Record No. 06-2182

IN THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

STEVEN ROSENFIELD, *et al.*,
Appellants,

v.

HON. WILLIAM W. WILKINS,
Appellee.

On Appeal From The United States District Court for the
Western District of Virginia, Charlottesville Division

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JURISDICTIONAL STATEMENT

The district court had jurisdiction over the constitutional claims below pursuant to 28 U.S.C. §§1331 and 1343 and Article III Sec. 2 of the United States Constitution. This Court has jurisdiction over this appeal under 28 U.S.C. §1291 from the final judgment below, which was entered October 18, 2006 and disposed of all claims in the case. The notice of appeal in this case was filed October 30, 2006. App. 127.

STATEMENT OF THE ISSUES

1) Where the judge specially assigned to adjudicate this case below had a clear institutional and professional interest in the matter at hand adverse to the plaintiff's interest, and hundreds of federal judges lacking such interest were available to hear the case in his place, whether the judge sitting by designation should have recused himself on plaintiff's motion.

2) Whether the portions of the Criminal Justice Act that provide for payment of fees to counsel who represent defendants in capital cases create a property interest in such fees on the part of such counsel, entitling them to due process of law in connection with fee awards.

STATEMENT OF THE CASE

On December 12, 2005, appellants Steven Rosenfield and Edward Wayland (hereafter referred to for convenience as "Rosenfield") filed suit in United States

District Court for the Western District of Virginia against the Hon. William W. Wilkins, chief judge of this Court, seeking declaratory and injunctive relief. App. 2. The complaint posed a Fifth Amendment challenge to Judge Wilkins' failure to afford adequate procedural protections in connection with the calculation of fee awards under the Criminal Justice Act, 18 U.S.C. §3006A and 21 U.S.C. §848(q)[1] ("CJA"). The case was assigned to District Judge Norman K. Moon.

By order entered February 13, 2006, Judge Moon recused himself *sua sponte*, deeming it inappropriate to sit in judgment of the contested action of the chief judge of the appellate court having jurisdiction over his decisions. App. 129-132. Rosenfield was advised by court personnel that a judge from outside the circuit would be sought for the case.

On May 12, 2006, Judge Wilkins filed a motion to dismiss the case, on the grounds that the court lacked jurisdiction to hear this case and that the complaint did not state a claim upon which relief might be granted. App. 23. Rosenfield duly filed an opposition memorandum.

In August, 2006, newly-entered counsel for Rosenfield learned that the case had been assigned to the Hon. James B. Loken, Chief Judge of the Eighth Circuit. In order to acquaint themselves with how best to present their case to an unknown

[1] Following the filing of this action, the provisions of 21 U.S.C. § 848(q) were recodified at 18 U.S.C. § 3599, and appellants hereinafter use the latter citation.

jurist, counsel undertook to educate themselves about Judge Loken's history of involvement with the matters at issue. The result of these inquiries suggested to counsel that Judge Loken had significant institutional and professional interests aligning him with his fellow chief judge of the Fourth Circuit – the defendant in the matter at hand – on the very matters at issue in the suit. Counsel for Rosenfield thereupon moved for Judge Loken to recuse himself, explaining that while they feared no personal bias, in their view the juxtaposition of interests in the case suggested that his impartiality "might reasonably be questioned" within the meaning of 28 U.S.C. Sec. 455(a). App. 65. Counsel attached to their moving papers abundant documentation attesting to the factual basis of their concern. App. 66.

Judge Wilkins filed no opposition to the recusal motion. Without holding a hearing, by memorandum opinion dated October 18, 2006, Judge Loken denied the motion to recuse on the grounds of "necessity" (*some* judge having to hear the case), and at the same time granted the motion to dismiss under Rule 12(b)(6), finding that Rosenfield did not enjoy a property right in the CJA fee which he sought to obtain, and was therefore not entitled to due process in connection with that award.. App. 4-11.[2] Rosenfield appealed.

[2] Althought Judge Wilkins's motion to dismiss presented arguments under both Rule 12(b)(1) and Rule 12(b)(6), it is clear from the ruling below that the case was

STATEMENT OF FACTS

Two separate sets of facts are at issue on this appeal: one with reference to Rosenfield's claims under the CJA, and one relative to the question of whether Judge Loken should have recused himself. The two sets of fact will be presented separately.

Facts Relevant To The Merits

To carry out the mandate of the Sixth Amendment, the CJA authorizes federal courts to appoint attorneys to represent defendants who are financially unable to hire their own defense counsel. 18 U.S.C. §§ 3006A and 3599. Appointed attorneys are to be compensated for all time expended in court and all time reasonably expended out of court. 18 U.S.C. § 3006A(1). Under the Fourth Circuit's plan for implementation of the CJA (App. 27-36), the Chief Judge has the final authority to determine the amount of compensation for attorneys who represent indigent defendants in the Court of Appeals. App. 33.

