

University of Colorado Law School

Colorado Law Scholarly Commons

Colorado Supreme Court Records and Briefs Collection

11-5-1983

Bye v. District Court of County of Larimer

Follow this and additional works at: <https://scholar.law.colorado.edu/colorado-supreme-court-briefs>

Recommended Citation

"Bye v. District Court of County of Larimer" (1983). *Colorado Supreme Court Records and Briefs Collection*. 2389.

<https://scholar.law.colorado.edu/colorado-supreme-court-briefs/2389>

This Brief is brought to you for free and open access by Colorado Law Scholarly Commons. It has been accepted for inclusion in Colorado Supreme Court Records and Briefs Collection by an authorized administrator of Colorado Law Scholarly Commons. For more information, please contact rebecca.ciota@colorado.edu.

FILED IN THE
SUPREME COURT
OF THE STATE OF COLORADO

NOV 25 1983

SUPREME COURT, STATE OF COLORADO

Case No. 83 SA 417

David W. Drozina, Clerk

ORIGINAL PROCEEDING
DISTRICT COURT NO. 81 CR 286

CERTIORARI TO THE COLORADO COURT OF APPEALS NO. 82 CA 1059

DAVID BYE and JOHN P. GASCOYNE,

Petitioners,

vs.

DISTRICT COURT IN AND FOR THE COUNTY OF LARIMER, and
THE HONORABLE JOHN-DAVID SULLIVAN, One of the Judges Thereof,

Respondents.

PETITIONER'S BRIEF ON CERTIORARI ISSUE AND
RESPONSE TO ORDER TO SHOW CAUSE

DIVISION I
Opinion by CHIEF JUDGE ENOCH
Smith and Sternberg,
JJ., concur

APPEAL DISMISSED

David Bye and
John P. Gascoyne,
Petitioners
116 North College Avenue
Post Office Box 1905
Fort Collins, Colorado 80522-1905
Telephone: 493-6556

TABLE OF CONTENTS

TABLE OF AUTHORITIES	i
STATUTES CITED	ii
DISCIPLINARY RULES CITED	iii
INTRODUCTORY STATEMENT	iv
STATEMENT OF THE CASE	1
STATEMENT OF THE FACTS	3
ISSUES RAISED ON APPEAL	7
ARGUMENT	
POINT I	7
POINT II	7
POINT III	11
CONCLUSION	18
LIST OF EXHIBITS	22

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS:

United States Constitution, Amendment 14 12

Colorado Constitution, Article II, Section 6 12

STATUTES:

Colorado Revised Statutes (1973) (as amended)

C.R.S. 21-1-103 12

C.R.S. 21-1-1-5 12, 15

DISCIPLINARY RULES

Disciplinary Rule 7-110 14

Disciplinary rule 5-107(B) 14

CASES:

Espinoza v. Rogers, 470 F. 2d 1174 (10th Cir., 1972) 14

STATUTES CITED

C.R.S. 21-1-103. REPRESENTATION OF INDIGENT PERSONS.

(1) The state public defender shall represent as counsel, without charge, each indigent person who is under arrest for or charged with committing a felony if:

(a) The defendant requests it; or

(b) The court, on its own motion or otherwise, so orders and the defendant does not affirmatively reject, of record, the opportunity to be represented by legal counsel in the proceeding

(2) The state public defender shall represent indigent persons charged in any court with crimes which constitute misdemeanors; juveniles upon whom a delinquency petition is filed or who are in any way restrained by court order, process, or otherwise; persons held in any institution against their will by process or otherwise for the treatment of any disease or disorder or confined for the protection of the public; and such persons charged with municipal code violations as the public defender in his discretion may determine, subject to review by the court if:

(a) The indigent person, or his parent or legal guardian, in delinquency or other actions under article 1 of title 19, C.R.S. 1973, requests it; or

(b) The court, on its own motion or otherwise, so orders or requests and the defendant, or his parent or legal guardian, in delinquency or other actions under article 1 of title 19, C.R.S. 1973, does not affirmatively reject, of record, the opportunity to be represented by legal counsel in the proceeding.

(3) The determination of indigency shall be made by the state public defender, subject to review by the court.

C.R.S. 21-1-105. APPOINTMENT OF OTHER ATTORNEY IN PLACE OF PUBLIC DEFENDER.

For cause, the court may, on its own motion or upon the application of the state public defender or the indigent person, appoint an attorney other than the state public defender to represent the indigent person at any stage of the proceedings or on appeal. The attorney shall be awarded reasonable compensation and reimbursement for expenses necessarily incurred, to be fixed and paid by the court from state funds appropriated therefor.

