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In the

Supreme Court of the United States

JAMES R. JAMES, Judicial Administrator, State of Kansas,

Appellant,

vs.

DAVID E. STRANGE,

Appellee.

No. 71-11

Washington, D. C.
March 22, 1972

Pages 1 thru 46

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v.	:	No. 71-11
DAVID E. STRANGE, Appellee.	:	

Washington, D. C.,

Wednesday, March 22, 1972.

The above-entitled matter came on for argument at 1:34 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice.
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

EDWARD G. COLLISTER, JR., ESQ., Assistant Attorney General of Kansas, State House, Topeka, Kansas 66612; for the Appellant.

JOHN E. WILKINSON, ESQ., 1000 First National Bank Tower, Topeka, Kansas 66603; for the Appellee.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments next in No. 71-11, James against Strange.

Mr. Collister, you may proceed whenever you're ready.

ORAL ARGUMENT OF EDWARD G. COLLISTER, JR., ESQ.,

ON BEHALF OF THE APPELLANTS

MR.COLLISTER: Mr. Chief Justice, and may it please the Court:

This is one of those cases that, in attempting to characterize what you're doing to your colleagues back in the office, you have a little bit of difficulty identifying exactly what it is, because I hate to refer to it as the Strange case.

What it is is a direct appeal from the three-judge court sitting in the District of Kansas, which declared unconstitutional and enjoined the future enforcement of a statute passed by the 1969 Kansas Legislature. The statute involved, K.S.A. 1971 Supp. 22-4513, is a part of the Aid to Indigent Defendants Act, passed in that year by that Legislature.

I think what happened to generate the passage of the entire Act was that the confusion that existed with regard to the manner and method of not only determination of indigency for the purposes of appointing counsel in criminal cases, but also the method of payment of counsel in some fashion, caused the Legislature to pass a rather comprehensive Act. And that

Act provides for the establishment of a board of supervisors to govern the administrative work of the system, which is administered directly by the State's judicial administrator, Mr. James.

The board of supervisors is authorized to cause to be accumulated a panel of attorneys in the various districts, and to formulate rules and regulations for the implementation of the Act.

Once the panel of attorneys is formulated, any district judge or magistrate may rely on any attorney on that panel for providing counsel to those who he finds indigent and requiring counsel.

The challenged portion of the Act provides that when any expense has been advanced or paid by the State on behalf of somebody who has been found to be indigent, the State is allowed an opportunity to cause repayment, at least to be attempted. The procedure that is used in 4513, the repayment statute, is that the judicial administrator causes a notice to be sent to the person upon whose behalf the expenditure was made.

Q May I ask, what would the expense embrace?

MR. COLLISTER: The expense can embrace any amount of money expended under the Act for the provision of counsel --

Q Well, right there; is there a fee provided for counsel?

MR. COLLISTER: Is it set by the Act?

Q Or, in any event, do counsel -- are they awarded fees?

MR. COLLISTER: They are awarded fees. Currently what -- well, I shouldn't say currently, because this has been true through the history of the Act. Each year the judicial administrator, on behalf of the Supreme Court, proposes a budget to the State Legislature, which appropriates the money to fund the indigent programs. His estimate is really a guess, at least it was to start with. In any event, the money is appropriated, then the board of supervisors, which includes the judicial administrator and a justice of the State Supreme Court, determine rates of compensation. Currently the rates are figured at about $15 to $20 an hour; $15 an hour for out-of-court time, and $20 an hour for in-court time, with a maximum of $500 in any case not involving a sentence of life imprisonment or death.

In other words, for all practical purposes, everything but a capital case.

Also the statute authorizes the expenditure of funds to provide defense services, let's say, an investigator, I would assume the transcripts would be included although I have no State decision controlling that one way or another, perhaps experts, yes, sir.

Anything that the State is authorized to initially

provide on the indigent defendant's behalf under the Act, which covers the criminal trial, the post-conviction collateral attack, the appeal stages of the proceedings.

Q These are direct outlays now, --

MR. COLLISTER: Yes.

Q -- they do not include any overhead for the administration of the program?

MR. COLLISTER: I'm not sure that I quite understand the question.

Q Well, I gather there's a staff that administers this program, and they're salaried, and that sort of thing.

MR. COLLISTER: Well, the program is administered by the judicial administrator, who does not receive any direct compensation for performing that portion of his job through the Aid to Indigent Defendants fund. Whatever staff he has is funded separately. There are no additional employees, to my knowledge.

Q They're employees of the State, are they?

MR. COLLISTER: Yes, sir.

Q Just receiving a salary from the State.

MR. COLLISTER: Yes, sir.

Q And the lawyers appointed, by contrast, are private practitioners who are appointed for a particular case and then get compensated by the State?

MR. COLLISTER: Yes, sir.

Q We don't have here a State Legal Aid organization?

MR. COLLISTER: No, sir. There is a statutory authorization for a State Public Defender system, but, to my knowledge, that has not been implemented by the State. There are two Public Defender offices, but they are funded through a federal grant, through federal Safe Streets Act money.

Q Right. Is this -- under the statute this is collectible equally, where the defendant is acquitted or convicted, is it?

MR. COLLISTER: The statute appears to read that way, yes, sir. There is no State decision interpreting any aspect of the statute handed down by the State Supreme Court; whether they would read some exceptions to those defendants who were acquitted into the Act, I do not know.

The statute applies equally across the board.

