No. 061606 MAY 18 2007

In The Supreme Court of the United States

STEPHEN AVILLA, and LEGAL AID SOCIETY OF SANTA CLARA COUNTY,

Petitioners,

v.

JAMES MCNAIR THOMPSON,

Respondent.

On Petition for Writ of Certiorari to the California Court of Appeal for the Sixth District

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

A non-governmental, non-profit legal aid corporation contracts with a County to appoint and compensate non-employee lawyers from a panel to represent indigent criminal defendants in cases where a conflict of interest requires separate counsel. The corporation is solely responsible for the review, approval/disapproval, and payment of billings submitted by its appointed attorneys, and operates independently of any state entity in regard thereto. The following question is presented:

> Is the legal aid corporation a "state actor," therefore subjecting it to suit for alleged violation of the lawyer's civil rights under 42 U.S.C. §1983, when it disapproves an appointed lawyer's bills and deals with a subsequent fee dispute with the lawyer over the disputed bills, because the legal aid corporation performs a traditionally exclusive state function in dealing with such matters?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The parties to this Petition are the Legal Aid Society of Santa Clara County and Stephen Avilla (its employee/manager). The Legal Aid Society of Santa Clara County is a private, non-profit California corporation. It does not have a parent corporation. No publicly held company owns any interest in the Legal Aid Society of Santa Clara County. Neither the County of Santa Clara nor any other governmental agency has an ownership interest in or governance right over the Legal Aid Society of Santa Clara County.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Stephen Avilla and Legal Aid Society of Santa Clara County respectfully petition for a writ of certiorari to review the opinion of the Court of Appeal of the State of California, Sixth Appellate District in this matter.

OPINIONS BELOW

The unreported opinion of the Court of Appeal of the State of California, Sixth Appellate District, is reproduced as App.1a-42a. The unreported Order of the California Supreme Court denying the Petitioners' Petition for Review is reproduced as App. 43a. The unreported Judgment rendered in the Superior Court of California, County of Santa Clara is reproduced as App. 44a-45a, and its accompanying Statement of Decision is reproduced as App. 46a-62a.

JURISDICTION

The opinion of the Court of Appeal of the State of California was filed and entered on November 30, 2006. The order of the California Supreme Court denying the Petition for Hearing was filed and entered on February 21, 2007. This petition for Writ of Certiorari is timely filed under Rule 13.1 of the Rules of the Supreme Court. This Court has jurisdiction under 28 U.S.C. §1257(a).

STATUTES INVOLVED

This case involves the 14th Amendment of the United States Constitution (App. 63a), 42 U.S.C. §1983 (App. 65a), California Penal Code §987.2 (App. 66a), and California Penal Code §987.3.

The immediate pertinent part of the 14th Amendment of the United States Constitution is set forth as follows:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The immediate pertinent part of 42 U.S.C. §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

The immediate pertinent part of California Penal Code §987.2 provides:

> (a) In any case in which a person, including a person who is a minor, desires but is unable to employ counsel, and in which counsel is assigned in the superior court to represent the person in a criminal trial, proceeding, or appeal, the following assigned counsel shall receive a reasonable sum for compensation and for necessary expenses, the amount of which shall be determined by the court, to be paid out of the general fund of the county: . . .
>
> (3) In a case in which the court finds that, because of a conflict of interest or other reasons, the public defender has properly refused.

California Penal Code §987.3 provides:

> Whenever in this code a court-appointed attorney is entitled to reasonable compensation and necessary expenses, the judge of the court shall consider the following factors, no one of which alone shall be controlling:
>
> (a) Customary fee in the community for similar services rendered by privately retained counsel to a nonindigent client.
>
> (b) The time and labor required to be spent by the attorney.

(c) The difficulty of the defense.

(d) The novelty or uncertainty of the law upon which the decision depended.

(e) The degree of professional ability, skill, and experience called for and exercised in the performance of the services.

(f) The professional character, qualification, and standing of the attorney.

STATEMENT OF THE CASE

In the latter part of the 90's, San Jose was the site of trials of certain members of the Nuestra Familia ("NF") prison gang. Among other cases, four of the alleged members of this gang were tried and convicted of murder and conspiracy in1997 following a year-long trial. Robert Mares was originally charged (two counts of homicide with special circumstances allegations) in that case, but was severed from the four defendants who went to trial. No date was ever set for Mr. Mares' trial.