DISCIPLINARY RULES CITED

DISCIPLINARY RULE 7-11-. CONTACT WITH OFFICIALS

(a) A lawyer shall not give or lend anything of value to a judge, official, or employee of a tribunal except as permitted by Section C(4) of Canon 5 of the Code of Judicial Conduct, but a lawyer may make a contribution to the campaign fund of a candidate for judicial office in conformity with Section B(2) under Canon 7 of the Code of Judicial Conduct.

(B) In an adversary proceeding, a lawyer shall not communicate, or cause another to communicate, as to the merits of the cause with a judge or an official before whom the proceeding is pending, except:

(1) In the course of official proceedings in the cause.

(2) In writing if he promptly delivers a copy of the writing to opposing counsel or to the adverse party if he is not represented by a lawyer.

(3) Orally upon adequate notice to opposing counsel or to the adverse party if he is not represented by a lawyer.

(4) As otherwise authorized by law, or by Section A(4) under Canon 3 of the Code of Judicial Conduct.

DISCIPLINARY RULE 5-107(b)

A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services.

INTRODUCTORY STATEMENT

Because the record of the Court of Appeals has been destroyed, Petitioners have excerpted exhibits from the trial court record, and submitted them with their brief. Footnotes in the text refer to the exhibits submitted. Two copies of all exhibits have been submitted. Each copy of the brief contains a list of the exhibits submitted.

Defendant's attorneys, David Bye and John P. Gascoyne, respectfully submit this brief in support of the Writ of Certiorari and Writ of Mandamus issued in the above-entitled case.

I. STATEMENT OF THE CASE

Charges of Murder in the First Degree were filed against Jorge Vargas on May 5, 1981, in Larimer County, Colorado. The charges alleged that on or about May 4, 1980 Vargas participated in the commission of a robbery, and, during the course of that crime, he killed John Garcia, Senior, a Fort Collins resident, by repeatedly striking Garcia's head with a hatchet.¹ Vargas, a Mexican national illegally in the United States, was arrested on April 20, 1981. He was advised of his rights on April 24, 1981. Vargas' bond was set at \$250,000, and he was ordered to appear in Larimer County District Court on May 5, 1981.

Prior to the Defendant's first appearance in County Court on April 24, 1981, John Gascoyne, a private attorney, was appointed to be counsel for the Defendant. Xavier Villa, another person charged with Mr. Garcia's murder, had been represented by the public defender's office, and the public defender could not, therefore, represent Vargas. At the Defendant's first appearance, upon Mr. Gascoyne's request, David Bye was appointed as co-counsel for the Defendant.

A protracted preliminary hearing was held on May 14, May 28, May 29, and June 9, 1981.² Defendant filed motions to dismiss and to suppress evidence. Hearings on these motions were held on August 4, 1981 and September 3, 1981. Both sides filed extensive written briefs on these motions, and the Defendant filed a reply brief on the issues. The Court granted in large part the Defendant's Motion to Suppress Testimony of Juan Roybal, and denied other motions to dismiss and to suppress.

The People filed an interlocutory appeal of the Court's order suppressing testimony of Juan Roybal, and both parties filed appellate briefs in conjunction with this appeal (See People v. Vargas, 81 SA 498).

The case was set for trial on January 11, 1982. Defense attorneys had to be and were fully prepared for trial at that time with defense witnesses under subpoena and with their trial strategy completed and ready to employ. On that date, the interlocutory appeal had not been determined, and the trial date was continued to February 16, 1982.

Following the continuance of the trial, Defendant's attorneys received information from an attorney in the Public Defender's Office indicating that false prosecution testimony had been presented at the hearings on Defendant's motions to suppress. They investigated, verified the information, and presented it to the District Attorney. They then filed a Motion to Dismiss.³ The District Attorney also verified the information, and thereafter moved to dismiss both the interlocutory appeal and the charges against the Defendant. All charges were dismissed on February 1, 1982.

On September 9, 1981, Defendant's attorneys filed their motion for interim payment of attorney fees, together with detailed billings of \$1,574.12 for Mr. Gascoyne, and \$4,338.56 for Mr. Bye.⁴ The Court did not approve or disapprove the amount of time spent, but did authorize an interim payment of \$1,500 total.⁵ This amount was not paid because other necessary paperwork was not then processed.

On February 17, 1982, Defendant's attorneys filed their motion for payment of attorney's fees in excess of the maximum, and on March 15 filed their Motion for Extraordinary Attorney's Fees.⁶ These motions sought fees and expenses of \$7,550.06 for Mr. Bye and \$1,957.20 for Mr. Gascoyne. The Court awarded fees of \$3,000 to Mr. Bye and \$1,000 to Mr. Gascoyne.⁷ The

attorneys filed their Motion to Reconsider or to Modify this Order⁸ and brief in support of this motion, together with an affidavit from David D. Wymore, Deputy State Public Defender, stating that his office spent approximately 500 attorney hours, all of which were reasonable and necessary for effective representation of the co-defendant.⁹ The case of Xavier Villa, the other person charged with the murder of John Garcia, Sr., was also resolved just prior to trial.