Q I'm familiar with the system of at least one State, at least the way it used to be, where if the defendant was acquitted that was the end of it and the State absorbed the cost. But if he was convicted, he was supposed to pay off the cost over the period of his time.

MR. COLLISTER: Our research disclosed, I think, several States where that was the case.

Q I suppose an equal protection attack could be made upon that kind of a system.

MR. COLLISTER: I would expect it.

I think, regardless of what the statute in its current form provides, under the district court's decision, the three-judge court, the State would be prohibited from taking any kind of action to allow reimbursement or recoupment, because what the three-judge court decided -- and if I may refer to the -- the court's opinion is printed in the Jurisdictional Statement, in the appendix to the Jurisdictional Statement, and I would like to refer to pages 7 and 8 of the appendix, where the three-judge court, on page A7, says:

"Hence any construction of the Kansas statute which leaves intact the State's right to recover legal expenses from indigents is a construction which inevitably impinges upon and determines [sic: undermines] the rights protected in Gideon."

And the same reasoning is employed on the next page, leading us to conclude that whatever form the State might have enacted or might choose to enact in the future would, under that philosophy, be an unconstitutional burden on the right to counsel.

This action was filed in the Federal Court on behalf of a plaintiff, David Strange, who had been charged with a felony crime in the district court, ultimately in the District Court of Shawnee County, Kansas; Topeka, Kansas.

He received the letter of demand from the judicial administrator, notifying him of the State's claim as a result

of a direct outlay of $500 to his court-appointed attorney, Mr. Wilkinson.

At that time the Federal Court action was filed and ever since then the State in that case has agreed to not proceed any further; and when the district court handed down its decision, a permanent injunction restraining any enforcement of that provision of the statute was also ordered.

Q Now, I gather, in this case, the only expense was the $500 paid the attorney?

MR. COLLISTER: That's my understanding, yes.

Q Yes.

MR. COLLISTER: The issue, as we see it, is one that's a little bit -- for me to verbalize, the issue stated in the brief is as follows: Whether the existence of a State statutory procedure, providing for the collection from an indigent defendant of moneys expended by the State to furnish him counsel, constitutes an unlawful burden upon an indigent defendant's Sixth Amendment right to the assistance of counsel.

Now, that's pretty wordy. But it's difficult to approach the subject without having to do a little bit of defining of what we're talking about.

The State has attempted to treat all those who are found to be indigent equally, with regard to this particular statute. The State has attempted to treat them the same as would any civil judgment debtor be treated in the State courts, with

one possible exception, and that relates to the exemption. The exemptions for a civil judgment debtor in the State are a little bit broader than those under the Aid to Indigent Defendants Act, and the statute specifically defines what exemptions are available and what are not. Primarily the exemption is the homestead exemption.

The statute is much broader, however, than simply allowing the State to take a judgment against the person found to be indigent, because it authorizes, in effect, the setting aside of a fraudulent conveyance and the establishment of a lien against any property that might have been transferred by the indigent prior -- or, excuse me, subsequent to the time the crime was committed.

In trying to define what the precise issue that the lower court treated, the three-judge court, we have to look to the Sixth Amendment, which provides that in all criminal prosecutions the accused shall enjoy the right to have the assistance of counsel. And the precise question we ask is: What does it mean when it says "the right to the assistance of counsel"? Does it mean that the State has to provide free counsel? Because that's adding a word that's not in the Constitution.

And in the decisions of this Court, relating to the right to counsel, when this Court speaks in terms of protecting the Sixth Amendment right to counsel by providing counsel, or

seeing that the defendant at a criminal trial has the opportunity to be heard by counsel, does that mean that the State has to bear the expense of providing that counsel under all circumstances?

It is the State's position that at the time the criminal defendant is tried in the State of Kansas under the Aid to Indigent Defendants Act, the constitutional right to counsel is protected.

Q It's protected to this extent: that if I ever get money any time in my life you're going to take $500 away from me.

MR. COLLISTER: It is protected in that manner with the same limitations that exist with regard to any other civil judgment, as to time period, yes, sir.

Q We're not talking about civil cases, we're talking about criminal cases.

MR. COLLISTER: I understand that. The same --

Q And Kansas, I assume, is in the business of rehabilitating prisoners?

MR. COLLISTER: Yes, Your Honor.

Q And so after the man has served his time and comes out, and he says, "Well, I think I'll get a job." And then he remembers: "no use me getting a job because I'm going to have to give that money to the State." Does that help his rehabilitation?

MR. COLLISTER: I don't know that I can qualify as a penologist. I think what it does do is create an impression with him that there are certain consequences of his acts, other than the mere commission of the crime and, as in this case, achieving a status of probation just as the person who did not qualify as an indigent and did have some financial consequences. They did hurt him. That he did have to remember, because he had to purchase the services of counsel, would remember the same thing.

Q He's paid that; his services, he's paid for that. But this is --

MR. COLLISTER: If he has, yes, sir.

Q But in this case he's told that "We'll give you counsel, but if you ever get your hands on a buck, we're going to make you pay for it."

MR. COLLISTER: Well, the statute provides that that will occur if --

Q If he gets a buck.

MR. COLLISTER: Within a five-year period. I mean --

Q If he gets a buck.

MR. COLLISTER: Within five years. And the State can collect it.

Q The State will collect it.

Q Mr. Collister, let's take an extreme case. Suppose he inherits a million dollars next week? You would

expect him to pay that 500?

MR. COLLISTER: Yes, sir.

