Defendant asked for $1000 to cover the expenses of hiring an investigator to interview the possible witnesses located in both Arkansas and Texas. *Id.*

gin expert.[10] Allen filed a motion for certification of attorneys' fees and expenses, stating that as of February 20, 1991, he had incurred $749.40 in out-of-pocket expenses and $2735.65 in office overhead.[11] Arnold also petitioned the court asking that he be justly compensated for his time and requesting reasonable fees and out-of-pocket expenses.[12]

In a letter opinion dated February 28, 1991, Circuit Judge John Dan Kemp upheld the validity of the statute.[13] The court relied on *State v. Ruiz*[14] to "reluctantly" find the statute constitutional.[15] In another letter opinion dated March 12, 1991, the court denied defendant's motions for funds to hire a forensic pathologist, a chemist, and an arson or fire origin expert.[16] The court ordered that the defendant be provided psychiatric assistance and a psychological examination by the Arkansas State Hospital as provided by statute.[17] The court also granted defendant funds in the amount of $100[18] for the purpose of hiring an investigator. The motion for attorneys' fees and expenses was to be held until the attorneys' representation of defendant was concluded.[19]

On March 14, 1991, Arnold and Allen advised the court that they were refusing to proceed until funds to employ the requested experts and investigators were provided.[20] Although they had challenged the fee cap, the reason they gave for refusal to proceed was the narrower issue of enforcement of the $100 expense cap.[21] The circuit court held

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10. *Id.* at 19. The state and its experts had been unable to determine the cause and origin of the fire, although they insisted that defendant started the fire. Arnold and Allen asked for $1000 to employ an arson or fire origin expert. *Id.*

11. Record at 130, *Arnold* (No. 91-60).

12. *Id.* at 148.

13. Appellant's Brief and Abstract at 110-12, *Arnold* (91-60).

14. 269 Ark. 331, 602 S.W.2d 625 (1980). The Arkansas Supreme Court upheld the constitutionality of ARK. CODE ANN. § 16-92-108 (Michie 1987) in *State v. Ruiz.*

15. Appellant's Brief and Abstract at 111-12, *Arnold* (No. 91-60).

16. *Id.* at 112.

17. *Id.* ARK. CODE ANN. § 5-2-305(d) (Michie 1987) provides for an examination by the Arkansas State Hospital of a defendant who intends to rely on the defense of mental disease or defect when there is reason to believe that it will become an issue in the case. The United States Supreme Court has held that when a defendant's sanity is likely to be an issue at trial, the Constitution requires that the State provide the defendant access to a competent psychiatrist. Ake v. Oklahoma, 470 U.S. 68, 83 (1985).

18. Appellant's Brief and Abstract at 114, *Arnold* (No. 91-60). *See supra* note 3 regarding statutory limits on expenses.

19. Appellant's Brief and Abstract at 114, *Arnold* (No. 91-60).

20. 306 Ark. at 296, 813 S.W.2d at 771.

21. *Id.*

them in contempt of court and fined them $1000 each.[22] It also ordered them to appear before the court on March 29, 1991, for further proceedings.[23] Arnold and Allen, on behalf of Jernigan as well as themselves, filed a notice of appeal and petitioned for a temporary writ of prohibition and for permanent writs of prohibition, mandamus, and certiorari.[24] They asked for a stay of all proceedings against Jernigan in the case in chief, a stay of enforcement of the contempt citations against them, and a dismissal of the citations upon consideration of the merits.[25]

On appeal, the Supreme Court of Arkansas vacated the contempt citations and held that the fee and expense limitations imposed by the Arkansas statute were unconstitutional.[26] Specifically, the court found that the attorneys' rights to due process and equal protection were violated by requiring them to represent an indigent defendant for insufficient compensation.[27] The court also invalidated the expense limitation, the trial court's enforcement of which, strictly speaking, was the reason the lawyers were held in contempt.[28] *Arnold v. Kemp,* 306 Ark. 294, 813 S.W.2d 770 (1991).

Within the context of uncompensated or undercompensated indigent defense, there are several interrelated issues. The first is the right of the indigent defendant to counsel. A second issue is the right of counsel to compensation. Another related issue is the right of access to funds necessary to provide a constitutionally adequate defense. The court in *Arnold v. Kemp* addresses these issues in its invalidation of the fee and expense caps.

