2018 WI 83

SUPREME COURT OF WISCONSIN

No. 17-06

In re the Petition to Amend SCR 81.02

FILED

JUN 27, 2018

Sheila T. Reiff
Clerk of Supreme Court
Madison, WI

The Wisconsin Association of Criminal Defense Lawyers, the Wisconsin Association of Justice, and a number of individuals[1] have filed an administrative rule petition asking the court to amend Supreme Court Rule (SCR) 81.02. Supreme Court Rule 81.02 sets the compensation rate applicable when the court appoints a lawyer.[2] Since

[1] Francis W. Deisinger, Paul G. Swanson, Christopher E. Rogers, Dean A. Strang, Jerome F. Buting, Louis B. Butler, Janine P. Geske, John A. Birdsall, Henry R. Schultz, Keith A. Findley, Franklyn M. Gimbel, Walter F. Kelly, Peggy A. Lautenschlager, John T. Chisholm, Kelly J. McKnight, E. Michael McCann, Daniel D. Blinka, James M. Brennan, Ben K. Kempinen, John S. Skilton, James C. Boll, Ralph M. Cagle, Robert R. Gagan, Diane S. Diel, Thomas S. Sleik, Gerald W. Mowris, Gerald M. O'Brien, Jon P. Axelrod, Michael J. Steinle, Howard A. Pollack, Thomas R. Streifender, Joseph E. Tierney, and Christy A. Brooks.

[2] There are a number of situations in which a court may need to appoint counsel, such as guardians ad litem in family cases. Often, the individual requiring legal representation is not indigent and the court may establish a payment plan to enable the individual to obtain and pay for the legal services, or the county may seek full or partial reimbursement for the costs.

1994, the compensation rate in SCR 81.02 has been $70/hour.[3] It has not changed in nearly 25 years.

As the petitioners candidly acknowledge, however, the real reason for this petition is not merely because an increase in the compensation rate in SCR 81.02 is overdue.

Chronic underfunding of the Office of the State Public Defender (SPD) has reached a crisis point. In filing this petition, the petitioners hope to leverage the rulemaking power of this court to persuade the legislature to raise the compensation rate it authorizes the SPD to pay private counsel to represent indigent criminal defendants under Wis. Stat. § 977.08.

That Wisconsin's compensation rate for SPD appointed attorneys is abysmally low is not in dispute. Wisconsin's $40/hour compensation rate is the lowest in the entire nation. It has been

[3] Initially, the rate in SCR 81.02 was $50/hour, with lesser rates for office and travel time. See S. Ct. Order, In the Matter of the Amendment of SCR 81.02, Compensation of Court Appointed Attorneys (May 19, 1978). In 1989 it was raised to $60/hour. See S. Ct. Order, In the Matter of the Amendment of SCR 81.02, Compensation of Court Appointed Attorneys (issued Dec. 9, 1988, eff. Jan. 1, 1989).

In 1993, several rule petitions were filed asking the court to modify SCR 81.02. The State Bar of Wisconsin sought a compensation rate increase. Racine County sought permission to enter into flat rate contracts for guardian ad litem appointments. Legal Aid Society of Milwaukee, Inc. and the Office of Lawyer Regulation sought leave to contract for legal services at a lower rate. The court increased the rate from $60 to $70/hour and adopted SCR 81.02(1m), permitting flat rate contacts. See S. Ct. Order 93-02, In the Matter of the Amendment of SCR 81.02, Compensation of Court Appointed Attorneys (issued June 21, 1993, eff. July 1, 1994). The court agreed to delay the effective date for a year, in order to accommodate county budgets.

unchanged since 1995. Wis. Stat. § 977.08(4m).[4] Most attorneys will not accept SPD appointments because they literally lose money if they take these cases. Consequently, the SPD struggles to find counsel who will represent indigent criminal defendants.

Seven years ago, we denied a very similar rule petition, but observed that "[i]f this funding crisis is not addressed, we risk a constitutional crisis that could compromise the integrity of our justice system." See S. Ct. Order 10-03, In the matter of the petition to amend Supreme Court Rule 81.02 (issued July 6, 2011). The petitioners assert that the situation has continued to deteriorate and the predicted constitutional crisis is now upon us. The petitioners urge us to raise the compensation rate in SCR 81.02 and to declare "unreasonable" the rate set by the legislature in Wis. Stat. § 977.08(4m).

This rule petition was filed on May 25, 2017. The court discussed the petition in open administrative rules conference on June 21, 2017, and voted to contact legislators, solicit additional information from the petitioners, and schedule a public hearing.[5]

[4] In 1978, the legislature set the hourly rate of compensation for SPD appointed private counsel at $35/hour and $25/hour for travel time. In 1992 the legislature increased the rate to $50/hour for in-court time and $40/hour for out-of-court time; travel time remained at $25/hour. However, in 1995, the legislature eliminated payment for out-of-court and reduced the in-court rate to $40/hour. The $25/hour rate for travel remained unchanged. The legislature has not increased this rate in nearly 25 years.

[5] The petitioners asked the court to schedule the public hearing for May 2018.

