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# Reimbursement of Expenses of Appointed Counsel

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appoint counsel in serious misdemeanor cases to ensure that such convictions will not be overruled by cases expanding the right and, more important, to ensure full implementation of this fundamental human right.

2. Counsel must be appointed before the defendant pleads. The better practice, especially in the more serious cases, would be to appoint soon after arrest.

3. It is not required by the Supreme Court that counsel be appointed immediately after arrest, but the bench and bar should realize that this may be required in the event *Escobedo* is extended.

4. Full implementation of the right requires thorough and complete explanation to a defendant of the right and its scope; perfunctory reference to the right is not sufficient.

*Lee Hargrave*

## REIMBURSEMENT OF EXPENSES OF APPOINTED COUNSEL

The decision in the *Gideon* case<sup>1</sup> in 1963 has emphasized several problems in the administration of criminal justice. Among them are the following: when to appoint counsel, how to select counsel, how to finance alternatives to the appointed counsel system, whether to provide compensation for appointed counsel, and whether to reimburse appointed counsel for expenses. This Comment will attempt an exploration of the last of these questions, with emphasis on the practical need for reimbursement, the difficulties involved in securing reimbursement, and the practice in Louisiana as compared to the federal system and the other states.

### THE PROBLEM

*Gideon v. Wainwright* established that an indigent accused of a felony has an absolute right to the assistance of counsel for his defense. Enforcement of the decision has made necessary a great increase in the number of attorneys representing in-

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1. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

digent defendants. This is not to say that appointments were not being made before the decision, but rather that the clear necessity which the decision determined has forced many states to change their methods of appointment and to widen the classes of cases in which counsel is appointed. The growing number of attorneys appointed in such cases tends to multiply problems which were present but not very apparent in the previously existing context of indigent defense.

The basic problem is who is to pay the cost of defending the indigent. Certainly the indigent cannot pay it. Unless assistance is made available by such organizations as charitable foundations or the United Fund, there are only two sources of funds, the prosecuting jurisdiction and the appointed counsel. In a majority of jurisdictions in the United States the burden has fallen on the court-appointed attorneys.<sup>2</sup> But it should be added that part of the burden may sometimes have fallen on the indigent defendants, in the form of an inadequate effort by impecunious counsel.

Two examples will delineate the main area of concern.

John Smith is arrested on a charge of robbery in New Orleans, his home. The crime occurred on December 2, 1965, at about 11:00 A.M. His description is quite similar to that given by the victim. Smith was actually in Baton Rouge on that day to see an old friend who was passing through on his way to the West Coast to look for a job. The friend would be an excellent witness and the jury could not help but believe him. Smith cannot afford a lawyer, so the court must appoint one for him. However, owing to lack of funds, Smith cannot hire an investigator to look for the missing friend. John Smith, who has a perfect alibi, is convicted, even though he had a capable lawyer, a fair-minded judge and prosecutor, and an honest jury.

Or suppose that Smith is arrested for forgery. He is indicted and a lawyer is appointed to defend him. The local police crime laboratory's handwriting expert is the chief witness against Smith. He is a capable man, but not infallible. The defense could call in an expert of its own who would show definitely that the police expert is mistaken and that Smith did not commit the forgery of which he is accused. However, the fee for this expert is substantial. Smith cannot bear the expense, and his appointed

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2. 1 SILVERSTEIN, DEFENSE OF THE POOR 16 (1965).

lawyer probably cannot either. The inevitable result is that Smith will be convicted.

Similar cases can be imagined in which the vital factor is the inability of the defendant to secure a piece of physical evidence, to locate a missing witness, or to obtain the services of an expert in any one of a dozen fields. In each case the accused may be provided with competent counsel and the proceedings may be completely fair, but will be convicted of a crime of which a man of means would probably have been acquitted.<sup>3</sup>

In practical effect what is happening is that the indigent too often gets a second-class form of justice. The appointed attorney, who is seldom happy with such an assignment, particularly if he has a busy practice, may feel that he must forego the complete investigation he would make for a paying client. This often will mean a plea of guilty being entered where such a plea should not have been made. The practice of some judges to appoint counsel from among attorneys present in the courtroom is especially conducive to a kind of "instant justice."