From October 1996 through the voluntary dismissal of the charges by the District Attorney in December 1999, Mr. Mares was represented by Respondent James McNair Thompson ("Respondent"), an independent San Jose attorney (Appendix ("App.") 4a.) The Public Defender's office was unable to represent Mr. Mares because of a conflict. (The term "conflict" means the conflict between the obligations a public defender would have to another person and those which he would owe to the defendant if he chose to represent both parties. *People v. Norman (1967) 252 Cal.App.2d 381, 402.*)

Respondent was originally appointed to represent Mr. Mares by the Court, acting at the suggestion of the Conflicts Administration Program, Inc. (App. 4a.) At that time, this group had a contract with the County of Santa Clara to provide representation to "conflicted" indigent criminal defendants. (App. 4a.) The Court was the ultimate authority in regard to fees in such cases.

Respondent continued to represent Mr. Mares. However, Conflicts Administration Program, Inc., did not continue its involvement. Pursuant to a new contract entered into in the Fall of 1996 between the County of Santa Clara ("County") and Petitioner Legal Aid Society of Santa Clara County, a non-profit California corporation ("Legal Aid"), Legal Aid began to supervise conflict appointments and representation. (App. 4a.) In early 1997, Petitioner Stephen Avilla ("Avilla" and collectively with Legal Aid, "Petitioners") was hired as the Attorney Coordinator of Legal Aid's Conflicts Division.

Part of Avilla's job was to review invoices to insure that public money was appropriately spent on these cases. Relieved of the usual supervision of the paying client, appointed counsel have sometimes strained the public budget. Budgetary factors and the absence of cost controls were among the factors which led to the institution of the San Mateo Private Defender program. See, for instance, San Mateo County Bar Association, The Private Defender Program - A Brief History, http://www.smcba.org/pdp.htm.

In May of 1999, Respondent had completed his representation of Geary German, a conflicts client unrelated to the NF cases. Petitioner Avilla questioned a portion of the bill. In response, Respondent filed an application for payment of attorney's fees in the criminal court. (App.4a -

5a.) The application for payment was ultimately decided in Respondent's favor in October 1999.

In late August 1999, Legal Aid filed written opposition to Respondent's application in the German matter. In a footnote to his Opposition, Avilla wrote "As previously explained, the Attorney Coordinator was operating in accordance with his understanding as to the contractual nature of the relationship between counsel and the prior Conflicts Administration. Since Counsel Thompson believes that the Court is the proper forum for determining a reasonable fee for conflict assignments, it would be inappropriate for the Attorney Administrator to continue the policy of interim payments on this and other Conflict Program assignments. Obviously, having endured this onslaught, armed with the new knowledge that, at the conclusion of Conflict cases the reasonableness of fees and rates and the Attorney Coordinator, himself, will be aggressively attacked by Counsel Thompson, all payments will be deferred to the conclusion of all other remaining conflict cases. At that point, a more orderly presentation can be made, hopefully, avoiding the unpleasantness of this proceeding." Legal Aid did not pay Respondent for his July interim billing in Mares. (App. 5a.)

In August 1999, Respondent filed an application for payment in the criminal court for his July 1999 billings in the Mares case. In September 1999, the Superior Court denied this motion. Respondent continued to submit interim billings on the Mares case through December 1999, when the charges against Mr. Mares were dismissed. These bills also were not paid.

In December 2000, Respondent filed his civil complaint in Superior Court Civil Division. The Complaint

originally sought civil rights recovery against the County, but this was dismissed on the County's Demurrer (App. 3a). Trial proceeded on a contract, statutory duty, and quantum meruit basis against the County and the Petitioners. Trial proceeded on the civil rights claim, but only against the Petitioners, not against the County. (App. 3a)

The basis of Respondent's civil rights claim is the allegation that the above footnote (App. 30a-31a.) established that Avilla and Legal Aid were retaliating against him with regard to the Mares case billings (his only other case where Legal Aid was involved) for his application made to the Court in the German matter, and was intended to deter Respondent from filing other applications for payment of disputed fees.

Trial was had to the Court, which ultimately entered Judgment in favor of Respondent on one cause of action, as a third party beneficiary of the County-Legal Aid contract, and awarded a reduced amount of the fees sought by Respondent. (App. 44a-45a). Judgment was for the Petitioners on the civil rights cause of action. The case was appealed to the State of California Sixth District Court of Appeals. (App. 3a-4a.).

The trial court dismissed the civil rights cause of action because Petitioners were not "state actors" and therefore, were not acting under color of state law (App.51a-54a). The Court of Appeals opinion is attached as App 1a-42a. The Court of Appeals mostly affirmed the Judgment, but reversed on the civil rights cause of action (App. 41a), declaring that Legal Aid was a state actor because it was fulfilling a traditionally exclusive state function. (App. 17a-32a). Petitioners sought review by the Supreme Court of the State of California, which was denied. (App 43a).

REASONS FOR GRANTING THE PETITION

This case involves the interpretation of federal law by the California state courts in a case where there is no direct California or federal precedent. The ruling of the Court of Appeals is inconsistent with federal precedent in analogous cases.

