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ATTORNEY GENERAL OPINION NO. 81-260

The Honorable Alfred G. Schroeder
Chief Justice
Supreme Court of Kansas
3rd Floor, Kansas Judicial Center
Topeka, Kansas 66612

Re: Criminal Procedure -- Aid to Indigent Defendants -- Board of Supervisors; Rules and Regulations

Synopsis: Under the provisions of K.S.A. 1980 Supp. 22-4504 (as amended by L. 1981, ch. 157, sec. 1), the board of supervisors of panels to aid indigent defendants is empowered to adopt rules and regulations concerning the ability of a defendant in a criminal action to retain counsel to assist in his defense. Such rules and regulations specifically relate to the income, assets and anticipated costs of representation of a defendant. Pursuant to the 1981 amendment, such rules and regulations are controlling on any determination by a judge or magistrate as to whether a defendant is financially unable to employ counsel. Moreover, these rules and regulations are adopted in accordance with K.S.A. 77-415 et seq., thus allowing the legislature to modify or reject them through the adoption of a concurrent resolution (K.S.A. 1980 Supp. 77-426). Insofar as the making of indigency determinations involves the resolution of questions of fact, which is a judicial and not a legislative function, control by the legislature over such determinations is an impermissible interference with the authority of another department of government. Accordingly, those provisions of L. 1981, ch. 157 which require the submission of such rules and regulations to the legislature and which make any rules and regulations so adopted binding on district courts are unconstitutional as violative of the separation of powers doctrine. Cited herein:

K.S.A. 1980 Supp. 22-4501, 22-4504 (as amended by L. 1981, ch. 157, §1), 22-4507, K.S.A. 22-4512, K.S.A. 1980 Supp. 22-4514, 77-415 (as amended by L. 1981, ch. 157, §3), Kansas Constitution, Article 3, Section 1, United States Bill of Rights, Sixth Amendment, Fourteenth Amendment.

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Dear Chief Justice Schroeder:

As Chief Justice of the Kansas Supreme Court, you request our opinion on a matter which concerns the operation of the board of supervisors of panels to aid indigent defendants in criminal proceedings. Specifically, you inquire as to the effect of recent legislative action which removes certain rule-making power from the Court and places it with the panel, at the same time requiring such rules and regulations to be adopted through the procedures set out at K.S.A. 77-415 et seq. As this change allows the legislature to modify or reject rules and regulations which control a district court's determination of whether a defendant is indigent, a question is presented whether this is an impermissible interference by one department of government in the affairs of another. You also ask whether the administration of the indigent defendants' fund is more properly an executive rather than a judicial function.

We would initially note that the principle of counsel for an indigent accused was well-established in Kansas even before the decision of Gideon v. Wainright, 372 U.S. 335, 9 L.Ed.2d 799, 83 S.Ct. 792 (1965), held that the right to counsel in such situations is a fundamental one guaranteed by the Sixth Amendment and extended to the states by the Fourteenth Amendment. As the court pointed out in State v. Young, 196 Kan. 63, (1966), from the time of the first territorial legislature in 1855, Kansas has provided for the appointment of counsel to assist indigent defendants accused of felony offenses. Initially, counsel so appointed served without compensation. Case v. Board of County Commissioners, 4 Kan. 441 (1868). However, by the time of Gideon, appointed counsel received reasonable fees for their services, which were allowed by the trial judge and paid from the general fund of the county. Stahl v. Board of County Commissioners, 198 Kan. 623, 626 (1967).

The act providing for the current system of aid to indigent defendants, enacted in 1969, appears in the Kansas statutes at K.S.A. 22-4501 et seq. The act provides for a determination by the district court of a defendant's indigency (K.S.A. 1980 Supp. 22-4504), the appointment of counsel from a list

of eligible attorneys (K.S.A. 1980 Supp. 22-4501), and establishes procedures by which court appointed counsel may be compensated for services rendered (K.S.A. 1980 Supp. 22-4507). Following approval by the district court before whom the service was performed, such compensation is paid through the office of the judicial administrator (K.S.A. 1980 Supp. 22-4507) from a fund created by the legislature (K.S.A. 22-4512). Fee schedules are established by a board of supervisors which is composed of a justice of the supreme court, the judicial administrator, two district judges and five attorneys, all of whom are appointed by the chief justice of the supreme court. K.S.A. 1980 Supp. 22-4514.

Prior to the 1981 legislative session, the supreme court possessed the power to

> "adopt rules relating to the income, assets and anticipated costs of representation for the purpose of determining the ability of a defendant to contribute to the cost of the defendant's legal defense services . . . ." K.S.A. 1980 Supp. 22-4504(5).

Such rules were binding on inferior courts throughout the state. Those rules, together with the considerations prescribed by the legislature in K.S.A. 1980 Supp. 22-4504(1), guided a district court in determining whether a defendant was indigent in full or in part. We note that such rules were not subject to review by the legislature, by virtue of K.S.A. 1980 Supp. 77-415.