Acting under a CJA appointment from this Court, Rosenfield represented one Bobby Swisher, an indigent defendant under sentence of death, in presenting claims for federal *habeas corpus* relief.[3] Following the conclusion of this case,

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dismissed on the grounds that the plaintiffs had failed to state a claim upon which relief could be granted under 12(b)(6).

[3]Under *Powell v. Commonwealth*, 261 Va. 512 (2001), the verdict form used for sentencing at Mr. Swisher's trial contained inaccurate and misleading information

Rosenfield submitted a timely and detailed CJA voucher to this Court seeking fees of $38,393.75. Acting in his administrative capacity as chief judge, Judge Wilkins awarded Rosenfield $10,000.00. This amounted to a reduction of approximately 74% from the requested amount, and was not even sufficient to cover Rosenfield's overhead for the time he expended on the case.[4] Judge Wilkins offered no explanation for this reduction or for the manner in which he calculated the fee of $10,000.00. Nor were there any published criteria, standards, guidelines or policies for him to use in evaluating the plaintiff attorneys' time records to determine the appropriate amount of the fee which should be paid. Finally, there was no process available to the plaintiff attorneys to be heard to question this reduction. *See generally*, App. 15-18.

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which could lead a jury erroneously to believe that it was required to impose a death sentence. Because this issue had not been raised by trial counsel prior to the ruling in *Powell,* however, Rosenfield was precluded from asking the Virginia Supreme Court to intervene. Recognizing the problems involved in executing a man based on a process which had been declared improper by his own state's supreme court, the governor granted a temporary stay of execution to permit counsel to ask the court one more time to intervene. Citing procedural obstacles, the court declined. Shortly thereafter, Mr. Swisher was executed.

[4] Section 2.28(A) of the *Guidelines for the Administration of the Criminal Justice Act* provides: "General office overhead includes general office expenses which would normally be reflected in the fee charged to the client. *The statutory fee is intended to include compensation for these general office expenses*." (emphasis added)

The hourly rates implemented under the CJA, are well below market rates. The attorneys who do this work are often highly skilled, dedicated practitioners, devoting their time and talents to make the criminal justice system work. Cutbacks from the already limited compensation available under the CJA create very significant problems for them as they struggle to provide this important public service while making ends meet financially in their practices. Rosenfield's usual rate at the time was $250 per hour. App. 90. The fee reduction resulted in an almost 40% reduction in Steven Rosenfield's annual income for 2003. App. 89-90.

A subcommittee of the Judicial Conference has recognized that:

> [A]ppropriate rates of compensation are essential to maintaining the quality of representation required in a federal capital case. The time demands of these cases are such that a single federal death penalty representation is likely to become, for a substantial period of time, counsel's exclusive or nearly exclusive professional commitment.[5]

The American Bar Association has criticized the compensation provided to court-appointed attorneys representing defendants in death-penalty cases. According to Robin M. Maher, Director of the ABA Death Penalty Representation Project since 2001,

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[5]*Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation*, Part II of a report prepared by the Subcommittee on Federal Death Penalty Cases of the Judicial Conference's Defender Services Committee. This report was published as Appendix I of the Judicial Conference's Guidelines for the Administration of the Criminal Justice Act and Related Statues. An excerpt was filed below. App. 91-94.

> It is clear that attorneys without adequate compensation and resources cannot take on the burden of representing a death row client in post-conviction proceedings. The ABA recognized this fact in its revised edition of "Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases," approved in February 2003: "[i]t is demonstrably the case that, by discouraging more experienced criminal defense lawyers from accepting appointments in capital cases, inadequate compensation has often left capital defense representation to inexperienced or outright incompetent counsel."

Declaration of Robin M. Maher, App. 96-99.

Facts Relevant To Recusal Issue

The CJA provides for administrative supervision of the CJA program within each judicial district under the supervision of the judicial council of the circuit. The chief judges of the circuit courts play a central administrative role in making and implementing the policies of the CJA. The chief judges are all members of the Judicial Conference of the United States, 28 U.S.C. §331(a), which exercises general administrative oversight over the CJA system. The Judicial Conference plays a key role in making policy decisions involving the operation of the CJA by the courts. It reviews and approves detailed guidelines governing CJA administration by the federal courts, which have been published as *Guidelines for the Administration of the Criminal Justice Act and Related Statutes*. The Judicial Conference is also authorized by Congress to review the fees payable to CJA attorneys and to raise the fee cap if appropriate. Acting under this authority, the Judicial Conference has, in fact, raised the hourly fee several times.