Q Or suppose, another hypothetical case, that at the time of his arrest or his trial, it developed that he had $500 in the bank saved up. He wouldn't get the free service then, would he, necessarily?

MR. COLLISTER: Well, that's a -- in practice, I think that's a lot more difficult to answer than it would appear. My impression would be that he would not if he could afford to use that money for the services of an attorney. Of course he would claim that he couldn't use that money for the services of an attorney; or that he wasn't sure that that much money would be enough, because the attorney who represented him on a retainer basis might say, "I'll charge you on an hourly basis."

Practically, whether or not that would in fact occur, I think may be debatable; but as a matter of abstraction, I would think that that would be the case.

Q And if he hires a lawyer for $250, and he inherits a million dollars, that lawyer can't get another 250 from him, can he?

MR. COLLISTER: No, sir. I'm assuming that they have a set agreement that he is to receive only 250, not something dependent upon his acquiring money.

Q Do you think this -- does this help in guilty pleas?

MR. COLLISTER: I don't -- I don't have any statistics that would lead to a conclusion one way or another. My guess is not, because I do know that we're trying a lot more cases than we have in the past, generally.

Q Who sets the fee? Certainly the defendant has no say in the amount of the fee, does he?

MR. COLLISTER: The Claim is made by the attorney to -- which has to be approved by the judge who presided over the case, did the appointing in the appointing hearing; the claim is then submitted to the judicial administrator to present to the panel that supervises the entire operation of the Act.

Assuming that the rate that is then in existence is followed, that's approved.

Q What I had in mind was -- I don't know that your brother on the other side makes this argument, or that the court did the decided this case; but normally in a -- when a defendant is not an indigent, at least there is or might be some negotiation with his own selected lawyer as to the amount of the fee. And while he may not be in a very good bargaining position, at least he may negotiate a fee. And here the fee, the amount of the fee, is entirely beyond his control. He's not consulted about it at all; and presumably, again to take a hypothetical case, Kansas might decide to pay lawyers $10,000 for this job.

And I know in the Act you say it's limited to 500,

except in non-capital cases, but -- or they might decide to pay $500 for ten minutes' time.

MR. COLLISTER: There are --

Q And then just automatically charge the defendant that amount, that he would not have had anything to say in.

MR. COLLISTER: There are conceivable situations which might be subject to a different kind of attack than the present statute, where an unreasonable amount was charged.

Q There's no claim that this amount is unreasonable, I gather, in this case, or that the general fee schedule is -- or fee system is unreasonable?

MR. COLLISTER: I don't believe so. And, furthermore, the basis of the three-judge court's decision was that any attempt, regardless of whether it was five percent of what the regular minimum fee schedule would be, would be an unconstitutional burden on the exercise of the right to counsel.

Q Of course, I suppose present counsel isn't in a very good position to challenge that reasonableness of the fee.

[Laughter.]

Q Mr. Collister, does the existence of this recoupment statute in Kansas tend to reduce in any way the type of inquiry or the extent of inquiry initially made by the trial court, when the defendant claims to be indigent does the trial court feel freer to conclude that he is indigent without any searching

examination because of the existence of the recoupment statute?

MR. COLLISTER: Well, again, I don't have -- that's not a -- my answer can't be documented; but my assessment of what is occurring would be that because of other reasons our judges are getting much more careful about examining persons who allege they are indigent for the purposes of appointing an attorney. And the primary reason is that the increase in the number of representations by attorneys in court-appointed cases has increased so much in the last three to four years that our courts are becoming very -- are much more seriously inquiring as to the indigency status than they ever did before.

And that approach is implemented even more by the statute, which,the current statute which, in another -- current Act, excuse me, which, in another provisions, specifically authorizes the trial judge, if he wishes in his discretion, to require the indigent applicant to file an affidavit setting out certain information concerning his finances.

So my guess is that there is more inquiry going on right now.

Q But not because of the recoupment statute?

MR. COLLISTER: Correct.

Q Mr. Collister, you mentioned the fraudulent conveyance provision in the statute. Has there been any experience in Kansas, to your knowledge, that suggests the Legislature was motivated, in the enactment of this statute,

by conveyances being made to enable individuals to take advantage of free legal counsel?

MR. COLLISTER: Not to my knowledge. I have been in the Attorney General's office for four years, and I have not heard of anything that has caused the Legislature to become -- to react in that fashion. I suspect that what has happened in our State, as has happened in so many other places in the last three to five years, is that every year we get into a continual fight in the Legislature about who is going to get what money is available, and how we're going to get that money.

And, as a matter of fact, it was reflected in this very same Act, in 1971, when the Legislature almost refused to expend any money to the judicial -- to appropriate any money to the judicial administrator to administer under the Act.

I suspect that what they were concerned about was trying to recover as much money as they could, and there has been some recovery, and I recognize that that recovery is not very much compared to the total expended.

Q $17,000 in two years, as I recall.

MR. COLLISTER: The period of time that the recoupment provision has been in effect was from approximately July 1 of 1969 through the first part of 1971, when the three-judge court declared the statute unconstitutional. There's been no attempted collection since then.

So it's about one year and eight or nine months.

I don't know how effective the provision would be to collecting a greater sum of money because we haven't had that much experience, to be quite honest about it.

Q I'm not sure I followed your figures. What was the amount recouped in that period of time?

MR. COLLISTER: Approximately $17,000.

Q About a thousand dollars a month?

MR. COLLISTER: Roughly.