Admittedly, examples of this sort are not in keeping with the ethical standards of the bar. However, the present widespread practice of not reimbursing counsel may force counsel to choose between severe financial hardship and the ethical ideal.<sup>4</sup> As one attorney from a rural parish in Louisiana put the problem:

"Sure, the first five cases you are appointed to, you expend every effort to try to find all the witnesses for the defendant, and take whatever time is necessary to fully prepare a defense. But about the sixth case you begin to work from the position of whether the man is guilty or not and not how much the State can prove against him. As a result, you just don't do as much to protect his rights at every turn as you would do for the banker's son who could afford to pay you a fee of \$5,000. You lose some sleep over it, but what can you do when you have an office full of clients who want service and you have to hold everything until the criminal appointment case is finished?"<sup>5</sup>

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3. For examples of actual cases of this type, see FRANK & FRANK, *NOT GUILTY* (1957) and BORCHARD, *CONVICTING THE INNOCENT* (1932).

4. Ervin, *Uncompensated Counsel: They Do Not Meet the Constitutional Mandate*, 49 A.B.A.J. 435, 436 (1963).

5. Statement to writer.

The problem grows with the increasing costs of an adequate defense. The defense attorney, to present his client in the most favorable light, must know as much as possible about him and about the case which the prosecution has against him. But in the best circumstances the defense attorney can hardly hope to match the resources available to the prosecution.

"The growth of the modern American police force and prosecutor has been understandably mercurial. From the local constabulary to the national F.B.I., there are approximately 40,000 police jurisdictions in the United States. The total police personnel in this country numbers about 300,000."<sup>6</sup>

"It is, of course, not only with numbers of investigators and prosecutors that the lonely individual is confronted when caught up in the criminal law processes. State, federal, and many local police officers and prosecutors are full-time, extensively trained and highly qualified professionals, assisted by the speed and mobility of the car and plane, the facility of electrical and electronic communication, the sciences of *moulage*, dactyloscopy, microscopy, ballistics, handwriting analysis and serology, as well as the less acceptable — although regarded as essential by the police — auxiliaries of informer, wire tap, lie detector and narcoanalysis."<sup>7</sup>

"Pitted against the crushing complex of the power of the police and prosecution, the accused individual is helpless except for the countervailing defenses erected by the Constitution, and even with those he may be pitifully frail."<sup>8</sup>

"At the trial stage the growing imbalance between State and accused is another reminder that Constitutional rights are not self-enforcing and, unless implemented, are inadequate to dissipate the twentieth century disparity between the resources available to the criminal trial combatants."<sup>9</sup>

In effect, the practice of not supplying appointed counsel with adequate funds to conduct a defense has negated the effectiveness of counsel.

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6. BOTEIN & GORDON, *THE TRIAL OF THE FUTURE* 58 (1963).

7. *Ibid.*

8. *Id.* at 64.

9. *Id.* at 69.

## THE CONSTITUTIONAL "MANDATE"

The question whether the Constitution requires that appointed counsel be reimbursed by the state for the expenses of defending an indigent is yet to be presented to the Supreme Court. The Court, however, seems to be moving toward the position that due process and equal protection require that every person accused of crime should have a full opportunity to present his defense, regardless of financial condition. This idea has been stated most clearly in the opinions of Justice Douglas:

"In criminal trials a State can no more discriminate on account of poverty than on account of religion, race or color."<sup>10</sup>

"There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."<sup>11</sup>

"There is lacking that equality demanded by the Fourteenth Amendment where the rich man . . . enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments in his behalf, while the indigent . . . is forced to shift for himself."<sup>12</sup>

## THE FEDERAL POSITION

At present the position in the federal courts under the Criminal Justice Act of 1964<sup>13</sup> is that counsel may be reimbursed for all reasonable expenses, and funds in a limited amount are available for expert witnesses and investigative services. This should largely solve the problem of appointed counsel in the federal courts. Before passage of the Criminal Justice Act, the apparent position in the federal courts as expressed by the Ninth Circuit in *Dillon v. United States*<sup>14</sup> was that, in the absence of statutory authority, there was no basis for any reimbursement of appointed counsel. The reasoning in this case was that attorneys are officers of the court and consent to the appointments without reimbursement, or compensation, as a condition of admittance of the bar. This was in accord with the majority of the state court decisions on the subject and, as the Ninth Circuit

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10. *Griffin v. Illinois*, 351 U.S. 12, 17 (1956).

