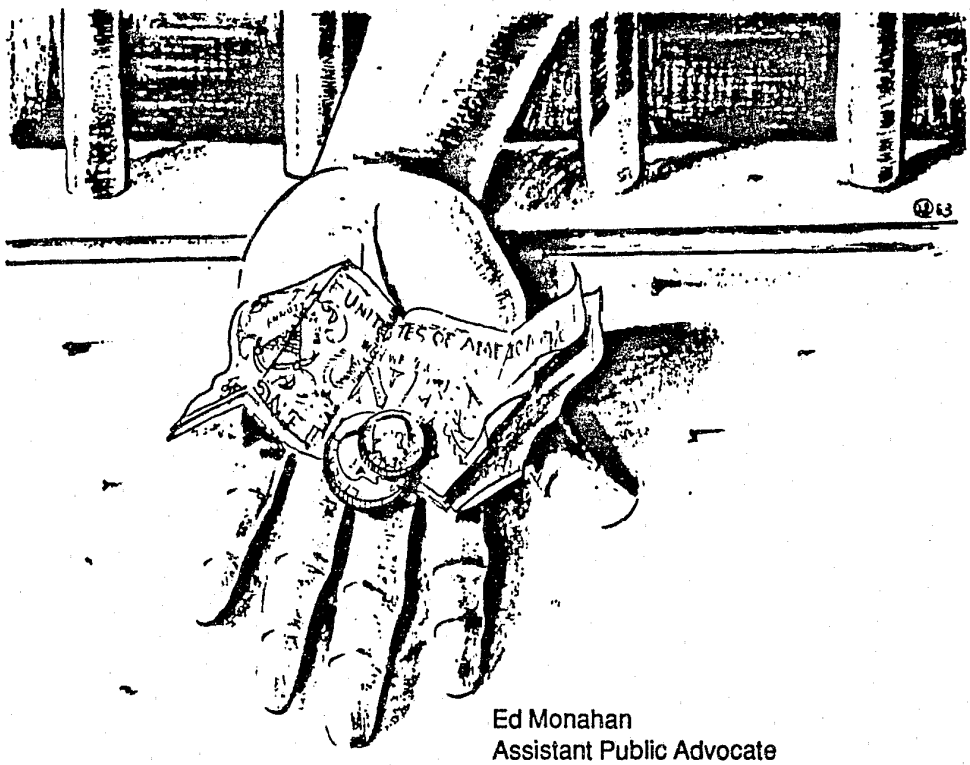
OBTAINING FUNDS FOR THE DEFENSE OF INDIGENTS ACCUSED OF CRIMES



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June, 1990

Kentucky Department of Public Advocacy

Advocacy Rooting out Injustice

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INTRODUCTION

No major undertaking in life can be done well without the proper resources and expertise, whether it be building a house, healing our bodies, or defending a citizen accused of a crime. Criminal defense work requires resources to investigate; select jurors; to test, consult and present testimony on such things as psychological aspects of the client, forensic evidence presented by the prosecution, and suppression of evidence; and to cross-examine prosecution experts.

Obtaining the money to be able to employ the necessary experts and obtain needed resources is often a high priority since so many possibilities are created when we have the means to fully defend the case. In many ways, experts and resources are as important as the right to counsel. They are the fingers of the guiding hand of counsel.

The needed money can be obtained from the client or his family and friends. But when the client does not have or cannot procure the money, criminal defense lawyers in most states must turn to the courts for the funds.

As with most things that make a real difference in the results of a criminal case, defense attorneys have to fight hard to persuade a judge to authorize funds for experts. The process of persuading must be done in a way that will convince the judge, and, if we lose, create a solid record for success on further review.

More basic than funds for experts is funds for counsel. The Constitution's guarantee of the right to counsel in criminal trials and direct appeals is now well understood in this country. But that right only has full meaning if there are monies sufficient to insure good defense counsel. Unfortunately, many jurisdictions have not allocated even a minimum amount of money necessary to provide adequate counsel for all indigents accused of crimes. However, the trend in the case law is towards insuring that a fair amount of money is paid to criminal defense attorneys who represent indigents.

The following information about funds for resources is an attempt to make the favorable law and authority available to those advocating for funds for resources in the defense of indigents.

I. KENTUCKY STATUTES AND RULES

A. KRS 31.200 Expenses chargeable to county and to public advocate

1. Subject to KRS 31.190, **any direct expense,** including the cost of a transcript or bystander's bill of exceptions or other substitute for a transcript **that is necessarily incurred in representing a needy person** under this chapter, is a charge against the county on behalf of which the services is performed.

2. Expenses incurred in the representation of needy persons confined in a state correctional institution shall be borne by the state office for public advocacy.

B. KRS 31.110 Persons benefited

1. A **needy person** who is being detained by a law enforcement officer, on suspicion of having committed, or who is under formal charge of having committed, or is being detained under a conviction of, a serious crime, **is entitled:**

   a. To be represented by an attorney to the same extent as a person having his own counsel is so entitled; and

   b. To **be provided with the necessary services** and facilities of representation including investigation and other preparation. The courts in which the defendant is tried shall waive all costs.

C. KRS 31.185 Facilities for defendant attorney

Any defending attorney operating under the provisions of this chapter is entitled to use the same state facilities for the evaluation of evidence as are available to the attorney representing the Commonwealth. If he considers their use impractical, the court concerned may authorize the use of private facilities to be paid for on court order by the county.

D. RCr 9.46 Expert Witnesses

The court may order the parties to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint witnesses of its own selections. An expert witness shall not be appointed by the court unless the

witness consents to act. A witness so appointed shall be informed of his duties by the court at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of his findings, if any, and may thereafter be called to testify by the court or by any party. He shall be subject to cross-examination by each party. The court may determine the reasonable compensation of such witness and direct its payment out of such funds as may be provided by law. The parties also may call expert witnesses of their own selection at their own expense.

E. KRS 210.360 Mental Examination of persistent felony offender

210.360 Mental examination of persistent felony offenders

(1) When a person who has been twice previously convicted of a felony, is indicted by a grand jury as a persistent felony offender, the circuit clerk of the court in which he is indicted shall give notice of the indictment to the secretary of the cabinet for human resources within seven (7) days after the indictment is returned by the grand jury. The secretary shall cause such person to be examined by a psychiatrist already in the employ of the cabinet, to determine his mental condition and the existence of any mental disease or defect which would affect his criminal responsibility. This examination shall be made without expense other than the amount to cover necessary travel, as provided by law for any other employee of the state traveling on official business.

(2) The psychiatrist making the examination shall submit a written report of his findings to the judge of the court having jurisdiction, who shall make the report available to the prosecuting attorney and the attorney for the defendant.

(3) The secretary may decline to cause such examination to be made if the number of psychiatrists on duty in the cabinet is insufficient to

spare one from his regular official duties, in which event the secretary shall notify the clerk of the circuit court to that effect within three (3) days.

F. KRS 441.047 Psychiatric and similar services for criminal defendants

441.047 Psychiatric and similar services for criminal defendants

(1) Whenever a prisoner confined in the county jail is in need of psychiatric or similar evaluation, treatment or services, it shall be the responsibility of the Commonwealth to provide such evaluation, treatment, or services at the expense of the Commonwealth at the nearest state operated or state supported facility suitable for the provision of the required evaluation, treatment, or services at no cost to the county.

(2) Whenever a criminal defendant is in need of psychiatric, sociological, or similar evaluation in connection with the criminal proceedings in which he is a defendant it shall be the responsibility of the Commonwealth to provide the evaluation at the nearest state operated or state supported facility suitable for the provision of the required evaluation at no cost to the county.

(3) In the event that no suitable state operated or state supported facility is located within a reasonable distance, then the evaluation may be made at a suitable local facility or at the jail. In such instances a request must first be made to the cabinet for human resources to provide the evaluation, treatment or service unless the situation is an emergency requiring immediate attention. If the cabinet cannot provide the service or if the situation is an emergency, then local resources may be utilized.

> (4) In the event that local resources are utilized in an emergency situation, or when the cabinet for human resources is unable to provide the evaluation, treatment, or service, then the reasonable cost of providing such service, treatment, or evaluation shall be paid from the state treasury in the same manner as other medical expenses of indigent prisoners confined in the county jail.
>
> (5) The cabinet for human resources shall administer the provisions of this section and shall issue such administrative regulations as necessary to carry out the provisions of this section.

This statute was enacted July 15, 1986. Its effect is unclear. To this point, it has provided absolutely no money for experts for indigents. When presented a bill in a criminal case, the Department of Finance refused to pay, saying no money was appropriated, and that the Department of Corrections has responsibility to pay. The Department of Corrections says that the county has responsibility to pay.

II. FEDERAL STATUTES

A. Criminal Justice Act, 18 USC § 3006A(e)(1)

3006A Adequate representation of defendants

.....

(e) Services other than counsel.

(1) Upon request. Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for an adequate defense may request them in an ex parte application. Upon finding, after appropriate inquiry in an ex parte proceeding, that the services are necessary and that the person is financially unable to obtain them, the court, or the United States magistrate if the services are required in connection with a matter over which he has jurisdiction, shall authorize counsel to obtain the services.

B. The legislative history of the 1970 amendments to section 3006A

1. A letter from the President to the Congress concerning the need for assistance to indigents:

THE WHITE HOUSE
Washington, March 8, 1963.

Hon. John W. McCormack,
Speaker of the House of Representatives,
Washington, D.C.

Dear Mr. Speaker: To diminish the role which poverty plays in our Federal system of criminal justice, I am transmitting for consideration by the Congress proposed legislation to assure effective legal representation for every man whose limited means would otherwise deprive him of an adequate defense against criminal charges. The need to protect this basic right makes enactment of this measure imperative.

In the typical criminal case the resources of government are pitted against those of the individual. To guarantee a fair trial under such circumstances requires that each accused person have ample opportunity to gather evidence, and prepare and present his cause. Whenever the lack of money prevents a defendant from securing an experienced lawyer, trained investigator or technical expert, an unjust conviction may follow.

The Attorney General's accompanying letter describes the deficiences in the present system.

These defects have prevailed for many years despite persistent pleas for legislation by the judicial and executive branches and the organized bar. Fairness dictates that we delay no longer.

I commend the proposed Criminal Justice Act of 1963 for prompt and favorable action by the Congress. Its passage will be a giant stride forward in removing the factor of financial resources from the balance of justice.

Sincerely,

JOHN F. KENNEDY.