The chief judges of the circuits play central roles in the administration of the CJA in their circuits. The CJA plan adopted by each federal district is to be reviewed and approved by the judicial council of the circuit. 18 U.S.C. §3006A(a). The judicial council is made up of representative district and circuit court judges, with the chief circuit judge a member by statute. 28 U.S.C. §332(a)(1). The chief judge is the person designated to call judicial council meetings, and presides at those meetings.

The chief judges of the circuits have significant responsibilities regarding the review of individual payment vouchers submitted by CJA attorneys seeking payment of fees and expenses. Under 18 U.S.C. §§3006A(d)(3) and 3599(g)(2), the approval of the chief judge of the circuit is required for payment of fees in excess of the payment caps set by the CJA. And often the chief judge is responsible for reviewing and approving fee petitions submitted by CJA attorneys for work in the circuit court. Considerations such as these led Judge Moon tellingly to state, in his decision recusing himself from this case *sua sponte*, that "Chief Judge Wilkins is *likely the sole individual* whose administrative duties and authority would enable him to implement the relief Plaintiffs seek, and was thus the only sensible defendant to name" (emphasis added). App. at 132.

The Eighth Circuit has its requisite plan, enforced by Judge Loken in his role as chief judge of the circuit, to implement the CJA. This *Plan to Implement*

the Criminal Justice Act of 1964, submitted into evidence below, App. 110-17, exhibits precisely the same failings as those addressed by the instant litigation involving the Fourth Circuit's CJA procedures. Like the Fourth Circuit's plan, the Eighth Circuit's includes no standards, criteria, guidelines or policies governing the determination of fees for work before the court of appeals. It does not require that attorneys be advised of the reasons for any reductions in the fees they receive. And it does not provide for any appeal or review of an adverse decision.

The Eighth Circuit's CJA plan is the plan which Judge Loken implements and causes to be implemented as chief judge of his circuit, and his involvement with all fee issues arising in the Eighth Circuit necessarily reflects that plan. Were a like-minded CJA attorney in the Eighth Circuit to file an identical suit challenging a substantial unexplained reduction in his or her CJA fee, the sole appropriate defendant would be Chief Judge Loken, for exactly the reasons that Judge Moon identified in acknowledging the designation of Chief Judge Wilkins as defendant in this suit. In Judge Moon's words, Judge Loken would be "*likely the sole individual* whose administrative duties and authority would enable him to implement the relief Plaintiffs seek, and ... thus the only sensible defendant to name" (emphasis added). App. at 132.

SUMMARY OF ARGUMENT

Chief Judge Loken should have recused himself from this case. This case challenged actions and policies materially identical to those of Judge Loken and those of the court of which he is chief judge. Recognizing the conflict presented by his sitting in judgment of such a case, Judge Loken improperly invoked the "Rule of Necessity" to legitimize his adjudication of the controversy. He did this notwithstanding that Judge Moon before him had expressly found that the "Rule of Necessity" did not apply in this case, and notwithstanding that the salient conflict was not - as Judge Loken stated - between appellants and all Article III judges, but between appellants and a chief circuit judge whose own actions and policies on the matter at bar were indistinguishable from those of the defendant chief judge. Judge Loken should not have invoked the "Rule of Necessity" and should have recused himself in light of the conflict.

The court below also erred in holding that the plaintiffs could not state a claim under the Due Process Clause of the Fifth Amendment because they had no "property interest" in the amount of their fees. The Criminal Justice Act provides that a court-appointed attorney "*shall*" be compensated for time reasonably expended on representation of indigent defendants. The mandatory language of the act creates a statutory entitlement to reasonable fees – an entitlement that constitutes "property" protected by the Due Process Clause. The fact that a court official may exercise some judgment in determining what fees are "reasonable"

does not negate the existence of a property interest. Rather, the plaintiffs are entitled to fair procedures that allow them an opportunity to convince the decision-maker that the time they expended and the fees they requested are reasonable.

STANDARD OF REVIEW

A dismissal for failure to state a claim is reviewed *de novo*. *Glaser v. Enzo Biochem, Inc*, 464 F.3d 474, 476 (2006). "A complaint should not be dismissed unless there is no set of facts on which relief can be granted, with all well-pled allegations of the complaint viewed as true and drawing all reasonable inferences in favor of the plaintiff." *Id.* (citing *Trulock v. Freeh,* 275 F.3d 391, 405 (4th Cir.2001); *Edwards v. City of Goldsboro,* 178 F.3d 231, 244 (4th Cir.1999)).

A trial judge's denial of a recusal motion is reviewed for abuse of discretion. Sales v. Grant, 158 F.3d 768 (4th Cir. 1998).