Three substantive changes contained in the 1981 amendments significantly altered the foregoing system. K.S.A. 1980 Supp. 22-4504, amended by L. 1981, ch. 157, §1, removed the power to make such rules from the Supreme Court. Such power was vested instead in the board of supervisors of panels to aid indigent defendants. A second alteration was made by Section 3 in the manner such rules are to be adopted. This change created a special exception to K.S.A. 1980 Supp. 77-415, so that rules adopted by the board must be submitted to the same administrative review process as other rules and regulations. K.S.A. 1980 Supp. 77-415 et seq. require approval by the Secretary of Administration and Attorney General, followed by public hearings and eventual submission to the legislature for possible modification or rejection. However, this change did preserve the general exclusion of legislative or judicial agencies from such procedures. A third significant change affects district courts, which are henceforth governed by the board's rules in making determinations of indigency. (L. 1981, ch. 157, §1). The substance of these

changes takes the ultimate power to determine indigency from the supreme court and vests it in the legislature, a result which prompted your request.

An analysis of this rather involved question should begin by briefly reviewing the doctrine of separation of powers in Kansas law. The Kansas Constitution, like that of the United States, contains no express statements on separation of powers. State ex rel. Schneider v. Bennett, 219 Kan. 285 (1976). Rather, the doctrine has been implicitly recognized from the outset by courts of both jurisdictions. In its simplest form, the doctrine was designed to avoid a dangerous concentration of power in a single branch of government and to allow the respective powers to be assigned to a department, whether legislative, executive or judicial, most fitted to exercise them. Van Sickle v. Shanahan, 212 Kan. 426, 446 (1973).

From the early days of this state, however, courts have recognized the distinction between applying the doctrine in theory and in practice. In his concurring opinion in In re Sims, 54 Kan. 11 (1894), Justice Johnston noted:

> "It is highly important to separate the legislative, judicial and executive functions, and that the officer of one department should not exercise the functions conferred upon another. Under our system, however, the absolute independence of the departments, and the complete separation of the powers is impracticable, and was not intended.
>
> "'It is true, with some exceptions, that the legislature cannot exercise judicial or executive power; that the courts cannot exercise legislative or executive power, and that the executive department cannot exercise legislative or judicial power; but it is not true that they are entirely separate from each other, or independent of each other, or that one of them may not in some instances control one of the others.' (Martin v. Ingham, 38 Kan. 654.) The governor has been vested with some judicial functions, and the legislature acts judicially when it tries a charge of contempt and adjudges punishment therefor. Ministerial duties have been placed upon courts, and while scrupulous care should be used to prevent an officer of one department from intruding to any extent upon the duties conferred upon an officer of another department, nothing in our

> state constitution, as there is in that of some other states, prevents the vesting of more than one function in a single individual."

Although some decisions have attempted to apply the doctrine strictly [State v. Johnson, 61 Kan. 803 (1900)], the modern view echoes that of Justice Johnston.

In the case of State ex rel. Schneider v. Bennett, supra, it was held:

> "In our judgment a strict application of the separation of powers doctrine is inappropriate today in a complex state government where administrative agencies exercise many types of power including legislative, executive, and judicial powers often blended together in the same administrative agency. The courts today have come to recognize that the political philosophers who developed the theory of separation of powers did not have any concept of the complexities of government as it exists today. Under our system of government the absolute independence of the departments and the complete separation of powers is impracticable. We must maintain in our political system sufficient flexibility to experiment and to seek new methods of improving governmental efficiency. At the same time we must not lose sight of the ever-existing danger of unchecked power and the concentration of power in the hands of a single person or group which the separation of powers doctrine was designed to prevent." 219 Kan. at 288-89.

As a result of the practical impossibility of a strict separation of powers, courts have limited application of the doctrine to situations where an actual usurpation of power has occurred, i.e., one department of the government must be subjected directly or indirectly to the coercive influence of the other. [Leek v. Theis, 217 Kan. 784 (1975)]. In other words, for there to be a violation of the doctrine, there must be a significant interference by one department with the powers of another. State ex rel. Schneider v. Bennett, supra, at 290.

Given the above, it next must be determined what the respective powers of the three departments are. It was stated in Van Sickle v. Shanahan, supra, that:

> "[g]enerally speaking, the legislative power is the power to make, amend, or repeal laws; the executive power is the power to enforce the laws, and the judicial power is the power to interpret and apply the laws in actual controversies. As Chief Justice John Marshall said in Wayman v. Southard, 23 U.S. 1, 46, 6 L.Ed. 253, 263, '. . . The difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes the law . . . .'" 212 Kan. at 440.

The scope of this judicial power is further defined by the decision of Gawith v. Gage's Plumbing & Heating Co., Inc., 206 Kan. 169 (1970), where the Court quoted with approval the "classic statement" of Justice Holmes in Prentise v. Atlantic Coast Line, 211 U.S. 210, 53 L.Ed. 150, 29 S.Ct. 67 (1908):

> "A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power . . . . (p. 226.)" 206 Kan. at 178.