1964 U.S. Code Cong. and Admin. News 2993.

2. From the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 90th Cong., 2d Sess., **Report of the Criminal Justice Act in the Federal District Courts** at 220-21 (Comm. Print 1969):

Thus, we heard of attorneys who suspected their clients of being mentally disturbed, but had not evidence of this suspicion to present to a judge as a justification for his authorizing expenditures for psychiatric examinations. (We are unaware of whether the local district court's attitude toward subsection (e) authorizations was sufficiently hostile to justify these attorneys' timidity about requesting authorization.). . . Consequently, **we feel that the bar should be bold in seeking subsection (e) authorizations and the bench should be tolerant in entertaining and relatively generous in granting them.**

3. See also:

   a. Note, **"The Indigent's Right to an Adequate Defense: Expert and Investigational Assistance in Criminal Proceedings,"** 55 Cornell L.Rev. 632 (1970);

   b. Kutak, **"The Criminal Justice Act of 1964,"** 44 Neb.L.Rev. 703 (1965).

C. Amount of money expended

According to Mark Silver, (202) 633-6051, Fax # (202) 633-6289 who is with the Criminal Justice Act Division of the Administrative Office of the United States Courts, Washington, D.C. 20544, $2,065,015.03 was spent nationwide in fiscal year 1986 for expert and

investigative services for indigents, and the following amount was spent in FY 1988:

REPORT 88

CUMULATIVE PAYMENTS FOR TRANSCRIPTS, EXPERT AND OTHER SERVICES OUT OF THE APPROPRIATION FOR FY 1989 AS OF 12/89

EXPERT OR OTHER SERVICE	EXPERT FEE	OTHER EXPENSES	TOTAL
01 - INVESTIGATOR	990.493.00	172,994.00	1,163,487.00
02 - INTERPRETER	439,032.00	69,852.00	508,884.00
03 - PSYCHOLOGIST	41,438.00	2,070.00	43,508.00
04 - PSYCHIATRIST	288,718.00	17,047.00	305,765.00
05 - POLYGRAPH	30,774.00	577.00	31,351.00
06 - DOCUMENTS	55,746.00	12,429.00	68,175.00
07 - FINGERPRINT	18,027.00	439.00	18,466.00
08 - ACCOUNTANT	225,877.00	163,284.00	389,161.00
10 - CHEMIST	21,977.00	352.00	22,329.00
11 - BALLISTICS	4,130.00	1,227.00	5,357.00
12 - OTHER	736,901.00	120,372.00	857,273.00
GRAND TOTAL	2,853,113.00	560,643.00	3,413,756.00

D. This is money spent in CJA cases handled by full-time federal public defenders and appointed lawyers for cases opened in FY 88 (October 1, 1987 - Sept. 30, 1988), and is in addition to the money spent on full-time investigators in federal public defender offices.

In United States v. Schultz, 431 F.2d 907, 911 n.5 (8th Cir. 1970) the Court noted the amount of money spent under the CJA from 1966-1969:

> 5. Records of expenditures for investigative, expert and other services under the Criminal Justice Act of 1964 demonstrate no apparent abuse of the privilege granted to defendants to employ such services. Through December 31, 1969, all payments for services of every kind including attorneys' services aggregated $12,762,665.00. The amount spent for investigative, expert and other services amounted to $216,339.00. Expenditures for these services have been increasing substantially over the years. The following is a comparison of the cost of these services during fiscal year 1966 through 1969:
>
> | | FY 1966 | FY 1967 | FY 1968 | FY 1969 |
> |---|---|---|---|---|
> | Investigators | $8,610 | $20,368 | $25,906 | $35,283 |
> | Psychiatrists | 11,498 | 15,322 | 22,844 | 22,256 |
> | Interpreters | 516 | 3,302 | 5,296 | 9,212 |
> | Other | 5,663 | 7,547 | 11,251 | 11,465 |
> | Grand Totals | $26,287 | $46,539 | $65,297 | $78,216 |
>
> (Data from January 28, 1970, report of Deputy Director of the Administrative Office of the United States Courts to the Judicial Conference Committee to Implement the Criminal Justice Act.)

KENTUCKY FEDERAL COURTS
CUMULATIVE PAYMENTS FOR TRANSCRIPTS, EXPERT AND OTHER SERVICES OUT OF THE APPROPRIATION
FOR FY 1989 AS OF 12/89

SIXTH CIRCUIT
KENTUCKY EASTERN DISTRICT

EXPERT OR OTHER SERVICE	EXPERT FEE	TOTAL
01 - INVESTIGATOR	300.00	301.00
02 - INTERPRETER	1,147.00	1,147.00
04 - PSYCHIATRIST	1,318.00	1,318.00
06 - DOCUMENTS	655.00	655.00
12 - OTHER	8,250.00	8,250.00
DISTRICT TOTAL	11,670.00	11,671.00

KENTUCKY WESTERN DISTRICT

03 - PSYCHOLOGIST	1,475.00	1,475.00
04 - PSYCHIATRIST	1,375.00	1,375.00
10 - CHEMIST	650.00	650.00
12 - OTHER	6,745.00	6,745.00
DISTRICT TOTAL	10,245.00	10,245.00
TOTAL FOR KENTUCKY	21.915.00	21.916.00

III. KENTUCKY CASE LAW

A. Ragland v. Commonwealth, Ky., 515 S.W.2d 224 (1974)

Relying on United States ex rel. Smith v. Baldi, 344 U.S. 561 (1953), which has now been replaced by the contrary ruling of Ake v. Oklahoma, 470 U.S. 68 (1985) the court determined that it was not error for the trial judge to fail to supply the defendant with a psychiatrist at state expense even though there was a surgeon's report recommending that the defendant be evaluated by a psychiatrist and psychologist.

B. Young v. Commonwealth, Ky., 585 S.W.2d 378 (1979)

1. Money for clinical psychologist at issue.
2. First Kentucky case to address the statutory right to funds for experts.
3. The standard: "We readily concede that indigent defendants are entitled to **reasonably necessary** expert assistance." Id. at 379. Fiscal court must pay these costs
4. Court reads the Kentucky statute to require authorization for funds to come from the trial judge before employment of the expert.
5. Since the expert testified at the trial, there is no prejudice to defendant.
6. Rather, the aggrieved party is the psychologist.

C. Ford v. Commonwealth, Ky., 665 S.W.2d 304 (1984), cert. denied, 469 U.S. 984, 105 S.Ct. 392, 83 L.Ed.2d 325 (1984) (Marshall dissented).

1. Rather than deciding the real issue in this case, the Court created its own issue.
2. The defense collected data on the improper selection of grand and petit jurors and obtained money from the trial court to hire a statistician to analyze it. The statistician found a statistically significant underrepresentation of young persons and women in the jury pool but needed more data to make a finding on race. The defense made a motion to the trial court asking for more money to gather more data and to hire an expert to show young people are a cognizable group, if the trial court found not enough evidence was presented. The trial judge denied this request for money.
3. On appeal, the Commonwealth improperly characterized the defense request as a request for an additional statistician. The Court addressed this nonissue and held that a second statistician was not shown to be necessary, and did not address the real issue before it.

4. The Court also displayed incredible hostility by gratuitously stating:

> We do not conceive that employment of statisticians and mathematicians to examine the representation of recognizable groups on jury venires, especially in the absence of specific knowledge of irregularities, to be included in "necessary services." We know of no statute or principle which would authorize expenditures of public funds to conduct a witch hunt. Cf. Gilliam v. Commonwealth, Ky., 652 S.W.2d 856, 858 (1983).
> Id. at 309.

5. In Ford v. Seabold, 841 F.2d 677 (6th Cir. 1988), cert. denied ___ U.S. ___, 109 S.Ct. 315, 102 L.Ed.2d 334 (1988) the Court, citing Ake, said:

> The due process clause of the fourteenth amendment requires that a state take certain steps to ensure that an indigent criminal defendant has a fair opportunity to prepare his defense.
> ....
> Admittedly, Ford's interest in the accuracy of the proceeding is great since it is determinative of his liberty. The government's interest, however, is also great. Requiring the State of Kentucky to fund a jury challenge of each defendant convicted of a crime would create an enormous financial burden upon the state. More importantly, however, the risk of an erroneous deprivation of Ford's liberty, is, under the present facts, slight. Ford requested additional funds to complete the jury challenges. Based upon the reasoning underlying our rejection of the challenge to the petit and grand juries, the only information sought by Ford's counsel which arguably might be beneficial is the larger sample size for 1979-1980. Dr. Edgell testified in his affidavit and at trial that although none of the analyses for race reached significance, with a larger sample size the result might be dif-

ferent. Ford, an indigent, was well-represented at trial and on appeal by public defenders. A thorough jury analysis was conducted. The contention that a larger sample size may have altered the level of significance is merely speculative. Accordingly, we find that the lower court's refusal to provide additional funds for further expert assistance did not deny Ford the opportunity to participant meaningfully in the proceedings below.
Id. at 690-91.

D. McQueen v. Commonwealth, Ky., 669 S.W.2d 519 (1984)

1. Defendant wanted an expert "to conduct a search to determine proper representation of a cross section of the community on the jury panel. There was not one shred of evidence herein which indicated any irregularity or underrepresentation. We disposed of this argument in Ford. Id. at 521.

2. "Second, appellant asks for an expert to show that death qualified juries are unconstitutionally more conviction prone than other juries. 'It is admitted that the expert sought had published works on he subject, and we see no way his personal attendance at a hearing, if any could be held, would enhance his treatises. The court sustained a motion to provide the defendants with a ballistic expert and a toxicologist. We find no abuse of discretion in denying either the statistician or the expert on death qualified jurors. The standard has been determined in this Commonwealth in the case of Young v. Commonwealth, Ky., 585 S.W.2d 378, 379 (1979), to be that the experts must be "reasonably necessary." We see no reasonable necessity for these two experts in the instant case."
Id. at 521-22.

E. Boyle County Fiscal Court v. Shewmaker, Ky.App., 666 S.W.2d 759 (1984)

1. Without question, the fiscal court had the responsibility to provide funds to pay the attorney fees after state allotment for public defender system exhausted. KRS 31.190; 050.
2. "...if the services were authorized and ordered by the trial court, as here, the trial court could in

the action in which the expense was incurred, order payment even though the fiscal court and the movant were not parties." Id. at 163.

F. **Rackley v. Commonwealth**, Ky., 674 S.W.2d 512 (1984)

1. The defendant was examined by a Comp Care psychiatrist with the conclusions being: No evidence of mental illness and competent.
2. The defense requested further psychiatric exam because

   a. the report indicated blackout spells and excess drinking
   b. defense attorney felt his client was "psychologically weak."

3. Court held it was not error to deny money for expert since

   a. "no showing herein of further questioning of the Comp Care psychiatrist about any "hiatus in his report"
   b. the blackouts were the diagnosis of the defendant, himself, who was equipped to give his attorney any background on that subject.

