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Attorney and Client -- Compensation of Indigent's Counsel in Federal Post-Conviction Proceedings

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damages to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." Purex's complaint alleges that Procter-Clorox "engaged and continued to engage in severe and sustained predatory price cutting." Implicit within Purex's claim for relief is the requirement that there be actual post-merger injury. However, neither the Court nor the Commission found that Procter had actually engaged in any definite anticompetitive behavior. Had there been any such behavior it seems highly unlikely that the Commission would have failed to use it against the merger, if only because an analysis based upon the actual manifestation of predatory pricing would have been far simpler. Therefore, it will be interesting to see to what extent, if any, the Commission might have considerably simplified their task by the use of such evidence.

K. G. Robinson, Jr.

Attorney and Client—Compensation of Indigent's Counsel in Federal Post-Conviction Proceedings

The North Carolina Supreme Court has recently held that counsel appointed to defend an indigent defendant in the courts of North Carolina cannot be compensated by the state for work done in the federal courts to vacate the state conviction. The attorneys re-

and not just liquid bleach. Observe that section 5(b) of the Clayton Act suspends the running of the statute of limitations during the pendency of government proceedings and for one year thereafter.

1 State v. Davis, 270 N.C. 1, 153 S.E.2d 749 (1967), cert. denied, 389 U.S. 828 (1967). The attorneys were appointed in Mecklenburg County Superior Court in 1959 to defend Elmer Davis, Jr. who was charged with rape and murder under ch. 112 (1949) N.C. Sess. L. (required counsel for indigents charged with a capital offense). The conviction was appealed to the North Carolina Supreme Court which affirmed, State v. Davis, 253 N.C. 86, 116 S.E.2d 365 (1960). After a petition for rehearing was denied, the attorneys won a stay of execution and sought certiorari from the United States Supreme Court which was denied, Davis v. North Carolina, 365 U.S. 855 (1961). Attorneys then petitioned the federal district court for a writ of habeas corpus which was denied, Davis v. North Carolina, 196 F. Supp. 488 (E.D.N.C. 1961). On appeal the Fourth Circuit Court of Appeals reversed and remanded the case to the district court to determine whether Davis' confession was obtained within the bounds of due process, Davis v. North Carolina, 310 F.2d 904 (4th Cir. 1962). The district court again refused to grant the writ, Davis v. North Carolina, 221 F. Supp. 494 (E.D. N.C. 1963) and the court of appeals upheld the lower court in a 3-2 decision, Davis v. North Carolina, 339 F.2d 770 (4th Cir. 1964). The Supreme Court granted certiorari and in Davis v. North Carolina, 384 U.S. 737 (1966),
ceived 1,700 dollars from Mecklenburg County for the work done in the courts of North Carolina and sought an additional 1,758.72 dollars for expenses and 30,000 dollars as the reasonable value of their services in the federal courts. The lower court ordered the state to pay the attorneys 8,000 dollars pursuant to N.C. GEN. STAT. § 15-5 (1965). The court stated that failure to compensate these attorneys would be a denial of due process and equal protection under the fourteenth amendment of the United States Constitution and would deprive the attorneys of their "rights" under the Constitution of North Carolina.

The North Carolina Supreme Court granted certiorari and reversed the lower court. It held that section 15-5 did not apply to the facts presented and it was error to allow compensation in this case. "The power to provide compensation for lawyers representing indigent defendants rests with the Legislature and not the courts."

It appears that the Supreme Court of North Carolina is the only appellate court to have passed on the question of whether a state should pay a lawyer who represents an indigent state prisoner in

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2 State v. Davis, 270 N.C. 1, 2, 153 S.E.2d 749, 750 (1967); this payment was subsequent to ch. 247 [1917] N.C. Sess. L. as amended by ch. 226 [1937] N.C. Sess. L., allowing the fee of appointed counsel in capital cases to be determined by the judge and paid by the county where the defendant was indicted.

4 N.C. GEN. STAT. § 15-5 (1965) states in part: "Whenever an attorney is appointed by the court to defend an indigent defendant he shall receive a fee for performing such service to be fixed by the court which shall be reasonable and commensurate with the time consumed, the nature of the case, the amount of fees usually charged for such cases in the county or locality. . . ."

6 State v. Davis, 270 N.C. 1, 13, 153 S.E.2d 749, 757 (1967). Neither the judge below nor the attorneys' brief stated any specific provision of the North Carolina Constitution which would be violated by the state's refusal to pay compensation: "[A] person who asserts that a particular act violates his rights under the Constitution must point out the particular provision of the Constitution that he claims is violated." Id.