The Court refused to modify its order for attorney's fees.¹⁰ The attorneys filed their notice of appeal for review of this ruling. Question was raised, and resolved, as to a directive to district court judges requiring consent of the chief justice where the appointment of co-counsel is sought.

In the Court of Appeals, the People filed a Motion to Dismiss Appeal, which was denied. After full briefing and oral argument, the Court of Appeals dismissed the appeal. Appellant's Motion for Reconsideration was denied September 1, 1982.

STATEMENT OF THE FACTS

Jorge Vargas was arrested and charged with the murder of John Garcia, Sr., almost one year after the crime was committed. Xavier Villa, in companion case, 80 CR 301, was also charged with the murder. Villa was represented by the Public Defender's office, necessitating the appointment of private counsel for Mr. Vargas. Mr. Villa's case was resolved before trial, through plea negotiations.

Jorge Vargas was held in custody for ten months in lieu of \$250,000 bail. He is a Mexican citizen who speaks almost no English. The Defendant had only a second grade education. George Wallace of Fort Collins was appointed by the Court as interpreter for the defense.

i

The People endorsed 29 witnesses and, at the preliminary hearing, called two other witnesses, Juan Roybal and Xavier Villa, who had not been endorsed. Many of these witnesses were of Mexican descent, and spoke English as a second language. As a result of extensive interviews, the defense attorneys learned of and interviewed at least nine additional witnesses who could help establish the Defendant's account of his movements, speak to his character, and contradict statements made by the People's witnesses. Counsel and investigators for the Defendant located and interviewed, among others, the following witnesses:

Police officers involved: James Warren, Charles Robbs, Dean McWilliams.

Other prosecution witnesses:

Velma Gallegos and Jesus Armendirez, who claimed Mr. Vargas offered to sell a gun late in the day following the murder and the following Sunday. After continued efforts, Mr. Armendirez was located and interviewed, in Spanish, in a bar south of Greeley, Colorado.

Juanita Proa, who claimed Xavier Villa had confessed to her that he and Jorge Vargas had committed the murder.

Tony Martinez, who said he saw Xavier Villa with the money and gun around the time of the murder.

Reuben Tobias, who said he saw Xavier Villa with the money and gun around the time of the murder. He did not claim to see Jorge Vargas anytime after the murder. Mr. Tobias was located in Texas, and arrangements had to be made for his appearance in court in Colorado.

Jimmy Martinez, a friend of Xavier Villa, who was in the vicinity at the time of the murder.

Castulo Maldonado, who rented the house behind the victim's residence,

and who turned Xavier Villa in. Maldonado was ultimately located in Windsor, Colorado. Flo Archer, a woman who was with Maldonado on the night of the murder, was located in Utah.

Mariano Guaneros, who claimed Jorge Vargas asked him to help him rob Juan Garcia, or at least store some guns for him.

CBI lab specialists, to determine whether any kind of fingerprints had been found, which could eliminate Jorge Vargas as a suspect.

Dalio Medina, who allegedly assisted Jorge Vargas to escape the police. Without implicating Vargas, Mr. Medina did plead guilty to accessory to murder. He had to be interviewed in Canon City, Colorado.

Xavier Villa, who was present around the time of the murder and who plead guilty to being an accomplice. He had to be interviewed at Buena Vista, Colorado.

Juan Roybal presented a host of problems by himself. He testified to many admissions allegedly made by Jorge Vargas while the two were in jail together. For the defense to evaluate his credibility, it was necessary to check out all the facts he claimed Mr. Vargas had related to him, including the investigation of crimes allegedly committed in Mexico. This involved a series of long distance bilingual calls to Mexico. It was also necessary to chart Roybal's long criminal history and talk to many witnesses who had knowledge of his experience as a career informant. His proffered testimony was considered by the defense to constitute a major portion of the case against Mr. Vargas, and it had to be fully established that he was unreliable.

In addition to locating and interviewing all these witnesses, it was necessary to investigate the backgrounds of many of them for purposes of impeachment. Many had criminal records which had to be verified.

Defense witnesses were gained from leads furnished by Mr. Vargas:

Isaac Brooks, a Rock Springs, Wyoming sheep rancher, who hired Jorge Vargas the evening following the murder.

Tony Galabeez, who was with Jorge Vargas around the night of the murder.

Conrado Cordova, who worked with Jorge Vargas on a roofing job, and who could verify that Jorge Vargas had no quarrel with the victim.