4. MESSAGE: -If you expect relief from the appellate court in Kentucky, you must make a very clear showing of necessity.

G. **Hicks v. Commonwealth**, Ky., 670 S.W.2d 837 (1984)

1. The Court found no error in failing to give money to hire a defense serologist when the state serologist testified that the electrophoresis testing showing blood with the defendant's enzyme pattern was found on clothing near the victim's house and that only 4 people in 1000 have the same blood characteristics as the defendant because

   a. defense failed to meet the "reasonably necessary" standard
   b. defendant "made no showing as to what manner he expected to be assisted in cross-examining the serologist," and should "have had some idea of the manner in which these expert witnesses were material to the defense" since he had consulted out-of-state serologist.
   c. No prejudice to defendant shown since

      i. a medical doctor testified for defense that the testing performed was "extremely accurate;" and

ii. defense counsel received documents to assist him from his proposed experts and conducted a thorough cross of the state serologist.

d. "The trial courts are not required to provide funds to defense experts for fishing expeditions."

2. MESSAGE: -Don't ask for something you can't or aren't going to make the required minimal showing on.

H. **Perry County Fiscal Court v. Commonwealth**, Ky., 674 S.W.2d 954 (1984)

1. In this death penalty case, the trial court ordered the fiscal court to pay the fees of a psychologist and a ballistics expert. The fiscal court refused because they had not budgeted any funds for this. The trial judge then precluded the Commonwealth from seeking the death penalty.
2. The Commonwealth by writ of prohibition challenged the ruling of the trial court.
3. The Court held:

   a. The trial court had no authority to exclude the death penalty under these facts.
   b. "facilities" in KRS 31.185 embraces more than buildings and equipment. It also includes experts.
   c. The furnishing of non-state facilities for the evaluation of evidence in appropriate circumstances is a necessary governmental expense which must be met by counties.
   d. The county, not the Department of Public Advocacy, is responsible for payment of fees for necessary expert witnesses unless it involves representation of a person in a state prison.
   e. The Perry Fiscal Court is directed to pay the reasonable fees of such experts as are reasonably necessary for the defendant.

I. **Kordenbrock v. Commonwealth**, Ky., 700 S.W.2d 384 (1985)

1. The defendant was convicted and sentenced to death without the assistance of a psychiatrist who examined him.
2. The trial judge granted the defense request for funds for a psychiatrist. The psychiatrist was employed; examined the defendant; submitted a bill for pretrial work prior to writing his report, and the fiscal court refused to pay even when reordered by the trial judge. The psychiatrist was then not

willing to report or testify for free while the judge and prosecutor received their checks on a regular basis.

3. Without the assistance of the psychiatrist, the defense was unable to present expert testimony on

   a. Defendant's mental state at time of confession with the confession's voluntariness due to psychological pressure and the influence of drugs being challenged;
   b. what the mental state of the defendant at the time of the crime was - intentional or wanton;
   c. did the defendant act under extreme emotional disturbance;
   d. the effect of the defendant's severe motorcycle wreck, his military service, and the relationship with his mother and father;
   e. why the defendant was such a heavy drug user;
   f. what affect the codefendant had on the defendant;
   g. whether the defendant was a follower or a leader;
   h. whether the defendant could be rehabilitated;
   i. what factors mitigated the defendant's acts.

4. The court readily agreed that a defendant was statutorily entitled to "reasonably necessary" expert assistance. However, the defendant was not entitled to funds for a psychiatrist to present testimony on the above listed subjects since the assistance was not reasonably necessary.
5. Incredibly, the Court said: "We do not have an Ake v. Oklahoma... situation here" since the defense was not insanity and a "defendant in a case such as this does not have a right to a psychiatric fishing expedition at public expense, or an in-depth analysis on matters irrelevant to a legal defense to the crime. "We find Lockett v. Ohio...not applicable to this situation."
6. The opinion notes that the defendant was offered an "objective" mental evaluation at KCPC which the defendant refused. The opinion conveniently omits the documentation in the record from CHR clearly stating;

   a. they could not operate as a defense expert;
   b. they would examine the defendant only for competency and sanity, not for EED or any penalty phase mitigation factors.

Message: Expect only lip service from appellate courts on the right to money for experts.

No relief was obtained on this issue in federal district court. Kordenbrock v. Scroggy, 680 F.Supp. 867, 872-73 (E.D. Ky. 1988).

J. **Lovely v. Commonwealth**, Ky., (unpublished, December 19, 1985)

1. In this murder case, the Court recognized that "indigent defendants are entitled to reasonably necessary expert assistance." However, the defendant in this case was not entitled to funds for a defense pathologist because the "trial court was not presented with any facts to suggest a reason why the appointment of a defense pathologist was 'reasonably necessary,' and we have not been advised of any valid reason by appellant's brief."

K. **Todd v. Commonwealth, Ky., 716 S.W.2d 242 (1986)**

The court held that the defendant was not entitled to an independent psychiatrist to aid in presenting the defense or mitigation of insanity, intoxication or extreme emotional disturbance since the defendant was charged with wanton murder and intoxication and extreme emotional disturbance were not defenses or mitigation of that offense, and since the defense refused to avail himself of state psychiatric facilities in the issue of insanity. Id. at 246-47.

The court also refused to review the records of the defendant's prior mental health problems since they were not presented to the trial judge for his review, rather they were presented to the trial court only to be opened on appeal. Id. at 247.

L. **Smith v. Commonwealth, Ky., 734 S.W.2d 437 (1987)**

The court held in this death penalty case that the trial court properly overruled the defense motion for funds for a public opinion survey to prove the need for a change of venue. Id. at 445.

The court also held that it was proper to deny funds to the defendant to hire a defense pathologist or take the deposition of the medical examiner who did the autopsies since the "autopsy reports were admissible under KRS 72.260, and in view of that statute and the limited purposes for which autopsy reports can be admitted, admission of the reports without ordering funds for the appearance or deposition of the medical examiner was not error." Id. at 447.

"Smith was not denied a fair trial by the refusal of the trial judge to order funds for a crime scene or

ballistics expert. State facilities were available to him for this use. KRS 31.185, Perry County Fiscal Court v. Commonwealth, Ky., 674 S.W.2d 954 (1984)." Id.

"Here Smith seeks to prove his mental state by the testimony of either a ballistics expert or a crime scene reconstruction witness.... We do not believe that the expert assistance Smith claims he needed had anything to do with his defense which was that the murders were wanton, rather than intentional. The evidence he believed he needed was available through the use of state experts and facilities. He did not take advantage of the assistance available. At trial he cross-examined both the firearms examiner and the police sergeant in charge of the investigation of the homicides. The firearms examiner indicated that he had discussed the case with and cooperated with the defense attorney. Under the circumstances, it does not appear that the services of an independent ballistics expert were reasonably necessary. Hicks v. Commonwealth, Ky., 670 S.W.2d 837 (1984)." Id. at 447-48.

"There was no reversible error because he was denied funds to obtain the testimony of a psychologist regarding his intelligence. Nothing in his behavior or in the content of his confession indicates his inability to understand. There was no showing that the assistance of an expert would produce anything that was reasonably necessary for his defense." Id. at 450.

The court also held it was not error to deny a defendant money for a psychiatrist or psychologist to testify to mitigating factors in the penalty phase. Id. at 450.51.

M. Simmons v. Commonwealth, Ky., 746 S.W.2d 393 (1988)

The capital defendant asked for money for 2 independent psychiatrists, 2 independent psychologists and one licensed clinical social worker to examine him for trial and sentencing. The Court held that the assistance of KCPC was all the defendant was entitled to receive based on his failure to show greater necessity, and his failure to show what he received from KCPC was inadequate. Id. at 395-96.

N. Kathi Kerr v. Commonwealth, (Ky.App., February 5, 1988) (unpublished)

The Court held it error for the circuit judge to refuse to order the county to pay the transportation expenses to the trial at Louisville of a non-resident federal prisoner who was a material defense witness.

The Court recognized that an accused in a criminal prosecution has a constitutional right to have compulsory process issued to obtain testimony, even of an out-of-state federal prisoner, if the testimony is material to the defense, as it was in this case.

The Court rejected the argument of the Commonwealth that the defendant had to depose the witness prior to trial when the witness was in Louisville in order to preserve her right to have him appear as a witness.

The Court readily noted that, "It is clearly established that a state 'must, as a matter of equal protection, provide indigent prisoners with the basic tools of an adequate defense' when those tools are available for a price to other defendants. Britt v. North Carolina, 404 U.S. 226, 231, 92 S.Ct. 431, 30 L.Ed.2d 400 (1971). See also Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985). The stated policy in Kentucky is that '[t]he financial condition of the defendant should not be a determining factor in his relationship to the criminal process.' Stephens v. Bonding Association of Kentucky, Ky., 538 S.W.2d 580, 582 (1976). In furtherance of this policy, KRS 31.110(1)(b) provides that a needy person shall be 'provided with the necessary services and facilities of representation including investigation and other preparation.' We conclude that this statutory mandate must be deemed to include an indigent defendant's right to issuance of compulsory process for material defense witnesses to the same extent that such services are available to nonindigent defendants, since the right to compel witnesses to testify on one's behalf is clearly a 'basic tool' of an adequate defense as contemplated by the statute."

O. **Department of Public Advocacy v. Lincoln Co. Fiscal Court. Decision by on discretionary review by Kentucky Supreme Court is pending.**

The issue is whether, under KRS 31.200(3), the county in which a defendant is charged with committing a crime is responsible for the payment of mental health experts necessary to his defense when at the time of prosecution for that crime, not its commission, the defendant is confined in a state prison. In the decision being review, the Kentucky Court of Appeals held that the county, not the Department of Public Advocacy, is responsible for the payment.

P. **Department of Public Advocacy v. Patrick, 765 S.W.2d 36 (1989).**

Angela Patrick was appointed in October, 1985 to represent the indigent Grant Howard on a murder charge. In January, 1986 the trial judge decided that Howard had the ability to pay Patrick through the sale of real property. The trial judge denied the motion of Patrick to withdraw and ordered that she was to be paid from funds generated by the sale of the real property. At the conclusion of the trial, Patrick requested and the trial judge ordered DPA to pay $3,843.90.

The Court held DPA was not liable for this amount:

"Under KRS 31.120, the court is to determine with respect to each step in the proceedings whether an individual is a needy person requiring public defender assistance. Under Subsection (3)(a), it is prima facie evidence that a person is not indigent or needy within the meaning of this chapter if he owns real property in this state. Pursuant to this section, the district court determined that Howard was ineligible for public defender assistance and ordered that Patrick be paid with the funds from the sale of real estate Howard owned. Howard's status did not change after this determination had been made. As a result, the trial court had no authority to order the Department to reimburse Patrick for her representation of Howard. Further, had Patrick been participating in Howard's case as an appointed public advocate under KRS Chapter 31, she could not have agreed to accept any portion of her fee from the sale of Howard's property. KRS 31.250(1). There is simply no statutory justification for the imposition of payment of Patrick's fees upon the Department or any other public agency, once it was determined that Howard was ineligible for public assistance." Id. at 37.

Q. **Kenton-Gallatin-Boone Public Defender, Inc. v. Lape, Ky.App., (unpublished) (Dec. 1, 1989).**

The county fiscal court is responsible for attorney fees in excess of the statutory maximum, not DPA.