Whether or not the work that had to be done by the judicial administrator, the Attorney General's office, and the county attorneys in the State justifies that kind of recovery may be debatable, but that's the province of the Legislature, to decide what policy it wants to implement as long as it, of course, doesn't violate the Constitution.

Our feeling about the subject matter of the district court's opinion is that the right to counsel, the opportunity to be heard by counsel is granted and implemented by the Act. We've reviewed decisions of various courts. We find very few in point on this particular issue.

The California Supreme Court has held that you can't, as a condition of probation, require reimbursement of moneys expended, making much the same argument that is made in this case.

The Iowa Supreme Court, in dicta, indicated that if the State Legislature would adopt a statute -- I'm assuming

that it would be similar in substance to ours -- that the State could recover money.

The Ohio Court of Appeals has allowed a similar procedure in Ohio.

But other than that -- the Supreme Court of New Hampshire has rendered an advisory opinion that, the way I read it at least, indicates that under their State Constitution, which is different than the Constitution of the State of Kansas, the State has to provide free counsel; because of the wording of the New Hampshire Constitution.

That is about the sum total of the precedents that we're able to present; that either side is able to present, for that matter.

The issues, as seen by the three-judge court, were, one, whether or not the right to counsel encompasses an absolute requirement that the State provide free counsel as opposed to allowing the opportunity be heard by counsel; and, secondly, whether or not the statute imposes an unconstitutional burden on the exercise of a constitutional right.

Directing my attention to the latter of those, whether or not the burden is needless or unreasonable; in part those have to be, in this kind of a case I think, determinations of the Legislature: whether this kind of a policy is justified with the obvious time and trouble that State officials have to go through.

Q What comment do you have on the reasoning of the district court that the statute deters indigents from exercising their right to the assistance of counsel? Because it puts the accused in the position of deciding whether he can afford to consult even with court-appointed counsel. Because the accused has not the means to hire an attorney in the first instance, he will not be in a position to accept court-appointed counsel when it merely means that he has, at most, ninety days' grace in paying the cost of the legal services rendered on his behalf.

What's the ninety days?

MR. COLLISTER: The ninety days is after the notice is sent.

Q Well, when is the notice sent?

MR. COLLISTER: Excuse me.

[Conferring with co-counsel.]

The judicial administrator has thirty days in which to send out the notice, and then the --

Q Thirty days from what date?

MR. COLLISTER: The date the money is expended.

Q Oh, the date of the payment up here --

MR. COLLISTER: Yes.

Q -- the $500.

MR. COLLISTER: Which may come after the final action in the criminal case. It usually does, as a matter of

fact. And then when he --

Q When he's convicted, he's probably serving a term; he's in prison?

MR. COLLISTER: Or on probation.

Q Well. Let's assume he's in prison. And he was indigent when he went to trial, he has no money, and now he gets a notice, after the lawyer has been paid, that he must do what? Pay within --?

MR. COLLISTER: Within sixty days.

Q Well, obvously, he can't pay.

MR. COLLISTER: And if, in fact, he does not pay, a judgment is taken against him.

Q And then interest runs on that judgment?

MR. COLLISTER: Interest runs on the judgment.

Q And he's really helpless to do anything about it because he's been indigent all along? Assuming now he's got to --

MR. COLLISTER: Assuming that he's been indigent all along.

Q -- have counsel and this has been allowed.

MR. COLLISTER: Yes, sir.

Q He was appointed counsel because he was indigent.

MR. COLLISTER: At some time prior, he was; whether anything intervenes or not --

Q Yes.

MR. COLLISTER: I will assume that it did -- in most cases it doesn't.

Q I would think not. In, I guess, most of these cases he's indigent when he gets counsel, he's indigent when he's tried, he's indigent when he's convicted, he's in prison; as an indigent, he doesn't have a nickel.

Now he gets a notice that he must pay within sixty days, otherwise a judgment is entered, with interest to run against him?

MR. COLLISTER: That's correct.

Q Then why isn't that observation of the three-judge court sound?

MR. COLLISTER: That this statute, as it exists, creates an impediment to his choice.

Q Not to his choice, that isn't what I --

MR. COLLISTER: To his choice whether to accept appointed counsel.

Q Whether he can afford even to consult with court-appointed counsel.

MR. COLLISTER: Well, I have to admit that that's --

Q He'll not be in a position to accept court-appointed counsel, and it merely means that he has at most ninety days' grace in paying the cost of legal services rendered in his behalf.

Q On the other side of the coin, of course, is

that he can very well afford it if, we assume, he's going to remain indigent. The helpless party is the State, not the indigent. Because they will never collect a nickel.

MR. COLLISTER: That's also true. My thought about the question that Mr. Justice Brennan asked was: if that, in fact, is true, then our entire system of appointing -- excuse me, then our entire system of requiring representation of counsel in criminal cases is unconstitutional for all cases, except those who, unlike myself, are wealthy enough to afford any lawyer that they want to afford.

Q But, generally, if he pleads guilty, he doesn't have to wrry about it?

MR. COLLISTER: If he pleads guilty, he --

Q He has the right to counsel there also.

Q If he waives his right to counsel, and signs an affidavit waiving it, and pleads guilty, you can't collect a nickel from him; right?

MR. COLLISTER: If nothing has been expended, yes, sir. We can't --

Q So that's one way of saving 500 bucks.

MR. COLLISTER: Yes, it would be.

Q Another way would be to plead not guilty and waive counsel, wouldn't it?

