

poverty law Report

A REVIEW OF ADVANCES IN THE LEGAL RIGHTS OF THE POOR

Volume 8, Number 3

A publication of the Southern Poverty Law Center

June/July, 1980

Sides talk of settling 'WIC' suit

MONTGOMERY — *Wembley v. Bergland*, a suit almost given up for lost by Poverty Law Center attorneys at one point, is back in court and appears to be moving toward settlement.

The lawsuit was filed by the Center in 1978 against federal and state administrators of the Women, Infant, and Children (WIC) supplemental food program on behalf of the class of present and potential WIC participants who were being served by it inadequately or not at all. At the time WIC was relatively new and was operating in only about half the state's 67 counties.

The program was designed to provide a balanced diet for income-eligible pregnant or postpartum mothers and children under five who are certified as being at a point of "nutritional risk."

It is run on the federal level by the U.S. Department of Agriculture (USDA) and in Alabama by the state Department of Public Health.

At one point in early 1979, it appeared that the case would end without ever being decided on the merits. Defendants had succeeded in persuading the federal court here to dismiss all but one defendant, and almost all claims.

Center attorney Stephen Ellmann responded with motions for clarification and reconsideration, and for leave to file an amended complaint. Subsequently, the court reinstated a large part of the lawsuit.

Another motion to dismiss by defendants and another amendment to the complaint by plaintiffs resulted in the resurrection of almost the entire original case, and at that point, a year after the filing of the first complaint, discovery could begin in earnest.

To help with discovery, much of which was field work in the counties, the Center hired Brenda McGee, a nurse

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Center attorneys Dennis Balske and Morris Dees stand with Earl Charles, his wife, and parents in front of the federal courthouse in Savannah after telling a jury how it happened that Earl was sentenced to death for a crime he didn't commit. (L to R) Valetta Charles, Balske, Mrs. Flossie Mae Charles, Earl, Dees, and Mr. Patterson Charles.

Jury awards Earl Charles nothing

SAVANNAH, Ga. — Guided by what Center attorneys think were two incorrect rulings from the bench, a federal jury here in April returned a verdict in favor of a Savannah detective accused of violating Earl Charles' civil rights in the trial of Charles' \$7.2 million lawsuit.

Consequently, Charles was awarded no damages for the three-and-a-half years he spent under a death sentence for two murders committed here while he was in another state.

The first questionable ruling came after Center attorneys Dennis Balske and Morris Dees rested the plaintiff's case, when the judge, B. Avant Edenfield, granted the City of Savannah's motion for a directed verdict, resulting in the city's dismissal from the suit.

Evidence had been presented that the city's grossly negligent supervision of police officers had contributed to Charles' wrongful conviction, making the city's liability a question the jury should have been allowed to decide.

The ruling left as the sole defendant F. W. Wade, the detective in charge of the murder investigation that led to Charles' arrest and prosecution.

Post-trial interviews by the Center with several of the ju-

rors indicate that they were unwilling to lay responsibility for the mishandled investigation completely on him.

Had the city remained a defendant, these jurors said, they would have been inclined to enter a judgment against the city in favor of Charles and to have assessed monetary damages.

Although the suit originally named as defendants several police officers involved in the preparation of the case against Charles, as well as the city, by the time of trial the SPLC attorneys had voluntarily dismissed all but one, Wade.

It was Wade who other police officers say coached the only eyewitnesses to the crime to make a positive identification of Charles as the killer. Other witnesses testified that he falsified evidence.

By dismissing from the lawsuit the remaining officers, whose culpability was less than Wade's, Balske and Dees focused the jury's attention on Wade and the city. The city was liable, the attorneys contended, both because it had been grossly negligent in failing to supervise, and because Wade's conduct in the case had gone undisciplined, even in the face of

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Jurors hold out for acquittal, force mistrial in death case

NEW ORLEANS — Attorneys of the Southern Prisoners Defense Committee and the Southern Poverty Law Center, trying their first case together, have won a victory here in the retrial of a case that ended before with a death sentence. This time three jurors held out for acquittal, forcing a mistrial.

Parker was represented at his first trial by a private attorney who had never tried a death penalty case under the present law.

