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NJ Supreme Court establishes procedure for prosecutors to subpoena public defender applications

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In New Jersey, individuals accused of crimes who cannot afford an attorney are fortunate to be able to request representation by the New Jersey Office of the Public Defender. The Office of the Public Defender is comprised of highly skilled and trained attorneys very experienced in representing clients in all phases of criminal proceedings. Although many criminal defendants have a mis-perception that public defender attorneys are not as skilled or experienced as private counsel, those of us who practice in the Criminal Defense Bar know that the opposite is true. The public defenders who labor tirelessly day in and day out in this State's trial courts are among the best criminal defense attorneys in the State.

In order to qualify for representation by the Office of Public Defender, an individual must fill out an application to demonstrate to court staff that he or she is financially unable to retain private counsel. In a recent case, our courts have attempted to address whether the information contained in this application should be made available to prosecutors who are investigating a particular criminal defendant for providing potentially false information in his application for representation by the public defender.

Clearly, tax payer funds, which pay for the Office of the Public Defender, should not be wasted to provide attorneys, free of charge, to criminal defendants who can otherwise afford to pay for their own attorneys. No one can seriously dispute that proposition, one which was relied upon by the Supreme Court in its recent decision. Equally clear and not subject to serious debate is the notion that when someone lies on a financial affidavit submitted to the Court, and that lie can be proven, such an individual should be subject to penalties, including prosecution. The real question is what must prosecutors be able to show before they can access the public defender application of an accused, or should prosecutors be permitted to review any public defender application they want?

In a recently issued decision in this case, the New Jersey Supreme Court found that the information contained in an accused's application for public defender representation may be made available to prosecutors under certain circumstances. In its decision, the Supreme Court outlined a procedure for prosecutor's to obtain otherwise confidential information.

The Supreme Court seemed to recognize how sensitive this issue is, noting:

Defendants who complete intake forms are seeking the services of counsel to defend against criminal charges, asserting an indigent defendant's right to appointment of counsel guaranteed by the Sixth Amendment to the United States Constitution and Article I, paragraph 10 of the New Jersey Constitution. . . Permitting prosecutors to obtain a defendant's application for public defender representation runs the risk of intruding on the defendant's right to obtain a public defender attorney.

Consequently, the Court established some guidelines and some hurdles for prosecutors to clear before they can obtain information in a defendant's financial affidavit submitted in connection with a public defendant application.

1. To warn public defender applicants about the scope of confidentiality the application form affords defendants, the current form will be modified to warn the applicant that "At the direction of the Assignment Judge acting on his or her own initiative, or in response to a valid grand jury subpoena with the approval of the Assignment Judge, this page may be produced to a grand jury and a prosecutor."
2. In cases where prosecutors may wish to review the public defender application, the trial court must conduct a proceeding in open court where it asks the public defendant applicant whether the information in the application about his or her finances and employment is true; advises the defendant that willfully false statements on the form about those areas may subject him or her to punishment; and confirms that the defendant understands that information about finances and employment may be disclosed to a grand jury and the prosecution. Importantly, "the defendant should be given the opportunity to review and amend the financial information he or she submitted in light of this colloquy."
3. Any information obtained by prosecutors from the public defender application cannot be used as evidence in the case for which the accused applied for the services of the public defender. Any evidence obtained may only be used in a separate case.
4. Finally, to obtain the information, prosecutors must present the Assignment Judge with a grand jury subpoena, and a supporting affidavit "from the prosecutor that details the basis for the subpoena -- a showing that the intake form contains false financial information."

These procedures provide appropriate safeguards to ensure that prosecutors cannot readily abuse their considerable authority to use grand jury subpoenas to obtain what is otherwise confidential information. At the same time, in appropriate cases prosecutors can investigate individuals who are taking advantage of taxpayer funds to obtain free legal services to which they should not be entitled. This recent decision may also produce a collateral benefit of reducing the workload of public defender attorneys, as some applicants, fearful of possible prosecution, decide not to apply and instead retain their own attorney.

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