Numerous character witnesses who knew Jorge Vargas before he was arrested, and who could testify to his behavior both when sober and when he had been drinking.

Jail inmates, who could testify to Xavier Villa's admissions, if Xavier Villa should testify.

In addition to interviewing these witnesses, counsel reviewed over 1500 pages of written reports and extensive tape recorded material which had been assembled by police officers and public defenders' investigators. Some of this required translation from Spanish to English.

Counsel for the Defendant also participated in an extended preliminary hearing and hearings on motions to suppress. At most such hearings two prosecutors were present for the People.² Both parties filed extensive briefs on evidentiary motions, both in the trial court and on interlocutory appeal. The trial of Mr. Vargas was not continued until the morning it was to begin, and counsel thus had to be, and were, fully prepared to try the case.

On the morning the trial was scheduled to begin, no decision had been made on the People's interlocutory appeal, and the trial of the case was necessarily continued. A short time later, a deputy public defender obtained a copy of a promissory note, signed by Juan Roybal, a police informant in

the case, and co-signed by James Warren, the primary police investigator involved in the case. This note was dated shortly after Juan Roybal and James Warren had testified at the preliminary hearing. Both men testified that no promises or anything of value had been given to Juan Roybal.

Vargas' attorneys investigated the matter further, and obtained a copy of another promissory note signed by Juan Roybal and also co-signed by James Warren before the preliminary hearing. Vargas' attorneys presented this evidence to the District Attorney, and, after verifying the evidence, the People moved to dismiss the interlocutory appeal and the district court prosecution.

ISSUES RAISED

- I. Does the Court of Appeals have jurisdiction to review payment of court-appointed attorneys?
- II. Was the action of the trial court proper in this case?
- III. What are the larger implications of the trial court's action?

I. JURISDICTION OF THE COURT OF APPEALS

The Petitioners sought review of the trial court's denial of their request for extraordinary attorney's fees by direct appeal because Colorado had established no procedure for review, because other states are split on the proper method for review, and because a direct appeal seemed the most expeditious avenue. At this point in the proceedings, the matter is before this Court on both certiorari and mandamus, so the issue of the Court of Appeals' jurisdiction is moot. Petitioners would merely request that this Court specify a proper procedure for reviewing awards of attorneys' fees, so that confusion and wasted effort can be avoided in future cases.

II. PETITIONERS DESERVE TO BE PAID IN THIS CASE

In numerous briefs before the trial court, and the Court of Appeals,

and their petition to this Court, and in their statement of the case in this brief, the Petitioners have detailed the extraordinary circumstances of this case which justify the attorneys' fees they have requested. Copies of those briefs are attached hereto.¹¹ Further reiteration of these facts and circumstances would be redundant, so Petitioners will address the other arguments made by the court.

One reason stated by the trial court for denying our motion is that, by accepting the appointment, we contracted to represent Mr. Vargas for a total fee of \$1,500. This argument ignores several factors.

First, such a purported contract is unilateral at best. We were given no opportunity to negotiate or even discuss the terms. We were appointed, as we have been many times in the past eleven years and, as has been our practice, went to work vigorously, relying on previous experience that suggested we would be paid for the work we did.

The terms of the contract, as applied by the court in this case, would severely limit the ability of attorneys to fully represent their clients. Either they must expect to do extraordinary amounts of work for free, or they must entertain a nervous hope that the court will find theirs to be an "extraordinary case" that warrants full compensation. It must be noted here that we expected and were willing to be paid \$25 per hour for out-of-court work and \$35 per hour for in-court work. These fees, set more than ten years ago, are of course well below prevailing rates. We do not here challenge this hourly rate, we only wish to be paid at this rate for all hours worked. Here the trial court made a unilateral determination that some extraordinary circumstances existed, but not enough to justify even half the fee claimed. This makes the contract at best illusory, because the party dic-

tating the terms of the contract is also the party making the determination of whether there are extraordinary circumstances.

Secondly, in many cases, fees in excess of the maximum are paid. For example, in the case of People v. Romero, a murder case in which defense counsel was appointed, attorney's fees in excess of \$12,000 were awarded, and the total fees and expenses were over \$24,000.¹² In People in the Interest of C.A.K., one of the petitioners herein was awarded \$1635 as a guardian ad litem on appeal, and a comparable amount for the district court representation. Counsel for the mother was awarded approximately twice these amounts.¹³

Finally, the trial court had the opportunity to clarify the "contract" at the time the petitioners filed their motion for interim payment. Rather than indicating the court's apparent belief that we were spending too much time in defending Mr. Vargas, the court deliberately kept the matter vague and ambiguous, stating that it made no determination about the reasonableness of the fees requested at that time. If indeed a contract existed, it was incumbent upon the trial court to make it clear at that time, because the interim fees requested were in excess of the maximum for cases resolved before trial. The court's actions, if this is a contractual issue, show a clear intent to encourage us to continue to work in defense of Mr. Vargas and to inform us of its true intent only when determining payment for that work.