IV. KENTUCKY ATTORNEY GENERAL OPINIONS

A. OAG 80-401 (Boone County) (July 22, 1980)

When a county commits under KRS 31.160(1)(b) to a public defender program, it must pay expert witness fees pursuant to KRS 31.190(1), 31.200(1), and 31.240(3).

"Where the defense attorney considered the use of state facilities as being impractical, the court concerned may authorize the use of private facilities to be paid for on court order by the county."

B. 83-70 (Jackson County) (February 14, 1983)

Under KRS 31.200, the fiscal court, not the Administrative Office of the Courts, is responsible for paying for the transcript of a mistrial.

C. 84-223 (Clark County) (June 25, 1984)

When a county is currently committed to a public defender program under KRS 31.160, the county must bear the expense of expert witness' fees and psychological examinations used in the defense of indigents in criminal cases.

In involuntary commitment cases under 202A the county fiscal court in the county where the petition is filed must pay the psychological and psychiatric fees.

D. 84-280 (Clark County) (August 8, 1984)
see p. 38, infra.

V. UNITED STATES SUPREME COURT CASE LAW

A. **United States ex rel. Smith v. Baldi**, 344 U.S. 561, 73 S.Ct. 391, 97 L.Ed.2d 549 (1953) (6-3)

Opinion by Reed, Vinson, Jackson, Burton, Clark, Minton. Dissent by Frankfurter, Black, Douglas.

The defendant pled guilty to first degree murder. Smith had a significant history of mental difficulties. The Court appointed a state psychiatrist to examine him for competency and sanity. That psychiatrist said the defendant was competent, sane and faking. The state produced evidence to show that the killing was 1st degree murder. The defense produced documentary evidence of his prior mental commitments to show the defendant was insane. The trial judge sentenced the defendant to death.

No request for psychiatric assistance was made by trial counsel, but that issue was raised in the federal district court for the first time.

The psychiatrist who testified on the issue of sanity had, subsequent to consideration of this case by the federal district court, himself, been committed due to mental disease.

With boilerplate analysis, the Court held that defense assistance by a psychiatrist was not required in this case by 14th amendment due process or in order to afford Smith adequate counsel, saying "...the issue of petitioner's sanity was heard by the trial court. Psychiatrists testified. That suffices." Id. at 395.

This case was effectively overruled by Ake, infra.

B. **Little v. Streater**, 452 U.S. 1, 101 S.Ct. 2202, 68 L.Ed.2d 627 (1981).

In this quasi-criminal paternity action, the Court held that under fourteenth amendment due process the state cannot deny the putative father blood grouping tests if he cannot otherwise afford them because the indigent father is entitled to a meaningful opportunity to be heard.

C. **Blum v. Stenson, 465 U.S. 886, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984).**

Under 42 U.S.C. §1988 a prevailing party in a federal civil rights action is entitled to a "reasonable attorneys fee...." The prevailing party in this Medicaid class action suit under 42 U.S.C. §1983 was presented by

the New York Legal Aid Society. Legal Aid billed at rates varying between $95-$105 per hour for 809 hours of work or $79,312. Legal Aid requested a fee that was 50% above this level due to the novelty of the issues, complexity of the case and the great benefit achieved for a large class. The district court approved and the Second Circuit affirmed.

The Court held that the "statute and legislative history established that 'reasonable fees' under §1988 are to be calculated according to prevailing market rates in the relevant community, regardless of whether plaintiff is represented by private or non-profit counsel." Id. at 1547. The standard is not the actual cost of representation to the non-profit organization.

D. **Ake v. Oklahoma,** 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985) (8-1)

1. Issue: "whether the Constitution requires that an indigent defendant have access to the psychiatric examination and assistance necessary to prepare an effective defense based on his mental condition, when his sanity at the time of the offense is seriously in question." Id. at 1090.
2. The trial judge, due to the observation of bizarre behavior, ordered the defendant examined by a psychiatrist to see if further mental observation was needed. That psychiatrist diagnosed the defendant a probable paranoid schizophrenic and recommended more extensive evaluation. Defendant was committed for competency exam and the state hospital found him incompetent and a paranoid schizophrenic. Several weeks later, the court found the defendant to be competent.
3. The defense requested a psychiatrist to assist in the insanity defense as the state had not performed an exam for sanity. The trial judge denied the request. The defendant's sole defense was insanity. As a result, there was no expert testimony at trial on whether the defendant was sane or insane.
4. At sentencing, the prosecutor relied on the state psychiatrist's guilt phase testimony that Ake was dangerous to society to prove the aggravating factor of future dangerousness.
5. "Ake had no expert witness to rebut this testimony or to introduce on his behalf evidence in mitigation of his punishment." Id. at 1092.
6. "This Court has long recognized that when a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense. This elementary principle, grounded in significant part of the

Fourteenth Amendment's due process guarantee of fundamental fairness, derives from the belief that justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake." Id. at 1093.

7. Psychiatry has come to play a pivotal role in criminal proceedings.
8. "...when the State has made the defendant's mental condition relevant to his criminal culpability and to the punishment he might suffer, the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense. In this role, psychiatrists gather facts, both through professional examination, interviews, and elsewhere, that they will share with the judge or jury; they analyze the information gathered and from it draw plausible conclusions about the defendant's mental condition, and abut the effects of any disorder on behavior, and they offer opinions abut how the defendant's mental condition might have affected his behavior at the time in question. They know the probative questions to ask of the opposing party's psychiatrists and how to interpret their answers. Unlike lay witnesses, who can merely describe symptoms they believe might be relevant to the defendant's mental state, psychiatrists can identify the "elusive and often deceptive" symptoms of insanity...." Id. at 1095.
9. When the defendant's mental condition is seriously in question, the defense is entitled at guilt and penalty phases to a psychiatrist to

    a. conduct a professional exam on "issues relevant to the defense...";
    b. to help determine whether insanity defense is viable;
    c. to present testimony;
    d. to assist in preparing cross of state's psychiatrist;
    e. aid in preparation of penalty phase;
    f. rebut aggravating evidence in capital penalty phase;
    g. present mitigating evidence.

10. The defendant must make an ex parte threshold showing to show necessity of expert.
11. "This is not to say, of course, that the indigent defendant has a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own. Our concern is that the indigent defendant have access to a competent

psychiatrist for the purpose we have discussed." Id. at 1096.

12. If the state does not permit you to hire your own expert but instead forces you to use a state-employed expert, you are entitled to the following from that expert and if you do not receive it, you can argue the inadequacy of the expert:

    a. psychiatrist;
    b. competent, effective, 105 S.Ct. at 1093, 1097;
    c. mental states for guilt/punishment, 105 S.Ct. at 1095, 1097, 1098;
    d. marshal defense, evaluate, prepare, present, 105 S.Ct. at 1095, 1097;
    e. penalty phase assistance, 105 S.Ct. at 1097;
    f. cross-examine, 105 S.Ct. at 1096;
    g. rebut, 105 S.Ct. at 1097;
    h. confidential help, 105 S.Ct. at 1097 (ex parte);
    i. meaningful access to justice, 105 S.Ct. at 1094.

E. **Bowden v. Francis,** 470 U.S. 1079, 105 S.Ct. 1834, 85 L.Ed.2d 135 (1985)

The Court vacated and remanded for further consideration in light of Ake.

The dissenters, O'Connor, White and Rehnquist, felt no money for experts was required because the defendant "failed to present evidence raising a bona fide doubt as to his competency. As to psychiatric assistance to gather mitigating evidence, the Court of Appeals found no constitutional error because petitioner had not requested the state trial court to appoint a psychiatrist for that purpose."

F. **Tuggle v. Virginia,** 471 U.S. 1096, 105 S.Ct. 2315, 85 L.Ed.2d 835 (1985)

In Tuggle v. Commonwealth, 323 S.E.2d 539 (Va. 1984) the court, on the defendant's motion, ordered a competency and insanity evaluation at the state hospital. He was determined to be sane and competent.

Tuggle then requested a second psychiatric exam. He was denied this request, and he argued on appeal that he was precluded from presenting mitigating circumstances only ascertainable through a psychiatric exam by a neutral professional.

On petition for certiorari the United States Supreme Court vacated the judgment and remanded for further consideration in light of Ake.

On remand, Tuggle v. Commonwealth, 334 S.E.2d 838 (Va. 1985), cert. denied, 106 S.Ct. 3309 (1986), the court held: 1) the defendant failed to make the requisite Ake threshold demonstration. The court found that the defense did not demonstrate that his insanity was a significant factor at trial; 2) but that the trial court in light of Ake "erred in denying Tuggle's motion for an independent psychiatrist to rebut the Commonwealth's psychiatric evidence of future dangerousness"; 3) however, under Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983) no resentencing is required since the jury made a specific finding on another aggravating factor.

Amazingly, the Virginia Supreme Court refused to remand for resentencing even though the Virginia Attorney General suggested that the error required resentencing since the court was not bound under Orloff v. Willoughby, 345 U.S. 83 to accept the suggestion of a party concerning a question of law!

G. **Caldwell v. Mississippi**, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985)

This capital case presented an issue on whether an indigent defendant was entitled to have money for ballistics and fingerprint experts. The United States Supreme Court gave the defendant relief on the "recommendation" issue. During oral argument, which took place one day before the issuing of Ake, the following exchanges concerning the funds for expert issue took place:

RIGHT TO EXPERTS

> Turning to the question of the defendant's right to have the requested experts appointed, the defense attorney, Boyle, noted that the request was made in order to establish an adequate defense. The trial court denied the request, he said, on the basis of Mississippi precedent establishing that (1) there is no right to such appointment, and (2) the defendant failed to establish "need" for the experts.
>
> The state now concedes that there is a right to appointment of such experts, Boyle asserted, but is trying to win on the issue of the defendant's failure to specify costs.

Justice O'Connor: Is there anything that holds that the state can't require a threshold showing in this area?

Boyle: No.

Justice O'Connor: Then why can't they have a rule requiring a threshold showing?

Boyle: The state statute doesn't do that. It provides for reimbursement, on the assumption that there is no constitutional right.

The problem here, Boyle suggested, is that there is no provision for ex parte appointment. Thus, an indigent defendant is required to "tip his hand," giving risk to an equal protection problem.

Justice O'Connor: But the appointment of counsel isn't ex parte.

Boyle: But the appointment of counsel doesn't give away secret defense strategy. If, on the other hand, you ask for the appointment of, say, a footprint expert in advance, this forces the defense to give away its strategy. This, in turn, creates a classification that gives right to an equal protection argument.

Justice Rehnquist: But this would require states to set aside thousands of dollars in advance every year for such appointments. I doubt many states will do this.

Boyle: Federal law expressly provides for ex parte application.