An example of this principle in practice is found in Petersilie v. McLachlin, 80 Kan. 178, 179 (1909) where a statute which conclusively established the weight of certain evidence was struck down as unconstitutional, the Court holding that

> "[the statute] is a legislative declaration of the truth of facts--an invasion of the province of the judicial department of the government, to which alone belongs the power to inquire whether facts upon which rights exist are true or false. It must be held unconstitutional because it denies to the holder of the original certificate due process of law, 'and because wrongfully depriving the courts of the judicial power to determine the weight and sufficiency of evidence.'" (Citations omitted.) (Emphasis added.)

See also, Lira v. Billings, 196 Kan. 726, 731 (1966).

With respect to the particular subject presented by your request, it has been well-established, both in Kansas and elsewhere, that a determination of indigency is a question of fact to be made by a court. In State v. Timmons, 218 Kan. 741 (1976), it was stated:

> "K.S.A. 22-4504 sets out a number of financial and other criteria for the judge to consider in determining whether a defendant is financially unable to employ counsel. It provides that a judge may, in his discretion, require the defendant to file an affidavit stating various enumerated items and that the judge or magistrate may interrogate the defendant under oath concerning the contents of the affidavit. Upon the basis of the defendant's affidavit, if required by the court, defendant's statements under oath and such other competent evidence as may be adduced, the judge or magistrate shall determine whether the defendant is financially able to employ counsel. The statute further provides that evidence bearing upon the question shall be made a part of the record and the determination shall be subject to subsequent review at any time by any judge or magistrate before whom the case is pending. It is clear the statute does not mandate the automatic appointment of counsel, but rather contemplates that a determination of entitlement be made upon the evidence before the court."

Representative cases from other jurisdictions which reach the same conclusion include State v. Jensen, 241 N.W.2d 557 (N.D. 1976), State v. Mickle, 56 Hawaii 23, 525 P.2d 1108 (1974), Jenkins v. Commonwealth, 491 S.W.2d 636 (Ky. 1973), People v. Chism, 17 Mich. App. 196, 169 N.W.2d 192 (1969), and State v. Harris, 5 Conn. Cir. 313, 250 A.2d 719 (1968).

As noted in Timmons, supra, initially the legislature delegated the authority to set standards which determine indigency to the Supreme Court, although providing a series of factors to be considered at K.S.A. 22-4504. By virtue of L. 1981, ch. 157, this power now has been transferred to the board of supervisors, a judicial agency. Were this the extent of the intermixing of legislative authority with an agency of the judicial department, we would not hesitate to conclude that no usurpation has occurred. However, the effect of two of the substantive 1981 amendments leads us to the conclusion that an impermissible degree of control is now possessed by one department of government over the other.

Specifically, we refer to the requirements that: (1) the board of supervisors' rules be subjected to review by the legislature; and (2) any rules so adopted are binding on district courts. Using the considerations cited hereinabove from State ex rel. Schneider v. Bennett, supra, it would first appear that the objective sought to be attained by these amendments is tighter legislative control over the provision of counsel to indigent defendants. While K.S.A. 1980 Supp. 22-4504 continues to contain general guidelines for a district court to consider in making such determinations, the recent amendments subordinate the court's judgment to that of the board of supervisors, and, by virtue of K.S.A. 1980 Supp. 77-426, that of the legislature. Effectively, the legislature is now in a position to decide who is and is not indigent, and who ultimately may receive assistance in obtaining legal counsel. This degree of control removes from the courts the ability to decide the questions of fact which are necessary in determining whether an individual defendant is indeed totally or partially indigent.

Furthermore, in our opinion, this clear interference with a judicial function limits a court's ability to meet the mandate of Gideon, which insures each indigent accused the right to effective assistance of counsel. By removing control from the judicial department over indigency determinations, the above 1981 amendments to K.S.A. 1980 Supp. 22-4501 et seq. could result in denial of counsel to those who actually require it, thus opening the way to increased collateral attacks on any convictions henceforth obtained in Kansas. The result would therefore be detrimental to the efficient administration of justice by the courts, in addition to being an unconstitutional usurpation of power.

In summary, under the provisions of K.S.A. 1980 Supp. 22-4504 (as amended by L. 1981, ch. 157, §1), the board of supervisors of panels to aid indigent defendants is empowered to adopt rules and regulations concerning the ability of a defendant in a criminal action to retain counsel to assist in his defense. Such rules and regulations specifically relate to the income, assets and anticipated costs of representation of a defendant. Pursuant to the 1981 amendment, such rules and regulations are controlling on any determination by a judge or magistrate as to whether a defendant is financially unable to employ counsel. These rules and regulations and adopted in accordance with K.S.A. 77-415 et seq., thus allowing the legislature to modify or reject them through the adoption of a concurrent resolution (K.S.A. 1980 Supp. 77-426). Insofar as the making of indigency determinations involves the resolution of questions of fact, which is a judicial and not a legislative function, control by the legislature over such

determinations is an impermissible interference with the authority of another department of government. Accordingly, those provisions of L. 1981, ch. 157 which require the submission of such rules and regulations to the legislature and which make any rules and regulations so adopted binding on district courts are unconstitutional as violative of the separation of powers doctrine.

Very truly yours,

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