The issue is whether an independent, private non-profit legal aid agency is a "state actor" such that it is subject to liability under 42 U.S.C. Section 1983 for acts done while performing under an independent contract with a local governmental agency, in the course of its economic and supervisory relationship with non-employee lawyers whom it appoints and compensates to represent indigent defendants. Given that this affects the many agencies like Petitioner Legal Aid which serve the criminal justice system across the country, it is an important issue. (See, for instance, Los Angeles County. Bar Assoc., Indigent Criminal Defense Appointments Program, http://www.lacba.org/showpage.cfm?pageid=24 and San Mateo County. Bar Assoc., Private Defender Program - A Brief History, http://www.smcba.org/pdp.htm, for two examples of the tens of thousands of cases handled by just two of many such agencies.)

The initial issue is whether the "state actor" issue should be evaluated on the basis of (1) whether this is a function traditionally exclusively performed by the State or (2) whether the government is involved in the decisions and policies of Legal Aid involving payment of panel conflict attorneys. If the matter is to be resolved by application of the "traditional exclusive" test, then the further issue is whether the particular function – paying counsel – which is at stake here is within any traditionally exclusive government

function.

The two California courts (trial and appellate) which considered the instant case came to different conclusions as to whether such independent agencies are subject to civil rights claims by their appointed attorneys. The trial court evaluated the extent to which the government was involved in the decisions and policies of Petitioner Legal Aid. Since the government was undisputedly not involved at all in Legal Aid's fee payment decisions or relations with panel attorneys, the trial court decided that Legal Aid was not a state actor (App. 22a). The Sixth District Court of Appeal held that the key question was whether this is a function traditionally exclusively performed by the State. (App. 22a.) The Court of Appeals determined that it was, and held that the civil rights action could proceed to trial because this made Legal Aid a "state actor."

The issue is unsettled and important. The instant case presents the issue in simple and stark form: It is unquestioned that the government was not involved in Legal Aid's decision or policy, so the case rises and falls on the applicability of a "traditionally exclusive public function" test. Thus, this case presents an excellent vehicle for resolving the question.

So far as we have discovered, no case directly addresses the issue of whether a non-profit, non-governmental conflicts administration program is fulfilling a function that is traditionally exclusively performed by the state; whether, in such a situation, the correct test is the "traditionally exclusive public function" test; or how, if this test is appropriate, it should be applied.

This Court's ruling, undoing the incorrect approach

taken by the Court of Appeal, is important to the administration of justice throughout the States. The approach espoused by the Court of Appeals broadly exposes legal aid agencies to a multitude of suits for violations of civil rights by panel attorneys.

Today, it is an argument over behavior in the course of a fee dispute; tomorrow it will be appointed counsel taking the position that they cannot be supervised at all without invading their constitutional rights. Every time a program refuses an attorney admission to a panel, or consigns an attorney to a lower panel, there will be the possibility of civil rights litigation. Attorneys being removed from panels will doubtless claim the right to notice and a hearing. The discretion of independent non-profit agencies to manage their funds and their lawyers will be damaged.

Although most counsel are responsible, thorough, and competent, over-aggressive and/or overcharging counsel will be emboldened to sue or threaten to sue to put pressure on conflict administrators. Not only will that stress and damage legal aid agencies and their employees, who have potential personal liability, but respect for scarce public funds will be lost. Administrators will lose the ability to administer these matters.

The issue of whether all these conflict administration agencies, simply by virtue of the function they perform, are acting "under color of law" and thus subject to suit under 42 U.S.C. §1983, is an important issue of nationwide concern. This decision affects the ability of all these agencies to fulfill their historic role – providing competent lawyers at a price that will not break the public bank. If any dispute with a lawyer is potentially a federal civil rights case – and that is where the Court of Appeals ruling leaves us – then

administrators will be afraid to discipline lawyers and control fees.

Such liability contrasts markedly with the practice with regard to private, non-profit legal aid agencies that provide direct representation through their own lawyers (*Lefcourt* and *Graseck*). In that situation, the courts have clearly held that the defense-providing agencies are not state actors.

Brentwood Academy v. Tennessee Secondary School Athletic Association, 531 U.S. 288 (2001) recognized explicitly that there can be policy values which outweigh factors tending toward a "state action" finding. The Court of Appeals dismissed these policy contentions, but they are very real. The values to be served by keeping Legal Aid's decisions private are significant. The administration of justice would be adversely affected if every fee dispute and appointment decision can be converted into a civil rights case by alleging retaliation or a due process violation. If treatment in a fee dispute is subject to civil rights attack, will that also be true of decisions to select particular lawyers, to place lawyers on particular panels, to determine rates, and otherwise to manage the situation? The management of conflict administration programs, already difficult, will be made substantially more so.