On January 19, 2018, the court sent a detailed letter to the petitioners posing several questions. On March 17, 2018, the court solicited public comment and, on April 17, 2018, the court extended the public comment period to May 1, 2018. The petitioners responded to this court's questions by letter dated March 22, 2018 and provided a supplemental report dated April 19, 2018.

The court received over 100 written comments from judges, lawyers, administrators, legal organizations, and members of the public. All but three support the petition.[6]

The court conducted a public hearing on May 16, 2018. Attorney John A. Birdsall and Attorney Henry R. Schultz presented the petition to the court. Numerous speakers appeared. The testimony presented to the court was often eloquent and very informative. The court discussed the matter at length in closed conference and voted to grant the petition, in part.

The right to counsel in criminal proceedings is a fundamental constitutional right and a cornerstone of our justice system. U.S. Const. amend. VI; Wis. Const. art. I, § 7; In Gideon v. Wainwright, 372 U.S. 335 (1963), the United States Supreme Court explained:

> [L]awyers 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

[6] All of the documents filed in this matter are available on the court's website at: www.wicourts.gov/scrules/1706.htm.

> 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. Indeed, long before Gideon, Wisconsin recognized the need to appoint counsel for indigent criminal defendants. Carpenter v. County of Dane, 9 Wis. 274 (1859).

Since Gideon, the SPD has provided that legal representation to qualified indigent defendants in cases specified by state law.[7] Wisconsin's SPD uses a "hybrid" system of representation, employing SPD staff attorneys and also assigning cases to certified attorneys who are members of the private bar. See Wis. Stat. §§ 977.05(4)(i), (j), (jm); 977.05(5)(a); 977.07; 977.08. Private attorneys currently handle nearly half of all SPD eligible representations. The SPD pays these attorneys in one of two ways, as provided in Wis. Stat. § 977.08(4m): (1) a $40/hour rate ($25/hour for travel) with no payment allotment for overhead; or (2) a flat, per-case contracted amount.[8]

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[7] Although we refer primarily to indigent criminal defendants, the SPD also handles civil commitments, protective placements (personal guardianship), revocations of conditional liberty (probation, parole, or extended supervision), termination of parental rights, juvenile delinquency proceedings, and certain other juvenile court matters. Applicants for public defender representation must meet strict financial guidelines to qualify for appointment of an attorney by the SPD.

[8] Wis. Stat. § 977.08(4m)(c) provides:

> Unless otherwise provided by a rule promulgated under s. 977.02(7r) or by a contract authorized under sub. (3)(f), for cases assigned on or after July 29, 1995, private local attorneys shall be paid $40 per hour for time spent related to a case, excluding travel, and $25 per hour for time spent in travel related to a case if any portion of the trip is outside the county in which the attorney's principal office is located or if the trip

The SPD acknowledges that the current reimbursement rate in Wis. Stat. § 977.08 "severely disrupts both the quantity and quality of representation. As the reimbursement rate has become more disparate from the market rate of compensation, there has been a significant impact on defendants, victims, and all sectors of the criminal justice system at both the state and county level." Forty dollars an hour does not even cover a lawyer's overhead expenses. The SPD confirms that while the number of appointments has remained relatively steady, the number of attorneys willing to take these public defender appointments has declined steadily, from 1099 attorneys in 2012 to only 921 attorneys in 2017.

The testimony from our public hearing indicates that the decrease in lawyers available to accept SPD appointments disproportionately affects rural counties and has reached a state of crisis in Northern Wisconsin.[9]

In Bayfield County, cases are now assigned to out-of-county private attorneys 99 percent of the time. At a recent legislative hearing, the SPD testified that its Appleton office had to make an average of 17 contacts per case just to find an assigned counsel attorney. In three difficult cases, it took 302, 261, and 260 contacts to find an attorney. The Ashland office (Ashland, Bayfield, and Iron counties) needed nearly 39 contacts per case and an average

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requires traveling a distance of more than 30 miles, one way, from the attorney's principal office.

[9] For example, in FY 2012, Ashland County appointed only 28 percent of cases to out-of-county private attorneys. In FY 2017, that number had risen to 73 percent.

of 24 days to find an attorney. In Marathon County, it takes an average of 80 contacts and 17 days to appoint a private attorney to a case. In Price County, it takes an average 33 days to appoint a private attorney to a case.

These data are amply supported by the anecdotal experiences recounted in the many written comments and testimony provided to the court. The Honorable John P. Anderson, Bayfield County Circuit Court, explains the problems he faces in his courtroom:

> In the last year or two, I have had to appoint lawyers at higher rates for criminal defendants who *are* eligible for public defender representation, but the public defender's office cannot find an attorney willing to accept the very low reimbursement rate paid. I have had individuals sitting in jail unable to post cash bond in serious felony cases for upwards of four to six weeks without representation. Once such a lengthy time has passed, I feel I have no choice but to find an attorney at county expense. I find it hard to conclude that allowing someone to be held in custody without legal representation for that long is something other than a constitutional crisis. It is also becoming an unfunded mandate imposed upon the counties, requiring that they shoulder the costs which are supposed to be covered by the state through the public defender's office.