Parker is accused of shooting to death two cashiers in the robbery of a fast-food restaurant here in 1976. He was connected to the murders by two pieces of circumstantial evidence on which the state based its case: the murder weapon, allegedly found in his car; and a fingerprint, supposedly taken off the cash box from the restaurant's safe.

Parker, who is black, testified at the trial in April that he is innocent and was somewhere else when the murders took place.

His claim of innocence was supported by facts brought out through the cross-examination of police officers whose testimony demonstrated that there had been procedural irregularities in the handling of some of the evidence used against him.

These facts, and other testimony, created enough doubt in the minds of three jurors as to Parker's guilt that they decided to vote for acquittal, and to hold out as long as necessary.

One of the three, coming forward to talk with the defense team after the trial, told them, "We couldn't get an acquittal, but the least we could do was get you another chance."

Parker will be retried June 9 and will face the death penalty for the third time. He will be represented by Center Legal Director John Carroll and staff attorney Stephen Ellmann and Behlia Martin of SPDC, which is the legal arm of the Southern Coalition on Jails and Prisons, a prison reform group.

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Volume 8, Number 3

June/July, 1980

The *Poverty Law Report* is published five times a year by the Southern Poverty Law Center, 1001 S. Hull St., Montgomery, Alabama 36101.

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Doctors told to honor oath

A doctor who participates in an execution by lethal injection is violating the Hippocratic Oath, the authors of an article in the January 24 issue of *The New England Journal of Medicine* say, because it makes the doctor an active and key participant in the execution.

W. J. Curran, a lawyer who heads the medical ethics program at Harvard

Medical School and Ward Casscells, an internist at Harvard and Beth Israel Hospital in Boston, urge the medical profession to "formally condemn all forms of medical participation" in execution by drug injection.

Already Texas, Oklahoma, Idaho and New Mexico have legalized this sanitized form of killing.

LEGAL AID

Mobile: a great leap backward

By David Walbert

The history of racial progress in the United States has been marked too often by stagnation, and occasionally by outright regression. We sought during Reconstruction to move towards a politically fair society in the South. With the end of Reconstruction, the forces of reaction regained control and pushed blacks back into total political and economic dependence. Politics were "purified" as blacks were eliminated from the electoral process by a series of legislative devices, as well as by the better known intimidation and violence of the Ku Klux Klan, which occurred from the end of Reconstruction through the first part of this century.

The Supreme Court has played a significant role in this historical evolution, several times providing the impetus for progress, but also, on occasion, bringing a halt to the effort to end white supremacy. Before the turn of the century, the Supreme Court's hostility to racial equality led it to strike down much of the most important legislation of the Reconstruction Congress.

Several decades later, on April Fool's Day, 1935, the Supreme Court upheld the white south's ultimate tool of political domination, the "white primary." The white primary was the South-wide practice of the Democratic Party, the only political party in the South, to prohibit blacks from voting in any primary election. Since general elections simply "ratified" the Democratic primary winners in the one-party

South, the white primary eliminated blacks from politics completely.

The 1935 ruling proved to be a low point, however, as the Court overruled their decision in 1944, eliminating the white primary forever. The 1944 ruling marked the beginning of a long line of decisions, lasting until the late 1960's, that tended to give some real meaning to the principle of equality embodied in the Constitution and civil rights laws.

Since 1970, however, the Supreme Court has headed in the opposite direction again, once more turning its back on claims to basic equality and justice.

The present trend may have culminated on April 22, 1980, in a ruling that stunned even those who were most cynical toward the Burger Court, and who expected little but hostility in discrimination cases. The name of the decision is *City of Mobile vs. Bolden*, and the opinion was designed to stop blacks from making further gains in the struggle for political equality in the South.

Throughout the region, there are literally thousands of municipal governments, county commissions, and elected school boards. In most of these places, black voters are a substantial minority, but very rarely a majority.

In Georgia, for example, blacks are a majority of the voters in only one of 159 counties. Because blacks are usually a voting minority, and because voting occurs on racial lines, blacks cannot elect candidates in "at-large" elections — that is, elections that are held on a city-wide or county-wide basis.