ARGUMENT

I. JUDGE LOKEN SHOULD HAVE RECUSED HIMSELF.

The United States Code, 28 U.S.C. §455(a) provides for disqualification of a judge where a judge's impartiality "might reasonably be questioned." This section codifies the recognition that "the goal of the judicial disqualification statute is to foster the appearance of impartiality." *Potashnick v. Port City Const. Co.*, 609 F.2d 1101, 1111 (5th Cir. 1980).

> The question is not whether the judge is impartial in fact. It is simply whether another, not knowing whether or not the judge is actually impartial, might reasonably question his impartiality on the basis of all the circumstances.

Aiken County v. BSP Div. of Envirotech Corp., 866 F.2d 661, 679 (4th Cir. 1989); *Rice v. McKenzie*, 581 F.2d 1114, 1116 (4th Cir.1978). The Fourth Circuit's formulation of the applicable standard is conventional. "Any question of a judge's impartiality threatens the purity of the judicial process and its institutions." *Potashnick*, 609 F.2d at 1111. The judiciary's understandable overriding concern with appearances dictates that disqualification should follow "if the reasonable man, were he to know all the circumstances, would harbor doubts about the judge's impartiality." *Id*.

Just such concerns motivated Judge Moon below to recuse himself *sua sponte* below, notwithstanding that he "firmly believe[d] he could try this matter fairly." Judge Moon perceived "a nontrivial risk that an outside observer might doubt his impartiality," App. 131, stemming from the fact that Judge Wilkins hears appeals from his decisions. Judge Moon reasoned, *id*.:

> The observer might perceive that Judge Moon's own personal and professional interests would be served by ruling in Judge Wilkins' favor, and question Judge Moon's ability to ignore these interests when deciding this case.

This high standard, which helps ensure the perception as well as the rule of law and fairness in our courts, is what is implicated in the first instance in the instant appeal.

A. Judge Loken Should Not Have Sat in Judgment of Policies Identical to Those Which He Enforces or of Actions Materially Identical to Those He has Taken.

In *United States v. Wright*, 873 F.2d 437, 445 (1st Cir. 1989), then-Judge Bryer addressed the recusal of judge who had acted in an administrative or quasi-legislative capacity, similar to what judges do when awarding fees under the Criminal Justice Act. Judge Breyer, a member of the commission which had devised the newly promulgated sentencing guidelines, considered whether he had to recuse himself from the appeal of a sentence given under the guidelines. He declined expressly because the case did not challenge the guidelines but rather the district judge's application thereof. In language directly applicable here, Judge Breyer noted that a "substantial challenge" made "against the existence of the Guidelines system and hence of the Sentencing Commission itself" would have warranted recusal. *Id.* at 445.

The instant case warrants recusal under Judge Breyer's cogent formulation. In his capacity as chief judge of the Eighth Circuit, Judge Loken is specifically charged with implementation of his circuit's CJA policies, which present the self-

same constitutional problems which Rosenfield has alleged are problems with the process used in the Fourth Circuit.[6]

In the circumstances, Judge Loken's ruling on the merits of the instant case below amounted, effectively, to his ruling on the constitutionality of his own previous actions and practices as chief judge, and on the constitutionality of his own court's administrative policies. Indeed, if a case similar to the present one were brought in a district court in the Eighth Circuit, then Judge Loken would be, as Judge Moon said of Judge Wilkins, "the only sensible defendant." App. 132. The recusal statute exists to insure that such a situation not arise.

It is obvious that judges should not pass on the propriety of their own acts. In *Rice v. McKenzie*, 581 F.2d 1114 (4th Cir. 1978), for example, the Fourth Circuit considered a *habeas corpus* appeal from the adverse decision of a newly-appointed district judge who had also acted adversely on the case while sitting as a

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[6]The Declaration of John Wesley Hall was submitted below. App. 101-03. Mr. Hall has practiced criminal defense law in Arkansas and in the courts of the Eighth Circuit for over 30 years. Hall Declaration, ¶1. He has handled approximately 80 appellate arguments before the Eighth Circuit. Id., ¶2. Among other things, he serves as First Vice-President of the National Association of Criminal Defense Lawyers, a national organization with over 13,000 members. *Id*., ¶3. He is on the CJA panel for his district and handles both capital and non-capital cases. *Id*., ¶4. He estimates that he has handled over 250 jury trials and about 800 bench trials during the course of his career. *Id*., ¶5. In his declaration, Mr. Hall gives an example of a case in which he was awarded approximately 50% of his requested fee, without explanation, standards or the opportunity to have the award reviewed. *Id.*, ¶¶6-11 and accompanying documents.

justice of his state's supreme court. The judge had no memory of having heard the case as a state jurist, and the appellate panel expressed its complete confidence in his impartiality. Still, the Fourth Circuit ordered his recusal, in words applicable here:

> Judge Haden's prior participation in the case, of course, was entirely judicial and not personal, but as a district judge he was reviewing the federal constitutional validity of what he previously had approved as a member of the Supreme Court of West Virginia. In that situation, there is a basis for a reasonable person to form a reasonable basis for questioning his impartiality and his capacity to provide the independent federal review that is requisite."