The Honorable Robert E. Eaton, Ashland County Circuit Court, describes granting "adjournments, too numerous to count, while indigent defendants wait for representation. These litigants qualify for representation through the State Public Defenders Office. However, it often times takes weeks and months to locate an attorney who will take their case."

State Bar President Paul G. Swanson, one of the petitioners, notes that:

> The State Bar of Wisconsin stands united in the proposition that, in order to provide competent representation to indigent criminal defendants, compensation must be increased significantly. The reality of the situation is that attorneys who take these appointments at the current private bar rate are, to a large extent, providing a pro bono service. The rate discourages experienced practitioners and the general effect of this is a diminishment of the rights of individuals underrepresented or facing delays in representation, which only serves to prejudice those rights.

A long time prosecutor states:

> This problem is perhaps most severe in counties where the well-documented heroin epidemic has resulted in a disproportionately greater increase in crime and the pool from which to draw assigned counsel for the indigent is comparatively small. In Manitowoc county, for instance, Preliminary Examinations and other hearings are frequently adjourned for lack of appointed counsel. Indigent defendants continue to be held in custody while the local SPD office tries to find lawyers to represent them. The result is not only an unjust delay affecting the rights of indigent defendants and victims of crime, but an inefficient use of scarce judicial resources. Defendants incarcerated in other counties or prison must be returned and then transported back for the adjourned hearing at county expense. Cities and counties pay overtime for police officers who are subpoenaed to appear in court only to have the hearing adjourned for another day. SPD pays an ever growing amount of travel expenses to appointed counsel from surrounding or more distant counties. Court and DA calendars become further clogged, leading to pressure for additional prosecutors and judges. . .

Another attorney recounts that one defendant waited six months for an attorney. He observes "[s]ince the daily cost of incarcerating a defendant in the jail is roughly $100 per day, the inability to get this defendant an attorney has already cost the county more than $18,000."

Attorney Christopher Zachar describes seeing the same defendants appearing in court week after week without counsel:

> They plead for bond reductions and try to explain that they are losing their jobs, their homes, and their families while they wait on an attorney. Witnesses aren't interviewed, evidence isn't preserved, and the lives that these defendants are fighting to preserve fade while they sit in jail. Some of these defendants are unequivocally innocent, but because they are poor they will wait in jail with everyone else.

The SPD has not sat idly by as this state of affairs developed. Since the legislature reduced the SPD reimbursement rate in 1995, the SPD has petitioned the legislature for an increase in every biennial budget request, without success. Since 1999, 18 separate formal efforts to obtain a rate increase have been tried and failed. SPD budget requests have not been included in the budget introduced by the Governor. None of the proposed stand-alone legislation received a public hearing or vote by the Legislature or its standing committees.[10]

This funding crisis is certainly not unique to Wisconsin. Across the nation, inadequate funding for indigent criminal defense has compromised the constitutional rights of individuals, as well as

[10] We note three recent, unsuccessful, attempts to raise the rate by statute: (1) Assembly Bill (AB) 275, introduced June 29, 2015, proposed raising the assigned counsel rate to $85/hour. AB275 was referred to the Committee on Judiciary on June 29, 2015. An amendment to raise the proposed rate to $100/hour was offered on January 19, 2016 and defeated on April 13, 2016. There was no further action taken; (2) AB37, introduced January, 2017, proposed raising the rate to $100/hour. AB37 was referred to the Committee on Judiciary on January 20, 2017 but was never acted upon; see also SB283; (3) AB828, proposed January 2018, proposed a three tiered rate for different types of cases of $55/hour, $60/hour and $70/hour. AB828 was referred to the Committee on Judiciary on January 12, 2018 but was never acted upon.

the ability of the justice system to function properly. Other states have faced legal challenges in this regard.

In Massachusetts, for example, the Massachusetts Committee for Public Counsel Services (CPCS) traditionally provides most right to counsel representation through assigned counsel. In 2004, indigent defendants, represented by CPCS and the American Civil Liberties Union, filed a lawsuit claiming that chronic underfunding of the assigned counsel system (then an average of $40/hour) resulted in an insufficient number of attorneys willing to accept assignments.

The Massachusetts court declined the petitioners' request to raise the statutory compensation rate directly, mindful that appropriating funds under that statute was "a legislative matter."

However, the court determined that indigent criminal defendants were indeed being denied their constitutional right to counsel because of the lack of attorneys willing to serve at the low rates. The court issued an order to show cause why pre-trial detainees should not be released after seven days if no counsel was appointed and why criminal charges should not be dismissed after 45 days against any defendant who was entitled to counsel and had not received one. See Lavallee v. Justices in the Hampden Superior Court, 442 Mass. 228, 812 N.E.2d 895 (2004).

Facing the imminent release of criminal defendants, the Massachusetts state legislature promptly convened a special session and passed a bill increasing compensation for indigent defense attorneys and establishing "a commission to study the provision of counsel to indigent persons who are entitled to the assistance of assigned counsel." This action ultimately resulted in an increase in

assigned counsel compensation rates and the CPCS budget has more than doubled since 2004.