8 Id. at 9, 153 S.E.2d at 755. If N.C. GEN. STAT. § 15-5 (1965) is read alone it would appear broad enough to cover the circumstances in the instant case, but when read in conjunction with N.C. GEN. STAT. § 15-4.1 (1965) its coverage does appear limited to compensation for state proceedings only. N.C. GEN. STAT. § 15-4.1 states in part: "When a defendant charged with a felony is not represented by counsel. . . . If the judge finds that the defendant is indigent . . . he shall appoint counsel for the defendant. . . . In case of an appeal to the supreme court the judge shall appoint counsel for such appeal or continue the services of the counsel already appointed . . . ."

9 270 N.C. at 10, 153 S.E.2d at 755.
subsequent proceedings in the federal courts. On the question of services rendered within the same judicial system, the weight of authority in this country and England adheres to the general principle that only the legislature can provide for the compensation of an indigent's court appointed lawyer. Two theories have been offered in support of this principle, either singly or in conjunction. First, a lawyer is an officer of the court and as such has special rights and privileges, a corollary to which is the duty, when called upon by the court, to defend indigent criminal defendants. One who accepts the office of attorney does so _cum onere_, with all the burdens incident thereto. Second, the obligation to defend indigents without compensation is a condition under which a lawyer is licensed by the state to practice law. The courts have used this reasoning to reject the claims of attorneys that refusal to compensate them for their work was an unconstitutional deprivation of property.

A minority of courts has rejected the idea that only the legislature can provide for the payment of court appointed counsel. Those courts claiming the power to grant compensation despite the lack of legislative authority have given various reasons: (1) the

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8 270 N.C. at 13, 153 S.E.2d at 757. The circumstances presented by this case probably constitute the only way that the question of compensation of counsel could occur in North Carolina today. North Carolina provides for mandatory appointment of counsel in state post-conviction proceedings, N.C. Gen. Stat. §§ 15-217 to -222 (1965), and requires that such counsel be compensated, N.C. Gen. Stat. § 15-219 (1965).

9 Dolan v. United States, 351 F.2d 671 (5th Cir. 1965); United States v. Dillon, _In re Strayer_, 346 F.2d 633 (9th Cir. 1965), _cert. denied_, 382 U.S. 978 (1966); Jackson v. State, 413 P.2d 488 (Alaska 1966); Weiner v. Fulton County, 113 Ga. App. 343, 148 S.E.2d 143 (1966); Warner v. Commonwealth, 400 S.W.2d 209 (Ky. 1966); _In re Mears_, 124 Vt. 131, 198 A.2d 27 (1964); Ruckenbrod v. Mullins, 102 Utah 548, 133 P.2d 325 (1943); All these cases concerned compensation for services rendered in the same judicial system which denied the compensation.

10 Cases cited note 9 _supra_.

11 Cases cited note 9 _supra_.

12 Dillon v. United States, _In re Strayer_, 230 F. Supp. 487 (D. Ore. 1964), _rev'd_, 346 F.2d 633 (9th Cir. 1965), _cert. denied_, 382 U.S. 978 (1966); People _ex rel._ Conn v. Randolph, 35 Ill.2d. 24, 219 N.E.2d 337 (1966) (the court stated that it had the power to relieve an intolerable burden on assigned counsel but the permanent solution was for the legislature); Knox County Council v. State _ex rel._ McCormick, 217 Ind. 493, 29 N.E.2d 405 (1940); Hyatt v. Hamilton County, 121 Iowa 292, 96 N.W. 885 (1903); State v. Rush, 46 N.1. 399, 217 A.2d 441 (1966) (the court delayed its plan until January 1, 1967 to give the legislature time to act on the matter); County of Dane v. Smith, 13 Wis. 585 (1861). _But see_ Green Lake County v. Wau- pac County, 113 Wis. 425 (1902). All these cases concerned services rendered to the same judicial system which granted the compensation.
court's power to grant compensation for a public taking of private property;\(^{13}\) (2) the theory of implied contract;\(^{14}\) and (3) authority incidental to the power of the court to appoint attorneys for indigents.\(^{15}\) In allowing the compensation, these courts have rejected the idea that lawyers are a privileged class and that the defense of indigents can be made a condition to the state's grant of a license to practice law.\(^{16}\)

While it is true that almost all states\(^{17}\) and the federal government provide some method of compensating assigned counsel for trial and appellate work, the area of post-conviction proceedings has been almost ignored.\(^{19}\) Today an attorney, appointed to represent an indigent defendant, who decides to seek relief in the federal courts\(^{20}\) from a state or federal conviction, will probably not receive compensation from any source.