We submit that allowing §1983 liability to disturb the relations between conflict administration programs and panel attorneys will not serve the slightest public good; in fact, it will have many negative effects. Insurance will have to be purchased, if available, or reserves will have to be developed to defend such cases and pay judgments when necessary. The amount paid by local governments for this particular form of public service will go up. Relations between panel

attorneys and entities like Legal Aid will become adversarial and tainted with risk and the possibility of large judgments, including those for personal injury and punitive damage claims.

For the reasons stated both above and below, this Court ought to take up this matter, and decide that independent non-profit providers of panel attorneys for cases where indigent defendants cannot be represented by a public defender because of a conflict are not state actors in their relations with their appointed or panel attorneys.

I. The Correct Standard To Determine Whether Legal Aid Was a "State Actor" for Purposes of §1983 Was Whether The Government Was So Entwined, Involved, or Implicated In the Action Alleged to Have Created the Liability That The Action Could Fairly Be Considered the Act of the State.

Graseck v. Mauceri, 582 F. 2d 203 (2nd Cir. 1978) and *Lefcourt v. Legal Aid*, 445 F. 2d 1150 (2d Cir. 1971), both cited and relied on by the trial court, held in markedly similar circumstances that Legal Aid Societies that hire lawyers to provide direct services to indigent criminal defendants are not state actors when it comes to their relations with their employee-lawyers.

In both these cases, the legal aid society defendant contracted with a New York county to provide criminal defense for indigents. In each case, a legal aid attorney sued the non-profit entity under 42 U.S.C. §1983, alleging that his discharge was in violation of his Constitutional rights. Both cases held that the legal aid societies, in dealing with their employees as employees, were not state actors sufficient to

allow suit by an employee-lawyer under §1983.

Lefcourt v. Legal Aid held that:

> "The dismissal of a legal aid attorney by the Legal Aid Society of the City of New York was not performed under color of state law, notwithstanding the receipt of substantial government funds by the Society. The lack of governmental control over or interference with the Society's affairs was deemed pivotal." (Lefcourt, supra, 445 F. 2d at 1155.)

Graseck, supra, 582 F. 2d at 210, held that in the typical case, the question posed is relatively simple: *"Was the state 'involved not simply with some activity of* the institution alleged to have inflicted injury upon a plaintiff, *but with the activity that caused the injury*?" The Court went on to state that financial support was insufficient for "state actor"status; what was important was the degree of control:

> "It cannot be said that the Society acts under color of State law by virtue of the financial and other benefits which it receives from the City and various other governmental agencies, courts and subdivisions, since there has been no sufficient showing of governmental control, regulation or interference with the manner in which the Society conducts its affairs." *Graseck, supra*, 582 F. 2d at 208.

In the present case, it was clear that the County was not involved in supervising or controlling the activities of Legal Aid in any way. In particular, there were no facts adduced to show that the County had control over, regulated, or interfered with the manner in which Legal Aid conducted

its affairs with regard to the particular decision not to pay Respondent, nor **any** decisions about compensation of panel attorneys. The trial court found as a fact that Legal Aid was independent of the County in regard to issues of paying attorneys (App. 44a-45a and 22a). The Court of Appeals opinion did not challenge this finding. (App. 22a.)

Lefcourt dealt directly with the argument by the appellant therein "that the Society's activities constitute State action because of the function which the Society fulfills . . . because the defense of indigent persons accused of criminal activity is mandated by the Sixth Amendment and State law, the performance of that function by the Society constitutes an essential State function . . ." (445 F.2d at page 1155-56). In this regard, the Court said:

> Activities which are constitutionally essential to the functioning of the judicial process, including the representation of indigent persons accused of criminal activity, are doubtless among the most significant functions that any agency, public or private, might be called upon to perform. However, the representation of persons accused of crimes, far from being the function of any agency which 'traditionally serves the community' is normally performed for and by private persons. [The Court's embedded quote is from *Evans v. Newton*, 382 U.S. 296, at 302 (1966)]

Lefcourt went on to point to the independence of the Society from public control, then stated that "the hiring and firing practices of the Society as they relate to this case do not involved the manner in which the Society carries on its

public function." 445 F.2d at p.1156-57.