Between 2009 and 2017, class-action suits have been filed in Michigan, New York, Texas, California, Pennsylvania, and Idaho. In February 2007, the ACLU, along with two law firms, filed a class action lawsuit on behalf of indigent defendants charged with felonies in three Michigan counties. They sued the counties as well as the state. The complaint alleged that the state had done "nothing to ensure that any county has the funding or the policies, programs, guidelines, and other essential resources in place to enable the attorneys it hires to provide constitutionally adequate legal representation."

In July 2013, after more than six years of protracted litigation, the Michigan legislature passed comprehensive reform legislation, and the ACLU dismissed the lawsuit. The statutory changes created the Michigan Indigent Defense Commission, a state agency with authority to promulgate and enforce right to counsel standards, including compensation standards across the state. Duncan v. Michigan, 284 Mich. App. 246, 774 N.W.2d 89 (2009). See also Hurrell-Harring v. New York, 15 N.Y.3d 8, 930 N.E.2d 217 (2010) (after seven years of litigation the matter settled, with the state agreeing to: pay 100 percent of the cost for indigent representation in the five named counties; ensure that all indigent defendants are represented by counsel at their arraignment; establish and implement caseload standards for all attorneys; and assure the availability of adequate support services and resources. In 2017, the state extended the settlement to all counties); see also Tucker v. Idaho, 162 Idaho

11, 394 P.3d 54 (2017) (holding, inter alia, in pretrial proceedings that "[a] criminal defendant who is entitled to counsel but goes unrepresented at a critical stage of prosecution suffers an actual denial of counsel and is entitled to a presumption of prejudice," citing United States v. Cronic, 466 U.S. 648 (1984)).[11]

With this, we turn to the petition that is before us. This petition asks the court to: (1) raise the compensation rate in SCR 81.02(1) from $70/hour to $100/hour, (2) tie that rate to cost of living increases, (3) repeal a provision, SCR 81.02(1m), permitting legal service contracts at a lesser rate, and (4) declare that payment of an hourly rate less than the rate in SCR 81.02(1) for legal services rendered pursuant to appointment by the State Public Defender under Wis. Stat. § 977.08 is "unreasonable."

This rule petition implicates the sometimes complicated interplay of statutes and rules that govern which criminal defendants are sufficiently indigent to qualify for legal representation, who represents these indigent criminal defendants, how much these lawyers are compensated for their services, and who pays the bills.

Considerable and long-standing precedent confirms the court's authority to appoint counsel and to set an appropriate compensation rate for court appointed attorneys. County of Dane v. Smith, 13 Wis. 585, 586 (1861) (expressly affirming the court's "power and duty" to appoint counsel to defend paupers and other indigent person charged with crime, and to bind the county to pay the costs of the

[11] On January 17, 2018, the Idaho court ruled that this challenge can proceed as a class action.

appointment); County of Door v. Hayes-Brook, 153 Wis. 2d 1, 3, 449 N.W.2d 601, 602 (1990). Indeed, while compensation of court appointed counsel is generally described as an area of shared authority, the judiciary has the ultimate authority to set compensation for court appointed counsel. State ex rel. Friedrich v. Circuit Court for Dane Cty., 192 Wis. 2d 1, 10, 531 N.W.2d 32, 34-35 (1995) (stating "courts have the power to set compensation for court-appointed attorneys and are the ultimate authority for establishing compensation for those attorneys. The courts derive this power and ultimate authority from their duty and inherent power to preserve the integrity of the judicial system, to ensure and if necessary to provide at public expense adequate legal representation, and to oversee the orderly and efficient administration of justice.").

The counties' obligation to pay the costs of court appointed counsel has also been settled for well over a century. Carpenter v. County of Dane, 9 Wis. 274 (1859) (rejecting county's objection to paying for court appointed counsel on the theory that the constitution didn't specify it, stating the county's obligation was "clear and manifest" and that "[i]t seems eminently proper and just that the county, even in the absence of all statutory provision imposing the obligation, should pay an attorney for defending a destitute criminal.").

We are wholly persuaded that increasing the compensation rate in SCR 81.02 from $70/hour to $100/hour is appropriate. As early as 1859, in Carpenter, Wisconsin courts recognized the necessity of court appointed counsel for impoverished felony defendants, the court's inherent authority to appoint such counsel, and the

concomitant obligation of the counties to pay the costs for the appointed counsel. Id.; Wis. Const. art. VII, § 3(1) (vesting the supreme court with "superintending and administrative authority over all courts"); County of Dane v. Smith, 13 Wis. 585, 589 (1861).

The petitioners have demonstrated that the current rate in SCR 81.02 is significantly lower than the average hourly rate charged by Wisconsin lawyers. In 2017, the mean hourly rate for private practitioners in Wisconsin was $251/hour. Criminal attorneys have a typical mean hourly billing rate of $168/hour, and the median hourly billing rate for a criminal law private practitioner is $183/hr. Moreover, on average, 35 percent of a Wisconsin private practice attorney's gross revenue is needed for overhead expenses.[12] A rate of $100/hour is reasonable and necessary to ensure the court can obtain needed counsel to assist in the administration of justice.