Q And that's what I gather the three-judge court is talking about. In that circumstance, to say: Then I'll not

take counsel if I've got this burden on my back, if I'm convicted and I come out, I'll just try the case on my own.

MR. COLLISTER: That is a possibility, yes, sir.

Q Do you know how many people have refused counsel since this plan went into effect?

MR. COLLISTER: To my knowledge -- I don't have any personal knowledge either way.

Q I'd be surprised if anybody had!

MR. COLLISTER: To my knowledge, none.

Q I would take judicial notice of the proposition that people in those circumstances don't give it any thought one way or another, whether at some future date they may be called upon to pay $500.

Going to another event, if the man is going to plead guilty and, of course, as Justice Stewart said, he must have counsel, he's going to plead guilty, that doesn't necessarily mean he's going to have a $500 fee to consult about a guilty plea, does it? He's paid, you said, $15 an hour.

MR. COLLISTER: That's correct, he's paid -- the attorney is paid on an hourly basis.

Q So his bill might be --

MR. COLLISTER: With a maximum.

Q -- ninety dollars or $125, not 500?

MR. COLLISTER: That's correct. And the rate is much below that which is charged in metropolitan areas of

Kansas on the minimum --

Q So that Kansas sues him for the 500?

MR. COLLISTER: Yes, sir.

Q Does Kansas name a lawyer to represent him?

MR. COLLISTER: I don't think there's any provision for that; no, sir.

Q Well, does Kansas sue him, or is the judgment entered by confession?

MR. COLLISTER: The judgment is entered, in effect, by confession, and then it is enforcible by the State in a proceeding.

Q And then tell me, what is your Kansas system? What is that judgment of lien against, and how long is it valid as a lien?

MR. COLLISTER: The judgment is a lien against -- let me approach that question by answering it this way: The judgment is treated almost exactly the same as would any judgment in a civil case. It is a lien against all property that a civil judgment would operate against. The homestead exemption exists. The lien exists for five years, unless execution is issued. If execution is not issued, it becomes dormant and is subject to revival within a two-year period, just as are all civil judgments, which are liens.

Q So if the man remains indigent, if he was truly indigent in the first place, remains indigent, the judgment

really doesn't have much effect then?

MR. COLLISTER: That's correct.

Q Well, suppose he gets a 20-year prison term, and I gather the State has to give him the 60-day notice; he's in prison; he's still indigent. And then within two years the State has to sue him, is that right?

MR. COLLISTER: Well, --

Q It says: No action shall be brought against any person under the provisions of this section to recover for sums expended on behalf of an indigent ..., unless such action shall have been filed within two years after the date of the expenditure from the fund to aid indigent defendants."

MR. COLLISTER: I think that provision relates to the suit against the person to whom property has fraudulently been transferred.

Q Only to that one?

MR. COLLISTER: Yes, sir.

Q I see. Well, then, --

MR. COLLISTER: Otherwise the judgment, when it's filed, would operate as a lien for five years, just as --

Q Well, if he had a 20-year term, the lien runs out while he's still serving his term?

MR. COLLISTER: Yes, sir.

Q So it's to his interest to get a long prison term!

[Laughter.]

MR. COLLISTER: I see that my time has run out. I don't have anything further to say. We tried in our brief to cite the authorities we found available in similar or analogous statutes in other States comparable to ours.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you.

Mr. Wilkinson.

ORAL ARGUMENT OF JOHN E. WILKINSON, ESQ.,

ON BEHALF OF THE APPELLEE

MR. WILKINSON: Mr. Chief Justice, and members of the Court:

I suppose that I am the one who failed to tell David Strange that I wasn't free court-appointed counsel, and consequently I have felt morally obligated to carry his cause pretty much at my expense.

When I first confronted David Strange in the jail, I was under the impression that I was free court-appointed counsel. And had the statute been called -- had I known about the statute at that time, the state became effective July 1, I think I was called on July the 10th, 1969, some nine days later, ten days later, I perhaps would have done essentially the same thing I did after I pled David Strange guilty under ex parte law, which I believe Justice Brennan cited in Fay vs. Noia.

I would have attempted to stop the criminal proceedings at that time, because, contrary to what Mr. Chief Justice Burger has said, he thought he could take judicial notice of, I think it's important for a young man to be advised, and particularly in this young man's circumstances where he's guilty, committed his first offense, to be given a chance again. And that's what he's been grappling with in his own situation. He's from a family of eleven children.

He had a brother who was in the hospital for the criminally insane, who set a bad example for him when he ran away from the State hospital, and got him into trouble in this case.

After I pled him guilty to this offense, David Strange got a job, and he's working today. He's had a marginal existence. He does not need this $500 judgment or any judgment against him. But he's gainfully occupied. He's taking care of his wife, he's taking care of his baby. This $500 judgment, at the time it was to be levied against him, on February 4, 1970, I believe, would have put him in the ranks of the people who could not honestly apply for a job, because he was judgment material, he was legal-fee material.

His work would have required -- this judgment against him would have caused his employer to expend legal fees on his behalf, just to meet garnishment problems.

Now, the State says, and has said all along, that

there is only the five years involved. But they can renew this judgment by a simple matter at the Clerk of the District Court's office. So whether he has five years or twenty years, it's a matter of levying execution, returning the execution unsatisfied.

Q Do you think this statute really puts the lawyers to the option of telling his client all this, or saying "I won't take the 500"?

MR. WILKINSON: I think it would behoove the lawyer to render this advice, and I wouldn't want to impose that burden upon any judge, because I think in making --

Q Well, I take it, you don't get the allowance without applying for it?