Referring to the Society as an agency that ". . . by contract has undertaken to make available to indigents legal services which otherwise governmental agencies might have to assume . . .," the Court went on to point out that:

> Although the State must see to it that indigents are provided with free legal counsel where they are constitutionally entitled to same, the State need not itself provide such counsel. To subject to the constitutional limitations on State action the hiring and firing and other practices of any private law firm which accepted court appointments to represent indigent claims, would be a highly unreasonable extension of the State action concept and §1983 and would quite transcend their intended scope. [445 F.2d at p.1157, fn.10]

Graseck and *Lefcourt* make it clear that a legal aid society that hires lawyers (or, per footnote 10 above, a law firm that hires lawyers and takes indigent appointments) can fire or discipline them without being subject to constitutional challenge. A conflicts administration operating by appointing independent lawyers from a panel has far less control over the appointed lawyers than a legal aid society where the attorneys are supervised employees. It has an equally tenuous relationship with the government – receiving funds but not being subject to control in regard to the details of the work to be performed. The idea that Legal Aid should be a state actor, while legal aid societies or law firms providing defense through their lawyer-employees are not, makes no sense.

Clearly, the Courts in both *Graseck* and *Lefcourt* held (1) that providing counsel to the indigent was not a traditional and exclusive public function, and (2) that the appropriate test was the level of control over the situation exercised, or which could have been exercised, by the state. We believe those cases – dealing as they do with the representation of indigents by lawyers and the relationship of a non-governmental representation agency with the lawyers who directly handle the defense – establish the principle that the appropriate test in such a case is the level of state involvement and control over the situation.

Logiodice v. Trustees of Maine Central Institute, 296 F.3d 22 (1st Cir., 2002) took up this subject in another context: School discipline by a private but publicly funded high school. In declaring the school was not a state actor, the Court noted:

> The reality is that we are all dependent on private entities for crucial services . . . Consider, for example, towns in which electric, gas, or bus service is privately provided under franchise. Thus far, the Supreme Court has declined to impose due process requirements on such institutions. *E.g.*, Jackson [v. Metro Edison Co., 419 U.S. 345 (1974)], 419 U.S. at 353-54 & n.9 . . . It perceives, as we do here, that state statutory and administrative remedies are normally available to deal with such abuses and that 'constitutionalizing' regulation of private entities is a last resort. [296 F.3d at p.30-31]

If the lower court ruling is allowed to stand, the effect is to "constitutionalize" the relations between private

conflicts administration entities and their panel lawyers, when state law remedies are perfectly adequate (as shown by Respondent's ability to recover his appropriately charged fees in the portion of the instant case based on contract).

The case which the Court of Appeals considered most apposite in this matter, on which it apparently based its holding, was *West v. Atkins*, 487 U.S. 42 (1988). In *West*, the plaintiff was an incarcerated prisoner in need of the most basic of services – medical care. The West plaintiff was in the involuntary custody of the state, which chose to fulfill its duty to provide medical care through a contracting doctor rather than an employee. Under those circumstances, where the imprisoned plaintiff had no choice of physician or medical care and was directly fulfilling the state's obligation to the prisoner, the Court held that the act or omission of the contract doctor *in rendering his professional services to the prisoner* would be deemed the act of the state.

It is notable that the *West* case dealt with the issue of whether the state's contractor had failed to fulfill the state's obligation to the prisoner, whereas the instant case has no such close relationship to the defense of Mr. Mares. Indeed, Respondent's argument was not that he was punished for something he did in the defense of Mr. Mares, but for something he did to collect his own fees in a different matter involving defendant German. ***

Accordingly, the *West* case provides no authority for considering Legal Aid's function in the criminal justice system to be a "traditionally exclusive" prerogative of the state.

If the posture here was that Mr. Mares, the defendant in the underlying criminal case, was suing Respondent for

violating his constitutional rights, then there would be an analogy to the *West* case (such a lawsuit might yet be prevented, however, under the dictates of *Polk County v. Dodson*, 454 U.S. 312 (1981)).

Here, however, it is as if the doctor in *West* was suing a private corporation that provided his services to the prisoner, and claiming that the private corporation, in its economic relations with the doctor, was equivalent to the state and therefore owed the doctor the duty of the state not to violate his civil rights. Similarly, Respondent Thompson is suing a private corporation that provided his services (in the sense of appointment and payment) to Mr. Mares as defendant. He is claiming that the private corporation, in its relations with the lawyer, owed him the duties the state would owe him in regard to civil rights, rather than the standard duties of a private company. As the trial judge in this case correctly perceived, neither the hypothetical situation where the doctor in *West* is the plaintiff against the private corporate provider of incarceration services, nor the current situation where the lawyer is the plaintiff against the private corporate appointer of lawyers, are sufficiently analogous to *West* to require its application.

Far from the helpless prisoner in *West,* the Respondent is a free actor who can choose what cases he wants to work on and can "go elsewhere" if he disagrees with the way they are handled by the conflicts administration. Rather than being in the care of the state, the Respondent is independent of it. In *West*, the plaintiff was in coercive custody – the most extreme exercise of state power over an individual short of the death penalty. No condition of that sort is present here.