Since almost all elections were conducted at-large, blacks were rarely elected to local office. And those blacks who were elected were often weak persons who were hand-picked by white leaders in order to create the appearance of equality, when in substance, these black officials were not inclined to do much, if anything, for local black citizens.

This situation had begun to change (although far too slowly) by a series of lawsuits brought to replace at-large voting with various forms of ward, or district, voting. With blacks having a majority of voters in some districts, black voters were finally able to elect officials of their choice, which is the essence of representative democracy.

The Poverty Law Center has participated in several reapportionment actions and has obtained excellent results in a number of cities and counties in Georgia and Alabama. After these places were redistricted, blacks were elected for the first time since the end of Reconstruction.

The Center was handling other cases in various stages of litigation and appeal when the *Mobile* decision was handed down.

The *Mobile* case was a challenge to an at-large system that had operated, in combination with the racist attitudes and practices of the community, to preclude blacks from election. The suit was successful: a federal district court in Mobile held that the at-large system there was unconstitutional and ordered the implementation of a new election

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Hall

Dahlia J. Hall earns degree

TAHLEQUAH, Okla. — Dahlia June Hall has graduated from college, an event of more-than-ordinary significance for her and for the Center.

Four years ago Ms. Hall was put on trial for her life in Tulsa for killing her two small children. After a series of personal tragedies, she had shot the children one day in a dark depression and then turned the gun on herself. Five days later she was found, near death, lying between their bodies.

The state asked for the death penalty, notwithstanding her mental and emotional condition. A first trial ended in a hung jury. With financial help from the SPLC, her public defender put a psychiatrist who specialized in intra-familial homicides on the stand at the second trial. He testified to Ms. Hall's delusional state at the time of the killings and described her as "psychologically dead." The jury voted to acquit.

Since then Ms. Hall has been putting her life back together. Now she's earned a college degree from Northeastern State University here and has begun working on a master's in criminal justice.

"You have been significant people in my life," she wrote the SPLC staff recently. "Thank you again for your part in making it possible."

Judge rejects motion asking recusal in brown lung suit

GREENVILLE, S.C. — Despite the appearance of a conflict of interest, a federal judge assigned to a lawsuit filed here by the Southern Poverty Law Center against one of his former clients refuses to recuse himself.

The suit, *Burdette v. Burlington Industries*, is a class-action brought on behalf of disabled cotton-mill workers formerly employed at a now-closed plant here.

It charges that Burlington intentionally exposed them to working conditions that led to the development of lung disease and then defrauded them of workmen's compensation benefits, with the help of the mill's insurance carrier and medical director, who are also named as defendants.

Before being appointed to the federal bench last fall, the judge, P. Weston Houck, represented Burlington's workmen's compensation carrier, Liberty Mutual Insurance Company, for about 20 years.

During part of this time Houck was only a partner in a law firm that represented Liberty Mutual, but when he left that office later to establish his own firm he took the company with him as a client.

Many times during the years he defended it against workmen's compensa-

tion claims, and on at least one occasion he represented the company in a by-sinosis, or brown lung, claim.

SPLC attorneys Dennis Balske and Ira Burnim, who are handling the suit, first asked Houck to remove himself from the case in February. He denied the motion, citing a 1970 federal statute that required a judge to recuse himself only if he believed he could not be impartial to both parties in a suit.

That law was amended by Congress in 1975, however, and the standard for recusal was changed. The more recent version reads that a judge should recuse himself if his "impartiality might reasonably be questioned."

Pointing out the judge's failure to apply the most recent law to the case, Balske and Burnim renewed the motion for recusal, and again it was denied.

Motions to dismiss the suit filed by the defendants remain before the court. Oral argument on the motions is scheduled for June 4 in Greenville.

Meanwhile, a ruling is expected soon on motions to dismiss a similar suit filed by the SPLC against a textile mill in Opelika, Ala. In that case, styled *Wilkins v. West Point Pepperell*, final oral arguments were heard by the court on April 23.



Negotiations continue toward settlement of an SPLC suit against the administrators of WIC, a nutrition program for income-eligible women, infants, and children.

In 'born-again' suit

Center, WIC defendants move toward settlement

(Continued from Page 1)
trained and experienced in maternal health care.

She observed first-hand the operation of a number of WIC programs run by county health departments and spoke with both staff and participants.