The decision in *Arnold v. Kemp* represents the end of a long line of challenges to Arkansas' indigent defense structure.[29] Although the right of an indigent defendant to be represented by counsel was established through a series of landmark United States Supreme Court cases,[30] interestingly, that right has been recognized by statute in Ar-

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22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.* at 304-06, 813 S.W.2d at 776-77.
27. *Id.* at 303-04, 813 S.W.2d at 775-76.
28. *Id.* at 304-06, 813 S.W.2d at 776-77.
29. *See* Coulter v. State, 304 Ark. 527, 804 S.W.2d 348 (1991); Pickens v. State, 301 Ark. 244, 783 S.W.2d 341 (1990); State v. Ruiz, 269 Ark. 331, 602 S.W.2d 625 (1980).
30. *See* Gideon v. Wainwright, 372 U.S. 335 (1963); Betts v. Brady, 316 U.S. 455 (1942); Powell v. Alabama, 287 U.S. 45 (1932).

kansas since statehood.[31]

In *Powell v. Alabama*[32] the Supreme Court held for the first time that the Sixth Amendment right to counsel did apply in certain state proceedings.[33] The case involved the so-called "Scottsboro Boys," black youths accused of rape, a capital offense in Alabama at the time.[34] The Court stated that a denial of due process, within the meaning of the Fourteenth Amendment,[35] would result if the right to counsel did not apply in this instance.[36] The Court did limit its holding to cases in which an indigent accused of a capital crime is incapable of adequately providing his own defense because of ignorance, illiteracy, or some similar deficiency.[37] The Court declined to decide whether the right to counsel would apply in other circumstances.[38]

In 1942 the Supreme Court held in *Betts v. Brady*[39] that the Due Process Clause of the Fourteenth Amendment did not require the states to appoint an attorney for an indigent defendant in every situation.[40] Betts had been accused and convicted of robbery without provision of requested counsel.[41] The Court found that Betts had not been denied due process; the Fourteenth Amendment, the Court said, only prohibits conviction and incarceration of a defendant whose trial is "offensive to the common and fundamental ideas of fairness and right."[42] The Court

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31. *See* ARK. CODE ANN. § 16-85-703 (Michie 1987), a descendent of *Rev. Stat.* Ch. 45 § 112.

32. 287 U.S. 45 (1932).

33. *Id.* at 71.

34. *Id.* at 49-50. Alabama statutory law provided for appointment of counsel for indigent defendants prosecuted for rape and murder. *Id.* at 48. The judge appointed the entire Alabama Bar, but no specific attorney, to represent the defendants. *Id.* at 56. For a discussion of this famous case and the racial issues involved, see LAUGHLIN MCDONALD, RACIAL EQUALITY 131-33 (1977).

35. Section 1 of the Fourteenth Amendment states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, §1.

36. 287 U.S. at 71.

37. *Id.*

38. *Id.*

39. 316 U.S. 455 (1942).

40. *Id.* at 471.

41. *Id.* at 456. There was no statutory provision for appointment of counsel for this offense. *Id.* at 457.

42. *Id.* at 473.

held that Betts' trial did not meet that standard.[43]

In dissent, Justice Black argued that the Fourteenth Amendment fully incorporates the Sixth Amendment and makes it applicable to the states.[44] He argued that it was unfair to increase an innocent man's chance of incarceration because of his poverty.[45] Justice Black noted that thirty-five states provided counsel, upon request, either by statute or established practice, for indigent defendants accused of both capital and serious noncapital crimes.[46]

Justice Black, along with Justice Douglas, continued to oppose the use of the "fair trial" standard of *Betts*.[47] From the mid-1950s, the courts developed so many exceptions to *Betts* that by 1963 the exceptions had virtually swallowed the rule.[48] Because of errors inherent in any criminal proceeding and criminal defendants' lack of skills necessary to provide an adequate defense, grounds for appellate reversal could almost always be found.[49] By 1963, only five states did not provide, either by statute or practice, for appointed counsel in noncapital felony cases.[50]

That same year, *Gideon v. Wainwright*[51] overruled *Betts v. Brady* and incorporated the Sixth Amendment's right to counsel into the Fourteenth Amendment's right to due process, thus making the Sixth Amendment applicable to the states.[52] The Court, with Justice Black writing the majority opinion, stated that it agreed with the contention in *Betts* that constitutional rights which are "fundamental and essential to a fair trial" are imposed upon the states by the Fourteenth Amend-

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43. *Id.* For a criticism of the Court's holding, see Yale Kamisar, *The Right to Counsel and the Fourteenth Amendment: A Dialogue on "The Most Pervasive Right" of an Accused*, 30 CHI. L. REV. 1 (1962).

44. 316 U.S. at 474 (Black, J., dissenting).

45. *Id.* at 477.

46. *Id.* at 477 n.2.

47. William Beaney, *The Right to Counsel: Past, Present, and Future*, 49 VA. L. REV. 1150, 1153 (1963).

48. *Id.*

49. *Id.*

50. Kamisar, *supra* note 43, at 19. The five states were Alabama, Florida, Mississippi, North Carolina, and South Carolina.

51. 372 U.S. 335 (1963). Gideon had been charged in Florida State Court with breaking and entering with the intent to commit a misdemeanor. Gideon was indigent, and therefore requested that counsel be appointed to represent him. The trial court denied his request, stating that state law only allowed court appointment in capital offenses. Gideon was convicted and appealed, claiming that his constitutional rights had been denied. *Id.* at 336-37.

