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July 28, 1981

ATTORNEY GENERAL OPINION NO. 81-174

Mr. Howard Schwartz
Judicial Administrator
Supreme Court of Kansas
Kansas Judicial Center
301 West 10th
Topeka, Kansas 66612

Re: Criminal Procedure -- Aid to Indigent Defendants --
Recoupment by the State of Funds Dispersed

Synopsis: Sections 1 and 2 of 1981 Senate Bill No. 403 (L. 1981, ch. 157) prescribe procedures by which the State of Kansas may seek recoupment of defense funds extended to indigent criminal defendants. The method of recoupment satisfies constitutional requirements enumerated in recent federal decisions, construing and invalidating prior provisions of Kansas recoupment statutes. Cited herein: K.S.A. 20-1201, K.S.A. 20-1207, K.S.A. 1980 Supp. 20-1204a, 22-4504 (as amended by L. 1981, ch. 157, §1), 22-4513 (as amended by L. 1981, ch. 157, §2), U.S. Const., Amends. VI, XIV.

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Dear Mr. Schwartz:

In your capacity as Judicial Administrator for the courts of Kansas, you have inquired as to the constitutionality of 1981 Senate Bill No. 403, which now appears as Chapter 157 of the 1981 Session Laws of Kansas, as such pertains to recoupment of defense expenses for the Aid to Indigent

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Defendants Fund. As you note, the State of Kansas previously has faced some difficulty in enacting statutory provisions which have passed constitutional tests in the federal courts.

Recently, the United States Court of Appeals for the Tenth Circuit ruled in two consolidated cases, Olson v. James, and Simmons v. James, et al., 603 F.2d 150 (10th Cir. 1979), that a portion of the prior Kansas recoupment statute (K.S.A. 1978 Supp. 22-4513) was in violation of the Sixth and Fourteenth Amendments to the United States Constitution. The court specifically provided guidelines in the above consolidated opinion by which this situation may be corrected, in stating the following:

"There are some general guides relevant to the case before us which are to be gleaned from the Supreme Court's decisions in James v. Strange [407 U.S. 128 (1972)] and Fuller v. Oregon [415 U.S. 40 (1974)]. These are:

"First, a requirement of repayment is to be imposed only upon a convicted (not an acquitted) defendant or one whose conviction is reversed on appeal.

"Second, a court should not order a convicted person to pay these expenses unless he is able to pay them or will be able to pay them in the future considering his financial resources and the nature of the burden that payment will impose. If a person is unlikely to be able to pay, no requirement to pay is to be imposed.

"Third, a convicted person on whom an obligation to repay has been imposed ought at any time be able to petition the sentencing court for remission of the payment of costs or any unpaid portion thereof. The court should have the power to issue remittitur if payment will impose manifest hardship on the defendant or his immediate family.

"Fourth, if the convicted person shows that his default was not attributable to an intentional refusal to obey the order of the court or to a failure on his part to make a good faith effort to make the payment, he ought not be held in contempt." [Simmons, supra, 603 F.2d at 155.]

We note Senate Bill No. 403 contains provisions which appear to address the concerns of the Tenth Circuit in Simmons, supra. Specifically, section 1 of the bill amends K.S.A. 1980 Supp. 22-4504, and the amended statute now provides in subsection (b):

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"(b) The judge shall inform the defendant for whom counsel is appointed that the amount expended by the state in providing counsel and other defense services may be entered as a judgment against the defendant if the defendant is convicted and found to be financially able to pay the amount." (Emphasis added.)

In our opinion the above emphasized language meets the first two enumerated guidelines suggested by the court in Simmons, supra. In Senate Bill No. 403 an order for recoupment is thus a discretionary power of the court, and is imposed upon only convicted defendants financially able to pay.