The federal courts have held that the sixth amendment right to counsel does not apply in a post-conviction proceeding.\(^{21}\) The reason often given is that such proceedings are civil rather than criminal.\(^{22}\) However, a failure to appoint counsel may be reversible


\(^{14}\) Haytt v. Hamilton County, 121 Iowa 292, 96 N.W. 885 (1903); (the state, by requesting and accepting the services of appointed counsel, implies a promise to pay the reasonable value thereof).


\(^{16}\) Dillon v. United States, In re Strayer, 230 F. Supp. 487, 493 (D. Ore. 1964); Knox County Council v. State ex rel. McCormick, 217 Ind. 493, 29 N.E.2d 405 (1940). In Ruckenbrod v. Mullins, 102 Utah 548, 553, 133 P.2d 325, 327 (1943), the court rejected the idea that defense of indigents could be made a condition to the granting of a license by the state to practice law but allowed compensation on the "officer of the court" theory.

\(^{17}\) See L. Silverstein, Defense of the Poor 253-67 (1966) for a summary of the various state statutes relating to appointment and compensation of counsel for indigent defendants as of March 1, 1965.


\(^{19}\) American Bar Ass'n, Standards Relating to Post-Conviction Remedies: Tentative Draft 65 (1967) [hereinafter cited as A.B.A. Standards].

\(^{20}\) 'Federal post-conviction proceedings' for the purpose of this note mean proceedings under 28 U.S.C. § 2241 (1958) (brought by one who seeks relief in the federal court from a state court conviction), and under 28 U.S.C. § 2255 (1958) (brought to vacate a federal conviction).

\(^{21}\) Whether or not this rule should be changed is beyond the scope of this note. For discussions of this rule see: 51 Calif. L. Rev. 970 (1963); 30 U. Chi. L. Rev. 583 (1963); and 19 U. Miami L. Rev. 432 (1965).

\(^{22}\) E.g., Baker v. United States, 334 F.2d 444, 447 (8th Cir. 1964) (appointment of counsel is within the discretion of the trial court); Huizar v. United States, 339 F.2d 173 (5th Cir. 1965).
error if the circumstances of the particular case show that such failure resulted in a denial of due process as required by the fifth amendment. 23 If a substantial issue of fact is alleged in the petition which would require a hearing in the case of a non-indigent defendant, counsel should be appointed. 24

The procedure of appointing counsel to represent an indigent petitioner for post-conviction relief only after the court has determined that the petition is not frivolous has received some criticism, 25 but it does have merit. The classification of the relief as civil rather than criminal is not the real reason for the refusal to appoint counsel as a matter of right. 26 Sounder reasons for the practice are as follows: (1) these proceedings follow criminal proceedings where the petitioner has had benefit of counsel at every step; (2) such proceedings are not part of the guilt determining process, but follow it; and (3) petitions may be resubmitted and are often frivolous. 27

Once the court determines that a petition does have merit and decides to appoint counsel, he should be compensated. 28 The burden confronting counsel assigned for post-conviction proceedings is often greater than that faced by counsel assigned at the trial level. 29 When a hearing is granted, "it must be a fair one considering all the circumstances, adequate . . . to allow a meaningful presentation