52. *Id.* at 342.

ment.[53] *Gideon* differed by concluding that the Sixth Amendment's right to counsel is indeed fundamental and essential to a fair trial, regardless of the felony of which the defendant is accused.[54]

In that same term, the Supreme Court also determined that an indigent's right to counsel extends to the first direct appeal of right.[55] Nine years later, in *Argersinger v. Hamlin*,[56] the Court extended the indigent's right to counsel to include misdemeanors if a conviction could result in incarceration.[57]

Whether the Sixth Amendment guaranteed a right to *effective* assistance of counsel or merely to have a lawyer present at trial, however, was still unanswered.[58] Several courts held that the Sixth Amendment guaranteed only a right to have an attorney.[59] A common interpretation of the Court's discussion in *Powell*[60] of "effective" assistance of counsel was that it set only a procedural standard, not a standard of skill.[61]

In *McMann v. Richardson*[62] the Supreme Court held that an indigent defendant's right to assistance of counsel included the *effective* assistance of counsel.[63] However, in *Strickland v. Washington*,[64] the Court held that to warrant reversal in federal habeas corpus, the de-

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53. *Id.*

54. *Id.*

55. Douglas v. California, 372 U.S. 353 (1963). This case involved two defendants who were represented by a single public defender. The defendants dismissed the public defender, claiming that he was unprepared. The defendants were convicted and denied appointment of counsel on appeal. The Supreme Court held that this was a violation of the defendants' due process. *Id.* at 354-58.

56. 407 U.S. 25 (1972).

57. *Id.* at 37.

58. J.R. Waltz, *Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases*, 59 NW. U.L. REV. 289, 293 (1964).

59. *Id.* at 293 n.19. *See* Hester v. United States, 303 F.2d 47 (10th Cir.), *cert. denied*, 371 U.S. 847 (1962); Mitchell v. United States, 259 F.2d 787 (D.C. Cir.), *cert. denied*, 358 U.S. 850 (1958); Miller v. Hudspeth, 176 F.2d 111 (10th Cir. 1949); Diggs v. Welch, 148 F.2d 667 (D.C. Cir.), *cert. denied*, 325 U.S. 889 (1945); *cf.* United States *ex rel.* Feeley v. Ragen, 166 F.2d 976 (7th Cir. 1948).

60. 287 U.S. 45 (1932).

61. Waltz, *supra* note 58, at 293. *See also* Mitchell v. United States, 259 F.2d 787 (D.C. Cir.), *cert. denied*, 358 U.S. 850 (1958). The court in *Mitchell* stated that effective appointment of counsel did not refer to the quality of counsel appointed. *Id.* at 790. It is interesting to note that former United States Supreme Court Justice Warren Burger was one of the three judges who heard the case.

62. 397 U.S. 759 (1970).

63. *Id.* at 771 & n.14.

64. 466 U.S. 668 (1984).

fendant must satisfy a two-prong cause and prejudice test.[65] The "cause" prong is met by the demonstration that "in light of all the circumstances . . . the identified acts or omissions were outside the wide range of professionally competent assistance."[66] The "prejudice" prong is met by the demonstration that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."[67] The Court also applied the *Strickland* requirements to appeals of federal convictions in *United States v. Cronic*.[68]

The historical notion that attorneys, as officers of the court, are obligated to provide legal services to the indigent for little or no compensation originated in the common law of England.[69] Authority can be found to both support[70] and reject[71] the contention that American attorneys are under a similar professional obligation. Arkansas was one of the last states to reject the obligation theory in light of current realities of criminal defense.[72]

In recent years, Arkansas has provided some payment for court-appointed attorneys. Act 276 of 1953 provided that payments to court-appointed attorneys would be no lower than $25 and no higher than $250 in any county with a population not exceeding 100,000.[73] Act 125 of 1971 superseded Act 276 of 1953 to require all counties to compensate court-appointed attorneys, but left the fee limitations in effect.[74] In the 1970s, the legislature enacted public defender legislation permitting

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65. *Id.*

66. *Id.* at 690.

67. *Id.* at 694. A possible result of *Strickland* is that effective assistance of counsel may not be required when there is a very strong case against the defendant, even though effective representation is most needed in such a case. *See* Richard Klein, *The Emperor "Gideon" Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625, 644-45 (1986).

68. 466 U.S. 648 (1984).

69. David L. Shapiro, *The Enigma of the Lawyer's Duty to Serve*, 55 N.Y.U. L. REV. 735, 740-41 (1980). Shapiro offers a nontraditional view of this obligation as it actually existed in England.

70. *See, e.g.*, United States v. Dillon, 346 F.2d 633 (9th Cir. 1965), *cert. denied*, 382 U.S. 978 (1966).