Justice Marshall: If the state was using fingerprints, should a defendant automatically get an appointed fingerprint expert?

Boyle: If the request was reasonable.

In conclusion, Boyle added that Mississippi's reimbursement statute requires defense counsel to reach into his own pocket. This puts an unfair burden on defense lawyers, he said.

NO BASIS FOR EXPERTS

Defense counsel never told the trial court whom he wanted to retain as a footprint or ballistics expert, Boyd (the prosecutor) stressed. In such cases as Ruffin v. State, 447 So.2d 113 (Miss. 1984), and Billiot v. State, 454 So.2d 445 (Miss. 1984), the Mississippi Supreme Court has held that there is a constitutional right to such services under some circumstances, but that the necessity for such services must be shown.

Given the other evidence present in this case, Boyd argued, such as the defendant's confession, the expert services were superfluous.

Justice Rehnquist: If the state is planning to use experts, shouldn't the defendant be entitled to his own?"

Boyd: No. Unless the prosecution's experts are biased against the defendant, or the evidence is pivotal to the case, experts shouldn't automatically be appointed for the defense.

In the Caldwell opinion written by Justice Marshall, the Court held that money for experts was not constitutionally required in this case:

> Mississippi law provides a mechanism for state appointment of expert assistance, and in this case the State did provide expert psychiatric assistance to Caldwell at state expense. But petitioner also requested appointment of a criminal investigator, a fingerprint expert, and a ballistics expert, and those requests were denied. The State Supreme Court affirmed the denials because the requests were accompanied by no showing as to their reasonableness. For example, the defendant's request for a ballistics expert included little more than "the general statement that the requested expert 'would be of great necessarius witness.'" 443 So.2d 806, 812 (1983). Given that petitioner offered little more than undeveloped assertions that the requested assistance would be beneficial, we find no deprivation of due process in the trial judge's decision. Cf. Ake v. Oklahoma, ... (discussing showing that would entitle defendant to psychiatric assistance as matter of federal constitutional law). We therefore have no need to determine as a matter of federal constitutional law if any showing would have entitled a defendant to assistance of the type here sought.
>
> Caldwell, supra, 105 S.Ct. 2633, 2637 n.1.

H. **Felder v. Alabama**, 474 U.S. 976, 106 S.Ct. 376, 88 L.Ed.2d 330 (1985)

Vacated and remanded Felder v. State, 470 So.2d 1321, (Ala.Crim.App. 1985), aff'd 470 So.2d 1330 (Ala. 1985) for consideration in light of Ake. The Court of Criminal Appeals remanded the case to the trial court for a full evidentiary hearing. Felder v. State, 491 So.2d 225 (Ala.Cr.App. 1986).

I. **Dufour v. Mississippi**, 479 U.S. 841, 107 S.Ct. 292, 93 L.Ed.2d 266 (1986)

In his dissent from denial of certiorari, Justice Marshall stated that certiorari should have been granted to determine the question of whether a defendant who had a defense lawyer who failed to ask for funds for a psychiatrist under Ake to develop psychological evidence in mitigation of his sentence had the burden to prove prejudice from that failure in order to prevail.

Justice Marshall believes that requiring that showing of an indigent defendant is an insurmountable burden: "prejudice cannot be shown because the alleged error of counsel was in failing to seek the appointment of an

expert without whose assistance the evidence which would show prejudice cannot be brought to light." Id. at 294.

J. **Brown v. Dodd**, 484 U.S. 474, 108 S.Ct. 33, 98 L.Ed.2d 164 (1987)

Petitioner had a long history of mental illness and a 6 year history of incompetence. At a competency hearing he was examined for 20 minutes by a recent Ph.D. graduate in psychology who was not yet licensed. The psychologist found petitioner competent performing no psychological tests, consulting none of the previous examining doctors, and not having completely read petitioner's file. Petitioner was sentenced to death.

In his dissent from denial of certiorari which was joined by Justice Brennan, Justice Marshall stated that this case called on the Court to determine if an expert appointed by the state to evaluate a defendant's competency had to be qualified and perform competently. Justice Marshall expressed his view that under Ake the Constitution required an examiner to possess minimum professional qualifications and that the examination conform to minimum professional standards.

K. **Johnson v. Oklahoma**, 484 U.S. 878, 108 S.Ct. 35, 98 L.Ed.2d 167 (1987)

A police chemist testified that petitioner's hair, blood, semen and clothing were consistent with physical evidence found in the victim's apartment. Petitioner's request for the court to appoint a chemist to challenge the police chemist's qualifications and testimony and to conduct an electrophoresis, which could show petitioner was not the perpetrator, was denied.

In his dissent from the denial of certiorari, Justice Marshall, who was joined by Justice Brennan, felt it appropriate to address the issue reserved in Caldwell of whether and when an indigent defendant is entitled to non psychiatric expert assistance. He noted that denying petitioner a chemist "prevented petitioner from raising doubts about the strength of the state's evidence against him," and "prevented petitioner from gaining potentially conclusive exculpatory evidence in support of his affirmative alibi defense." Id. at 37. Petitioner was denied the right to present a meaningful defense.

L. **FTC v. Superior Court TrialLawyers Ass'n, 107 U.S. 851, 110 S.Ct. 768, 107 L.Ed.2d 851 (1990)**

A boycott by a Washington, D.C. appointed counsel group, which refused to continue to represent indigent criminal defendants until a reasonable level of compensation was

provided them, constituted a restraint of trade in violation of the anti-trust laws and was not permitted under 1st amendment protections.

While the ruling is unfavorable, the Association of Lawyers did, as a consequence of their boycott, have their compensation rates rasied from $20/$30 per hour to $35 per hour.

M. Missouri v. Jenkins, ___ U.S. ___, 110 S.Ct. 1651, ___ L.Ed.2d ___ (1990)

Federal judges have the power in 42 U.S.C.§1983 litigation to order states to turn up the funds to meet the state's constitutional obligations.

In this case the court held that a federal district judge could require a school district to levy taxes in excess of limits set by state statute to fund a school desegregation plan.

"To hold otherwise would fail to take account of the obligations of local governments, under the Supremacy clause, to fulfill the requirements that the Constitution imposes on them." Id. at 1666.

N. Granviel v. Texas, ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___ (May 29, 1990)

In his dissent from denial of certiorari, Justice Marshall (joined by Brennan) state that the 5th Circuit's holding in this case, 881 F.2d 185 (1989), that the constitutional right to the assistance of a psychiatrist, is not satisfied by appointment of a psychiatrist whose examination report is available to the prosecution.

"Ake mandates the provision of psychiatrist who will be part of the defense team and serve the defendant's interests in the context of our adversarial system." Id. at ___.

Thus, we recognized in Ake that a defense psychiatrist is necessary not only to examine a defendant and to present findings to the judge or jury on behalf of the defendant, but also to "assist in preparing the cross-examination of a State's psychiatric witnesses," Id., at 82, and in determining "how to interpret their answers," Id. at 80. Just as an indigent defendant's right to legal assistance would not be satisfied by a State's provision of a lawyer who, after consulting with the defendant and examining the facts of the case and the applicable law, presented everything he knew about the defendant's guilt to the defendant, prosecution, and the

court, so his right to psychiatric assistance is not satisfied by provision of a psychiatrist who must report to both parties and the court.

O. **Mallard v. U.S. District Court for So. District of Iowa, ___ U.S. ___, 109 S.Ct. 1814, 104 L.Ed.2d 318 (1989)**

In a 5-4 decision the Court decided that civil statute 28 U.S.C. §1915(d), which states that "the court may request an attorney to represent any such person unable to employ counsel...," "does not authorize the federal courts to make coercive appointments of counsel." Id. at 1823. The Court did not address in Mallard whether the federal courts have inherent authority to require lawyers to serve in civil or criminal cases. Also, the Court did not address whether other statutes that talk in terms of assignment or appointment without any or without full pay allow for a court to make counsel represent a person against counsel's will. But see Powell v. Alambama, 287 U.S. 45, 53 S.Ct. 55, 65, 77 L.Ed. 158 (1932), which holds that "attorneys are officers of the court, and are bound to render service when required by such an appointment."

The Court did recognize in Mallard that "...in a time when the need for legal services among the poor is growing and public funding for such services has not kept pace, lawyers' ethical obligation to volunteer their time and skills pro bono publico is manifest." Id. at 1823. It is noteworthy that the Court approved the use of mandamus to contest an involuntary civil appointment. Mandamus was appropriate because the judge acted beyond his jurisdiction and because the coerced attorney had no other remedy available to him. Id. at 1822.

The opinion was written by Justice Brennan. Justices Marshall, Stevens, Blackmun and O'Connor dissented.

VI. SIXTH CIRCUIT CASELAW

A. Appellate Decisions

1. Kordenbrock v. Scroggy, 889 F.2d 69 (6th Cir. 1989) petition for rehearing en banc granted, opinion vacated, Februrary 20, 1990

2. Foster v. Kassulke, 898 F.2d 1144 (6th Cir. 1990)

3. Ford v. Scroggy, 841 F.2d 677 (6th Cir. 1988)

4. United States v. Day, 789 F.2d 1217, 1224-25 (6th Cir. 1986)

5. Matlock v. Rose, 731 F.2d 1236 (6th Cir. 1984)

6. Payne v. Thompson, 622 F.2d 254 (6th Cir. 1980)

7. United States v. Tate, 419 F.2d 131 (6th Cir. 1969)

B. District Court Decisions

1. Kordenbrock v. Scroggy, 680 F.Supp. 867 (E.D. Ky. 1988)

2. United States v. Jackson, 587 F.Supp. 80 (D.C. Tn. 1983)

VII. OTHER FEDERAL AND STATE CASE LAW

A. APPEAL

1. In Re Ketchell, 438 P.2d 625 (Cal. 1968).

The Court held that the prison warden must allow a psychiatrist working for appointed appellate counsel to interview the defendant in prison so that appellate counsel could be aided in developing and executing appellate strategy, and to provide basis for collateral attack. This was required in order for the defendant to be effectively represented by his post-conviction counsel.

B. ATTORNEY FEES

1. In Re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender, Florida, ___ So.2d ___ (May 3, 1990) (1990 WL 59673, 15 Fla.L.Week 278).

In response to a huge backlog of indigent appeals in this district, the Florida Second District Appellate Court issues a sua sponte order regarding the appellate public defender system. The District Appellate Court stated that the briefs of non-indigents were being filed at least a year sooner than those of indigents, creating a "constitutional dilemma" due to the equal protection clause. The order mandated that the public defender of each judicial circuit must handle appeals of indigents from its own circuit, and that if a conflict arises due to an inability to ably represent all assigned clients, the circuit judge may appoint counsel from the bar's private sector. The responsibility for compensation of appointed counsel was placed on the county governments, and six counties appealed this order. The high court held that although the Tenth Circuit's public defender was obligated by statute to take the cases of the other defender offices in the district, this public defender could move to withdraw in any case which would result in a "backlog conflict." A court could then appoint counsel, the Supreme Court held, as provided for in the original order. The Court also upheld the placement of fiscal responsibility upon the counties, but stated that "the [state] legislature should live up to its responsibilities and appropriate an adequate amount for this purpose. Finally, to deal with the backlog that already exists, the Court ordered "massive employment of the private sector bar on a 'one-shot' basis." To help persuade the legislature to meet its

responsibilities to these ends, the Court ordered that, after 120 days from the filing of its opinion, state courts will entertain habeas motions for "backlogged" appellants' immediate release unless the legislature should appropriate funds.