The People also argue that this decision is a matter within the discretion of the trial court, and the court did not abuse that discretion. This argument is undercut by the court's lack of specific findings and its awards to the attorneys. Nowhere in the court's order is there given any reason why 329 attorney hours in defense of Mr. Vargas were unreasonable, but the 500 attorney hours put in in defense of Mr. Xavier Villa, charged with the same crime, were not unreasonable. Mr. Villa was arrested and charged immediately after the crime; Mr. Vargas not until one year after the crime. Mr. Villa speaks both

English and Spanish; Mr. Vargas speaks only Spanish. In the Villa case no interlocutory appeal was filed; in Vargas the prosecution filed an interlocutory appeal. Both cases were resolved before trial, but only after full preparation for trial. Villa reached a plea agreement; Vargas show police misconduct and discredited the People's primary witnesses. The public defenders, as well as the district attorneys, had two attorneys in court most of the time.

The court also failed to indicate what hours spent were unnecessary. There were no findings that we shouldn't have appeared for any of the court hearings, that we should not have prepared briefs for the trial court or on the interlocutory appeal, that we should not have reviewed the police reports or tapes of interviews of witnesses, or that we should not have sought out and interviewed prosecution or defense witnesses. For future reference, if an indigent defendant is to be given less than a full defense, attorneys willing to work in such circumstances should be instructed when and where to withhold their efforts and why.

In making the determination that our actions were necessary, we had to weigh the fact that we were expecting remuneration at the rate of \$25 per hour rather than our private rate of \$60 per hour, so we made certain that the time we spent was necessary.

The court made no determination of how many hours in court by each attorney and how many hours out of court by each attorney were appropriate. The awards of \$3,000 and \$1,000, to Mr. Bye and Mr. Gascoyne respectively, suggest an arbitrary award of fees. No explanation was given for awarding Mr. Bye 44% of his requested fee and Mr. Gascoyne 53% of his. Nor is any explanation given for the fact that, if it was the court's intention that only one attorney was to be present at each court appearance, the court made no mention of this intent when both attorneys were present--and two deputy district attorneys also appeared. The court also failed to make any finding

concerning why the defendant's expenses, which were fully detailed in Petitioners' Motion for Reconsideration, were summarily denied. The court's bald statement that it considered all relevant factors cannot atone for the fact that the awards made were arbitrary.

III. LARGER IMPLICATIONS OF THIS CASE

The issues raised so far are narrow ones in that they are restricted to the facts of this case. Of more import, however, is the precedential value of this Court's holdings in the case. We suggest the following questions for the Court's consideration:

1. Should the number of attorney hours and expenses available for the defense of an indigent defendant depend upon whether he or his co-defendant is the first to reach the public defender?
2. Is an attorney entitled to know in advance of accepting an appointment whether he will be compensated for extraordinary investments of his working hour under extraordinary circumstances?
3. Is the determination of a competent attorney, that the work he puts in on a case is necessary, entitled to respect?
4. Does the present system encourage the prosecution to prolong the prosecution of a case so as to deplete resources available to a defendant?
5. Should a small cadre of defense attorneys be called upon to carry the obligation of the entire bar for representing indigent defendants?

1. Indigent defendants are entitled to full representation by counsel regardless of whether the public defender or private counsel is appointed to represent them.

Colorado Revised Statutes §§ 21-1-103 and 21-1-105 provide for the representation of indigent defendants in criminal cases. Nowhere in these statutes is it specified that defendants who have private counsel appointed are any less entitled to full representation than those who have the public defender appointed. Indeed, to do so would fly in the face of the equal protection clause of the 14th Amendment to the United States Constitution and Article II, Section 6 of the Colorado Constitution. It would arbitrarily limit the right to counsel guaranteed by the Sixth Amendment to the United States Constitution and Article II, Section 16 of the Colorado Constitution. And it would base the kind of representation to which an indigent defendant is entitled, in many cases, upon who reached the Public Defender's Office first. There can be no justification for such an arbitrary system, and therefore all criminal defendants who have appointed counsel must be entitled to full representation, regardless of the source of the representation.