71. *See, e.g.*, Webb v. Baird, 6 Ind. 11 (1854).

72. Jeff Rosenzweig, *The Crisis in Indigent Defense: An Arkansas Commentary*, 44 ARK. L. REV. 409, 417-18 (1991).

73. 1953 ARK. ACTS 276.

74. 1971 ARK. ACTS 125.

certain counties to establish salaried public defenders.[75] Act 246 of 1977 amended the Act by increasing the fee limitation on court-appointed attorneys to $350, depending upon the experience of the attorney, the time and effort devoted to the case, and comparable fees charged in the community.[76] This Act also provided for up to $100 for investigative expenses.[77] The statute was again amended in 1985 to allow for fees up to $1000 for representation of indigents in capital or first degree murder prosecutions.[78]

Arkansas courts had upheld the constitutionality of requiring attorneys to provide services to the indigent for little or no compensation since the late 1800s.[79] In the retrial of the well-publicized case of Paul Ruiz and Earl Van Denton, the circuit court awarded attorney's fees exceeding the statute's maximum, and the State appealed.[80] In *State v. Ruiz*,[81] the Arkansas Supreme Court admitted that the statutory fee provisions do not provide adequate compensation for the services performed,[82] but nevertheless upheld the constitutionality of the provisions.[83] The court based its ruling on the common-law obligation of attorneys to serve the indigent, the strong presumption of constitutionality of legislative acts, the professional oath of the Arkansas Bar,[84] and the holding of *United States v. Dillon*.[85] In *Dillon* the Ninth Circuit Court of Appeals determined that there was no common-law, statutory, or constitutional authority requiring payment of fees to court-appointed attorneys.[86] The court in *Dillon* held that lawyers have an obligation to provide services to the indigent, and to do so for little or no fee was not a taking of property in violation of the federal Due

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75. These provisions are codified at ARK. CODE ANN. §§ 16-87-101 to 16-87-108 (Michie 1987).

76. 1977 ARK. ACTS 246.

77. *Id.*

78. This is the current statutory provision found in ARK. CODE ANN. § 16-92-108 (Michie 1987).

79. *See* Arkansas County v. Freeman & Johnson, 31 Ark. 266 (1876).

80. State v. Ruiz, 269 Ark. 331, 602 S.W.2d 625 (1980).

81. *Id.*

82. *Id.* at 333, 602 S.W.2d at 627.

83. *Id.* at 335, 602 S.W.2d at 627.

84. The oath states in relevant part:

I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay any man's cause for lucre or malice. SO HELP ME GOD.

Id. at 334, 602 S.W.2d at 627.

85. 269 Ark. at 333-35, 602 S.W.2d at 627. *Dillon* is found at 346 F.2d 633 (9th Cir. 1965), *cert. denied*, 382 U.S. 978 (1966).

86. 345 F.2d at 636-38.

Process Clause.[87]

The constitutionality of the fee and expense caps in Arkansas was again raised in *Pickens v. State*.[88] Although the Arkansas Supreme Court noted that other jurisdictions had recently declared comparable statutes unconstitutional, the court stated that this was not the proper case to reconsider the constitutionality of the fee caps because there was no allegation of ineffective counsel, and the court determined that counsel had not been forced to stay with the case for the retrial or resentencing.[89] Therefore, the court found no due process violation of the attorney's rights and concluded that there was no indication the indigent defendant did not receive effective assistance of counsel as a result of the statutory limitations.[90]

In *Coulter v. State*[91] the Arkansas Supreme Court again declined an opportunity to hold the fee and expense caps unconstitutional.[92] The court stated that the defendant would have to demonstrate prejudice had resulted from the fee and expense limitations. The court held that Coulter did not do so.[93] This decision resulted in a "catch-22" for defense attorneys. Because the attorney must represent the defendant on his first appeal of right, and because the court held in *Ruiz*[94] that a lawyer could be required to represent a defendant gratis, the attorney must allege on appeal that he or she failed to do things because of lack of compensation, thus admitting to an ethical violation.[95] The court did refer to recent decisions in other states holding comparable statutes unconstitutional.[96] Once again the court said it would reconsider *Ruiz*[97] in the appropriate case.[98]

Despite the absence of the *Coulter* criteria that a defendant must

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87. 346 F.2d at 638.

88. 301 Ark. 244, 783 S.W.2d 341 (1990).

89. *Id.* at 256, 783 S.W.2d at 348.

90. *Id.*

91. 304 Ark. 527, 804 S.W.2d 348 (1991). Coulter's lawyer was appointed from outside the district because no one within the district would take the case. The lawyer spent his fee on a defense expert that the court refused to compensate.

92. *Id.* at 545, 804 S.W.2d at 358.

93. *Id.* For criticism of the *Coulter* decision see Rosenzweig, *supra* note 72.