2. **Remeta v. Florida, 559 So.2d 1132 (Fla. 1990)**

Florida had a statutory maximum of $1000 for appointed attorneys in clemency procedures.

"[C]ourts have the authority to exceed statutory fee caps to compensate court-appointed counsel for the representation of indigent death-sentenced prisoners in executive clemency proceedings when necessary to ensure effective assistance." Id. at ___.

The attorney fee of $3000 at $60/hour and expenses of $622 was approved.

3. **State v. Ryan, 444 N.W.2d 656 (Neb. 1989)**

The court held that the 2 court-appointed attorneys who represented the indigent defendant charged with 2 counts of murder were entitled to $33,000 for their representation at $50 per hour, not the $8,776 approved by the trial judge. Id. at 661. "In horrifying cases such as this case, it is vital that we, as a State and a nation, maintain our decree of civilization and reliance on our Constitution. We must not sink to the level of nations that execute transgressors the morning after alleged offenses occur. Defense attorneys perform an absolutely essential function under our Constitutions and must be treated as honorable persons performing a necessary legal duty." Id. at 662.

4. **Jewell v. Maynard, 383 S.E.2d 536 (W.Va. 1989).**

This case addressed the constitutionality of its state's system for providing counsel to indigents in criminal cases that provided for hourly rates of $20 for out of court work and $25 for in court work with a maximum of $1,000 per case.

The Court concluded that "...the current system does not consistently ensure experienced, competent, capable counsel to all indigent defendants and others entitled to appointed counsel." Id. at 542. The Court recognized that inadequate rates and artificial fee caps have unacceptable consequences:

> We have a high opinion of the dedication, generosity, and selflessness of this States' lawyers. But, at the same time, we conclude that it is unrealistic to expect all appointed counsel with office bills to pay and families to support to remain insulated from the economic reality of losing money each hour they work. It is counter-intuitive to expect that appointed counsel will be unaffected by the fact that after expending 50 hours on a case they are working for free. Inevitably, economic pressure must adversely affect the manner in which at least some cases are conducted. Id. at 544.

With adequate service to the client being the highest value. The Court determined that the legislature had to fund the public defender/ appointed counsel systems with "substantially more money than is currently appropriated to meet constitutional standards." Id. at 546. The constitutional right to effective assistance of counsel requires that no lawyer can be "involuntarily appointed to a case unless the hourly rate of pay is at least $45 per hour for out of court work and $65 per hour for in court work." Id. at 547.

5. **White v. Board of County Commissioners, 537 So.2d 1376 (Fla. 1989).**

By statute, Florida has a $3500 maximum for attorneys fees in court-appointed indigent criminal cases. The court-appointed lawyer, White, spent 134 hours on his first degree murder case with 63 of those hours in court over a 3 1/2 month period. The $3500 maximum fee would mean that White would get $26.12 per hour. An expert testified for White that an appropriate fee would be $12,135. White asked the court for $50 per hour for a total of $6700.

In Makemson v. Martin County, 491 So.2d 1109 (Fla. 1986) the Florida Supreme Court determined the fee cap statute unconstitutional as applied in extraordinary and unusual cases. In White, the court extends that ruling by finding that "virtually every capital case fits within this standard and justifies the court's exercise of its inherent power to award attorney's fees in excess

of the current statutory fee cap." Id. at 1380. The Court did not hesitate in finding that $3500 was "unrealistic." Id. at 1379. The determining

factor in deciding whether the fee cap should be exceeded is not whether the case is complex. It is "the time expended by counsel and the impact on the attorney's availability to serve other clients...." Id. at 1380.

The Court reiterated that a conflict between a burden on a county treasury and an individual's constitutional rights is resolved in favor of constitutional protections.

6. **McDonald v. Armontrout, 860 F.2d 1456 (8th Cir. 1988).**

Missouri death row inmates prevailed in a 42 U.S.C. §1983 action involving a violation of their constitutional rights due to conditions and practices on death row. The federal district court judge ordered the defendant state officials to pay $276,000 in attorney fees and expenses at the following rates: $150 per hour for the Missouri lawyer who was counsel, $100 per hour for his law partner, $85 per hour for his associates, and $150 per hour for the NAACP Legal Defense Fund counsel. Travel time was calculated at 1/2 these rates.

The 8th Circuit held there was no abuse of discretion in awarding these fees. Under 42 U.S.C. §1988 a prevailing party's attorney is entitled to "a reasonable attorneys fee." A reasonable fee under §1988 should be calculated using "market rates," which are the prevailing rates in the community. The attorneys ordering billing rate is a good indicator of this.

7. **Luckey v. Harris, 860 F.2d 1012 (11th Cir. 1988) rehearing denied, 896 F.2d 479, cert. denied, ___ U.S. ___ (1990).**

The Eleventh Circuit determined that the Eleventh Amendment did not bar relief against the state of Georgia in a suit filed pursuant to 42 U.S.C. §1983 (1982) that alleged "systemic deficiencies including inadequate resources, delays in appointment of counsel, pressure on attorneys to hurry their clients' case to trial or to enter a guilty plea, and inadequate supervision in the Georgia indigent criminal defense system...," all of which denied indigent defendants their constitutional guarantees. Id. at 1013.

Luckey is a significant advance. (See Stephen B. Bright et al, Keeping Gideon from Being Blown Away, Criminal Justice, Winter 1990, at page 10. See also

R. Wilson, Litigative Approaches to Enforcing the Right to Effective Assistance of Counsel in Criminal Cases, 14 Rev. of L & Soc Change 203 (1986).) Neal Bradley of the Georgia ACLU, 404/523-5398, is plaintiff's counsel in Luckey. The Luckey state-wide approach has been successfully used to challange a county defender system in Carter v. Chambers County, Alabama. A partial consent decree has been entered, and the litigation continues. Richard Cohen of the Southern Poverty Law Center, P.O. Box 2087, Montgomery, Alabama 36102 (205/264-0286) is handling that case.

8. State Ex Rel. Stephan v. Smith, 747 P.2d 816 (Kan. 1987).

Kansas has a mixed system of full time public defenders and appointed counsel.

Kansas statutes and regulations set compensation at the rate of $30 per hour for attorneys fees in appointed cases. There is a maximum of $400 for cases that are pled; $1000 for cases tried, and $5000 for exceptional cases. $100 of expenses are also allowed.

Due to a shortage of funds, there had been a 12% cut imposed on the billed fees and expenses in appointed attorney criminal cases.

A Kansas trial judge entered a general order that no attorney would be required to serve as counsel for an indigent accused absent reasonable compensation, which the judge defined as $68 per hour, considering overhead expenses that ranged from $27-$35 per hour. Id. at 822, 837. The judge further ordered that an indigent defendant's charges would be dismissed without prejudice if such compensation was not available within 30 days of a determination of indigency. Id. at 822. The state challenged this order by way of mandamus.

"Attorneys generally have an ethical obligation to provide pro bono services for indigents. Such services may only be provided by attorneys. The individual attorney has a right to make a living. Indigent defendants, on the other hand, have the right to the effective assistance of counsel. The obligation to provide counsel for indigent defendants is that of the State, not of the individual attorney.... The burden must be shared equally by those similarly situated. In the final analysis, it is a matter of reasonableness." Id. at 835-36.

The Court found that the fifth amendment's prohibition against unfairly taking property and the fourteenth amendment's equal protection clause were violated. Id. at 842, 846. "The State also has an obligation to pay appointed counsel such sums as will fairly compensate the attorney, not at the top rate an attorney might charge, but at a rate which is not confiscatory, considering overhead and expenses. The basis of the amount to be paid for services must not vary with each judge, but there must be a statewide basis or scale. No one attorney must be saddled with appointments which unreasonably interfere with the attorney's right to make a living. Out-of-pocket expenses must be fully reimbursed." Id. at 849.

9. DeLisio v. Alaska Supreme Court, 740 P.2d 437 (Alaska 1987).

A private attorney cannot be compelled to represent an indigent criminal defendant without just compensation since otherwise it would be an unconstitutional taking of property.

The measure of the mandated attorney fee compensation is the "fair market value of the property appropriated, or the 'price in money that the property could be sold for on the open market under fair conditions between an owner willing to sell and a purchaser willing to buy with a

reasonable time allowed to find a purchaser.'" Id. at 443.

10. Criminal Justice Act Compensation

In 1987 the Criminal Justice Act was amended to increase compensation rates and maximums for attorneys appointed in federal court. Under 18 U.S.C. § 3006A(d)(1) the compensation is set at $60 per hour for in court work and $40 per hour for out of court work. Those rates can be increased to $75 per hour if the Judicial Conference deems the higher rate justified. Further increases are possible under the Act's provisions.

The maximum amounts for attorney fees has been increased to $3500 for each attorney in a felony case and $1000 for each attorney in a misdemeanor case. 18 USC § 3006A(d)(2).

The maximum amounts can be exceeded for "extended or complex representation whenever the court...certifies that the amount of the excess payment is necessary to provide fair compensation and the payment is approved by the chief judge of the circuit." 18 USC §3006A(d)(3).

11. Makemson v. Martin County, 491 So.2d 1109 (Fla. 1986).

The indigent defendant's attorney was appointed by the court to represent him on this capital murder, kidnapping and armed robbery charges. The representation spanned a 9 month period. The case was changed to a venue 150 miles away. The in-court time by defense counsel amounted to 64 hours. The appointed attorney asked for compensation for 248.3 hours in the amount of $9,500, even though expert testimony valued his services at a maximum of $25,000. The Florida statute allowed for a maximum of only $3,500 for attorney compensation in indigent criminal cases.

The court held the statute putting a cap on attorney fees in capital cases facially valid but "unconstitutional when applied in a manner to curtail the court's inherent power to ensure adequate representation of the criminally accused." Id. at 1112. The court specifically found the sixth amendment right to effective representation violated, but the holding was limited to "extraordinary and unusual" capital cases. The court noted that to safeguard a person's rights," it is our duty to firmly and unhesitatingly resolve

any conflicts between the treasury and fundamental constitutional rights in favor of the latter." Id. at 1113.