In the instant case, the Public Defender's office put in approximately 500 hours in representing Xavier Villa, who was charged in a companion case with the same murder with which Jorge Vargas was charged. All the hours were necessary to proper representation of Mr. Villa. That case was also settled without trial, and it did not involve any interlocutory appeals. Mr. Villa also speaks English fluently, whereas Mr. Vargas speaks only Spanish. For the Court to determine that the 329.5 hours expended by counsel in representing Mr. Vargas were unnecessary and inappropriate, while the 500 hours expended in representing Mr. Villa were not, is arbitrary and capricious, and should not be countenanced by this Court. To do so would

be to establish two classes of representation of indigent defendants, one for those represented by the Public Defender, and one for those who have private counsel appointed.

2. The present system puts a defense attorney in a state of limbo regarding his fees in a court appointed case. He is asked to devote his full time and energy to the defense of his client, but he must depend upon the good will of the judge involved for payment. In some instances, the compensation is paid fully and promptly. In others the payment is delayed and begrudged and perhaps never paid in full.

Leaving such decisions to the unfettered discretion of the judge puts an attorney in the position of doing the work with the illusory promise of reasonable payment, but without any assurance of payment commensurate with the amount of work put in. It allows the state to secure the services of an attorney and then to decide whether or not to pay him or her.

While many of us are willing to devote substantial amounts of our work year to indigent defendants, it is cruel to hold out the promise of fair compensation only to deny it later. At best we are offered a pig in a poke, under the present system. If such is to be the case, this should be made explicit. If fair compensation is to be paid, as promised by the statute, that should be clear. And if all work above the specified maximum is to be pro bono, that, too, should be made clear. Then an attorney can make an informed decision whether to accept the appointment or not. Otherwise, the state can reap the benefits of full representation without full payment.

3. Private counsel are entitled to use their professional judgment in representing court appointed defendants.

It is elementary that a lawyer must be able to use his independent pro-

fessional judgment in representing criminal defendants, and this must apply to court-appointed counsel as well as to retained counsel. It would be improper for court-appointed counsel to discuss their representation of a defendant with the court in an ex-parte hearing. Disciplinary Rule 7-110 specifically prohibits such communication without opposing counsel present. To have such discussions in the presence of opposing counsel would severely inhibit preparation of an adequate defense, because justification of proposed actions by defense attorneys would frequently involve disclosures from the defense which are protected by the attorney-client privilege.

Furthermore, DR 5-107(B) prohibits a lawyer from allowing a person who employs or pays him to render legal services to another, to direct or regulate the lawyer's professional judgment in such cases. Consultation with the court for the purpose of allowing the court to regulate the defense of the case clearly violates this disciplinary rule.

Courts have taken great pains to assure that attorneys for indigent persons are not improperly influenced by the fact that they are appointed by the state. See Espinoza v. Rogers, 470 F.2d 1174 (10th Cir. 1972). Attorneys, especially in court-appointed cases, must be allowed to exercise their independent professional judgment, to avoid any appearance of collusion between them and other officials employed by the state.

Court-appointed attorneys are entitled to compensation for their time expended in the defense of their clients. Although the state has established maxima for routine cases in which counsel are appointed to represent indigent defendants, extraordinary cases are not governed by these maxima. The notion that these maxima establish a contract between a court-appointed attorney and the state certainly is not borne out by the practice in compensating attorneys. See, e.g., orders for payment in Santos Romero case. Nor was this considera-

tion raised by the court when it authorized interim payment of the attorneys in this case, in the amount of the maximum authorized before trial.

Colorado Revised Statutes §21-1-105 provides that a court-appointed attorney "shall be awarded reasonable compensation and reimbursement for expenses necessarily incurred, to be fixed and paid by the court from state funds appropriated therefor." The reasonable compensation has been set by this Court at \$25 per hour for time spent out of court, and \$35 per hour for time in court. Despite the fact that the cost of living has more than doubled in the past ten years, these rates have not been increased in over ten years.

To assure that an indigent defendant receives the full representation to which he is entitled under the United States and Colorado Constitutions, and to avoid any impropriety which may be attributed to the fact that the defense attorney is paid by the state, it is absolutely essential that court-appointed attorneys be paid for the time expended in the preparation and presentation of a defense. To pay defense attorneys for less than half their time expended, which total time was less than 65 per cent of the time expended by Public Defender attorneys in defending a companion case, is to indicate that the representation of indigent defendants by court-appointed private counsel is of lower priority than representation of indigent defendants by public defenders. This must, in turn, lead to two classes of representation, depending on which defendant reaches the public defender's office first.

Of course, there must be reasonable restraints on the amount of time spent by attorneys, but this restraint is assured by the rates paid for the time spent by the attorneys. Under these rates, no attorney (especially those with over ten years in practice, as is the case here) is going to be tempted to put in more hours in preparing a defense than he believes is essential for an adequate defense. For each dollar paid by the state, the attorney is

donating at least an equal amount from his customary fees. Arbitrarily reducing this still farther works a hardship on the attorneys and jeopardizes an adequate defense for their clients.