11. *Id.* at 19.

12. *Douglas v. California*, 372 U.S. 353, 357 (1963).

13. 78 Stat. 552, 18 U.S.C.A. 3006A (1964).

14. 346 F.2d 633 (9th Cir. 1965).

claimed, with the historical nature of the relationship of the attorney to the court system.<sup>15</sup>

#### THE POSITION IN STATES OTHER THAN LOUISIANA

At the present time nine of the fifty states and the District of Columbia provide specifically for reimbursement of the expenses of appointed counsel.<sup>16</sup> In many of the other states, appointed counsel are paid by increasing the compensation allowed by statute in an amount sufficient to cover reasonable expenses without making an allowance for them specifically.<sup>17</sup> In the thirteen jurisdictions that afford complete reimbursement, the only requirement seems to be a showing that the expenses were reasonably necessary.<sup>18</sup>

In many of the states which have only limited reimbursement, or none at all, there have been recommendations from the bar that adequate funds be made available. Even in states which allow reimbursement, it is often true that securing the return of expense money is difficult and time-consuming. This complaint is particularly prevalent in New Jersey, where lawyers have found that the cost in time of filling out the required forms to secure reimbursement is often more than the actual expenses themselves.<sup>19</sup>

The New Jersey Supreme Court, however, is the source of the leading opinion on the inherent power of the courts to order reimbursement of expenses to appointed counsel. In *State v. Horton*<sup>20</sup> the limits of reimbursement were defined:

"A word should be said about the matter of out-of-pocket expenses of defense, including expenditures of the assigned attorney himself. Customarily, and we think properly so, the reasonable costs of necessary items such as experts, whether witnesses or not, medical examinations, scientific tests, photographs, depositions and transcripts, and, in essential circumstances, professional investigation, have been ordered paid from public funds by trial courts. The Constitutional obligation to furnish counsel to an indigent can sensibly only

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15. *Id.* at 636.

16. 1 SILVERSTEIN, DEFENSE OF THE POOR 16 (1965).

17. *Ibid.*

18. 2 & 3 *id.* (State Reports).

19. 3 *id.* at 476.

20. 34 N.J. 518, 170 A.2d 1 (1961).

be construed to include as well that which is necessary to proper defense in addition to the time and professional efforts of an attorney, and we have no doubt of the inherent power of a court to require such to be provided at public expense. Cf. *Griffin v. People of State of Illinois*, 76 S.Ct. 585, 352 U.S. 12, 100 L.Ed 891 (1956). . . . We think the assigned attorney is also entitled to receive reimbursement on the same theory for his reasonable and necessary miscellaneous out-of-pocket disbursements not falling within the more extensive categories mentioned. We have in mind not those items like office stenographic and clerk services, supplies, local telephone charges, postage, meals and the like which ordinarily constitute a part of general office overhead and are not usually charged by the average attorney to the paying client, but rather things such as traveling expenses outside the local area, toll telephone charges and incidental investigation disbursements, capable of specific itemization."<sup>21</sup>

This is unusually generous treatment, but it may indicate the direction in which the states are moving. There would, however, be a good deal of quarrelling with the position that power to direct reimbursement is inherent in the courts. Most states have considered that there is no such power in the courts, and that authority for such payments can come only from the legislature.<sup>22</sup>

#### THE LOUISIANA POSITION

Under the Code of Criminal Procedure, Louisiana has made possible the appointment of counsel for indigent defendants.<sup>23</sup> With the exception of one parish,<sup>24</sup> this is the only concession made to an accused because of his indigence, at least on the trial level.<sup>25</sup> At present no allowance is made to appointed counsel for his expenses, though there is some evidence of coopera-

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21. *Id.* at 534, 170 A.2d at 9.

