

## Opinion No. 81-04

April 1, 1981

**OPINION OF:** Jeff Bingaman, Attorney General

**BY:** Reginald J. Stormont, Assistant Attorney General

**TO:** Mr. Albert Romero, Director, Local Government Division, Department of Finance and Administration, Lamy Building, Santa Fe, New Mexico 87503

### MUNICIPALITIES, ATTORNEYS, FINANCIAL INSTITUTIONS

Although a defendant is entitled to be represented by counsel on the appeal of a conviction to the court of appeals, a municipality is not required to provide for such legal representation because: (1) the legislature has set a comprehensive plan to furnish counsel to qualified criminal defendants; and (2) municipal budgetary restrictions preclude expenditures for items not budgeted.

### FACTS

The Town of Hagerman charged the defendant with violating certain town ordinances. After a trial in the Hagerman municipal court, at which he represented himself, the defendant was convicted of the offenses charged and sentenced to one hundred eighty days in jail, of which ninety days were suspended. He appealed **pro se** to the district court of the Fifth Judicial District, which, after a trial **de novo**, affirmed the judgment and sentence of the municipal court.

The defendant then appealed the district court's judgment to the Court of Appeals, expressing a desire to be represented by counsel at the appellate level. However, the defendant claimed to be financially unable to obtain counsel and the district court appointed a local law firm to represent him on appeal. The district court stated that the Town of Hagerman would be expected to pay the defendant's legal fees, and the appointed law firm has now requested the town to remit a one thousand dollar retainer.

### QUESTIONS

Is the Town of Hagerman required to provide for legal representation of an indigent criminal defendant convicted of violating a municipal ordinance and sentenced to serve a term of imprisonment on appeal of the conviction to the Court of Appeals?

### CONCLUSIONS

No.

### ANALYSIS

Resolution of this question necessitates a two-part analysis: (1) Is this defendant entitled to services of an attorney in this specific situation; and (2) If so, who is responsible for providing these services?

## OPINION

### I. Right to Counsel

Section 30-1-4 NMSA 1978 defines a crime as "an act or omission forbidden by law . . . for which, upon conviction, a sentence of . . . imprisonment or a fine is authorized." If, as in the present situation, a {211} municipal ordinance provides a sentence of imprisonment for its violation, the act forbidden by the ordinance falls within the definition of a crime.

The Sixth Amendment to the United States Constitution guarantees that in all criminal prosecutions an accused is entitled to assistance of counsel. This provision has been interpreted to require that no indigent criminal defendant may be sentenced to a term of imprisonment unless the state has afforded him the right to assistance of appointed counsel in his defense. **Argersinger v. Hamlin**, 407 U.S. 25, 32 L. Ed. 2d 530, 92 S. Ct. 2006 (1972); **Scott v. Illinois**, 440 U.S. 367, 59 L. Ed. 2d 383, 99 S. Ct. 1158 (1979); c.f. **Baldasar v. Illinois**, U.S. , 64 L. Ed. 2d 169, 100 S. Ct. 1585 (1980). Article II, Section 14 of the New Mexico Constitution mandates the same result. See e.g., **State v. Sanchez**, 94 N.M. 521, 612 P.2d 1332 (Ct.App. 1980), **cert. denied**, N.M. , P.2d . The constitutional right to appointed counsel for indigent criminal defendants has also been extended to include certain aspects of appellate review. **Douglas v. California**, 372 U.S. 353, 9 L. Ed. 2d 811, 83 S. Ct. 814 (1963). Thus, as the defendant in this case was convicted and sentenced to a term of imprisonment, he is entitled to assistance of counsel.

The facts indicate that the first time this defendant chose to exercise his right to counsel was on the appeal of his district court conviction to the court of appeals. We therefore conclude that the defendant does have a right to assistance of appointed counsel at this stage of the proceedings.

### II. Responsibility for Providing Counsel

The state legislature has long recognized the right of an indigent criminal defendant to assistance of appointed counsel, and enacted a comprehensive statutory scheme to provide for such assistance. Sections 31-15-1, **et seq.**, NMSA 1978. Section 31-15-9 provides for the establishment of public defender districts coextensive with the boundaries of one or more judicial districts of the state and for appointment of a district public defender in each district. Section 31-15-10 provides that the district public defender "shall represent every person without counsel who is financially unable to obtain counsel and who is charged in any court<sup>2</sup> within the district with any crime that carries a possible sentence of imprisonment." This duty of representation continues throughout any appeal, although the appellate division of the department, rather than

the district public defender, may actually provide representation in the appellate courts. Section 31-15-8.

Given the fact that the legislature has clearly established a statutory scheme to provide counsel for indigent criminal defendants in the district courts of the Fifth Judicial District, and has provided funding for its continued implementation, {<sup>2</sup>12} this scheme would control. The district court, having determined that the defendant was indigent, should have appointed the public defender to represent him on his appeal to the Court of Appeals, rather than appointing a private law firm at the expense of the Town of Hagerman.

Additionally, as a municipality, the Town of Hagerman is purely a creature of statute and is endowed only with powers expressly conferred in the statutes. **Sanchez v. City of Santa Fe**, 82 N.M. 322, 481 P.2d 401 (1971). Municipalities have no authority to make, and in fact are precluded from making, expenditures from approved budgets for items not budgeted. Section 6-6-1 **et seq.**, NMSA 1978. As the budget approved by the local government division for the Town of Hagerman does not include money for payment of legal fees for indigent criminal defendants, the town may not pay the private law firm's legal fees for representation of this defendant on his appeal to the Court of Appeals from its present budget.

### III. Conclusion

Although the defendant in this case is entitled to be represented by counsel on the appeal of his conviction to the court of appeals, the Town of Hagerman is not required to provide for such legal representation because: (1) the legislature has set forth a comprehensive plan to furnish counsel to qualified criminal defendants; and (2) municipal budgetary restrictions preclude expenditures for items not budgeted.

### ATTORNEY GENERAL

Jeff Bingaman, Attorney General

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<sup>n</sup>\* Section 31-15-2B of the Public Defender Act defines "court" as district or magistrate court, thus clearly precluding the public defender from representing any indigent criminal defendant in municipal court. However, the instant case involves an appeal to the court of appeals from the district court **de novo** and judgment and sentence.