Petitioners also deem it appropriate to compare the restrictions being imposed on them with the situation under which the District Attorneys were working. Spending the same state tax monies that fund the defense, the prosecution, without supervision or comment from the court, placed two attorneys in court for most of the time the court sat on this case, had special office investigators working on the case, and received hundreds of hours of labor from the municipal police department. While the district attorneys are not required to log their time or justify it after the fact, the nature of their efforts suggests a much greater total time involvement prosecuting Jorge Vargas than the private attorneys spent in defending him.

4. Although considerations of the prosecution's prolonging a case to exhaust defense resources should not be a factor in any criminal case, certain actions taken in this case require that the aspect be examined.

In this case the defendant was unpopular. He was an undocumented laborer who could not speak English. The victim of a brutal murder, Juan Garcia, was an elderly and well-respected local resident. The prosecution was under considerable pressure from the community to prosecute to the maximum.

The district attorney, in addition to inadvertently using perjured testimony, took every action available, with the inevitable result of prolonging the case and requiring more time from the defense attorneys, in addition to keeping Mr. Vargas incarcerated. The filing of the interlocutory appeal, in the face of well-established precedent, was, at best, grasping at straws. At worst, it was deliberately prolonging the case. The people requested, and were granted, over defense objections, an extension of time to file their opening brief on the interlocutory appeal.¹⁴ This led to continuing the trial date on the morning

the trial was set to begin, and kept the defendant in jail.

The prosecution refused to agree to even the most perfunctory motions of the defense, thus requiring the filing of written motion and hearings on those motion for subpoena expenses for defense witnesses, and a formal pretrial conference to avoid duplication of expenses in securing out of state witnesses endorsed, but not necessarily to be called by the prosecution.¹⁵ The defense sought to save state funds by not subpoenaing witnesses who would be called by the People, but the People refused to divulge which witnesses they would have available, for fear of tipping off their case.

The action of the Attorney General's office in delaying the Petitioners' appeal by repeated requests for extensions of time, filing its motion to dismiss and then requesting further extension of time when that motion was denied, speaks for itself.¹⁶

The present system of compensating defendants' attorneys does nothing to discourage this kind of action on the part of the prosecution, but rather acts to encourage it. The combination of prosecutorial zeal and judicial reluctance to pay defense attorneys can result in the depletion of defense resources and the denial of justice to a defendant.

5. Perhaps the cruelest and most hypocritical argument urged by the People is that quoting the New York Court of Appeals:

The lawyers who participate in the representation of indigent criminal defendants do so willingly, in the highest traditions of the profession, knowing that the limited fees provided fall short of full, or even fair, compensation for their services. In so participating, the lawyers undertake an important public service, which before the statute conferring payment of reasonable attorneys fees was enacted, they performed without any compensation at all.

The legislature has recognized the unfairness of asking defense attorneys to bear the full burden required by the United States Constitution, and has provided for payment of reasonable fees. C.R.S. §21-1-105. This Court

has set prescribed payment rates. Petitioners, by accepting appointment have agreed to accept such fees and to provide the remaining part of their services pro bono. In this case, however, the trial court has increased the pro bono portion of the work by more than 100%. Defendant's attorneys did not enter into the representation of the defendant knowing that their pro bono portion would be nearly so great.

It seems the height of hypocrisy for an attorney, who is being fully paid from state funds, to quote a judge, another attorney being fully paid from state funds, in a case prosecuted by two district attorneys, fully paid from state funds, before a district court judge, fully paid from state funds, to argue that attorneys representing the defendant are upholding the highest traditions of the profession when they are denied even minimal compensation.

At a nominal rate of \$60 per hour, the defense attorneys would be entitled to \$19,740 for the 329 hours we served on this case. We requested only \$8717.50, plus expenses, and the court awarded \$4000. We were willing to provide over \$10,000 worth of services pro bono. The trial court has taken another \$4717.50, and more than \$750 worth of expenses from us, expenses that were left for us to pay from other sources. In addition, the court required that expenses for our investigator, some of which it denied, be handled by us. Let those state paid attorneys who are willing to donate comparable amounts toward the representation of indigent defendants make their appeals to the high standards of the profession.

CONCLUSION

The attorneys involved in the defense of Jorge Vargas are deeply concerned with the implications of this case. We accepted appointment as counsel, knowing it was a complex case involving stale facts, witnesses from two cultures and two languages, many transient witnesses who would be difficult to locate, many questions about the physical evidence and how it was handled, and many

complex legal issues. It also involved representation of an unpopular defendant, an illegal alien, charged with the murder of a respected older chicano gentleman. It was a case significant enough to induce a police officer to cosign a loan for an informant, and then to deny, under oath, that he had made any promises or given anything of value to the informant. It was a case of sufficient import for the District Attorney to file an interlocutory appeal of an evidentiary ruling, in the face of well-established precedent.