22. See cases cited in *Dillion v. United States*, 346 F.2d 633, 637 (9th Cir. 1965).

23. LA. R.S. 15:143 (1950).

24. *Id.* 15:868, limited to cases involving inmates of the Louisiana State Penitentiary.

25. See *id.* 15:555, dealing with right of accused to have testimony transcribed and provisions for paying therefor. See also *United States ex rel. Weston v. Sigler*, 308 F.2d 946 (5th Cir. 1962); OP. ATT'Y GEN. LA. (June 14, 1965), to the effect that an indigent accused is entitled to a transcript on appeal, paid for by the parish.

tion from the police and district attorneys in supplying information which helps reduce costs of investigation.

The case law offers no prospect of change. *State v. Simmons*<sup>26</sup> indicates that Louisiana is in accord with the majority position that there can be no reimbursement of expenses to appointed counsel in the absence of an authorizing statute. This is not to say that the issue of reimbursement of expenses is not being contested. In one instance known to the writer, a lawyer has made it a practice in every case in which he is appointed to defend an indigent to present motions to the court for cash allowances for investigative facilities and other services similar to those the prosecution has at its disposal. To this date none of the motions has been granted, but it is significant that the issue is being raised in the courts.

The proposed Code of Criminal Procedure also has little to say regarding expenses incurred in defense of the indigent. Articles 512 and 513 of the proposed code deal with appointment of counsel at the trial level and before. The only mention of compensation or reimbursement is in the last sentence of each article: "The defendant shall not be required to pay for such representation." This, of course, says nothing about reimbursement of expenses by the state.

Records of the Louisiana State Law Institute, the body charged with the revision of the Criminal Procedure Code, indicate that the subject of reimbursement was considered.<sup>27</sup> However, the decision was made to eliminate any reference to reimbursement of appointed attorneys based on the conclusion that the matter would be more appropriately dealt with by general legislation placed in title 15 of the Revised Statutes of Louisiana. An additional consideration was the failure of the 1964 Legislature to pass any of four bills proposing the establishment of a Public Defender System.<sup>28</sup>

The question will probably arise in future sessions of the legislature as awareness of the problem continues to grow. Consider, for example, the following excerpt from the just-published study of indigent defense by the American Bar Foundation.<sup>29</sup>

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26. 43 La. 991, 10 So. 382 (1891).

27. LOUISIANA STATE LAW INSTITUTE, CODE OF CRIMINAL PROCEDURE REVISION, *Exposé des Motifs No. 18, Title XIV, Right to Counsel*, 14-16 (March 16, 1962).

28. 1964 Louisiana Legislature: H.B. 937, 262, 1171, 1172.

29. See SILVERSTEIN, DEFENSE OF THE POOR (1965).

"The difference in compensation among states and even within them raises questions of equal protection for indigent defendants. Lack of reimbursement of expenses is especially disturbing, since the appointed lawyer faces the dilemma of cutting short his investigation or contributing his funds in addition to his time. Some lawyers, especially the younger ones, can ill afford such cash outlays. For instance, two lawyers from a rural parish in Louisiana, appointed in a rape case, (a capital case), had the expense of a three day trial, an appeal to the Supreme Court of Louisiana, an application for a writ of certiorari to the United States Supreme Court, and an appeal to the federal court of appeals.<sup>12</sup> Such a system is unfair not only to lawyers, but also to their clients to the extent it hampers the lawyers' best efforts."

"[Footnote 12:

"[One of the lawyers wrote a long letter about the case, which included the following paragraph.

"[The local Bar Association was kind enough to pick up a collection to pay for printed briefs in the State Supreme Court. These are not necessary, but to adequately impress the Court, it is a good idea to have them printed. The Sheriff of our Parish was kind enough to transport us to Baton Rouge, along with the District Attorney, for the Habeas Corpus hearing. However, we will have to transport ourselves to New Orleans (220 miles) in connection with the 5th Circuit Court of Appeals argument.]"<sup>30</sup>

In summary of the present state of affairs in Louisiana, it can be said that no reimbursement is now being made directly, although some courts may favor counsel appointed in criminal cases with appointments in remunerative civil matters.<sup>31</sup> Difficulties of the present policy are being recognized and some effort is apparently being made to correct the situation.

