



**TYRONE C. FAHNER**

ATTORNEY GENERAL  
STATE OF ILLINOIS  
SPRINGFIELD

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FILE NO. 80-033

**CRIMINAL LAW AND PROCEDURE:**

**Liability For the Fees of a Private  
Attorney Appointed to Represent an  
Indigent Prisoner in Post-Conviction  
Proceedings Arising Out of His  
Conviction of a Crime Committed While  
Confined by the Department of Corrections**

Honorable William A. Schuwerk, Jr.  
State's Attorney  
Randolph County  
Courthouse  
Chester, Illinois 62233

Dear Mr. Schuwerk:

I have your letter wherein you set forth the following factual situation:

'Defendant was convicted of unlawful possession of a controlled substance while being confined as an inmate at the Menard Correctional Center. He was tried and convicted and the Department of Corrections paid the costs of prosecution including the costs of the court appointed attorney for the defendant. Following defendant's conviction, the defendant filed a post conviction petition and had court appointed counsel represent him at the hearing. The defendant at this time was still confined to the Menard Correctional Center. \* \* \*'

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Based upon the foregoing situation, you inquire whether the Illinois Department of Corrections or the county is liable for the fees of a private attorney who is appointed to represent an indigent resident of a correctional facility in post-conviction proceedings arising out of the resident's conviction of a crime committed while he was confined by the Department. For the reasons hereinafter stated, it is my opinion that the county where the facility is located, and not the Department of Corrections, is liable for these fees.

Post-conviction relief is governed by the provisions of article 122 of the Code of Criminal Procedure of 1963 (Ill. Rev. Stat. 1979, ch. 38, par. 122-1 et seq.). Section 122-1 of the Code provides in pertinent part:

"Any person imprisoned in the penitentiary who asserts that in the proceedings which resulted in his conviction there was a substantial denial of his rights under the Constitution of the United States or of the State of Illinois or both may institute a proceeding under this Article. The proceeding shall be commenced by filing with the clerk of the court in which the conviction took place a petition (together with a copy thereof) verified by affidavit. \* \* \*

Section 122-4 provides that the court shall appoint counsel to represent an indigent petitioner if he so requests. This section further states:

"The court, at the conclusion of the proceeding upon receipt of a petition by such appointed counsel, shall determine a reasonable amount to be allowed an indigent defendant's

counsel other than the Public Defender or the State Appellate Defender for compensation and reimbursement of expenditures necessarily incurred in the proceedings. \* \* \* The court shall enter an order directing the county treasurer of the county wherein the case was tried to pay the amount thereby allowed by the court. The court may order the provisional payment of sums during the pendency of the cause."

Post-conviction review is not a part of the appeals process. As stated by the Illinois Supreme Court in People v. Vail (1970), 46 Ill. 2d 589, 591:

" \* \* \* A proceeding under the [Post-Conviction Hearing] Act is not an appeal, but is a new proceeding for purposes of inquiring into constitutional phases of the original conviction which have not already been adjudicated \* \* \* . It is limited to a consideration of constitutional claims and does not afford a procedure for a redetermination of guilt or innocence. \* \* \* " [Citations omitted.]

Post-conviction relief is available only for constitutional claims which could not have been raised on direct appeal. Res judicata bars issues actually appealed and the waiver doctrine bars those which might have been raised. United States ex rel. Bonner v. Warden, Stateville Correctional Center (N.D. Ill. 1976), 422 F. Supp. 11, 13, aff'd 553 F. 2d 1091, cert. denied 431 U.S. 943, 97 S.Ct. 2662, 53 L. Ed. 2d 263.

The only basis for requiring the Department of Corrections to pay the fees of an indigent defendant in a criminal case appears in section 3-6-5 of the Unified Code

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of Corrections (Ill. Rev. Stat. 1979, ch. 38, par. 1003-6-5)  
which provides:

"When any person is charged with committing an offense while confined by the Department, cognizance thereof shall be taken by the circuit court of the county wherein such crime was committed. Such court shall adjudicate and sentence the person charged with such crime in the same manner and subject to the same rules and limitations as are now established by law in relation to other persons charged with crime. The expense of prosecution shall be paid by the Department." (Emphasis added.)

Section 1003-6-5 is similar to its predecessor provision, section 14 of the Illinois State Penitentiary Act (Ill. Rev. Stat. 1965, ch. 108, par. 118). Section 14, which was considered in People ex rel. Conn v. Randolph (1966), 35 Ill. 2d 24, provided in pertinent part:

" \* \* \* [A]ll fees and costs arising from the prosecution of convicts for crimes committed within the penitentiary system, which would otherwise be paid by the county, shall be paid by the State." (Emphasis added.)

The court in Conn held at page 31:

" \* \* \* [T]hat the petitioner's fees and costs [as court-appointed counsel for indigent convicts charged with a crime while confined] are a part of the costs of 'prosecution' within the Penitentiary Act, \* \* \* ."

In reaching this conclusion, the court pointed out, also at page 31, that:

" \* \* \* The 'prosecution' of indigent convicts cannot constitutionally proceed unless the trial court provides counsel for the accused convicts \* \* \* ."

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Even if a court should hold that the term "expenses of prosecution" as used in the current Code of Corrections has the same meaning as "fees and costs arising from the prosecution of convicts" in the old Penitentiary Act, section 3-6-5 of the Code of Corrections applies only to expenses of "prosecution", and in a post-conviction proceeding there is no prosecution. The prosecution ended when the convict was adjudicated and sentenced. The post-conviction proceeding is a new proceeding instituted by the convict by petition. The convict is not charged with any crime and the State is not prosecuting.

The definition of "prosecution" in section 2-16 of the Criminal Code of 1961 (Ill. Rev. Stat. 1979, ch. 38, par. 2-16), as adopted by section 102-2 of the Code of Criminal Procedure of 1963 (Ill. Rev. Stat. 1979, ch. 38, par. 102-2), is as follows:

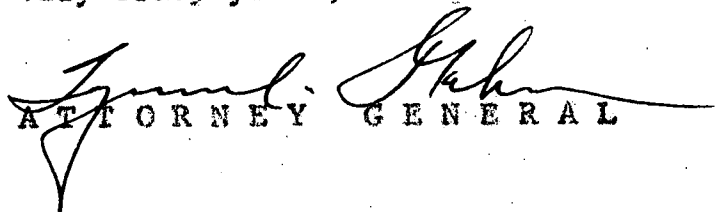
" \* \* \* [A]ll legal proceedings by which a person's liability for an offense is determined, commencing with the return of the indictment or the issuance of the information, and including the final disposition of the appeal."

Under the terms of the above definition, a "prosecution" in which a prisoner's liability for an offense is determined ends with the final disposition of the case on appeal. A post-conviction hearing can occur only after the appeals stage has been passed and therefore, it is not a part of a "prosecution".

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It is therefore my opinion that the fees of a private attorney who is appointed to represent an indigent resident of a correctional facility in post-conviction proceedings arising out of the resident's conviction of a crime committed while he was confined by the Department of Corrections are not an "expense of prosecution" for which the Department is liable. Rather, they are chargeable to the county treasury under the provisions of section 122-4 of the Code of Criminal Procedure of 1963.

Very truly yours,

  
ATTORNEY GENERAL