Accordingly, the Court of Appeals used the wrong

test in determining that Legal Aid was a state actor. That decision should be reversed. When the appropriate test is applied, Legal Aid will not be a "state actor," because there is no governmental involvement or control in its decisions relating to attorney compensation.

II. Providing Counsel for the Indigent Is Not a Traditionally Exclusive State Function; Therefore, If That is The Appropriate Test of Who Is a "State Actor," Legal Aid Does Not Meet The Test.

If the traditional and exclusive public function test is the applicable test, the Court of Appeals erred in applying it. When reviewed in light of the facts and other case law, it is apparent that Legal Aid does not perform a traditional and exclusive public function.

The notion of what is a traditional and exclusive public function has been narrowed by a variety of holdings. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 353 (1974) held that the provision of vital electrical services to homeowners under a state granted and highly regulated monopoly was not an exclusive and traditional state function. *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982) held that providing special education did not fall into this category while *Morse v. North Coast Opportunities, Inc.*,118 F.3d 1338 (9th Cir. 1997) held it was not applicable to regular education. *Blum v. Yaretsky*, 457 U.S. 991 (1982) held nursing homes were not state actors.

As the Court noted in *Gerena v. Puerto Rico Legal Services, Inc.*, 538 F.Supp. 754, 759 (D. Puerto Rico, 1982), "Merely because the federal and state government have elected to act on behalf of the public interest does not transform the created services into ones which have

traditionally and exclusively been performed by government. In *Polk County v. Dodson,* 454 U.S. 312, [318] (1981) . . . (footnote omitted), the Supreme Court stated the following with respect to services performed by public defenders in criminal proceeding: '[t]his is essentially a private function, traditionally filled by retained counsel, for which state office and authority are not needed.'"

As this Court said in *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 158 (1978): "[w]hile many functions have been traditionally performed by governments, very few have been 'exclusively reserved to the State.'" Furthermore, "it is not enough if the private entity is merely affected with the public interest; it must exercise powers 'traditionally exclusively reserved to the State.' *Id.* 419 U.S. at 352. . . " *Jensen v. Farrell Lines, Inc.*, 625 F.2d 379, 384 (2d. Cir., 1980), *cert. denied*, 450 U.S. 916 (1981).

Based on this jurisprudence, the question is not merely whether providing counsel for the indigent was a function that is sometimes performed by the State, but whether it is a function which is exclusively reserved to the State, i.e., cannot be performed by others.

The Court of Appeals held, based apparently only on the Sixth Amendment to the U.S. Constitution and Penal Code §987.2, that paying reasonable compensation to conflict attorneys was the "exclusive prerogative" of the state (App. 22a-24a).

However, the Court of Appeals opinion conceded that there are organizations and attorneys that have long provided *pro bono* services for indigent defendants (App. 23a-24a). These agencies have a long history of providing free services to indigent criminal defendants. Accordingly, there is no

exclusivity in the provision of such services.

In light of that undeniable fact, it is inexplicable that the Court of Appeal could have stated that the Sixth Amendment and Penal Code §987.2 "impose exclusive duties" on the state to provide and pay for counsel for indigents. The fact of the matter is, paying for criminal defense is not an exclusive state function. It is a function that is provided (and has traditionally been provided) by both state and non-state entities, and for many years of our history, was the province entirely of either charity, or lawyers appointed for no compensation by courts[1].

We submit initially that without hearing evidence to support the "constitutional facts" on which its decision was based, the trial court could not have made a determination that the function performed by Legal Aid was a traditionally exclusive function of government. The trial court did not make such a finding (App. 22a-23a), of course, and therefore, it was not appropriate for the Court of Appeals to base its finding on underlying facts not established in the trial court.

The Court of Appeals' application of the traditionally exclusive public function test was incorrect under the factual circumstances shown here. Given the myriad of ways that our society has provided counsel to the indigent over the years, through private charity, volunteer lawyers, attorneys

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1. Respondent did not offer, and the Court of Appeals opinion did not reference, any evidence to establish Legal Aid's function was a traditionally exclusive State prerogative. The decision was apparently made on the basis of the statute, the Supreme Court holdings requiring counsel for the indigent, and nothing else.

appointed and serving without compensation, and advocacy organizations, it is simply not correct to say that the state has ever asserted "exclusive" control over this function.

In fact, the state is simply the agency of last resort, not the exclusive provider. Indigents charged with crimes look first to family and friends to pay for counsel, then explore non-profits, law school clinics, issue advocacy groups, and *pro bono* lawyers, and last come to the public defender or appointed counsel system.

To see how "exclusive" the system is, we have only to think about whether the state could or would "exclude" others from performing the function. Obviously, if I or any other lawyer were to set up a "free clinic" to defend the indigent, we would be applauded, not prevented. The state simply does not assert any exclusive right to compensate lawyers for the indigent. It has not done so traditionally, and it does not do so today.