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23 Dillon v. United States, 307 F.2d 445 (9th Cir. 1962).
24 Id.; Eskridge v. Rhay, 345 F.2d 778 (9th Cir. 1965); Campbell v. United States, 318 F.2d 874 (7th Cir. 1963) (a divided court held that Gideon v. Wainwright, 372 U.S. 335 (1963), required appointment of counsel); Anderson v. Heinz, 258 F.2d 479 (9th Cir. 1958); Green v. United States, 158 F. Supp. 804 (D. Mass. 1958).
25 President's Comm'n on Law Enforcement and the Administration of Justice, Task Force Report: The Courts 47 (1967). This report recommended the appointment of counsel for petitioners as a matter of course. See also articles cited note 21 supra.
26 Dillon v. United States, 307 F.2d 445, 447 (9th Cir. 1962); United States ex rel. Wissenfeld v. Wilkins, 281 F.2d 707, 715 (2d Cir. 1960).
27 A.B.A. Standards § 4.4(a) (1967): "It is most desirable to avoid processing of applications for post-conviction relief beyond the initial screening of the documents without counsel. . . . When private counsel are appointed . . . their services should be compensated adequately from public funds."
28 Report of Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice 45 (1963) [hereinafter cited as Committee on Poverty]. Some examples of these are: (1) if there is a factual issue witnesses must be located and their memories may be poor; (2) often counsel must work from a "cold" record; (3) legal issues are often complex and require much research; (4) the proceedings can be protracted (five years in the instant case); and many others.
of the petitioner's claims. Whether failure to compensate attorneys for the work they do when appointed to represent an indigent results in constitutionally inadequate advocacy has yet to be answered. While some data on this question has been collected, it is insufficient to allow an affirmative answer. It is difficult if not impossible to determine what motivates an attorney to exhaust every means of relief for his indigent client. However, when assigned counsel has received less than adequate compensation for his work at trial and on appeal, the financial burden of federal post-conviction relief may be too great. Such a situation presents a serious ethical problem to the lawyer who fears that the diligent prosecution of his client's rights may seriously affect his earning capacity.

The Bar alone should not be required to carry the burden of the costs of post-conviction proceedings. The infrequency of appointment where it is discretionary may in some ways be attributed to the reluctance of the court, state or federal, to impose the financial burden of such proceeding on the bar. If due process requires counsel to be appointed for the indigent petitioner in the federal court, the duty to provide counsel should be that of the federal government and not the legal profession. The fifth amendment guarantee of just compensation was designed to prevent the government from placing a public burden on a single person or group of persons. When a fair hearing requires representation of the petitioner, coun-

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50 Id.
51 Silverstein, supra note 17 at 20-27. In one study, defendants with assigned counsel pleaded guilty more often and received prison sentences rather than probation more often than defendants with retained counsel.
53 The compensation allowed by the various statutes is often nominal. The Criminal Justice Act of 1964, 18 U.S.C. § 3006A(c) provides a maximum of 15 dollars per hour for work in court and 10 dollars per hour for work outside of court, not to exceed 500 dollars for a felony or 300 dollars for a misdemeanor, with a proviso for payment in excess of this limit in extraordinary circumstances. Compensation for appeal work "in no event" is to exceed 500 dollars for a felony and 300 dollars for a misdemeanor. W. Va. Code Ann. § 62-3-1 (1966) provides for a maximum of 50 dollars for a felony and 25 dollars for a misdemeanor.
54 Dillon v. United States, In re Strayer, 230 F. Supp. 487, 495 (D. Ore. 1964) (two young attorneys were forced to borrow money to support themselves when a case they were assigned lasted almost six months).
56 Cases cited supra note 24.
COMPENSATION OF COUNSEL

Sel should be appointed: "Counsel. . . should be permitted to make as effective a presentation as the merits allow. This requires that counsel be granted reasonable compensation and. . . expenses properly incurred."\(^8\)

While the majority of jurisdictions place the responsibility of providing for compensation of appointed counsel on the legislature,\(^8\) in federal post-conviction proceedings the issue is complicated by the question of which legislature—state or federal. Compensation of counsel for petitioners seeking relief under 28 U.S.C. § 2255 from federal convictions must be the responsibility of the federal government. One of the most delicate problems in the dual system of government is the power of the federal courts to grant relief to state prisoners by vacating state court convictions. The issue of compensation of counsel for state prisoners seeking federal relief merely compounds the problem.

A state could enact a statute which authorized the payment of attorneys for work done in the federal courts to vacate the convictions of indigent state prisoners, although this appears highly unlikely. States dislike the use of habeas corpus by the federal courts to vacate state court convictions. Since the state court has no jurisdiction to appoint counsel for a federal court proceeding, the state legislatures would be reluctant to appropriate money without any control over its disbursement.\(^4\)

It would seem that the best solution is a federal statute that provides compensation for attorneys appointed in the federal court to represent indigent petitioners proceeding under either 28 U.S.C. § 2241 (state prisoners) or 28 U.S.C. § 2255 (federal prisoners). Whether the Criminal Justice Act of 1964, 18 U.S.C. § 3006A, is sufficient for this purpose has not yet been decided.\(^4\) The statute