Id. at 1118. *Accord*, *Russell v. Lane*, 890 F.2d 947 (7th Cir. 1989); *Clemmons v. Wolfe*, 377 F.3d 322, (3rd Cir. 2004); *See also*, *McKinney v. Att'y Gen'l*, 225 F.3d 654 (table), 2000 WL 966040 (text) (4th Cir. 2000) (where judge earlier sat as juror). In *United States v. Columbia Broadcasting System, Inc*., 497 F.2d 107 (5th Cir. 1974), a district judge was required to recuse himself from a criminal contempt proceeding arising out of alleged violation of his own order, on the ground that a judge has an interest in the enforcement of his own orders and may not "pass on the clarity of his own orders." Id., at 109.

These decisions exemplify the judiciary's laudable instinct not only to do justice, but to been seen to be doing justice. Consider the court in *Limeco, Inc. v. Division of Lime*, 571 F.Supp. 710 (D.C.Miss. 1983). This case deals with the regulation of limes. Some forty-one years earlier, the assigned judge had served in

the state legislature, where he had voted on a bill relating to the establishment and activities of the defendant department. He had no recollection of the vote, and the opinion does not reveal connection between the issue before the legislature and the issue before the court. Yet the mere fact that the judge had taken a position on matters relating to one of the parties was sufficient to require recusal. Judicial decisions like this exemplify the commitment of federal courts to the principles informing 28 U.S.C. Sec.455(a).

B. Judge Loken Has an Institutional Interest in the Adjudication of the Instant Case Which Should Bar Him From Acting as Adjudicator.

The prospect of Judge Loken's adjudicating the merits of a claim implicating the constitutionality of his own actions was not the only impediment to his hearing this case. Given the Eighth Circuit's practices regarding appellate fees, Judge Loken had an institutional interest in the determination of this case – an interest that, fairly assessed, should have precluded him from sitting in judgment here. As chief judge of the Eighth Circuit, Judge Loken should not have adjudicated a case which directly called into question administrative practices adhered to by his court regarding matters for which he bore and continues to bear significant administrative obligations.

It is settled law that a judge associated with an institution that has a strong interest in a case must recuse himself under 28 U.S.C. § 455(a). *See, Liljeberg v.*

Health Services Acquisition Corp., 486 U.S. 847, (1988) (decision reversed where judge, trustee of university having interest in transaction with party in underlying suit, failed to recuse himself). *See also, United States v. Sartori*, 560 F.Supp. 427 (D. Md. 1983), *aff'd* 730 F.2d 973 (4th Cir. 1984) (judge, prominent member of American Cancer Society, recuses self from prosecution of purveyor of unproven cancer treatment due to institutional interests of the Society). These cases apply with special urgency when the judge is not only associated with the institution whose policies are being challenged but is the chief administrative officer of that institution, responsible for the implementation of those very policies.

Appellants respectfully submit that Judge Loken's institutional interests relative to the past and future administrative operations of the Eighth Circuit disqualify him as an appropriate adjudicator of their claims against the chief judge of this Court on the matters at issue.

C. This Case Does Not Require Recourse to the Rule of Necessity.

Judge Loken full well recognized the inherent conflict in his adjudicating claims against a fellow chief circuit judge which could just as readily have been, or still be, brought against him. For in deciding to keep this case, Judge Loken observed that "This motion [for recusal] puts the Rule of Necessity directly in play," App. 7, and the very premise for invoking that rule is a judicial conflict that

should be avoided if reasonably possible. In Judge Moon's familiar formulation, the rule mandates that a judge may not be recused if doing so "would result in denial of a litigant's right to have his claim adjudicated." App. 131. In finding the case below an occasion to invoke the rule of necessity, Judge Loken erred.