The test is even harder to apply when we consider the "traditional" requirement. Unless our traditions start in the 1960's (when *Gideon v. Wainwright*, 372 U.S. 335, 342-343 (1963) and *In re Williams*, 1 Cal.3d 168, 174 (1969) established a right to state-paid indigent defense counsel), for most of our national life, defense of the indigent was not at all the province or prerogative of the State, and in fact, the government took the position that it was not required to participate in such a system or provide funds for defense.

So, the state's involvement in these matters is not exclusive now, and has not traditionally been so. Since both findings would be necessary to denominate Legal Aid as a state actor, the Court of Appeals decision on this subject should be reversed.

III. Even if Providing Counsel for the Indigent *Is* a Traditionally Exclusive State Function, The Separate Function of Administering Payment To and Determining How to Handle Fee Applications From Appointed Counsel Is Not and Has Not Been Traditionally Exclusively Performed by the State and Therefore, With Regard to This Particular Purpose, There Was No State Action.

Assuming *arguendo* that providing counsel for the indigent is a traditionally exclusive state function, nevertheless, that conclusion does not determine the issue here. Because an entity may be a state actor for some but not all purposes, one would have to examine whether the separate function of administering payment to counsel and determining how to handle fee applications is a function traditionally exclusively performed by the State.

In a case which turned "almost solely" on the public function approach to determining the existence of state action, the U.S. Ninth Circuit Court of Appeals held that "[A]n entity may be a state actor for some purposes but not for others." *George v. Pacific-CSC Work Furlough*, 91 F.3d 1227 (9th Cir., 1996). In *George,* the Ninth Circuit considered a case by an alleged "whistleblower" plaintiff against his former employer, a private correctional contractor operating under contract with the County of San Diego.

The defendant contractor conceded that "incarceration is a traditionally exclusive state function." However, the court reasoned that "[T]his assumption misses the point . . . The relevant inquiry is 'whether [Pacific's] *role as an employer* was state action' in George's case" [quoting from *Gorenc v. Salt River Project Agricultural Improvement & Power Dist.*, 869 F.2d 503, at 505 (9th Cir., 1989)].

In *George,* the Ninth Circuit held that George had not shown that his employer had become the government for employment purposes, even though his employment was for the purposes of rendering services in regard to an admittedly traditional and exclusive state function – the incarceration of offenders.

Likewise, there was nothing in the record of the trial or the trial court's findings to demonstrate that Legal Aid had "become the government" in performing its role of evaluating and dealing with fee applications from appointed counsel and approves or disapproves them. Indeed, the trial court found the reverse (App. 46a-47a).

Handling these matters is a part of Legal Aid's function which is equivalent to Pacific's function as an employer in *George*. Pacific was performing a public function in handling incarceration of offenders, but that did not mean that in its employment practices, it became the government or was performing a public function. Likewise, even if Legal Aid is performing a traditionally exclusive public function in appointing and providing counsel, it does not do so in its economic relations with the appointed attorneys. Therefore, actions in the course of those relations are not state action, notwithstanding the possibility that other functions of Legal Aid may fall into that category.

When Legal Aid decides whether to pay or contest payment of a fee claim by an appointed attorney, it is performing a quality control function. Pacific was trying to assure quality in the services it provides for the public, with public money. Legal Aid is trying to assure that appointed counsel are paid only for activities that are actually and reasonably performed in providing services to indigents, so

that scarce public funds are expended as efficiently as possible. It is fundamentally inequitable if f Legal Aid can be sued by Respondent for civil rights violations in its actions in disputed fee claims, but Pacific can dismiss its employee for blowing the whistle on legal and safety violations without incurring such liability.

The case of *Wolotsky v. Huhn*, 960 F.2d 1331 (6th Cir., 1992) casts further light on why there was no state action here, as well as why our case should be distinguished from *West v. Atkins*. The court in *Wolotsky* first noted that *West* was concerned with a situation where the doctor was being sued based on his treatment of an injured inmate. The *Wolotsky* opinion went on to state:

> . . . West involves the professional judgment of a physician where the state was under a legal obligation to provide such professional services to its custodial inmates and the state had contracted with the physician to provide his professional services in fulfillment of the state's legal obligation. However, in this case, the dispositive issue is not plaintiff Wolotsky's services, but rather the decision to discharge him. An analysis of the decision to discharge plaintiff even in light of West shows that the decision was not made under color of state law. Although Portage Path in this case was under contract to the state, that contract gave the state no input in the personnel decisions of Portage Path because those personnel decisions were not directly related to any legal obligation of the state. 960 F.2d at 1337.