94. *See supra* notes 80-85 and accompanying text.

95. Rosenzweig, *supra* note 72, at 419.

96. 304 Ark. at 542-45, 804 S.W.2d at 356-57.

97. 269 Ark. 331, 602 S.W.2d at 625 (1980).

98. 304 Ark. at 545, 804 S.W.2d at 358. In a concurring opinion, Justice Holt severely criticized the statute and urged the legislature to address the issue of funding indigent defense. *Id.* at 547, 804 S.W.2d at 359 (Holt, J., concurring).

prove prejudice, the Arkansas Supreme Court finally met the constitutional issue squarely in *Arnold v. Kemp*.[99] The appellants in *Arnold* claimed that the statutory fee and expense caps violated the court-appointed attorneys' right to due process and that Arkansas' system of appointing attorneys violated their right to equal protection.[100] Appellants also alleged that the limitations resulted in a conflict of interest between the attorney and the client and that by creating such limitations, the General Assembly had invaded the province of the judicial branch of the government.[101] The supreme court addressed only the first two arguments.

Before discussing the due process issue, the court noted the strong presumption that legislative enactments are constitutional and that the benefit of any doubt must fall on the side of constitutionality.[102] The court next discussed the reasons for its previous decision in *State v. Ruiz*, which upheld the constitutionality of the fee cap.[103] The court noted that since the *Ruiz* decision, other states, including Alaska,[104] Florida,[105] and Kansas,[106] had recently determined comparable fee and expense caps to be unconstitutional.[107]

Writing for the court,[108] Chief Justice Holt followed the historical analysis of the recent Kansas decision, *State ex rel. Stephan v. Smith*,[109] which declared a similar statute[110] unconstitutional.[111] The

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99. 306 Ark. 294, 813 S.W.2d at 770 (1991).

100. *Id.* at 296, 813 S.W.2d at 771-72.

101. *Id.* at 296-97, 813 S.W.2d at 772.

102. *Id.* at 297, 813 S.W.2d at 772.

103. *See supra* notes 80-85 and accompanying text.

104. DeLisio v. Alaska Superior Court, 740 P.2d 437 (Alaska 1987). An attorney appealed a contempt citation for refusing to accept a court appointment on the grounds that the statutory fee cap was unconstitutional. The court held the statute unconstitutional as a taking of property in violation of the state constitution. *Id.* at 443.

105. Makemson v. Martin County, 491 So. 2d 1109 (Fla. 1986). The trial court awarded appointed counsel fees in excess of the statutory cap and the county appealed. The court held that the fee cap created a conflict between the rights of the indigent and the right to protect the treasury and declared the statute unconstitutional. *Id.* at 1112-13.

106. State *ex. rel.* Stephan v. Smith, 747 P.2d 816 (Kan. 1987). Two judges entered general orders establishing rules and panels for indigent defense that provided more compensation than the statutory fee caps allowed. The state filed a petition for mandamus. The court determined that the fee cap, as applied, was an unconstitutional taking of property under the Fifth Amendment and violated the Equal Protection Clause. *Id.* at 842-46.

107. Arnold v. Kemp, 306 Ark. at 298, 813 S.W.2d at 772.

108. It should be noted that only two of the justices joined with Chief Justice Holt in all reasoning. The remaining four justices disagreed with part of his reasoning or added their own rationales in concurring opinions.

109. 747 P.2d 816 (Kan. 1987).

Smith court looked to the English common law for the origin of the obligation upon lawyers to provide legal services to the indigent for little or no compensation.[112] The court in *Smith* observed that English attorneys enjoyed special privileges that modern American attorneys do not share.[113] The Kansas Supreme Court concluded that attorneys have an *ethical* obligation to provide services without compensation to the indigent, but that the *legal* obligation to provide such services rests on the state, not the individual attorneys.[114] In addition, the Kansas court analyzed the Fifth Amendment issues relating to fee and expense limitations and concluded that a finding of a violation of due process depends upon whether "property" has been taken and what kind of "process" is due.[115]

Relying on the analysis in *Smith*, the Arkansas Supreme Court determined that the services of an attorney are property subject to Fifth Amendment protection.[116] Recognizing that the complexities of criminal litigation and the skill required to provide effective assistance of counsel have increased dramatically in recent years, the court held that the burden imposed on Arnold and Allen by the appointment resulted in a taking of property in violation of the Fifth Amendment and a violation of article 2, section 22 of the Arkansas Constitution.[117]

The court next addressed the equal protection issue.[118] Arnold and Allen had argued that lawyers, as a classification, were not given equal

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110. The Kansas statute, KAN. STAT. ANN. § 22-4507, provided compensation for court-appointed attorneys pursuant to the regulations published by the State Board of Indigents' Defense Services. 747 P.2d at 824. Article 5 of the published regulations addressed compensation. Appointed counsel were awarded $30 per hour for time spent on the case with the maximum compensation of $400 if the case did not go to trial and $1000 if it went to trial. There was also a provision for compensation of up to $5000 in exceptional cases. *Id.* at 826-27.