12. **Blum v. Stenson, 465 U.S. 886, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984).**

Under 42 U.S.C. §1988 a prevailing party in a federal civil rights action is entitled to a "reasonable attorneys fee...." The prevailing party in this Medicaid class action suit under 42 U.S.C. §1983 was presented by the New York Legal Aid Society. Legal Aid billed at rates varying between $95-$105 per hour for 809 hours of work or $79,312. Legal Aid requested a fee that was 50% above this level due to the novelty of the issues, complexity of the case and the great benefit achieved for a large class. The district court approved and the Second Circuit affirmed.

The Court held that the "statute and legislative history established that 'reasonable fees' under §1988 are to be calculated according to prevailing market rates in the relevant community, regardless of whether plaintiff is represented by private or non-profit counsel." Id. at 1547. The standard is not the actual cost of representation to the non-profit organization.

13. **Boyle County Fiscal Court v. Shewmaker, Ky.App., 666 S.W.2d 759 (1984)**

The fiscal court had the responsibility to provide funds to pay the attorney fees after state allotment for public defender system exhausted. KRS 31.190; 31.050.

14. **State v. Smith (In Banc), 681 P.2d 1374 (Ariz. 1984).**

The Court noted that there were many different methods in the various counties of the state for delivering public defender services. The bidding system in Mohave County was determined to be inadequate by the Supreme Court of Arizona since it 1) did not take into account the time an attorney is expected to spend in representing a client; 2) did not provide for support costs (investigation, paralegals, law clerks); 3) did not account for the competency of the attorney to adequately represent all of his clients assigned him; and 4) did not take into account the complexity of each case. Id. at 1381.

The Court determined that such a system violates state and federal constitutional guarantees of due process and effective assistant of counsel since "an attorney so overburdened cannot adequately represent all of his clients properly and be reasonably effective." Id.

Significantly, the Court reminded public defenders of their ethical responsibilities:

> Therefore, an attorney may be forced to allot his limited amount of time and resources between paying clients and indigent clients or even between different indigent clients. This can result in a breach of the attorney's professional responsibility under DR 5-101, 6-101, 7-101 or 5-105. We remind counsel that accepting more cases than can be properly handled may result not only in reversals for failing to adequately represent clients, but in disciplinary action for violation of the Code of Professional Responsibility. See DR 1-102(A)(6)...
> Id. at 1382.

The Court noted that the ABA Standards for Criminal Justice, Standards 4-1.2 and 5-4.3 (2d.Ed. 1980) required public defenders to decline unreasonable workloads:

> (d) A lawyer should not accept more employment than the lawyer can discharge within the spirit of the constitutional mandate for speedy trial and the limits of the lawyer's capacity to give each client effective representation. It is unprofessional conduct to accept employment for the purpose of delaying trial.
>
> . . . .
>
> Neither defender organizations nor assigned counsel should accept workloads that, by reason of their excessive size, interfere with the rendering of quality representation or lead to the breach of professional obligations. Whenever defender organizations or assigned counsel determine, in the exercise of their best professional judgment, that the acceptance of additional cases or continued representation in previously accepted cases will lead to the furnishing of representation lacking in quality or to the breach of professional obligations, the defender organizations or

assigned counsel must take such steps as may be appropriate to reduce their pending or projected workloads.

15. **State v. Robinson, 465 A.2d 1214 (N.H. 1983).**

The appointed attorney in a misdemeanor theft case submitted a bill for $1,265.00 for legal fees ($20/hour out-of-court and $30/hour in-court) and $429.38 for expenses. The trial court only allowed the appointed attorney $200 of the expenses and the maximum misdemeanor fee of $500.

On appeal, the New Hampshire Supreme Court held that the $500 maximum misdemeanor fee could be exceeded for "good cause," and that all "reasonably incurred" expenses had to be paid:

> A fee for the defense of an indigent criminal defendant need not be equal to that which an attorney would expect to receive from a paying client, but should strike a balance between conflicting interests which include the ethical obligation of a lawyer to make legal representation available, and the increasing burden on the legal profession to provide counsel to indigents.
>
> . . . .
>
> The right to counsel as guaranteed by the sixth amendment and part I, article 15 of our own constitution would be meaningless if counsel for an indigent defendant is denied the use of the working tools essential to the establishment of a tenable defense because there are no funds to pay for these items.
>
> . . . .
>
> The State must provide the defense with these tools.
> Id. at 1216-17.

16. **OAG 84-280 (August 8, 1984) (Clark County)**

"The court assigning an attorney to represent a needy defendant will prescribe a reasonable fee, which shall be paid by the county.... Under this analysis, the mere agreement of the county to pay only just what the state contributes to the county, plus what the indigent pays, may not meet the requirements of KRS 31.170(3). We do not believe that KRS 31.170(3) was intended to stake out the state contribution as the maximum to be paid by the

committed county. In addition, where the court has set the fee under KRS 31.170(3), the fiscal court must, by the terms of KRS 31.190, pay that fee out of county appropriations, even if it equals the maximum provided in KRS 31.170(4). However, the court's prescribed fee should not exceed the legislative maximum set out in KRS 31.170(4)."

17. **State Ex Rel. Wolff v. Ruddy, 617 S.W.2d 64 (Mo. 1981) (En Banc).**

The Court held that all Missouri lawyers had to accept appointments to represent indigents in criminal cases without compensation when the state money appropriated ran out. Refusal to do so subjected the lawyer to disciplinary action. The only exceptions were if a lawyer could show undue hardship, or if a lawyer served for 120 days without compensation he would be excused from further appointments.

18. **Hulse v. Wifvat, 306 N.W.2d 707 (Iowa 1981).**

The court interpreted an Iowa statute on appointed attorney compensation which had a standard of "...reasonable compensation which shall be the ordinary and customary charges for like services in the community...," Id. at 708, to mean full compensation. Id. at 711. "No discount is now required based on an attorney's duty to represent the poor." Id.

19. **Department For Human Resources v. Paulson, 622 S.W.2d 508 (Ky.App. 1981).**

The legislature's attorney fee cap of $300 for attorneys representing an indigent parent in a termination proceeding is not an unconstitutional taking of property even though attorneys effectively worked pro bono.

20. **Shapiro, The Enigma of the Lawyer's Duty to Serve, 55 N.Y.Univ. L. Rev. 735, 756 (1980).**

Of the 35 or so jurisdictions that have addressed the issue of whether an attorney must represent an indigent criminal defendant pro bono, a slight majority now hold that a lawyer cannot be forced to represent an indigent criminal defendant absent compensation. Shapiro concludes, "At least absent adequate compensation, a lawyer should be able to decline an appointment for financial reasons whether or not it would cause 'unreasonable' hardship." Id at 792.

21. Bradshaw v. Ball, Ky., 487 S.W.2d 294 (1972).

The Kentucky Supreme Court held that attorneys could "no longer be required to accept court appointments to represent indigent criminal defendants, nor will they be subject to sanction if they decline such appointments," Id. at 300, because "the burden of such service [is] a substantial deprivation of property and constitutionally infirm." Id. at 298. The "constitutional right of the indigent defendant to counsel can be satisfied only by requiring the state to furnish the indigent a competent attorney whose service does not unconstitutionally deprive him of his property without just compensation." Id. As a result of Bradshaw, the Kentucky Legislature created and funded the statewide public defender system in 1972.

22. People v. Randolph, 219 N.E.2d 337 (Ill. 1966).

The court held that the statutory limit of $500, $250 for attorney fees and $250 for expert fees was inadequate for the appointed attorney in this murder case. The Court ordered the attorney awarded $31,000 out of the state treasury even though this amount was well above the statutory maximum.

23. Webb v. Baird, 6 Ind. 13 (Ind. 1854).

Recognizing that the "defense of the poor" is a "duty" that is "essential to the accused, to the Court, and to the public," the Court held it was a "discriminating and unconstitutional tax" to require a lawyer to represent an indigent accused of a crime without any fee. Id. at 18.

"The legal profession having been thus properly stripped of all its odious distinctions and peculiar emoluments, the public can no longer justly demand of that class of citizens any gratuitous services which would not be demandable of every other class. To the attorney, his profession is his means of livelihood. His legal knowledge is his capital stock. His professional services are no more at the mercy of the public, as to remuneration, than are the goods of the merchant, or the crops of the farmer, or the wares of the mechanic. The law which requires gratuitous services from a particular class, in effect imposes a tax to that extent upon such class-clearly in violation of the fundamental law, which provides

for a uniform and equal rate of assessment and taxation upon all the citizens." Id. at 17.

24. ETHICAL CONSIDERATIONS

The ABA Model Code of Professional Responsibility was adopted by the ABA In 1969. Canon 2 states, "A lawyer should assist the legal profession in fulfilling its duty to make legal counsel available." The aspirational, not mandatory, Ethical Considerations [EC] state: "The rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer...." EC 2-25. According to EC 2-29, a lawyer who is appointed by a court to represent a client unable to obtain counsel "should not seek to be excused from undertaking the representation except for compelling reasons." EC 2-30 indicates that a lawyer who is appointed by a court to represent a client unable to obtain counsel "should not seek to be excused from undertaking the representation except for compelling reasons." EC 2-30 indicates that a lawyer should not represent a person if competent service cannot be rendered or if the "intensity of his personal feeling...may impair his effective representation...."

In August, 1983 the ABA replaced its 1969 Model Code with the Model Rules of Professional Conduct. About 32 states use the new ABA Model Rules or a variation. Many of the other states continue to use the older ABA Model Code.

The new ABA Model Rules have a specific rule on public service:

> RULE 6.1 Pro Bono Publico Service
>
> A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.

Rule 6.2 instructs us that a "lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause...." Good cause includes 1) "...an unreasonable financial burden on the lawyer," 2) "the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client", and 3) if the "...lawyer could not handle the matter competently...." Rule 6.2 and its Comment.

Effective January 1, 1990, the Kentucky Supreme Court adopted a modified version of the ABA Model Rules of Professional Conduct titling them the Kentucky Rules of Professional Conduct. SCR 3.130.

ABA Model Rules 6.1 and 6.2 were both modified by Kentucky. Instead of saying that a lawyer should render public interest legal service and shall not seek to avoid appointment, Kentucky's Rules say that a lawyer is encouraged to render such service and should not seek to avoid an appointment.

In December, 1987 the Editor and Publisher of the ABA Journal called for a minimum of 50 hours per year pro bono work by each lawyer. ABA Journal (December 1, 1987) at 55. Mandatory pro bono has been adopted by several federal courts; has been proposed in 2 state legislatures, and imposed by 7 local bar associations.

The ABA in its Standards for Criminal Justice, Providing Defense Services (1986) rejects the view that attorneys can be required to defend indigents in criminal cases without compensation:

> Assigned counsel should be compensated for time and service performed. The objective should be to provide reasonable compensation in accordance with prevailing standards. Compensation for assigned counsel should be approved by administrators of assigned-counsel programs. Standard 5-2.4 Compensation.

25. **LRC Personnel Service Contract Review Committee's Maximum Rate Schedule** (as of December 30, 1987).