It is, obviously, sensible and appropriate for an actual or perceived judicial conflict of interest to be ignored if no unconflicted jurist may be identified. But while Judge Loken was correct in perceiving the conflict, he was substantively incorrect in rejecting Judge Moon's conclusion that the conflict could be cured, thus rendering the rule of necessity inapplicable.[7] For under the statutory and administrative scheme created by the CJA discussed above, it is because he is chief judge of a judicial circuit whose practices and policies are subject to the same alleged constitutional failings at issue below – and for that reason alone – that Judge Loken should have disqualified himself from sitting in judgment of this lawsuit. This conclusion, and none other, is consistent with Judge Moon's characterization of Chief Judge Wilkins as "*likely the sole individual* whose administrative duties and authority would enable him to implement the relief

[7]He was on procedurally infirm ground as well. Judge Moon had already ruled that "this is not an appropriate case to invoke the rule of necessity," App. at 132. It is uncertain on what basis Chief Judge Loken, who was hearing the case as a trial judge, reversed the law of the case as found by his predecessor judge. *See* generally, *Brown v. Slenker*, 197 F.Supp.2d 497, 504 (E.D. Va. 2002) ("prior ruling

Plaintiffs seek, and ... thus *the only sensible defendant to name*" (emphasis added). App. 132.

Judge Loken observes that "[E]very Article III judge shares my 'institutional interest' in the statutory [CJA] regime we are required to implement." App. 7. Respectfully, this observation is misleading in the extreme, in two distinct ways. "Every Article III judge" surely shares an institutional interest in constitutional implementation of the policies and practices mandated by the CJA. But by no means does every Article III judge "share [*Judge Loken's*] 'institutional interest' in the statutory [CJA] regime" *which Judge Loken implements within his circuit.* Not a single other judge, even in the Eighth Circuit itself, can be characterized as *"likely the sole individual* whose administrative duties and authority would enable him to implement the relief Plaintiffs seek [were it sought in the Eighth Circuit]." This distinction comes with the robes of the chief judge alone.

There is a second reason that Judge Loken's observation that all Article III judges share his institutional interests is misguided. *For in fact, they do not.* The vast majority of Article III judges have not been involved in the administration and enforcement of CJA circuit policies, and have nothing to defend or justify in that regard. While a chief judge who administers and enforces CJA fee policies with

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entitled to great deference and should not be revisited absent a compelling reason to do so.")

the same problems as those challenged in a lawsuit should not preside over such a lawsuit, this cannot be said of virtually all other Article III judges. In the case at bar, virtually any judge outside the Fourth Circuit (including chief judges in circuits with CJA policies not presenting the same constitutional problems) could hear this case, because none would have an institutional interest in defending the very policies being litigated.

The alleged constitutional failings sought to be addressed below are not mandated by the CJA, but have arisen as a result of the manner in which the CJA is being implemented. The policies giving rise to these alleged constitutional failings are not binding on any judge. While any Article III judge can be expected to give appropriate deference to the practical construction given the CJA's mandate by a chief circuit judge, even from a sister circuit, there is simply no basis for Judge Loken's bald assertion that "[E]very Article III judge shares my 'institutional interest' in the statutory regime we are required to implement." That is true only to the extent that the referenced "statutory regime" is the CJA. But the disqualifying factor here is not the CJA, but the Eighth Circuit's CJA Plan, presided over by Judge Loken.

Whether circuit judges other than chief judges would see fit to recuse themselves is a matter left to their discretion. Rosenfield objects only to the selection as adjudicator of a chief circuit judge presiding over a circuit whose CJA

plan contains the very infirmities challenged by this suit. This objection does not run to any other Article III judge, since as to none of whom might it be said that he or she is "*likely the sole individual* whose administrative duties and authority would enable him to implement the relief Plaintiffs seek [were it sought in that judge's jurisdiction]." Judge Loken could have recused himself in favor of any of literally hundreds of judges whose background and experience do not give rise to the a concern that his or her impartiality "might be questioned" by reason of past actions or institutional interests.

The balance of Judge Loken's opinion on the recusal issue caricatures Rosenfield's argument rather than responding to it. Rosenfield's argument is not "at bottom an attack on the Committee of Intercircuit Assignments for designating and assigning a chief circuit judge to this case." App. 7. While some other chief circuit judges may be unlikely candidates to adjudicate this case, the fact is that Rosenfield simply objects to the judge who was assigned, for the specific reasons given. The issues raised by this case are of the highest degree of importance to the American judiciary.[8] It is disheartening to read Judge Loken's making light of the

[8]The real-life consequences of underfunded CJA work are matters of record and deserve the highest consideration from the courts as well as Congress. The incidence of ineffective assistance of counsel in criminal, including capital, cases is a recognized national embarrassment, evidenced by death row exonerations, death penalty moratoriums, etc. The very defendant whose case gave rise to the work

concerns expressed below by observing entirely without basis that "Plaintiffs apparently believe that chief circuit judges cannot be impartial because we have too much knowledge and experience with the subject matter of their complaint." App. 7. The point is not that Judge Loken had "too much" knowledge and experience with the subject matter, but that his knowledge and experience were based on his having done the same things that Chief Judge Wilkins was being sued for having done. Rosenfield sought to prevent a judge from sitting in judgment on his own actions and interests. Judge Loken improperly overruled his recusal motion and proceeded to do precisely that. This was error which should be corrected by this Court.