MR. WILKINSON: That's right. That's right, Your Honor.

Q So if you had not applied for it, if it had not been allowed, no judgment against the man would ever have been entered?

MR. WILKINSON: Yes, there --

Q That's not a very nice position to be in, I take it?

MR. WILKINSON: That's right; it wasn't.

And I thought about it at considerable length before I decided to go ahead and file my voucher for payment of my services.

Q Mr. Wilkinson, before the enactment of this

statute in your State of Kansas, what was the system? Did lawyers appointed to defend indigent criminal defendants serve without pay, or were they paid by the State with no recoupment?

MR. WILKINSON: No, they were paid for by the county, as an expense of the county.

Q By the county.

MR. WILKINSON: The Board of County Commissions allowed -- set aside a sum of money for counsel for the indigent defendants.

Q And then without any recoupment?

MR. WILKINSON: Without any recoupment.

Q And this was the first Statewide State law on this subject, I believe?

MR. WILKINSON: Yes, sir, it was a reaction to Gideon vs. Wainwright.

Q Before that, was there disparity, were there variances with the way the various counties handled it?

MR. WILKINSON: Well, I would think so. I would think there would be some instances where, if a man was on probation, that a judge might say, "You pay back a certain sum of money to your attorney."

But you see this particular statute starts out prior to the time you really learn the circumstances of the indigent accused. The accused stands charged. You don't know whether he's going to get probation, whether he wants to

contest any of the actions of the police, whether or not he really wants to have a jury trial, whether or not he wants to confront his witnesses, whether or not he wants to cross-examine the State's witnesses. This has all been ahead of time.

And, as you pointed out earlier, he has no opportunity to determine what the amount of his judgment might be unless someone advises him in advance, which didn't happen.

Q But there are controls over the amount, as explained to us by your brother here?

MR. WILKINSON: Yes. Yes, sir, and in answer to one circumstance, I do know that there was a substantial judgment against an accused after trial in Shawnee County. He decided he would go ahead and contest the charges against him, and he was ultimately acquitted, and then he was saddled with the judgment.

Q He was saddled with the judgment?

MR. WILKINSON: With the judgment.

Q But after -- what -- a matter of $500, unless it was a --

MR. WILKINSON: I think --

Q -- capital case.

MR. WILKINSON: He says a maximum of $500, but there is an allowance in special circumstances, depending on what the judge will allow and what the Board of Supervisors will

allow.

Q Well, the County Board is still in the picture?

MR. WILKINSON: No, the county is not; it's a State Board.

Q State Board of Supervisors?

MR. WILKINSON: Yes, sir. And I did not contest that, but the judicial administrator and one Supreme Court justice and -- who's the other one? There are three of them.

Q But it's a State agency.

MR. WILKINSON: They sort of act together, primarily through the advice of the judicial administrator.

Q After this statute went into effect, Mr. Wilkinson, if you know, could you tell me whether the number of appointments went up or went down, as compared with the graph, if you were graphing it, prior to the Act?

MR. WILKINSON: I would say that it stayed essentially the same. The need for counsel in a serious offense, as set down by Gideon vs. Wainwright, was recognized by the courts, and that, as much as anything, determined that there should be counsel appointed; but not the statute. It didn't have anything to do with the statute, I don't believe.

Q Mr. Wilkinson, does Kansas, the State bar of Kansas have a recommended minimum fee schedule?

MR. WILKINSON: Yes, sir.

Q How did the limits on the fees recoverable under

this Act for representing indigents compare with the similar recommended fees in the Kansas State bar's schedule?

MR. WILKINSON: I would say that it's less than half for what I work for.

There is quite a bit of movement among the lawyers in the Legislature to do something about that, and I would suspect that over the course of time, as they pay out more money for fees for contract architects and consulting engineers, and things of that nature, that we attorneys will finally get paid a reasonable fee also.

Gideon vs. Wainwright, I don't want to lose sight of that, because I feel like the finding of the three-judge district court was correct, that if the statute was not to deter the accused from exercising basic rights, that it's needless, it's not necessary for our democracy to work. We must have a point of emphasis here.

A real finding that, for the poor who are in a free society, we must provide free counsel. I don't believe that's asking too much of our society.

Q You're now addressing yourself to the policy question, are you not?

MR. WILKINSON: Yes, sir. Yes, sir.

Q I think you'd probably find universal agreement on that as a matter of policy, that it's certainly desirable. But does that reach the constitutional issue that is involved

in this case, of the recoupment?

MR. WILKINSON: Well, I don't think that you can separate the two. I believe recoupment to be a, in this particular instance, to be somewhat the deterrent of the exercise of basic, fundamental rights.

I want to adhere to that policy. I feel that the recoupment provision is a means of control, supposedly, of holding down an accused, an indigent accused, in exercising basic rights. I firmly believe that.

Q Mr. Wilkinson, help me out on another aspect of deterrence. Suppose that your client here, Mr. Strange, were not an indigent but he was just above the indigency level, and he had a fairly large family to support. Do you think the fact of incurring legal fees to defend him in a legal case might deter him from pleading not guilty and, rather, push him into pleading guilty to get it over with?

MR. WILKINSON: Yes, sir, I do. I think that --

Q How do you square his situation with that of Mr. -- the actual Mr. --

MR. WILKINSON: The actual Mr. Strange?

Q Right.