In addition, she reviewed documents in the WIC division of the Alabama Department of Public Health and in the Atlanta office of USDA.

Her research confirmed the suit's contention that the problems suffered by the individual plaintiffs, such as delays in starting WIC programs and certifying individual participants, were typical of statewide program failures.

Settlement negotiations then began before the original trial date in April, and a tentative consent decree has been drawn up but not finally agreed to.

"The Center seeks the settlement process to systematize the administration of WIC in Alabama, as well as to confirm and implement the state's obligation to administer it in accordance with federal regulations," Ellmann said.

The proposed consent decree emphasizes the development of annual plans on the local level which would establish caseload objectives and guide other aspects of the program's operation, such as staffing and clinic frequency, to assure that these objectives are met.

The decree would create a state advisory council, whose members would include participants and advocates, to review planning and operations.

It would also stress the provision of adequate staff to follow up on difficulties experienced by participants and would notify them more fully of their rights.

Nationally, the WIC program serves only a small fraction of those in need. This is true in Alabama as well, although the state caseload has expanded greatly since the filing of this suit, and the state agency is no longer turning back federal funds unspent.

In a related matter not directly involved with the suit, Ellmann, working with Alabama Legal Services Corporation attorneys Larry Gardella and Will Campbell, a former SPLC intern, have successfully represented a private organization seeking designation as a WIC agency.

The exclusion of private health organizations from participating in WIC was one of the original grounds for the litigation of the *Wembley* case. The state Department of Public Health preferred the certification of county health departments as the local WIC agencies, even when private organizations offered more energetic and flexible proposals for implementing the program.

Ellmann and the legal services attorneys won WIC designation for the Southern Rural Health Care Consortium at an appeal hearing of an earlier decision not to certify it. The Consortium joins the county health department as a local WIC agency in its north Alabama county, with a rough division of responsibility between the two.

One of *Wembley's* original plaintiffs, the Alabama Council on Human Relations, another private agency, has also received WIC designation.

Only four private agencies operate in the 66 counties now participating in the program.

Budget for mental health is shortchanged by governor

MONTGOMERY — After six months in receivership, the Alabama mental health-mental retardation system seems little closer than before to compliance with an eight-year-old court order to provide constitutionally sufficient treatment for state mental patients.

A major problem, as always, has been a lack of commitment to the rights of the mentally ill and mentally retarded on the part of state politicians generally, and, in particular, the failure of the governor to provide adequate funding.

The system was placed in receivership in January by U.S. Circuit Judge Frank M. Johnson, Jr., because of the State Board of Mental Health's failure to achieve compliance with his 1972 court order.

The board admitted it was in non-compliance at hearings on implementation of the court order last fall. Afterward, Johnson named Governor "Fob" James receiver, at the governor's request.

The Center opposed James' nomination, primarily because of his lack of expertise in the field of mental health-mental retardation, and jointly nominated for the position with the Justice Department, acting as a friend of the

court, several independent mental health professionals. Other nominations were made by the Mental Health Law Project of Washington, D. C., as *amicus*.

While Center attorneys, who represent the plaintiffs, and *amici* were against James' appointment, they recognized that, as governor and receiver, he would be in a unique position to seek, and to obtain, the necessary funds from the legislature.

Regrettably, he has failed to do so. The governor's requested budget for the Department of Mental Health for FY '80-'81 is not only millions of dollars less than what the department asked for, it is over \$100 million below the figure James, prior to his appointment, told the court was necessary to begin bringing the system into line with court-ordered reforms.

The Poverty Law Center, *amici*, and plaintiff-intervenors have formally asked the governor to explain his policy.

If the governor fails to make satisfactory progress toward compliance, Johnson could compel the legislature to provide the system with adequate funding or take other drastic measures.

Jury awards Earl Charles no damages

(Continued from Page 1)
an investigation by the district attorney's office disclosing Wade's misconduct.

The second dubious ruling was Edenfield's decision to allow Wade the "good faith" defense. At the request of Wade's attorney, Edenfield charged the jury that the detective should be presumed to have been acting in good faith unless the evidence demonstrated otherwise. He further instructed them that if

Wade acted in good faith, a verdict could not be returned against him.