II. ROSENFIELD HAS A PROPERTY INTEREST IN HIS CJA FEE.

Rosenfield spent over 300 hours trying to save Bobby Swisher, an indigent defendant, from execution. His request for reimbursement for this time was slashed by nearly three-quarters, and was not sufficient even to cover Rosenfield's overhead. Pursuant to the Fourth Circuit's plan for implementation of the CJA, this apparently arbitrary reduction was made without explanation, was based on no published criteria, and no opportunity for appeal. Despite the utter lack of procedural protections available in the Fourth Circuit scheme, the

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sought here to be paid was executed after his lawyer did not make an appropriate objection to a concededly improper jury instruction.

court below held that Rosenfield could not state a claim under the Fifth Amendment's Due Process Clause because he did not have a "property interest" in the compensation for his work. This holding was in error.

It cannot be questioned that money is a form of property. That includes money earned for work completed. "[P]rivate citizens ordinarily have a constitutionally protected property interest in the wages earned from their labor under employment contracts." *Washlefske v. Winston*, 234 F.3d 179, 184 (4th Cir. 2000). Similarly, Rosenfield and other attorneys appointed under the CJA have a statutory entitlement to reimbursement for time reasonably spent representing their clients. This entitlement is a form of property protected under the Due Process Clause.

"To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). The Criminal Justice Act creates just such a claim of entitlement. An attorney appointed pursuant to the CJA "*shall*, at the conclusion of the representation or any segment thereof, be compensated at a rate not exceeding [the maximum hourly rate] for time expended in court . . and [the maximum hourly rate] per hour for time reasonably expended out of court . . ." 18 U.S.C. § 3006A (d) (1) (emphasis

added).[9] The mandatory language of the statute ("*shall* . . . be compensated") creates a statutory entitlement to compensation for all time expended in court and all time reasonably expended out of court.

To be sure, the judicial officer charged with making decisions about attorney's fees (here, the Chief Judge), retains some discretion in determining what level of compensation is "reasonable." But the existence of official discretion does not negate the existence of an interest protected by the Due Process Clause, as the Supreme Court explained in *Board of Pardons v. Allen*, 482 U.S. 369 (1987). There, the Court held that inmates in Montana's prison system had a liberty interest in receiving parole, even though board of pardons had broad discretion in determining whether parole was granted. Montana's statute provided that "the board *shall* release on parole . . . any [inmate] . . . when in its opinion there is reasonable probability that the prisoner can be released without detriment to the prisoner or to the community," and that "[a] prisoner shall be placed on parole only when the board believes that he is able and willing to fulfill the obligations of a law-abiding citizen." *Allen*, 482 U.S. at 376-77 (quoting Mont. Code. Ann § 46-23-201 (1985)). The Court found that the statute created a liberty interest because it "use[d] mandatory language ('shall') to 'creat[e] a presumption that parole

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[9] At the time Rosenfield submitted his voucher, the maximum hourly rate for both in-court and out-of-court work in capital cases was $125 (App. 33).

release will be granted' when the designated findings are made." *Id.* at 377-78 (quoting *Greenholtz v. Nebraska Penal Inmates*, 422 U.S.1, 12 (1979)). While the Court recognized that the decision to release an inmate on parole was "subjective" and the discretion of the board "very broad," it nonetheless found that the statue created "a liberty interest protected by the Due Process Clause." *Id.* at 381. Accordingly, inmates were constitutionally entitled to a procedurally adequate opportunity to convince the board that they met the criteria set forth in the statute.

Similarly, Rosenfield is entitled to an opportunity to attempt to persuade the decision-maker that the amount of time he has expended trying to save an indigent defendant from execution, and the compensation he seeks for his effort, are "reasonable" under the CJA.

As the Court explained in *Allen*, it is important to distinguish between "two entirely distinct uses of the term discretion." 482 U.S. at 375:

> In one sense of the word, an official has discretion when he or she is simply not bound by standards set by the authority in question. In this sense, officials who have been told to parole whomever they wish have discretion. . . . But the term discretion may instead signify that an official must use judgment in applying the standards set him [or her] by authority; in other words, an official has discretion when the standards set by a statutory or regulatory scheme "cannot be applied mechanically.

Id. (internal quotation marks and citations omitted). The Court found that a statute that grants an official the first kind of discretion does not create a constitutionally protected interest. But the second type of discretion can create such an interest

when the decision-maker is *required* to grant the benefit in question after it "determines (in its broad discretion) that the necessary prerequisites exist." *Id.* at 376.