111. 306 Ark. at 298, 813 S.W.2d at 773.

112. *Id.*

113. *Id.* at 299, 813 S.W.2d at 773.

114. *Id.* The Kansas court stated that the source of the ethical responsibility was Canon 2 of the Code of Professional Responsibility: "A Lawyer Should Assist the Legal Profession in Fulfilling its Duty to Make Legal Counsel Available." 747 P.2d at 833.

115. Arnold v. Kemp, 306 Ark. at 300, 813 S.W.2d at 773. The Kansas court determined that attorneys' services were analogous to merchants' goods since an attorney's advice is his or her livelihood. 747 P.2d at 837. The court added that when attorneys are forced to spend their money funding a defense, this is a taking of property in the form of money. *Id.* The court also noted that appointing attorneys to represent the indigent does serve a legitimate, governmental purpose, and therefore the statute is not unconstitutional on its face, but it is unconstitutional as applied. *Id.* at 838-42.

116. 306 Ark. at 302, 813 S.W.2d at 774.

117. *Id.* at 302-03, 813 S.W.2d at 774-75.

118. *Id.* at 303, 813 S.W.2d at 775.

protection with other classes of professionals in that individual lawyers were being required to fund society's obligation to provide legal defense for indigents.[119] The court noted that a classification must have a rational basis and be reasonably related to the purpose of the statute to avoid a denial of equal protection.[120] To determine if the fee cap statute violated equal protection requirements, the court examined the character of the classification, the individual interests asserted in support of the classification, and the governmental interests asserted in support of the classification.[121]

At the time of the *Arnold* decision, twenty-six counties in Arkansas had a public defender system and the remaining forty-nine counties appointed private attorneys for indigent defendants.[122] Therefore, the court determined, an attorney's geographic location determines whether he or she may be required to provide services for the indigent.[123] In addition, an attorney's field of practice will also determine whether he or she will be appointed.[124] These disparities place a burden of indigent representation on a "subclass" of attorneys.[125] Thus, the fee and expense limitations violate the attorneys' right to equal protection.[126]

The court then addressed the issue of how to compensate court-appointed attorneys for the indigent.[127] The court held that the trial court should not award fees based on the attorney's customary charges, but instead should award fees that are "just."[128] To determine what constitutes "just" compensation, the court stated that trial courts should use the factors set out in *Chrisco v. Sun Industries, Inc.*[129]

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119. *Id.* The argument is often raised that other professionals, such as doctors and engineers, are not forced to provide services to the public without compensation and it is no more logical to require attorneys to provide public services for little or no compensation. *See* Sparks v. Parker, 368 So. 2d 528, 534-35 (Ala. 1979) (Maddox, J., dissenting).

120. Arnold v. Kemp, 306 Ark. at 303, 813 S.W.2d at 775.

121. *Id.* (citing Holland v. Willis, 293 Ark. 518, 739 S.W.2d 529 (1987)).

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 304, 813 S.W.2d at 775.

126. *Id.* at 304, 813 S.W.2d at 776.

127. *Id.*

128. *Id.*

129. *Id.* at 304-05, 813 S.W.2d at 776. *Chrisco* is found at 304 Ark. 227, 800 S.W.2d 717 (1990). *Chrisco* involved a breach of contract suit. The two parties settled, leaving only the issue of the amount of attorneys' fees to award plaintiff's counsel. 304 Ark. at 228, 800 S.W.2d at 718. The judge awarded $25,000.00 and plaintiff appealed the award. *Id.* at 228-29, 800 S.W.2d at 718. The court listed guidelines that should be used to determine an appropriate award of attorneys' fees. *Id.* at 229, 800 S.W.2d at 718-19.

These factors include the experience and ability of the attorney, the time and labor required to perform the legal service properly, the novelty and difficulty of the issues involved, the fee customarily charged in the locality for similar work, the time limitations, and the likelihood, if apparent to the court, that the acceptance of the employment will preclude other employment by the lawyer.[130]

Additionally, the court in *Arnold* took guidance from, of all places, the fee cap statute itself to determine what would constitute just fees.[131] Before the section imposed the caps, the statute had declared that the court should determine an amount for a "reasonable and adequate investigation" and that the fees provided for the attorney be based on his or her experience, the time and effort involved, and comparable fees for the same service in the community.[132] The court stated that the factors provided by *Chrisco* and the statute should be "conservatively" applied by the trial courts.[133] Additionally, the court determined that the $100 limit on expenses, which was the actual reason for the attorneys' refusal to proceed, was too low and stated that trial courts should approve reasonable expenses.[134]

Although no one dissented from Chief Justice Holt's opinion, four of the seven justices issued concurrences. All justices agreed that the statutory fee and expense caps were unconstitutional.[135] However, Justice Dudley did not find a violation of Arnold's and Allen's due process

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130. Chrisco v. Sun Indus., Inc., 304 Ark. at 229, 800 S.W.2d at 718-19.