We decline to tie the rate in SCR 81.02 to a cost of living increase. Our rule requires the court to "review the specified rate of compensation every two years" and we commit to doing so, henceforth. SCR 81.02(1). We also decline to repeal SCR 81.02(1m) and ban fixed rate contracts for legal services. The petitioners express concern that fixed rate contracts pay lawyers "the same amount, no matter how much or little" the lawyer works on each case, such that it is in the lawyer's "personal interest to devote as

[12] Overhead expenses may include office rent, telecommunications, utilities, support staff salaries and benefits, accounting, bar dues, legal research services, business travel, and professional liability insurance. Many attorneys also have student loan payments.

little time as possible to each appointed case."[13] We are advised that fixed-fee contracting accounts for only a small fraction of the total SPD appointments to the private bar. Moreover, per Wis. Stat. § 977.08(3)(f) and (fg), the SPD is required to offer fixed fee contracts. Meanwhile, counties rely on these contracts to manage guardian ad litem and other appointments.

Our decision to raise the rate in SCR 81.02 is warranted and appropriate. However, we know it will have a profound impact on existing county budgets. If lawyers are unavailable or unwilling to represent indigent clients at the SPD rate of $40/hour, as is increasingly the case, then judges must appoint a lawyer under SCR 81.02, at county expense. See State v. Dean, 163 Wis. 2d 503, 471 N.W.2d 310 (Ct. App. 1991).

Thus, costs for indigent defense, which should be borne by the state as a whole, are being shifted to individual counties. The Bayfield County Administrator confirms that his county often cannot find attorneys who will accept representation at the current rate, so they are required to offer more money in order to find counsel. Then, the county's ability to recoup some of this money through collections is compromised, because of the lower rate set in the

[13] Several states ban fixed rate contracts. Idaho, for example, requires that representation shall be provided through a public defender office or by contracting with a private defense attorney "provided that the terms of the contract shall not include any pricing structure that charges or pays a single fixed fee for the services and expenses of the attorney." I.C. § 19-859. South Dakota Unified Judicial System Policy 1-PJ-10, bans flat fee contracting. Its policy requires that "[a]ll lawyers . . . be paid for all legal services on an hourly basis."

rule. In an April 2018 report, the Sixth Amendment Center[14] agrees that imposing the cost of counsel on counties is undesirable because "the local jurisdictions most in need of indigent defense services are often the ones least able to afford them." In many instances "the circumstances that limit a county's revenue – such as low property values, high unemployment, high poverty rates, limited household incomes, and limited educational attainment – are correlated with high crime rates."

This interplay between the rate paid by the SPD and the court's rate in SCR 81.02 brings us to the last request in the pending rule petition. The petitioners ask that we declare, in our court rule, that "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."

The threshold question is whether this court has the authority to declare a legislative mandate "unreasonable." The court might, in a different procedural posture, be called upon to rule on the constitutionality of the statutory rate in Wis. Stat. § 977.08(4m).

[14] The Sixth Amendment Center is a national non-profit organization "dedicated to ensuring that no person of limited means is incarcerated without first having the aid of a lawyer with the time, ability and resources to present an effective defense, as required under the U.S. Constitution." It conducts research, evaluates state justice systems, and testifies on right to counsel issues before state legislatures, state supreme courts and the U.S. Congress. In April 2018, the petitioners filed with this court a report authored by the Sixth Amendment Center, entitled "Justice Shortchanged II – Assigned Counsel Compensation in Wisconsin (April 2018, 6th Amendment Center).

See State v. Holmes, 106 Wis. 2d 31, 41, 315 N.W.2d 703, 710 (1982) (stating, inter alia, that the Wisconsin Constitution grants the "supreme court power to adopt measures necessary for the due administration of justice in the state, including . . . to protect the court and the judicial system against any action that would unreasonably curtail its powers or materially impair its efficacy.") However, that question is not before us today.

This court has traditionally exercised great care to avoid controversy with the legislature. We are highly mindful of the separation of powers and do not engage in direct confrontation with another branch of government unless the confrontation is necessary and unavoidable. See Gabler v. Crime Victims Rights Board, 2017 WI 67, ¶30, 376 Wis. 2d 147, 897 N.W.2d 384; see also Integration of the Bar Case, 244 Wis. 8, 47-50, 11 N.W.2d 643 (1943). We thus decline to use our administrative regulatory process to undermine a legislative enactment.

We are, however, deeply concerned about the impact of prolonged underfunding of the SPD on our duty to ensure the effective administration of justice in Wisconsin. We agree that the consequence - significant delays in the appointment of counsel - compromises the integrity of the court system and imposes collateral costs on criminal defendants and their families, and on all citizens of this state: jobs lost, additional expenses incurred, and justice denied. We have a constitutional responsibility to ensure that every defendant stands equal before the law and is afforded his or her right to a fair trial as guaranteed by our constitution.

We hope that a confrontation in the form of a constitutional challenge will not occur and trust that the legislature will work with the courts, the SPD, the petitioners, the counties, and other justice partners to ensure adequate funding for the SPD that is urgently needed to forestall what is clearly, an emerging constitutional crisis. Therefore,

IT IS ORDERED that, effective January 1, 2020:

SECTION 1. Supreme Court Rule 81.02(1) is amended to read:

Except as provided under sub. (1m), attorneys appointed by any court to provide legal services for that court, for judges sued in their official capacity, for indigents and for boards, commissions and committees appointed by the supreme court shall be compensated at ~~the~~ a rate of $~~70~~100 per hour or a higher rate set by the appointing authority. The supreme court shall review the specified rate of compensation every two years.

