

Approved by the Judicial Council December 4, 2009

**REPORT OF THE JUDICIAL COUNCIL
CRIMINAL LAW ADVISORY COMMITTEE
ON K.S.A. 22-4507**

In June, 2008, Marla J. Luckert, Kansas Supreme Court Justice, requested that the Judicial Council Criminal Law Advisory Committee (Committee) study K.S.A. 22-4507(b) and its relation to the holding in *State v. Robinson*, 281 Kan. 538, 132 P.3d 934 (2006). The *Robinson* court dealt with K.S.A. 22-4513 and held that a court must consider the defendant's ability to pay fees and the financial burden such would place on the defendant at the time of assessment. Similarly, K.S.A. 22-4507(b) requires that claims for compensation and reimbursement be certified by the claimant and presented to the court at sentencing. Several district judges had informed Justice Luckert that the requirement to make this analysis at sentencing was difficult and awkward in practice, especially in emotionally charged cases. The judges indicated that in most cases, the inquiry into the defendant's financial status was merely part of the sentencing routine. However, in some cases, especially where victims or witnesses have testified, the sentencing can be very emotional and it becomes difficult to transition from the type of dialogue involved in sentencing a defendant to the type of dialogue required to determine a defendant's ability to pay costs and fees. It seems to trivialize the victim's and the defendant's situations. Justice Luckert asked the committee to see if it could come up with an alternative to address this concern.

COMMITTEE

The members of the Committee taking part in this study are as follows:

1. **Stephen E. Robison, Chair**, Wichita; practicing attorney and member of the

Judicial Council.

2. **James W. Clark**, Lawrence; attorney for the Health Care Stabilization Fund.
3. **Edward G. Collister**, Lawrence; practicing attorney.
4. **Jim D. Garner**, Coffeyville; Secretary, Kansas Department of Labor.
5. **Patrick M. Lewis**, Olathe; practicing attorney.
6. **Hon. Michael Malone**, Lawrence; District Judge in the 7th Judicial District.
7. **Steven L. Opat**, Junction City; Geary County Attorney.
8. **John M. Settle**, Larned; Pawnee County Attorney.
9. **Ann Swegle**, Wichita; Sedgwick County Deputy District Attorney.
10. **Loren L. Taylor**, Kansas City; Attorney and Police Trainer.
11. **Debra J. Wilson**, Topeka; Capital Appeals and Conflicts Office.

DISCUSSION

One of the issues in *State v. Robinson*, 281 Kan. 538, 132 P.3d 934 (2006), was whether an assessment of fees under K.S.A. 2005 Supp. 22-4513 is error if a sentencing judge fails to explicitly consider *sua sponte* at the time of assessment a defendant's ability to pay and the financial burden payment would impose. *Robinson*, 281 Kan. at 538. The court reviewed the history of the changes to K.S.A. 22-4513 and ultimately determined that although neither subsection (a) nor subsection (b) of the statute explicitly state that consideration of a defendant's financial resources must occur "at sentencing", when read together the practical effect of the subsections is that the consideration must occur, and sentencing is the proceeding that routinely addresses BIDS reimbursement. Therefore, it logically follows that analysis of a defendant's financial resources must be done at sentencing. *Id.* at 547.

Since *Robinson* several district court judges have expressed to Justice Luckert that incorporating a discussion about a defendant's financial resources into the sentencing procedure is difficult and awkward in practice. Although many times the process is just a part of a routine

sentencing, the judges were specifically concerned with making the inquiry a part of an emotionally packed sentencing. Specifically they referred to situations where the victims and others have testified or where a departure motion was considered. The judges reported that it is difficult for them and others in the courtroom to transition from the type of dialogue that surrounds the imposition of a sentence to a discussion of how much the defendant is able to pay to the State. Whether the inquiry happens before or after other portions of the proceeding, there is a sense that talking about the cost of attorneys fees minimizes or trivializes the victim's and defendant's situations as if to say that the money is more important.

The committee discussed the issue and some members indicated that since the *Robinson* case, there have been dozens of these cases remanded for consideration of the defendant's financial resources to be made on the record. See *State v. Phillips*, No. 96,754, filed June 19, 2009. While prior to *Robinson*, it seems that few judges were making these required findings at sentencing, it now appears that the financial finding may have become a matter of routine in most courts. Nevertheless, the committee thought it prudent to address the concerns expressed by the judges. Therefore, to address the difficulty of transitioning to a costs and fees discussion following a highly emotionally-charged sentencing, the committee recommends the following amendments:

“K.S.A. 22-4507. Compensation and reimbursement of expenses for services to indigents; procedures for payment; exemption from fees for electronic access to court records. (a) . . .