Similarly, in the instant case, Legal Aid's decision as to how to conduct itself with regard to a fee application is far removed from the services which the state was obligated to provide in the instant case – the defense services that were rendered to Mr. Mares. Certainly, Legal Aid's actions which allegedly give rise to liability "were not related to any legal obligation of the state." *Id.* In addition, like Portage Path in *Wolotsky,* the County-Legal Aid contract gave the state no input into "personnel" decisions such as the decision to pay or not pay Mr. Thompson.

The *George* and *Wolotsky* cases take us back to *Graseck* and *Lefcourt,* whose results maintained the appropriate dichotomy. It would create a severe inequity and discontinuity in the law if a private contractor providing public defender services could fire or discipline its attorney-employees without fear of civil rights liability, while Legal Aid could be sued under these same statutes for its conduct in dealing with fee claims by appointed attorneys. In assuring quality and reasonable economy in the services provided to indigent defendants, the private public defender and the conflict administrator are performing highly similar functions. They should be treated the same for purposes of the determination of whether their actions are state action.

When analyzed from this point of view, it can be seen that when Legal Aid exercises its "custodian of public purse" function to try to make sure that public money produces the appropriate public benefit, and is expended economically and wisely, it is not fulfilling any purpose that is traditionally exclusively performed by the state. Rather, like the private independent contractors providing prison services in *George* and *Wolotsky,* where the payment function is concerned, Legal Aid is not a state actor.

Like Petitioner Legal Aid, the agencies in *Graseck* and *Lefcourt* provide counsel for the indigent, spending scarce public funds to do so, proceeding through admitted members of the bar, whom they must conciliate, manage, and discipline. In fact, conflict administrators possess less power over their panel attorneys than do the other entities, where the attorneys are on staff.

Like Petitioner Legal Aid, the agencies in *George* and *Wolotsky* interact with prisoners who have constitutional rights at stake, and seek to manage and discipline their custodial employees to assure that they deliver quality services for the benefit of the public under their contract with the government.

In all four of the above cases, the private independent contractor that is assisting the state is held to be like any other company in regard to disciplining its employees. There is no applicable difference between their function and Legal Aid's, and no good reason for the Court to allow a dichotomy whereby Legal Aid is subject to civil rights liability while other similarly situated entities are not. Accordingly, it is appropriate that the Court of Appeals decision be reversed.

IV. Ruling on This Issue Would Make This Case Consistent With Applicable Federal Precedents.

The Court of Appeals opinion says that its decision on the civil rights issue was based on *West v. Atkins*, 487 U.S. 42 (1988). However, *West v. Atkins* does not control this matter and is distinguishable (see *Wolotsky v. Huhn*, 960 F.2d 1331 (6th Cir., 1992) and associated discussion in Argument III, page 27)

The Court of Appeal disregarded the two closest

federal precedents: *Graseck v. Mauceri*, 582 F. 2d 203 (2nd Cir. 1978) and *Lefcourt v. Legal Aid*, 445 F. 2d 1150 (2d Cir. 1971) – the two cases most relied on by the trial court to decide the issue in favor of Petitioner. In *Schnabel v. Abramson*, 232 F.3d 83 (2nd Cir., 1999), the Court of Appeal reviewed its previous holdings in Graseck and *Lefcourt*, and reaffirmed those holdings. This is an issue of federal law, and if this case was rightly decided by the Court of Appeals, then *Graseck, Lefcourt,* and *Schnabel* are clearly wrong.

In *Graseck*, the fired attorney alleged that the courts pressured the Society to fire him because he was too aggressive in representing clients, and for other free speech activities. In *Lefcourt,* the fired attorney alleged that he advocated taking a much more aggressive role in the defense of criminal clients of the Society, in addition to other exercises of free speech, and was fired because of his views. In both cases, no state action was found to exist, and therefore, the Court upheld the dismissal of the civil rights claims, despite the fact that the views expressed and actions undertaken by the two attorneys went directly to the performance by the Societies of a very similar function to that performed by Legal Aid here, that is, providing defense counsel to indigents.

Yet under the reasoning of the Court of Appeals opinion in the instant case, the question in *Graseck, Lefcourt,* and *Schnabel* would be resolved in favor of liability – since the Legal Aid Society defendants were engaged in fulfilling a traditional and exclusive public function of providing indigent defense, they would be subject to civil rights liability as state actors in their dealings with their employees. While the Court of Appeals opinion purports to distinguish these cases, in fact it ignores them.

Accordingly, this Court's intervention in this case can maintain consistency in the law and avoid state applications of federal law which conflict with ruling Federal precedent.

CONCLUSION

Based on the foregoing arguments and authorities, we ask this Court to issue its Writ of Certiorari to examine these matters, and when examined, to reverse the holding of the Court of Appeals in this case.

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Respectfully submitted,

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