SECTION 2. Supreme Court Rule 81.02(2) is amended to read:

The rate specified in sub. (1) applies to services performed after ~~July 1, 1994~~January 1, 2020.

IT IS FURTHER ORDERED that the court declines to repeal Supreme Court Rule 81.02(1m), as requested by the petitioners.

IT IS FURTHER ORDERED that the court declines to adopt proposed Supreme Court Rule 81.02(3), as requested by the petitioners, which would declare that 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 Statute § 977.08 is unreasonable.

IT IS FURTHER ORDERED that notice of the above amendments be given by a single publication of a copy of this order in the official publications designated in SCR 80.01, including the official publishers' online databases, and on the Wisconsin court system's web site. The State Bar of Wisconsin shall provide notice of this order.

Dated at Madison, Wisconsin, this 27th day of June, 2018.

BY THE COURT:

Sheila T. Reiff
Clerk of Supreme Court

¶1 ANN WALSH BRADLEY, J. *(concurring in part, dissenting in part).* I wholly agree that the rate in SCR 81.02 should be increased. However, I would make the increase effective July 1, 2018. I would not unduly delay the effective date of this change.

¶2 I am authorized to state that Justice Shirley S. Abrahamson joins this opinion.

¶3 DANIEL KELLY, J. *(dissenting).* Compensation for attorneys appointed by the court to represent indigent criminal defendants is absurdly inadequate. The petitioners have established this proposition to an almost metaphysical certainty, which is no mean feat for a question of economics. The solution seems pretty simple——pay more. And it would be that simple if we shared the power of the purse with the legislature, there were no limits to financial resources or competing demands for them, and the money used to pay the attorneys belonged to the court. As it is, none of those conditions is true. So when we tell Wisconsin's counties to pay for the attorneys we appoint, we are trespassing on authority that belongs to others.

¶4 We know, and have known for over two-hundred years, that the power of the purse belongs to the legislature, not us. In arguing the benefits of the newly proposed United States Constitution, Alexander Hamilton observed that "[t]he legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary has no influence over either the sword or the purse, ..." The Federalist No. 78, at 522-23 (Alexander Hamilton) (Jacob Cooke ed., 1961). James Madison was of the same mind:

> The house of representatives can not only refuse, but they alone can propose the supplies requisite for the support of government. They in a word hold the purse; . . . . This power over the purse, may in fact be regarded as the most compleat and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress

> of every grievance, and for carrying into effect every just and salutary measure.

The Federalist No. 58, supra, at 394 (James Madison); see also The Federalist No. 48, supra, at 334 (James Madison) (stating that "the legislative department alone has access to the pockets of the people").

¶5 Our constitution follows these principles by entrusting the spending power to the legislature. It provides that "[n]o money shall be paid out of the treasury except in pursuance of an appropriation by law." Wis. Const. art. VIII, § 2. "Laws" are what come of "bills": "No law shall be enacted except by bill." Wis. Const. art. IV, § 17(2). "Bills" are created through the exercise of legislative power: "Any bill may originate in either house of the legislature, and a bill passed by one house may be amended by the other." Wis. Const. art. IV, § 19; see also Wis. Const. art. IV, § 17(1) ("The style of all laws of the state shall be 'The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:'"). And all legislative power belongs, unsurprisingly, in the legislative branch: "The legislative power shall be vested in a senate and assembly." Wis. Const. art. IV, § 1. The method by which the government spends the people's money is, therefore, plain beyond question. Funds may leave the treasury only pursuant to an appropriation, appropriations must be made by law, a law is created by a bill, bills are adopted through the exercise of legislative power, and legislative power belongs in the legislature. Nowhere in that seamless whole is there any room for the judiciary to insert itself. Quite clearly,

therefore, our constitution puts the spending power beyond the judiciary's reach.

¶6 The judiciary, as an institution, is not qualified to exercise that authority. As a foundational matter, when the advisability of a policy depends on competing considerations, it is a sure sign the question belongs to the legislature. We have this on no less an authority than the United States Supreme Court: "When an issue 'involves a host of considerations that must be weighed and appraised,' it should be committed to 'those who write the laws' rather than 'those who interpret them.'" Ziglar v. Abbasi, 137 S. Ct. 1843, 1857 (2017) (internal marks omitted) (quoting Bush v. Lucas, 462 U.S. 367, 380 (1983)).