The CJA involves the second kind of discretion. The Chief Judge does not have the discretion to grant or deny fees to whomever he wishes. Nor does he have the authority to withhold payment for any time the attorney reasonably expends. Instead, he must exercise some degree of judgment to determine how much time was reasonably expended. Having made that judgment, he "*shall*" compensate the attorney for that time. Surely, the CJA statute, which *requires* compensation for all time reasonably expended, constrains official discretion at least as much as the statute at issue in *Allen*, which required the board to grant parole "when, *in its opinion*, there is *reasonable probability* that the prisoner can be released without detriment to the prisoner or to the community." Indeed, in contrast to the highly subjective nature of the inquiry in *Allen*, federal courts have virtually made a science of determining the reasonableness of attorney's fees. *See, e.g.*, *Barber v. Kimbrell's, Inc.*, 577 F.2d 216, 226 n.28 (4th Cir. 1978) (setting forth factors to guide judgment in calculating attorneys fees).

The CJA's mandatory language thoroughly distinguishes this case from the Fourth Circuit cases relied on in the lower court opinion, in which no liberty or property interest was found. In *Smith v. Ashcroft*, 295 F.3d 425 (4th Cir. 2002),

this Court found that an alien who had committed an excludable offense was entitled to discretionary waiver under former section 212(c) of the Immigration and Naturalization Act, 8 U.S.C. § 1182(c). That statute provided that such aliens, under certain conditions, "*may* be admitted *in the discretion* of the Attorney General" (emphasis added). Because the statute "did not *in any way* limit the discretion of the Attorney General to admit otherwise deportable aliens," 295 F.3d at 430 (emphasis added), the Court held that it did not create a liberty interest. Similarly, in *Sylvia Development Corp. v. Calvert County*, 48 F.3d 810 (4th Cir. 1995), this Court held that a developer had no property interest in having certain land designated as a "Transfer Zone District" (TZD) under the county zoning ordinance. The ordinance provided that "'(t)he County Commissioners *may* designate a TZD if all the criteria for a TZD are met.'" *Sylvia Development Corp. v. Calvert County*, 842 F. Supp. 183 (D. Md. 1994) (quoting ordinance) (emphasis added). Because "the creation of a TZD at any location in the County is discretionary with the County Board," the developer "cannot claim entitlement to a TZD on its property, and approval of a TZD cannot be claimed by [the developer] as a property interest." *Sylvia Development Corp.*, 48 F.3d at 826.

The statutes considered in *Smith* and *Sylvia Development Corp.* both involved the first kind of discretion described in *Allen*. In both cases, the decision-maker had utter *carte blanche* to grant or deny a benefit. The CJA, which provides

that attorneys *shall* be paid for all time reasonably expended on cases, could hardly be more different. The mandatory language of the CJA creates a property interest in such reimbursement. The Due Process Clause entitles attorneys to a meaningful opportunity to be heard before their fees are reduced.

Rosenfield recognizes that, even with a full panoply of procedural protections, a reasonable decision-maker might not grant him the full fees he requests. But this reality does not deprive him of a property interest in reimbursement for the time he has reasonably expended. "The right to be heard does not depend upon an advance showing that one will surely prevail at the hearing." *Fuentes v. Shevin*, 407 U.S. 67, 87 (1972). *See also Mallette v. Arlington County Employees' Supplemental Retirement System*, 91 F.3d 630 (4th Cir. 1996) (claimant for disability benefits "need not prove that her injury meets County standards to rightfully claim a modicum of procedural fairness.").

Because the CJA confers a property interest in compensation for time reasonably expended by court-appointed attorneys, the Due Process Clause requires that attorneys be given the basic elements of fundamental fairness when a decision is made about how much they will be paid for their work: a public statement of the standards which determine what work will be compensated; an explanation of the reasons for the amount awarded; and an opportunity to be heard if the attorney disagrees with the result.

Rosenfield's request for these procedural protections is hardly novel or revolutionary. CJA attorneys handling death penalty defenses are often, like Rosenfield, dedicated and experienced attorneys, working under a system which pays far below prevailing market rates. The legal services legal services they provide are among the most professionally and emotionally challenging that a lawyer can undertake, and they are critically important to our system of justice. Surely these attorneys deserve no less than basic fairness when it comes time for them to be paid for their work.

The court below erred in dismissing this case.

CONCLUSION

For these reasons, the Court should reverse the decision below and remand the case for consideration on the merits before a new judge, selected for lack of supervisory involvement with appellate fee awards under the CJA.

REQUEST FOR ORAL ARGUMENT

Appellants respectfully request oral argument in this appeal.

Dated: January 9, 2007

Respectfully submitted,

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CERTIFICATE OF SERVICE

I herby certify that on this 9th day of January, 2007 I served two true and correct copies of the foregoing document by U.S. Mail, postage prepaid, addressed as follows:

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