131. Arnold v. Kemp, 306 Ark. at 305, 813 S.W.2d at 776.

132. *Id.*

133. *Id.* at 305, 813 S.W.2d at 776-77.

134. *Id.* at 306, 813 S.W.2d at 777. The expense cap had a checkered history in Arkansas. Although the expense caps were not overruled until *Arnold v. Kemp*, many trial courts ignored the caps and granted funds that exceeded the $100 expense cap. The Arkansas Supreme Court was faced with several cases where the trial courts allowed funds which exceeded the cap, but did not comment on the obvious disregard for the expense cap. In Simmons v. State, 278 Ark. 305, 645 S.W.2d 680 (1983), the defendant argued on appeal that the $200 allowed by the trial court for investigation expenses in his capital murder trial was inadequate. The court stated that counsel would have to show what defense might have been discovered in order to prove that the funds were inadequate. *Id.* at 316, 645 S.W.2d at 686. The court did not comment on the fact that the funds allowed exceeded the statutory limit. In Wainwright v. State, 302 Ark. 371, 790 S.W.2d 420 (1990), the trial court granted $840 for expenses. On appeal, the defendant asserted that the trial court erred in refusing to grant additional funds for expenses. Again, the supreme court did not comment on the trial court's disregard for the statutory cap, but only stated that it was not error for the trial court to refuse additional funds. *Id.* at 379, 790 S.W.2d at 423.
The trial court's decision in *Arnold v. Kemp* to strictly enforce the statutory expense caps probably provided the catalyst for the Arkansas Supreme Court to confront the issue.

135. Arnold v. Kemp, 306 Ark. at 306-17, 813 S.W.2d at 777-83.

rights and also disagreed with the "just compensation" standard.[136] He argued that the compulsion of an attorney to perform public service in the form of representing indigents does not violate the lawyer's due process rights and does not result in a taking of property.[137] Justice Dudley based this argument on the role of an attorney as an officer of the court.[138] He expressed concern as to the economic consequences of the majority's holding. If attorneys are justly compensated at market value, a financial crisis for the counties, and possibly the state, may result.[139]

Justice Newbern agreed with Chief Justice Holt that the statute violated both equal protection and due process.[140] He speculated that the issue of finances would be addressed by a statewide public defender system.[141] Justice Glaze, joined by Justice Hays, questioned what Chief Justice Holt meant by "just" fees.[142] He argued that this part of Chief Justice Holt's opinion is inconsistent with the Kansas decision, relied upon so heavily in other respects of the opinion.[143] In *Smith* the Kansas court held that attorneys should be paid at a rate which is "not confiscatory, considering overhead and expenses."[144] Justice Glaze argued that the holding should be limited to providing compensation on the same basis as that in the Kansas decision.[145] This, he reasoned, would allow the General Assembly the flexibility to adopt a fee schedule similar to the one used in federal courts.[146]

The concerns of the concurring justices are well-founded. The court states that the factors listed in *Chrisco* should be used in determining appropriate fees. *Chrisco*, however, was a civil suit and the plaintiff's attorney was to be awarded fees by the defendant.[147]

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136. *Id.* at 306, 813 S.W.2d at 777 (Dudley, J., concurring).

137. *Id.* at 308, 813 S.W.2d at 778 (Dudley, J., concurring).

138. *Id. See* United States v. Dillon, 346 F.2d 633, 635 (9th Cir. 1965), *cert. denied*, 382 U.S. 978 (1966).

139. 306 Ark. at 309, 813 S.W.2d at 779 (Dudley, J., concurring).

140. *Id.* at 313, 813 S.W.2d at 781 (Newbern, J., concurring).

141. *Id.*

142. *Id.* at 316, 813 S.W.2d at 782 (Glaze, J., concurring).

143. *Id.* at 316, 813 S.W.2d at 782-83.

144. 747 P.2d at 849. Another apparent difference is that the court in *Arnold* stated that award amounts would be left to the discretion of the trial court, 306 Ark. at 305, 813 S.W.2d at 777, while the court in *Smith* stated that awards should not vary depending on the judge, but a statewide scale should be used. 747 P.2d at 849.

145. 306 Ark. at 317, 813 S.W.2d at 783 (Glaze, J., concurring).