¶7 The power to spend consists of nothing but such competing considerations. Every decision about laying taxes, spending the proceeds, and the object of the expenditures, involves matters of public policy. Each decision operates against the backdrop that money is not inexhaustible, and the demand for spending always outstrips the amount available to spend. As a consequence, public policy questions require the balancing of one good against another, prioritization, and triaging emergencies so the most immediately important needs are addressed first. That is why we have previously recognized that the spending power belongs to the legislature, not us. "Specifically regarding appropriations, Wis. Const. art. VIII, §§ 2 and 5 empower the legislature, not the judiciary, to make policy decisions regarding taxing and spending." Flynn v. DOA, 216 Wis. 2d 521, 540, 576 N.W.2d 245 (1998) (emphasis added);

see also State ex rel. Thomson v. Giessel, 265 Wis. 207, 213, 60 N.W.2d 763 (1953) (stating that it is "the power of the legislature to appropriate public funds").

¶8 So our constitution, our cases, and the wisdom of the Founders all tell us that only the legislature may make appropriations. But when we tell counties to pay the attorneys we appoint, we are exercising that power. "An appropriation is 'the setting aside from the public revenue of a certain sum of money for a specified object, in such manner that the executive officers of the government are authorized to use that money, and no more, for that object, and no other.'" State ex rel. Finnegan v. Dammann, 220 Wis. 143, 148, 264 N.W. 622 (1936) (quoted source omitted). Our rule requires the counties to reserve enough public revenue that they will be able to pay for how ever many attorneys the judiciary may happen to appoint.

¶9 Not only does our Rule trespass on the authority to appropriate funds, we don't even engage in an analysis of all the considerations that drive taxing and spending decisions. We bypass all of the weighing, the compromises, the triaging, the prioritization, and simply announce that the counties' top priority is paying appointed counsel. When we issue an order, we expect it to be obeyed. So when the county boards next meet, they must adjust their budgets and all of their spending priorities to make room for the non-negotiable financial obligation we impose on them. And what if there is simply no room for our demand? Will we order them to raise taxes? The power to appropriate goes hand-in-hand with the power to tax, so

the court's assertion of power seems to leave room for that option. See State ex rel. Owen v. Donald, 160 Wis. 21, 124, 151 N.W. 331 (1915) ("It is a maxim of the law that the power to appropriate is coextensive with the power to tax and so has fundamental and inherent limitations.").

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¶10 I am not insensible to the fact that Wisconsin's judiciary has been ordering counties to pay for appointed counsel for almost as long as we have been a State. Such a lengthy history is due considerable respect. And I am keenly aware that I stand in a long succession of minds who have already considered this question, and nonetheless continued the tradition. But the judiciary cannot expand its authority into the legislative domain through adverse possession,[1] or the legislature's long acquiescence.[2] This is an evergreen subject, and we should stand ready to explain the reach of our jurisdictional borders whenever called upon to do so. Therefore, it is appropriate to examine the clutch of cases the court offered as support for this Rule to see what insight they

[1] "Each branch has exclusive core constitutional powers, into which the other branches may not intrude." Flynn v. DOA, 216 Wis. 2d 521, 545, 576 N.W.2d 245 (1998).

[2] "It is . . . fundamental and undeniable that no one of the three branches of government can effectively delegate any of the powers which peculiarly and intrinsically belong to that branch." Rules of Court Case, 204 Wis. 501, 503, 236 N.W. 717 (1931); see also id. ("[A]ny attempt to abdicate [a core power] in any particular field, though valid in form, must, necessarily, be held void." (internal quotation mark omitted) (quoting State ex rel. Mueller v. Thompson, 149 Wis. 488, 491-92, 137 N.W. 20 (1912))).

might offer into the source of our authority to appropriate county funds for the payment of appointed counsel.

¶11 Carpenter v. County of Dane, 9 Wis. 249 (*274) (1859), is the earliest case the court cites in support of this Rule. The opinion certainly contains statements supporting the proposition we advance today, but it's thin on the source of authority we seek. The court started its analysis by acknowledging that neither our constitution nor our statutes provide any authority for holding a county liable for payment of appointed counsel:

> It was insisted by the attorney for the county that as there was no provision in the constitution or statutes of the state, fixing the liability upon the county for such services, that therefore the county could not be held liable for them. It is true, we find no express provision of law declaring that the county shall pay for services rendered by an attorney appointed by the court, in defending a person on trial for a criminal offense; . . . .

Carpenter, 9 Wis. at 250-51 (*275).

¶12 Nonetheless, the Carpenter court concluded the county must pay because "[i]t seems eminently proper and just that the county, even in the absence of all statutory provision imposing the obligation, should pay an attorney for defending a destitute criminal." Id. at 252 (*277). The absence of any constitutional or statutory authority should have prompted a thorough-going analysis of why the court thought it nevertheless possessed the authority it was exercising. But the analysis is heavy on rhetorical questions, and short on grounds for authority. "Is it said that the court should, under such circumstances, assign the accused counsel, who must perform

services gratuitously?" the court asked. Id. That question immediately begot another: "But why should an attorney be required to devote his time, attention and all the energies of his nature, to the defense of a criminal, for nothing?" Id. Those are good and fair questions, and the answer we are apparently supposed to give is that the court, naturally, should not countenance such a result. But answering that the attorney should not work for free says nothing about who should pay him. The questions assume that if the court does not pay, then no one will, and that the importance of payment actually creates the authority to spend the county's money.