#### RECOMMENDATIONS FOR LOUISIANA

A recent study in the state of methods of defending indigents accused of crime suggests a strong feeling by judges, prosecutors, and attorneys that there should be some procedure by which

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30. 1 *id.* at 16.

31. 2 *id.* at 307, n.20.

assigned counsel can recover out-of-pocket expenses.<sup>32</sup> The general opinion is that the present system is unfair to appointed counsel in requiring him to bear all the cost of an obligation that should be borne by society generally.<sup>33</sup> There is also an underlying belief that the system as it now operates may be unfair to the indigent in that it limits in some ways the quality of his defense.<sup>34</sup>

Improvement in the present situation is within the control of the legislature, which will have to make the eventual choice of method. The methods available include continuance of the assigned counsel system with allowances from the state for expenses, a completely new system of public defenders adequately financed, or a combination of the two.

Experience in other states has shown that the assigned counsel system tends to break down in densely populated areas.<sup>35</sup> This can be seen, in our own state, in New Orleans. There a private defender office has been established which appears to be performing satisfactorily, although it has a need for more funds.<sup>36</sup> The reason for its establishment seems to have been that the case burden on individual lawyers was becoming too heavy for them to give adequate attention to indigent defense and still maintain their regular practice.

However, since there is a much smaller incidence of crime in the rural parishes,<sup>37</sup> it would seem that the expense of maintaining a full-time public defender there could not be justified. It would be wiser to retain the present system of assigned counsel in rural parishes, provided, of course, that money is made available to pay out-of-pocket expenses. The money should come from the state rather than the local level, as use of the latter source for funds in other jurisdictions has generally led to widespread inequalities.<sup>38</sup> A system of funding on a statewide basis would insure at least that counsel in every area of the state could count on receiving the same kind of treatment.

There would need to be safeguards to prevent unnecessary or extravagant use of expense funds. One suggested method is

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32. 2 *id.* at 291, 297, 300.

33. 2 *id.* at 291, 296-97, 300-01, 307.

34. 2 *id.* at 283-308.

35. 1 *id.* at 63.

36. 2 *id.* at 301.

37. 1 *id.* at 63.

38. 1 *id.* at 16.

for appointed counsel to submit expense itemizations to the judge for approval and concurrent order to pay. This gives the lawyer a degree of freedom to operate depending upon the facts of the particular case, which is better than having him bound by strictly interpreted terms as to what is acceptable and what is not. The method allows the judge to use his discretion in fixing reimbursement at a fair rate for the work done so that no one will be able to collect for clearly unjustified expenditures.

Where there is a public defender system, expenses should be paid on the basis of an annual budget to assure use of funds in the cases where they are most needed. A permanent, salaried investigator might help to reduce the cost of the entire operation.

A further reduction of costs would result if public defenders and assigned counsel were allowed the free use of the State Crime Laboratory and the assistance of its personnel. This should produce a substantial saving. In addition, some form of discovery device in criminal trials<sup>39</sup> would reduce expenditures for investigators and further diminish the cost of defending indigents.

All these suggestions can be used in Louisiana to create a program for the defense of indigents at a reasonable cost to the state. The hope of change from present practices seems to lie with a legislature responsive to public opinion that is sufficiently educated in the realities of administering criminal justice. A change is imperative in order to secure a fair system of criminal justice for both the indigent accused and the attorney selected to aid him in his defense.

*Walter G. Strong, Jr.*

## POST-CONVICTION REMEDIES AND WAIVER OF CONSTITUTIONAL RIGHTS

### INTRODUCTION

Each of the states and the federal government has its own system of criminal procedure. One of the most important and most publicized aspects of criminal procedure is that which

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39. Cf. Louisell, *Criminal Discovery: Dilemma Real or Apparent?* 49 CALIF. L. REV. 56 (1961).