In addition, this same statute was further amended by the inclusion of a new subsection (f), which states:

"(f) The board of supervisors of panels to aid indigent defendants shall adopt rules and regulations in accordance with K.S.A. 77-415 et seq., and amendments thereto, relating to the income, assets and anticipated costs of representation for the purpose of determining whether a defendant is financially able to employ counsel and the ability of a defendant to contribute to the cost of the defendant's legal defense services." (Emphasis added.)

By the addition of these new provisions we believe the legislature has established a viable method whereby inquiry may be made into the financial ability of a defendant to aid or assist in such person's defense.

Also, section 2 of Senate Bill No. 403 has amended K.S.A. 1980 Supp. 22-4513 by deleting the existing subsection (a) thereof and inserting new subsections (a) and (b) which read as follows:

"(a) Within 30 days after any expenditure has been made from the aid to indigent defendants fund to provide counsel and other defense services to any defendant as authorized by K.S.A. 1980 Supp. 22-4510 and such defendant has been convicted, the judicial administrator may send to the county or district attorney of the county where the defendant was convicted a notice stating the name of the defendant and the amount of the expenditure. The county or district attorney, in such attorney's discretion, may petition the district court to require the defendant to repay to the state all or a part of

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the amount expended from the aid to indigent defendants fund on behalf of such defendant. Subject to the provisions of subsection (b), the procedure for the filing of the petition and subsequent procedure to be followed in the action shall be the same as in other civil actions pursuant to chapter 60 of the Kansas Statutes Annotated, except that no docket fee shall be charged for the filing of the petition. At the hearing on the petition the court shall determine whether or not the defendant is or will be able to repay all or a part of the expenditures paid by the state on behalf of the defendant from the aid to indigents fund.

"(b) In determining the amount and method of payment of such sum, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of such sum will impose. A defendant who has been required to pay such sum and who is not willfully in default in the payment thereof may at any time petition the court which sentenced the defendant to waive payment of such sum or of any unpaid portion thereof. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family, the court may waive payment of all or part of the amount due or modify the method of payment." (Emphasis added.)

We note that the emphasized language in subsection (b) above appears to satisfy the third point suggested by the court in Simmons, supra by allowing for modification of prior recoupment orders based upon changes in the financial condition of a convicted defendant. Thus, Senate Bill No. 403 has specifically addressed three of the four criteria prescribed by the court.

As to the fourth point, although no specific provisions have been included dealing with contempt hearings in regard to the defendant, we do note from the emphasized portion of the above-quoted provisions of K.S.A. 1980 Supp. 22-4513(a), as amended, that the procedures are to be conducted in the same manner as in all other civil proceedings pursuant to Chapter 60 of Kansas Statutes Annotated. As a result, we believe contempt of court proceedings, as authorized by K.S.A. 20-1201 et seq., are applicable. K.S.A. 1980 Supp. 20-1204a establishes procedures regarding indirect contempt of court, and K.S.A. 20-1207 provides procedures for direct contempt. Both statutes are

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applicable, by their terms, to orders in civil actions. Accordingly, it is our opinion that these procedures would be available in proceedings to recoup moneys expended from the aid to indigent defendants fund.

In our judgment, therefore, the 1981 Session of the Kansas Legislature has considered the constitutional ramifications of its actions and has avoided the situation created by the previous Kansas recoupment statute, which was described as follows by the Tenth Circuit Court of Appeals:

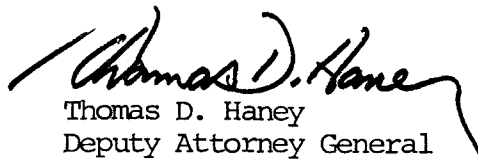
"We need only take notice of its awesome and forbidding character to realize that it emphasizes collection first and foremost. Its fulfillment of the defendant's right to counsel is much less than a primary purpose."
Simmons v. James, supra at 155.

Thus, in our opinion, the provisions of 1981 Senate Bill No. 403 satisfy the constitutional requirements enunciated in recent federal decisions construing and holding invalid prior provisions of Kansas recoupment statutes.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Thomas D. Haney
Deputy Attorney General

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