Defense counsel are very concerned that the action of the trial court will discourage adequate representation of defendants in complex cases, especially where an unpopular defendant is involved. We are also concerned that such action will encourage prosecutors to file more motions and appeals, knowing that defense counsel will not be compensated for their response, when defense counsel may not be able to afford to spend the time necessary for an adequate response.

Finally, defense counsel are concerned about the implications the trial court's action will have upon the appearance of the judicial system itself. In this case an unpopular defendant had the charges against him dismissed, and now his attorneys are being denied even minimal compensation for their services, which resulted in the dismissal. If a court can arbitrarily deny payment to the attorneys for an unpopular defendant, then the court can control the professional judgment of that defendant's attorneys, and that defendant will be denied effective assistance of counsel and due process of law.

When we undertook to represent Jorge Vargas, we did so with the full knowledge that this case would involve substantial work. We understood that the fees we would receive would be from \$25 to \$35 per hour less than even the nominal \$60 per hour we charge our poorer clients. In the highest traditions of our profession we were willing to work at that rate. We did the work we judged to be at least the minimum necessary to do a competent job of representing

Mr. Vargas. We did no work we did not consider essential both because we felt a responsibility to hold our fees down--a consideration in every case--and because there is no financial incentive to do this work rather than work for which we could charge \$60 per hour or more, work which has almost always been available to us in our combined 22 years of legal work together in this community. Each of us had over twelve years experience in criminal law practice upon which to base our judgment of what work was necessary.

We are now being denied even the minimal compensation we requested. While no one is attacking our competence, our integrity is being attacked by suggestions that the work we did was inappropriate, even though the public defender's office, in the same case and with a resolution before trial, put in almost 200 hours more than we did. The trial court even went so far as to imply that the mere submission of our request for payment of attorney's fees in excess of the maximum would be cause for filing a grievance. See Order (re: Attorneys Fees), filed June 25, 1982. We respectfully maintain that if such be the case, we would rather have such a grievance filed than face a grievance for failure adequately to defend our client.

No one has specified what work we did that should not have been done, whether court appearances, written briefs, legal research, factual research, discussions with our client or other witnesses, but the trial court and the people argue that we ask too much.

Although we are willing to go to great lengths to assure indigent defendants competent representation, we feel it is unfair that we be required to carry the full burden for our entire profession. We seek, if not the reasonable compensation provided by statute, at least the compensation at the court appointment rate for the hours we spent in the defense of Mr. Vargas.

For these reasons, we request that this Court reverse the ruling of the trial court and award the attorney's fees and expenses claimed.

Respectfully submitted,

David Bye

David Bye, #3203
116 N. College Avenue
P.O. Box 1905
Fort Collins, Colorado 80521
Telephone: 493-6556

LIST OF EXHIBITS

1. Information filed against Jorge Vargas
2. Title pages of reporter's transcript of preliminary hearing, showing appearances of counsel
3. Defendant's Motion To Dismiss for Prosecutorial Misconduct
4. Motion for Interim Payment of Attorney Fees
5. Order Authorizing Payment on Legal Fees
6. Motion for Payment of Attorney's Fees in Excess of the Maximum
7. Order, dated April 10, 1982, regarding attorneys fees
8. Motion To Reconsider or To Modify Order Relating to Attorneys' Fees, with list of expenses, and Brief in Support of Motion for Payment of Attorney's Fees in Excess of the Maximum and in Support of Payment of Interpreter's fees
9. Affidavit of David D. Wymore, concerning defense of Xavier Villa, 80CR301.
10. Order (Re: Attorney's fees), dated June 25, 1982
11. Appellant's Opening Brief and Reply Brief on Appeal, 82 CA 1059
12. Accounting for payments in People v. Romero, 81 CR 183
13. Orders for Attorney Fees in People in the interest of C.A.K., J-78-38.
14. Prosecution Motion for Extension of Time within Which To File Opening Brief and Defendant's Objections to People's Motion
15. Motion for Witness Fees and Motion for Pretrial Conference
16. People's Motions for Extension of Time on appeal and Motion to Dismiss Appeal
17. Billings submitted by attorneys for Jorge Vargas.

CERTIFICATE OF MAILING

I do hereby certify that I have served a true and correct copy of the foregoing Petitioners' Brief on Certiorari Issue and Response to Order to Show Cause by depositing same in the U.S. Mail this 25th day of November, 1983, proper postage affixed and correctly addressed to:

Attorney General
1525 Sherman Street
Third Floor
Denver, Colorado 80203