Center attorneys contended that if, in fact, the evidence proved what they said it did, there could be no "good faith" defense.

Influenced by these two rulings, the jury deliberated only about three hours before finding in favor of Wade. The Center has appealed the case on

the basis of these questionable rulings.

Though disheartened at the outcome of the trial, the Center staff thinks the suit has served an important purpose: to educate the public about risks society takes by having a death penalty.

"If the suit's changed one person's mind about capital punishment, then it's been successful," Balske said.



Kelly Dowe

The *Mobile* decision, in effect, puts the Supreme Court's stamp of approval on governmental discrimination in towns like Opelika, Ala., (above, a dirt street in a black neighborhood), where the SPLC has a voting rights suit.

Ruling in voting rights case sets back move for equality

(Continued from Page 2)

The U.S. Fifth Circuit Court of Appeals concurred.

But the Supreme Court has now reversed the Fifth Circuit and rejected the plaintiff's challenge. In the process, the Court has almost "repealed" the 15th Amendment, interpreting it so narrowly that it means next to nothing.

The Court also eliminated half of the 1965 Voting Rights Act, which had been won with the blood shed by the courageous marchers in Selma 15 years earlier.

Incredibly, the Court held that the substantive provisions of the Act were intended to make nothing illegal that was not already illegal by virtue of the Constitution itself! That holding ignored all relevant legislative history (including explicit testimony of the U.S. attorney general to the contrary), all principles of statutory construction, and dozens of contrary precedents.

Indeed, the Court conveniently ignored the fact that several other statutes had been passed during the prior 100 years that had already "enforced" the Constitution. One need not have a particularly profound grasp of history to know that Congress intended to do more in 1965 than just restate what it had said before.

Finally, the Court utilized its new "intent" theory — which has been used increasingly to eliminate the use of the equal protection clause — to reverse the Fifth Circuit's 14th Amendment holding. The Supreme Court appears to be saying that, unless you show that the enactment of the at-large scheme was specifically (and possibly exclusively) and intentionally initiated in order to deny blacks a fair vote, the defendants will prevail.

If this apparent interpretation is followed, it will mean that local elections, no matter how biased and discriminatory, will be allowed to continue.

The most likely application of the

Mobile decision will halt black political progress throughout the South and freeze blacks into the grossest kind of political impotence that has been "legalized" since the Court's infamous 1935 decision upholding the white primary.

Lawyers and other observers had assumed that a majority of even the present Supreme Court held enough of a belief in democracy that relief would continue to be granted in at-large cases, albeit slowly. With the justices' racial hostility apparently overcoming their commitment to democracy, however, people must turn once again to Congress to reaffirm and make unmistakably explicit, what Congress thought it had said in 1965.

There has been a great deal of interest expressed already in seeking remedial legislation, even though the *Mobile* decision is only a few weeks old. Congressional action may prove especially timely since those provisions of the Voting Rights Act that the Supreme Court has not yet eliminated are due to expire in 1982.

Presumably, the effort to extend the 1965 Act will proceed together with the effort to legislatively overrule the *Mobile* case.

But while the need for powerful legislation is clear, the political prognosis is less so. That is particularly true when one remembers that Jimmy Carter, as Governor of Georgia, advocated the repeal of the Voting Rights Act, and sought a commitment to that effect from Senator McGovern in exchange for Southern support of McGovern's presidential bid. It remains to be seen whether Carter's view from the White House, if he continues to be President, will be more reconstructed than his view from the Governor's mansion.

Walbert is an Associate Attorney of the Center who litigates voting dilution suits in several Southern states.

Withheld records

Textile officer rebuked; defendant in SPLC suit

RALEIGH, N. C. — The chief medical officer of Burlington Industries, whom SPLC attorneys accuse of failing to tell textile workers at one of the firm's South Carolina plants that they had brown lung (story, page 3), has been reprimanded by the N. C. Industrial Commission for withholding vital medical records from a disabled mill-worker trying to obtain workmen's compensation benefits.

Dr. Harold Imbus, Burlington's medical director, was rebuked for failing to provide the worker's attorney with the results of medical tests performed by him in 1971 that indicated she had brown lung.