(b) Claims for compensation and reimbursement shall be certified by the claimant and shall be presented to the court at sentencing *or on a date no later*

than 90 days after sentencing if the court determines that such a delay would be appropriate. A supplemental claim may be filed at such later time as the court may in the interest of justice determine if good cause is shown why the claim was not presented at sentencing. In accordance with standards and guidelines adopted by the state board of indigents' defense services under this section, all such claims shall be reviewed and approved by one or more judges of the district court before whom the service was performed, or, in the case of proceedings in the court of appeals, by the chief judge of the court of appeals and in the case of proceedings in the supreme court, by the departmental justice for the department in which the appeal originated. Each claim shall be supported by a written statement, specifying in detail the time expended, the services rendered, the expenses incurred in connection with the case and any other compensation or reimbursement received. When properly certified and reviewed and approved, each claim for compensation and reimbursement shall be filed in the office of the state board of indigents' defense services. If the claims meet the standards established by the board, the board shall authorize payment of the claim.
...

“K.S.A. 22-4513. Liability of defendant for expenditures by state board; judgment; determination of amount and method of payment; liability of others for expenditures. (a) If the defendant is convicted, all expenditures made by the state board of indigents' defense services to provide counsel and other defense services to such defendant or the amount allowed by the board of

indigents' defense reimbursement tables as provided in K.S.A. 22-4522, and amendments thereto, whichever is less, shall be taxed against the defendant and shall be enforced as judgments for payment of money in civil cases. *Such sum shall be assessed at sentencing or on a date no later than 90 days after sentencing if the court determines that such a delay would be appropriate.*

(b) . . .”

The committee anticipates that in most cases the courts will continue to address the issue of the defendant’s ability to pay costs and fees at sentencing as it does now. However, these amendments would allow the court to postpone that discussion in those highly emotional cases where a delay in the discussion would be more appropriate for the parties involved.

While discussing this issue, the committee received information from the Board of Indigent Defense Services (BIDS) that indicated there has been a significant decrease in the BIDS application fees recouped and it suspects that the fees are being waived by the court. Although the BIDS application fee, provided for by K.S.A. 22-4529, is intended to be collected at the start of a case, BIDS understands that in most, if not all, cases the fee is not being assessed until sentencing. It is unclear why, but BIDS has seen a sharp decrease in the BIDS application fee fund, from \$1,011,036 in FY 07 to only \$868,014 in FY 08, and only a slight increase in the attorneys fees recouped. The committee is concerned that in many cases the courts are finding the defendant unable to pay and then they are waiving both the application fee and the attorney’s fees. After discussing this issue, the committee agreed that if there was a way to treat the application fee and attorney’s fees, provided for by K.S.A. 22-4513, more like a civil judgment;

it may increase the potential for actually recouping the costs. For instance, if a defendant does not have the ability to pay during their probation term or while incarcerated, the court could postpone payment until a later time. Essentially the debt would remain and it could then be dealt with and collected the same as a civil debt. Therefore, the committee recommends the following amendments:

“K.S.A. 22-4513. Liability of defendant for expenditures by state board; judgment; determination of amount and method of payment; liability of others for expenditures. (a) . . .

(b) In determining the ~~amount and method of payment of defendant’s current and future ability to make payments on~~ 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 *or postpone* 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 *or time* of payment.

. . .”

“21-4603d. Authorized dispositions, crimes committed on or after July 1, 1993. (a) . . .

(b) . . .

(c) . . .

(d) In addition to any of the above, the court shall order the defendant to reimburse the county general fund for all or a part of the expenditures by the county to provide counsel and other defense services to the defendant. Any such reimbursement to the county shall be paid only after any order for restitution has been paid in full. In determining the ~~amount and method of payment of~~ *defendant's current and future ability to make payments on* 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 *or postpone* payment of such sum or 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 *or time* of payment.

(e) . . .”

“21-4610. Conditions of probation or suspended sentence. (a) . . .

(b) . . .

(c) . .

(d) In addition to any other conditions of probation, suspension of sentence or assignment to a community correctional services program, the court shall order the defendant to comply with each of the following conditions:

(1) Make reparation or restitution to the aggrieved party for the damage or loss caused by the defendant's crime, in an amount and manner determined by the court and to the person specified by the court, unless the court finds compelling circumstances which would render a plan of restitution unworkable. If the court finds a plan of restitution unworkable, the court shall state on the record in detail the reasons therefor;

(2) pay the probation or community correctional services fee pursuant to K.S.A. 21-4610a, and amendments thereto; and

(3) reimburse the state general fund for all or a part of the expenditures by the state board of indigents' defense services to provide counsel and other defense services to the defendant. In determining the ~~amount and method of payment of~~ *defendant's current and future ability to make payments on* 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 *or postpone* 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 *or time* of

payment. The amount of attorney fees to be included in the court order for reimbursement shall be the amount claimed by appointed counsel on the payment voucher for indigents' defense services or the amount prescribed by the board of indigents' defense services reimbursement tables as provided in K.S.A. 22-4522, and amendments thereto, whichever is less.”