MR. WILKINSON: Well, as far as squaring the person who has income just above the poverty line, I think probably the best way that that is provided for in the statute is through the judge's interrogation as to finding out what this man has

in the way of a family, what his needs are. And then, after the judge has made this judicial determination of indigency, then he's afforded free counsel. I think it's within the judge. I don't think I'm begging your question.

Q Maybe we just come out to the point where there are some inequities built into any system, somewhere.

MR. WILKINSON: I think so. I think that the best way is give them free counsel, then they will --

Q The best way is to give the true indigent free counsel and let the just-barely-over-the-indigency-line sink or swim?

MR. WILKINSON: Well, I know that Judge Templar, my ex-boss, in a similar case in criminal court gave free counsel to a man who was making right at $13,000 a year; making a determination that he had ten children, that it was more important for him to have the counsel in this case, free counsel in a federal district court case.

In the normal circumstance, you wouldn't determine that this man, making that kind of money, would be poverty-stricken. But still in need of counsel; indigent in the legal sense, I suppose. And that's up to the judge to determine.

After that determination has been made, I feel like it's in society's best interest to make it free, to make these rights viable.

Q Do you know of any statutory definition of

indigency?

MR. WILKINSON: The National Defenders' Association -- and I have to apologize to the Court, I didn't know enough about amicus curiae procedures to get this in ahead of time -- they have analyzed all these statutes that talk about poverty levels. And if you don't have it, I have one copy of it, if you'd like it.

Q You may leave it with the Clerk.

MR. WILKINSON: Yes.

Q You may hand it to the Clerk later on; you can do that afterwards, and he will prepare copies for us.

Q Mr. Wilkinson, --

MR. WILKINSON: Yes, sir.

Q -- you state in your brief that this statute has had a chilling effect on the use by indigents of counsel. Is there anything in the record to support that?

MR. WILKINSON: In this particular case?

Q Yes.

MR. WILKINSON: No. Because, you see, I didn't advise him that he was going to have to pay me back.

Q Well, what is the basis for the statement in your brief to that effect?

MR. WILKINSON: In my brief, it's in the district court's finding; that's what they found in their decision, Mr. Justice Powell.

Q They made a finding without anything in the record to support it?

MR. WILKINSON: When I filed -- I would say, to some extent, that's true. When I filed this case, I thought it was going to be a simple little matter, because I had not given this person notice that a judgment was about to be rendered against him, and neither did the magistrate judge, and neither did the district judge. I thought I was going to be proceeding on the basis of due process notice.

And it was admitted in the Stipulation of Facts that there is no notice given to the indigent accused. I did not contemplate that the court would keep this matter under advisement over a year, and make a decision later on on the basis of some chilling effect.

Q But nothing in the record on this subject?

MR. WILKINSON: There's nothing in the record that he ever had notice, either; and I don't want to lose David Strange's case. I did not cross-appeal, but I don't think that it's necessary to cross-appeal in a situation where the judgment may have been based on some wrong reasons.

And I bring this up in my motion to dismiss, after the jurisdictional statement was filed, that, sure, we go along with the chilling effect, and I can understand that from my own experience. But that's not in this record. But no notice to this indigent accused is in this record.

Q The record does not show the number of indigents who have been provided counsel in the last two years since the statute became effective?

MR. WILKINSON: No, the record does not show. I believe I have some statistics on that, that I can give to the Clerk.

Q From Kansas?

MR. WILKINSON: From Kansas.

I was going to put them in, but I thought that $17,000 would not -- it doesn't look like even a good deal for the taxpayers.

Q And Kansas may well decide, in a short time, that it isn't worth a candle and give up the whole idea; is that possible?

MR. WILKINSON: Well, they may decide, particularly if this decision stands, they --

Q No, I'm talking about --

Q They have no choice, then.

Q They have no options. I'm talking about independent of any judicial action. If they collect an average of a thousand dollars a month, it certainly must cost them something to collect it, administratively; but after a while, if they are let alone, Kansas could conclude that this was an interesting experiment and abandon the whole idea.

MR. WILKINSON: Except that the Attorney General

would probably testify: Well, this helps keep down problems in courts. We can get more guilty pleas, and we can keep better control over them.

Q But there's no evidence in this record that that's happened, is there?

MR. WILKINSON: No, sir.

Q Mr. Wilkinson, I have great problem with this no notice business. You knew about it.

MR. WILKINSON: I knew about the statute, you mean?

Q You're presumed to have known about it.

MR. WILKINSON: Yes, sir. Yes, sir, there's an exemption --

Q Isn't that a problem for you?

MR. WILKINSON: It is a great problem for me, because I was presumed to know the law, and did not -- and he was -- the indigent accused was presumed to know the law; the magistrate judge was presumed to know the law; the district judge was presumed to know the law. And this indigent accused didn't get any notice at all, other than constructive notice.

Q But I should assume that the magistrate and other people would assume that the lawyer would tell him what the law was.

MR. WILKINSON: I think that would -- you could assume that, if that were the actual case. I think the due process notice, however, talks about actual notice and not

constructive notice; not assumptive notice.

Q On December 22nd, 1969, were you in court and asked -- in terms of what the terms of probation should be?

MR. WILKINSON: Yes, sir, I went ahead at that particular time and asked the judge to waive this statute in the indigent accused --

Q Was the indigent in court then?

MR. WILKINSON: Yes, he was.

Q Well, you, the assigned counsel asked district judge to enter an order not requiring the defendant to pay back?

MR. WILKINSON: That's right.

Q And so he knew about it then?