146. *Id.*

147. 304 Ark. at 228-29, 800 S.W.2d at 718. Many attorneys in civil practice charge well over $100 an hour. If court-appointed defense attorneys are paid at a comparable rate, it could

The financial consequences of the ruling of the Arkansas Supreme Court declaring the statutory fee and expense limitations unconstitutional will likely force the General Assembly to address the problem of indigent defense in the state. There are four types of systems to choose from in providing legal services to the indigent.[148] One option is a public defender system with salaried lawyers which is supported by public funds.[149] A second alternative would be to have a private defender system in which a nonprofit agency receives private donations as well as public funds and contracts with the county or state to provide counsel.[150] A third alternative would be a contract system in which private attorneys would provide representation for all eligible defendants for a set fee.[151] Finally, the counties could continue to rely solely on court appointments. Also at issue is whether the burden should be borne by the state, the counties, or shared in some proportion.

The private defender system is probably not a realistic option for Arkansas. This system is financed by private donations as well as public funds. Arkansas is a small state with a relatively small population. Dependence partially upon private donations, which would fluctuate depending on the political climate and vary from year to year, would make the system unreliable at best.

The contract system has the problems that would predictably result from awarding such a responsibility to the lowest bidder. In the usual "contract" arrangement, office expenses, investigation, and sometimes experts, are paid out of the lump-sum fee. The less time and money the lawyer spends on the case, the greater profit for him.[152] Depending on how low the bid is, this system would be another form of the disincentive so obvious in the fee cap. This breeds a conflict of interest between attorney and client.

As a result of *Arnold*, the court-appointed system no longer has the "advantage" of being low-cost. The application of the factors outlined in *Arnold* will probably be sufficient to limit appointments to con-

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lead to financial crisis for the state as Justice Dudley suggests. 306 Ark at 309, 813 S.W.2d at 779 (Dudley, J., concurring).

148. Klein, *supra* note 67, at 656-57.

149. Klein, *supra* note 67, at 656-57. Twenty-six counties in Arkansas had a public defender system at the time of the court's decision. Arnold v. Kemp, 306 Ark. at 303, 813 S.W.2d at 775.

150. Klein, *supra* note 67, at 657. The Legal Aid Society of New York City is an example of this type of system. *Id.* at 657 n.180.

151. Klein, *supra* note 67, at 657.

152. Klein, *supra* note 67, at 679-80.

flict cases involving multiple defendants.[153] However, even with compensation increased to a constitutionally acceptable level it will still be necessary to formulate standards for appointment of counsel.[154]

Court appointment has not worked fairly with regard to indigent defendants. Arkansas currently has no minimum standards for counsel appointed to criminal cases.[155] Many attorneys appointed to represent indigents in criminal cases are inexperienced or unfamiliar with criminal law and, therefore, unable to prepare an adequate defense.[156]

A statewide public defender system seems to be the most logical choice as a long-term solution.[157] Because of the experience factor, this would lead to better representation for the indigent defendant. It also now appears to be the least expensive method of handling indigent defense because of the greater ability to control costs. However, one of the other three methods must be used in connection with the public defender system when conflicts involving the representation of multiple defendants arise.

It is important that the legislature provide a standard of representation in addition to a standard of payment for indigent defense, no matter which system is chosen.

Terri Schull

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153. Conflicts of interest can arise when one attorney represents more than one defendant. For example, each defendant may have a different defense or one defendant may blame the other.

154. Additionally, new problems would arise. If the county or state pays reasonable fees with no cap, it would be difficult to monitor the requested fees and expenses, which could tempt the attorney to defraud the state. *See* Shawn Hubler, *Lawyer Asks for Court-Appointed Attorney*, LOS ANGELES TIMES, Aug. 15, 1991, at B1. A California attorney was indicted for billing the county for indigent defense work that he never did. Within the last three years, the county paid him $1.3 million. *Id.*

155. Jim Echols, *Death Row Cases in Inexperienced Hands*, ARKANSAS GAZETTE, Sept. 24, 1990, at B1. A 1985 bill providing for minimum standards for court-appointed counsel could not find a sponsor in the legislature. *Id.* at B8.

156. *Id.* Jack Holt, Jr., Chief Justice for the Arkansas Supreme Court, offered a possible explanation for this. He believes that younger attorneys have more time and since they are not yet established, the appointment is less burdensome on them. He also alluded to the idea that being appointed is a young lawyer's way of "paying dues."

157. *See* Arnold v. Kemp, 306 Ark. at 313-14, 813 S.W.2d at 781 (Newbern, J., concurring). In response to *Arnold v. Kemp*, many counties in Arkansas have contracted with local lawyers to provide indigent defense, generally for a fixed monthly, quarterly, or annual fee, out of which the lawyer pays expenses. Some of these lawyers have the title "public defender." Telephone interview with Sherry L. Daves, Office of the Attorney General, State of Arkansas (March 10, 1991).

Author's Note

Jernigan prevailed on a motion to suppress the alleged confession. The charges against Ms. Jernigan were subsequently dismissed on February 10, 1992.