\(^8\) COMMITTEE ON POVERTY 45.
\(^8\) See note 9 supra.
\(^4\) State v. Davis, 270 N.C. 1, 8, 153 S.E.2d 749, 754 (1967). The attorneys in this case were never appointed by any court to represent Davis in the federal courts.
\(^4\) In In re Hagler, 246 F. Supp. 716 (D. Hawaii 1965), the court held that compensation could not be paid to counsel appointed to seek post-conviction relief under the Criminal Justice Act of 1964. However, the court treated the action before it as equivalent to a motion pursuant to Rules 12 and 48 of the Federal Rules of Criminal Procedure and granted the counsel compensation; In United States v. Boyd, 248 F. Supp. 291 (S.D. Cal. 1965) the court allowed compensation under the Criminal Act of 1964 to counsel appointed to represent an indigent defendant in a probation revocation proceeding, saying that the hearing was an extension of the criminal proceeding.
says that "A defendant... shall be represented at every stage of the proceedings from his initial appearance before the United States commissioner through appeal." The Attorney General of the United States said that the statute was "designed to afford representation to each defendant throughout his involvement in the judicial process." But the committee which was established to implement the statute stated that the act was not meant to apply to post-conviction proceedings. Since there is a strong possibility that the courts will refuse to grant compensation to counsel appointed for post-conviction purposes under the Criminal Justice Act of 1964, Congress should pass legislation specifically addressed to the problem.

Providing counsel for a prisoner attacking the validity of a state conviction in the federal courts creates a delicate situation. It is just this situation which strongly supports the present practice of not appointing counsel in such proceedings as a matter of course. It would be most offensive to the states if counsel were automatically appointed to examine the record for constitutional defects whenever a petition was filed. Such appointment is not required to establish the equality in the administration of criminal justice which the Supreme Court has sought. The proposed statute should set up guidelines that counsel not be appointed if the petition is frivolous or if there has been a prior unsuccessful application where the prisoner was represented by counsel.

When appointed counsel's duty to his client terminates with the final judgment of the court appointing him, there is a gap in representation. The statute could remedy this by establishing a procedure whereby a preliminary motion filed with the petition would

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45 COMMITTEE ON POVERTY 45.
46 See notes 22-25 supra and accompanying text.
48 A.B.A. STANDARDS 67.
49 Id.
allow the court to continue the appointment if it determined counsel was required.50

STEPHEN E. CULBRETH

Constitutional Law—Effect of the Right to Speedy Trial on Nolle Prosequi

In *Klopfer v. North Carolina,* the United States Supreme Court held that the sixth amendment guarantee of the right to speedy trial is a basic right protected by the Constitution and is therefore incorporated into the due process clause and made obligatory upon the states under the fourteenth amendment.2 Implicit in the decision is the proposition that the speedy trial guarantee is to be enforced against the states according to the federal standard.3

In *Klopfer,* a violation of the sixth amendment was found in the use of the North Carolina procedural device of "nolle prosequi with leave." Its objectionable characteristic is the power given the state solicitor to suspend indefinitely action on a case, after an indictment has been filed, and notwithstanding defendant's timely demand for trial.

Klopfer, a Duke University professor, was tried in March, 1964 on charges of criminal trespass resulting from his participation in a widespread effort to desegregate stores and eating places in Chapel Hill in January of that year.4 A mistrial was declared when the jury could not agree and the case was continued. Prior to the next

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50 Id. It is hoped that this would reduce the number of claims for relief and all but eliminate the frivolous ones. Counsel should advise the prisoner of the risks inherent in filing the petition: it endangers eligibility for parole and if successful the relief is usually limited to a new trial and the danger of a higher sentence.

2 87 S. Ct. 988 (1967).

3 *E.g.,* *Pointer v. Texas,* 380 U.S. 400 (1965) (sixth amendment right to confrontation); *Malloy v. Hogan,* 378 U.S. 1 (1964) (fifth amendment privilege against self incrimination); *Gideon v. Wainwright,* 372 U.S. 335 (1963) (sixth amendment right to counsel). These decisions, like the instant case, are part of a continuing pattern which is apparently directed towards complete imposition of at least the guarantees of the first eight amendments upon the states by declaring them to be a part of the fourteenth amendment. For a discussion of how, if at all, this operation should come about, see *Palko v. Connecticut,* 302 U.S. 319 (1937).

4 "To be enforced against the states under the Fourteenth Amendment according to the same standards that protect these personal rights against federal encroachment." *Malloy v. Hogan,* 378 U.S. 1, 10 (1964).