MR. WILKINSON: After the fees had already been earned, so to speak.

Q After they had been earned, but there hadn't been any judgment entered yet?

MR. WILKINSON: No, sir; and the judge said he didn't have any authority.

Q Well, I know, but there hadn't been any judgment entered yet, --

MR. WILKINSON: Yes, sir.

Q -- although he had had notice before that by mail that he's supposed to pay it?

MR. WILKINSON: Not at that time -- well, yes, sir,

he did --

Q On December 9. 1969, they sent a notice to him?

MR. WILKINSON: Right. He had notice --

Q So, he had notice before there was any judgment entered?

MR. WILKINSON: That's correct.

Q What is your due process contention? What other notice should he have had, do you say?

MR. WILKINSON: At the time, he was to be afforded, or provided court-appointed counsel.

Q Well, that's simply a question of knowing the substantive basis on which a judgment might ultimately be entered, isn't it?

MR. WILKINSON: But he didn't know that.

Q Well, but have any of our cases ever held that specific notice of a substantive provision of a particular law must be given to an individual before he can be made subject to it?

MR. WILKINSON: I think Walker vs. City of Hutchinson -- a due process and eminent domain case -- does not actually --

Q But that was a lien foreclosure. There was an action against a particular piece of property, wasn't it, in Walker?

MR. WILKINSON: Yes, sir.

Now, I think you're talking about essentially, not

property as such, but you're talking about a person's ability to make his way in society.

Q Mr. Wilkinson, I suppose in this lawsuit you're on your own?

MR. WILKINSON: Yes, sir.

Q I notice in your motion to dismiss the appeal filed here, you did indicate to us that the primary issue before the three-judge court, as you saw it, was whether or not David Strange had been given notice at the time counsel was appointed for him that he would be charged with paying that counsel, in the event he ever had any money; and that was a matter that the three-judge district court eventually just simply disregarded.

MR. WILKINSON: Yes, sir.

Q So I suppose if we should -- in the event that this Court decided that the district court was wrong on the constitutional issue it did decide, we should remand it to the three-judge court to decide the questions that you really thought were the primary questions in the case?

MR. WILKINSON: I think that that would be the case, Your Honor, because it was brought up before them. I don't think it's necessary, in view of the admission by the State that there wasn't any notice and that I had argued that I don't think it was necessary for me to cross-appeal.

Q Right. So there wasn't any deterrent in this

case, at least, that's clear?

MR. WILKINSON: Well, he had no notice. We don't know whether there was deterrence --

Q Well, if he did have notice he wasn't deterred; and if he didn't have notice he wasn't deterred.

MR. WILKINSON: I have to admit that there wasn't any deterrence in this case, and I --

Q So you must go -- so the three-judge court decided a case that wasn't before it?

MR. WILKINSON: Well, they -- I tried to --

Q And isn't the case you presented to them, anyway?

MR. WILKINSON: That's right. That's right. There was another case, there were other cases --

Q You were saying that he didn't know anything about what the law was, and that he shouldn't be saddled with a debt that he didn't know he was getting into?

MR. WILKINSON: That's right.

Q Well, I suppose you can, in arguing to the three-judge district court, though, make an argument that your client has been saddled with this $500 judgment and it's invalid, the law imposing it, because it would have a deterrent effect on other people.

MR. WILKINSON: Yes, sir.

Q Even though it may not have had on your particular client.

MR. WILKINSON: Yes. Well, --

Q Whether the court accepts that may be something else.

MR. WILKINSON: And that's what --

Q But that's your standing on it.

MR. WILKINSON: That's what the three-judge district court did.

Q Yes.

MR. WILKINSON: Yes. And I think justifiably.

Q You mean it's overbroad?

MR. WILKINSON: Well, I think they considered it sort of a class action: the accused and others similarly situated.

Then they took into consideration if they had another case that was --

Q They were more or less rendering a judgment at large, weren't they?

MR. WILKINSON: That's right.

I wanted to make just one statement about fraudulent conveyance, if you want to get talking about --

Q Was there any such problem in this case?

MR. WILKINSON: No, sir. It would seem to me that it would be unnecessary for the State to have such a statute, if someone makes a fraudulent conveyance under these circumstances, the State would have fraud practiced upon it, and

could exercise its common-law remedy.

This is another thing, Mr. Justice White, as to why they went into 3113(b), which dealt with fraudulent conveyance. But they declared the whole statute unconstitutional. I was really dealing with 3113(a).

I did include in my petition, included them both in my petition, that the facts of the case only relate to 3113(a), recodified as 4513(a).

Regardless of what you find the situation to be with the three-judge district court in making an overbroad decision, I want to reiterate that their decision -- that the decision of Gideon vs. Wainwright is sound, that this statute tends to impede and impinge and infringe upon that decision. When you take into consideration that we were bringing it for -- as the district court did, when we were bringing it for the indigent accused, this particular indigent accused and others similarly situated, that this three-judge district court was justified in finding on the basis of Gideon vs. Wainwright that he must have free counsel in order to provide him with a basic, fundamental right to counsel. A necessary fundamental right to counsel.

It's not, in my estimation, a right that needs any subtleties attached to it, as this statute does.

I urge the Court to uphold the decision of the three-judge district court and to reiterate again that in this

society we need to provide free counsel to the indigent accused.

I thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Wilkinson.

Thank you, Mr. Collister.

The case is submitted.

[Whereupon, at 2:34 o'clock, p.m., the case was submitted.]

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