¶13 The balance of Carpenter's analysis, it appears, depends on principles of symmetry. The county's residents elect and pay for the district attorney, the court noted, so it must also take on the concomitant duty to pay for the defense. Why? Because "surely the citizens of a county are vitally more interested in saving an innocent man from unmerited punishment than in the conviction of a guilty one." Id. at 251 (*276). "Why this great solicitude to secure him a fair trial if he cannot have the benefit of counsel?" Id. at 252 (*277). The assumption, again, is that the need for payment creates the authority to use the county's money. An attorney's need for compensation does not create in the judiciary the authority to confiscate another's resources to pay him.

¶14 Our court returned to this question a few years later in Dane County v. Smith, 13 Wis. 654 (*585) (1861). Smith affirmed Carpenter's rationale, and did so in even more explicit

and stark terms. With respect to compelling counties to pay for appointed counsel, it said, "[t]he power results from the necessities of the case." Smith, 13 Wis. at 656 (*587). That's a shockingly comprehensive assertion of power. If this is true, then no one in need of payment may lament, for the court holds itself out as the appropriator of last resort. But it is not true. We haven't the power of the purse, even when we think we really need it.

¶15 The Smith court also said counties were bound to pay for an indigent's defense on an implied contract theory:

> [T]he law, which gave the power to order [the appointment of defense counsel], implied the promise to pay. This is agreeable to the general doctrine, that whoever knowingly receives or assents to the services of another, which are of value and contribute to his benefit, impliedly undertakes to pay such sum as the services are reasonably worth. It has even a stronger foundation——that of an employment previously authorized.

Id. at 657 (*587-88). Whatever the persuasive force of this reasoning in theory, it is incapable of translating into a county's obligation to pay for the indigent's defense in practice. The county does not appoint the attorney; the court does. So if the appointment creates an implied undertaking to pay for counsel's services, the implication is that the court will pay, not the county. The Smith court, therefore, identifies no cognizable source of authority on which we can rely to compel counties to pay for defense counsel.

¶16 Finally, we made a direct pitch for the legislature's power of the purse in State ex rel. Friedrich v. Circuit Court for Dane Cty., 192 Wis. 2d 1, 531 N.W.2d 32 (1995) (per curiam).

There, the court addressed the differing attorney compensation rates in Wis. Stat. § 977.08(4m) and our Rule 81.02. See Friedrich, 192 Wis. 2d at 8-9. The court determined that compensation for court-appointed attorneys "fall[s] within the area of power shared by the judiciary and the legislature." Id. at 34. Consequently, we concluded that "courts have the power to set compensation for court-appointed attorneys and are the ultimate authority for establishing compensation for those attorneys." Id. at 10. We identified no constitutional provision to support that proposition, instead relying on our undefined and undefinable "inherent powers": "The courts derive this power and ultimate authority from their duty and inherent power to preserve the integrity of the judicial system, to ensure and if necessary to provide at public expense adequate legal representation, and to oversee the orderly and efficient administration of justice." Id.

¶17 The Wisconsin Constitution places the power to appropriate public funds exclusively in the hands of the legislature. Nonetheless, the Friedrich court concluded that our amorphous "inherent powers" were sufficient to give us a piece of that authority. Friedrich's conclusion does not bear much weight, however, because although the court conducted a separation-of-powers analysis, it never even mentioned the constitutional provisions explicitly vesting the appropriation power in the legislature.

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¶18 I think it is fair to say that raising the hourly rate for court-appointed attorneys is a "just and salutary measure." But just because it is good, and even needful, does not create in us the authority to make it so. Our "inherent powers" are no match for our constitution's explicit grant of the appropriation power to the legislature. Justice Joseph Story, in his indispensable Commentaries, said:

> [T]he judiciary is naturally, and almost necessarily (as has been already said) the weakest department. It can have no means of influence by patronage. Its powers can never be wielded for itself. It has no command over the purse or the sword of the nation. It can neither lay taxes, nor appropriate money, nor command armies, or appoint to offices.

2 J. Story, Commentaries on the Constitution of the United States § 541, at 23-24 (Boston: Hilliard, Gray, & Co., 1833) (footnote omitted). If our "inherent powers" give us the right to spend the counties' public revenue, then Justice Story was not just wrong, he was wildly wrong. We delved our undefinable "inherent power," and found we are not weak at all. We are strong, so strong we may spend public revenue whenever we find there is sufficient need of it. And not even an explicit constitutional provision granting that power to another branch can stop us.

¶19 We are strong, but perhaps not prudent. We should honor the wisdom of the Founders, and relinquish this incursion on legislative prerogatives. This would fix the error we have entertained for an exceedingly long time, but it will not fix the very real problem the petitioners brought to us. They speak truly when they say there is a constitutional crisis on the

horizon. The evidence that indigent defendants are being held in jail for extended periods of time for want of counsel is deeply disturbing. The constitution may have something to say about the predicament of such defendants; it would be unfortunate if a declaration on that question were necessary. The petitioners must address themselves to the legislature, something I know they have done many times before. Perhaps persistence will grant them a more responsive audience.

¶20 For these reasons, I respectfully dissent.

¶21 I am authorized to state that Justice REBECCA GRASSL BRADLEY joins this dissent.