The employee, Mrs. Ruth Williams, worked in the mill for Burlington for more than 30 years, but was fired in 1978 when she could no longer do her job because of breathing problems.

Soon afterward she filed for workmen's compensation benefits, but her claim was denied by Burlington and its insurance carrier, Liberty Mutual Insurance Company.

She appealed the denial and hired an attorney, Charles Hassell, who requested the medical records so that he could present her case before the state industrial commission.

Imbus denied knowing anything about Mrs. Williams or having any records on her until, several hours after a hearing on her claim, he and company attorneys mysteriously discovered the test results Hassell had sought.

Burlington attorneys soon notified the industrial commission officer who had conducted Mrs. Williams' hearing but failed to inform Hassell of the discovery.

Although the attorneys spoke with Hassell regarding her case on each of the next two days, they did not mention the records. Eventually Hassell found out about their existence from the hearing officer.

A new hearing was promptly scheduled, this one to determine why the existence of the documents had not been disclosed previously.

But the hearing was rigged. Before it was convened, the Burlington attorney and the hearing officer met to fix the procedure to be followed without consulting with Hassell. Hassell later charged that the officer was more interested in hiding, than finding, the truth, and the ground rules to which the officer agreed seem to bear out the accusation.

Burlington officials were allowed to testify from prepared statements without cross examination, the commission's usual rules of evidence were suspended, and Hassell was not permitted to object, to question Burlington witnesses or to otherwise participate in the hearing.

Council says blacks make little headway

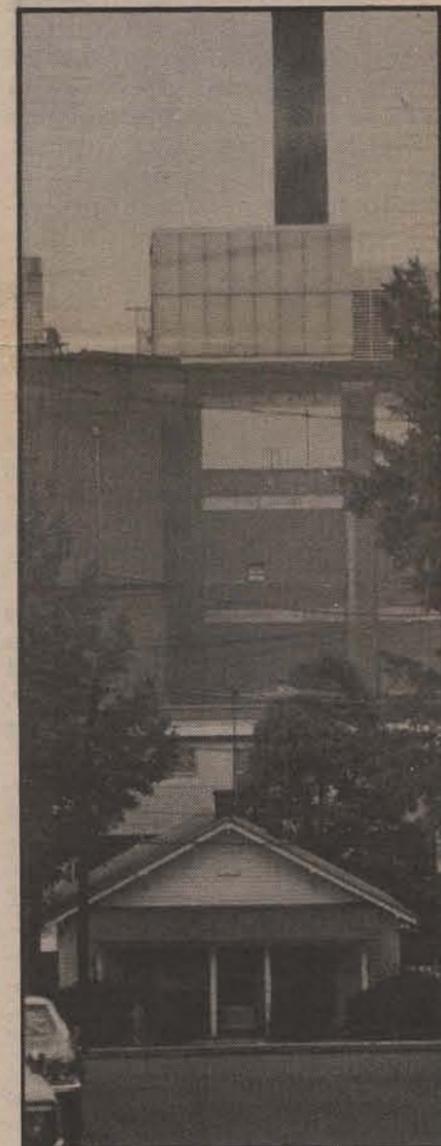
The economic gap between Southern whites and blacks is only a little narrower now than in the 1950s, the Southern Regional Council reports.

The Council, a research organization in Atlanta, said government statistics show that the median income for

Out of this hearing came Imbus' reprimand, although sterner punishment could easily have been taken, since his offense is a violation of North Carolina law.

Hassell, who represents other workers in claims against Burlington and Liberty Mutual, says these giants of the textile industry are guilty of similar obstruction in some of those cases.

Burlington is the world's largest textile mill. Liberty Mutual is the nation's largest textile insurance carrier. The two, along with Imbus, are defendants in a SPLC suit charging Burlington with intentionally exposing textile workers to conditions leading to the development of chronic obstructive pulmonary disease and then defrauding them out of their workmen's compensation benefits.



A cotton mill rises high behind a company house, a view symbolic of the textile worker's paternalistic, self-contained world. Southern millowners, who have cultivated a sense of dependency in their employees, react bitterly when they assert their rights.

a black family, which was 56 percent of that for a white family in 1950, increased to 62 percent by 1975.

The Council said economic differences in employment had worsened as well.