CLASS	NOT TO EXCEED
Attorneys (Individual)	$40 per hour
Attorneys (Firm)	Partner/Principal $75/hr.
Attorneys (Title Search)	$125 per surface title; $300 per mineral title; $1,000 per each case completed in Circuit Court; $500 per brief for Court of Appeals

C. BLOOD

1. Bowen v. Eyman, 324 F.Supp. 339 (D.Ariz. 1970).

It was error to fail to grant defendant's request for an expert in blood to test defendant's blood in this rape case.

D. CARDIOLOGIST

1. People v. Gunnerson, 141 Cal.Rptr. 488 (Cal.App. 1977).

It was error in this murder case to fail to grant money to the indigent defendant to employ a cardiologist to prove that the victim's death was due to a heart attack that occurred simultaneous with the robbery and not as a cause of it.

E. CIVIL COMMITMENT

1. In Re Williams, 478 N.E.2d 867 (Ill. App. 1985).

"A respondent in a civil commitment proceeding does not have a constitutional right to an independent psychiatric examination at the State's expense." Id. at 869.

However, since there was a state statute that entitled the defendant to secure an independent exam and since the defendant's "liberty is at stake, the assistance of an independent expert is essential to a fair and impartial hearing," Id., and the state must fund this even though no funds were allocated for this. Id. at 870.

F. CONFESSION

1. State v. Moore, 364 S.E.2d 648 (N.C. 1988).

The appellate court held it error to fail to provide the defendant funds to hire a psychiatrist to testify at pretrial suppression hearing on the voluntariness of the defendant's waiver of his Miranda rights and at trial as to the falseness of the coerced confession. Id. at ____.

The defense made the following showing to justify its need for expert help:

(1) Defendant has an IQ of 51;
(2) Defendant's "mental age" is equivalent to that of an eight or nine year old;
(3) Defendant's vocabulary is equivalent to that of a fourth or fifth grade elementary student;
(4) According to expert testimony, defendant cannot understand complicated instructions;
(5) According to family members, defendant could not understand the rights read by Detective Crawford without further explanation;
(6) According to the expert testimony, defendant is easily led and intimidated by others;
(7) According to a friend of defendant, defendant can be "run over" by "anybody";
(8) Defendant's law intelligence level may have rendered him unable to understand the nature of any statement he may have made;
(9) Defendant's mental retardation may have rendered him unable to knowingly waive his rights;
(10) The state's case against defendant was predicated in significant measure on defendant's confession because G.G. could not identify her assailant.
Id. at 652-53

This case provides a very good discussion of the need for an expert to educate the jury on the influence of mental retardation. There are also good references provided by the court.

2. In Re Allen R., 506 A.2d 329 (NH 1986).

The court held that the defendant was entitled to funds to employ a psychologist as an expert on Miranda issues to be used in an attempt to convince the judge to suppress statements.

3. People v. Mencher, 248 N.Y.S.2d 805 (N.Y.Sup.Ct. 1964).

Defendant was entitled to money for a physician who is an expert on narcotics in this murder case where the defense moved to suppress the confession since it was obtained a few hours after the defendant had been administered a narcotic drug.

G. DEFENSE EXPERT REQUIRED, NOT STATE OR NEUTRAL EXPERT

1. Buttrum v. Black, 721 F.Supp. 1268 (N.D.Ga. 1989)

While the court determined that state psychiatrists are not per se inadequate, the court did require the defendant be given a psychiatrist who "...will work closely with the defense by conducting an independent examination, testifying if necessary, and preparing for the sentencing phase of the trial." Id. at 1312-13.

2. State v. Moore, 364 S.E.@d 648 (N.C. 1988)

The court held that the defendant was entitled to funds to hire his own independent expert to testify as to the credibility of the confession of the mentally retarded defendant even though the defendant had been examined for competency and sanity by the state psychiatrist and even though the defendant called that state psychiatrist to testify at the suppression hearing and at trial:

> In Gambrell we addressed this argument and declared that "what is required, as Ake makes clear, is that defendant be furnished with a competent psychiatrist for the purpose of not only examining defendant but also assisting defendant in evaluating, preparing, and presenting his defense...." State v. Gambrell, 318 N.C. at 259, 347 S.E.2d at 395. In this case, Dr. Tanas was not appointed for the purpose of assisting defendant in preparation of his defense. He was appointed solely for the purpose of assessing defendant's competency to stand trial. Therefore, Dr. Tanas' involvement with defendant did not satisfy the state's constitutional obligation. Id. at 654.

3. Curry v. Zant, 371 S.E.2d 647 (Ga. 1988)

The trial judge had assured the appointed counsel that a psychiatrist would be appointed upon any reasonable request for one. On its own motion, the trial court had the defendant tested at the state

hospital for competency. The state doctor found the defendant to be organically brain damaged and to have a borderline personality disorder. He also found that he may be malingering or manipulating. Defense counsel did not ask for a defense expert. On a plea of guilty, the defendant was sentenced to death for murder.

On his state habeas challenge to his death sentence, the defendant produced a mental health expert who testified that the defendant had an IQ of 69; had the intelligence of a 12 year old with an IQ of 100; that he was seriously mentally ill, and that he could not waive his constitutional rights. Also, at the habeas hearing, the defendant's trial counsel said he did not ask for independent expert because he felt it would be futile based on the state doctor's report. The court held that the defendant was denied effective assistance of counsel:

> We find that although trial counsel met with Curry on many occasions, consulted with Curry and Curry's family on the decision to enter a guilty plea, and conscientiously prepared for the sentencing phase of the trial, his failure to take a crucial step of obtaining an independent psychiatric evaluation of Curry deprived his client of the protection of counsel. Conscientious counsel is not necessarily effective counsel. The failure to obtain a second opinion, which might have been the basis for a successful defense of not guilty by reason of insanity and would certainly have provided crucial evidence in mitigation, so prejudiced the defense that the guilty plea and the sentence of death must be set aside. Id. at 649.

4. Holloway v. State, 361 S.E.2d 794 (Ga. 1987).

The Court held that a capital defendant who had been examined by a state psychologist and state psychiatrist was nevertheless entitled to an independent psychiatrist under Ake on the issues of criminal responsibility and mitigation of sentence.

5. **United States v. Crews, 781 F.2d 826 (10th Cir. 1986).**

"Such a psychiatrist is necessary not only to testify on behalf of the defendant, but also to help the defendant's attorney in preparing a defense.... Although four treating or court-appointed psychiatrists testified with respect to Crews' mental condition, Crews also was entitled to the appointment of a psychiatrist "to interpret the findings of...expert witness[es] and to aid in the preparation of his cross-examination."
Id. at 34.

6. **But see State v. Gambrell, 347 S.E.2d 390 (N.C. 1986)**

A state doctor may fulfill the state's constitutional obligation but did not in this case.

7. **United States v. Sloan, 776 F.2d 926 (10th Cir. 1985).**

"The essential benefit of having an expert in the first place is denied the defendant when the services of the doctor must be shared with the prosecution. In this case, the benefit sought was not only the testimony of a psychiatrist to present the defendant's side of the case, but also the assistance of an expert to interpret the findings of an expert witness and to aid in the preparation of his cross-examination. Without that assistance, the defendant was deprived of the fair trial due process demands".
Id. at 929.

8. **Lindsey v. State, 330 S.E.2d 563 (Ga. 1985)** (defense psychiatrist).

9. **Commonwealth v. Plank, 478 A.2d 872 (Pa.Super. 1984).**

In this insanity case, the Court said:

"The court shall, on an indigent defendant's motion, allow reasonable compensation for a psychiatrist of defendant's choice.... The problem

inheres that the wealthy can afford more and better "psychiatric testimony."
Id. at 874 n. 3.

10. **Barnard v. Henderson, 514 F.2d 744 (5th Cir. 1975)**
Firearms examiner of own choosing.

11. **Marshall v. United States, 423 F.2d 1315 (10th Cir. 1970)**
Defendant entitled to investigator that will serve him unfettered by conflicts.

12. **Articles**

a. Kennedy, Kelley, Homont, **A Test of the "Hired Gun" Hypothesis in Psychiatric Testimony**, 57 Psychological Report, 117 (1985).

b. Gorman, **Are There Impartial Expert Psychiatric Witnesses?**, 11 Bull Am Acad Psychiatry Law (1983).

c. Diamond, **The Fallacy of the Impartial Expert**, 3 Archives of Criminal Psychodynamics, 221 (1959).

H. DENTAL

1. **Thornton v. State, 339 S.E.2d 240 (Ga. 1986).**

The indigent defendant was entitled to money to obtain assistance of court appointed forensic dental expert since that dental evidence was critical to the state's case. The defense asserted it was the one single item linking the defendant to the murder, and experts consulted by the defense questioned the reliability of dental impression evidence.

The court held that while the defendant was not entitled to an expert of his choosing, the trial judge "should follow a defendant's preference, if, in its discretion, such appears to be appropriate as to qualifications, availability, cost to the

public, and other pertinent factors." Id. at 241 n.2.

The court also required appointment of an expert who was comparable to state's expert: "the trial could shall appoint an appropriate professional, whose experience, at minimum, is substantially equivalent to that of the state's expert witness...." Id. at 241.

I. DEPOSITION COSTS

1. RCr 7.12(2)

"If a deposition is taken at the instance of the commonwealth, the commonwealth shall pay in advance the reasonable expenses of travel and subsistence of the defendant and his attorney in attending such examination."

2. Federal Rule of Criminal Procedure 15(c)

"**Payment of Expenses.** Whenever a deposition is taken at the instance of the government, or whenever a deposition is taken at the instance of a defendant who is unable to bear the expenses of the taking of the deposition, the court may direct that the expense of travel and subsistence of the defendant and the defendant's attorney for attendance at the examination and the cost of the transcript of the deposition shall be paid by the government."

3. United States v. Acevedo-Ramos, 605 F.Supp. 190 (D. Puerto Rico 1985)

The government must bear the costs of travel and subsistence for one of defendant's attorneys to travel from Puerto Rico to Massachusetts for the government's deposition of a co-indictee who is the government's witness.

4. United States v. Largan, 330 F.Supp. 296 (S.D.NY 1971)

Because a defendant is entitled to an effective defense, an indigent defendant is entitled to money for travel and living expenses to depose a witness.

J. DRUGS/INTOXICATION - Influence on body and mind

1. State v. Coker, 412 N.W.2d 589 (Iowa 1987).

An indigent defendant is entitled to an expert "to examine [him] and assist him in the evaluation, preparation, and presentation of his intoxication defense," where he was charged with first degree robbery and had a serious substance abuse problem. Id. at 593.

"Although trial court should present random fishing expeditions undertaken in search of rather than in preparation of a defense..., it should not withhold appointment of an expert when the facts asserted by counsel reasonably suggest further exploration may prove beneficial to defendant in the development of his or her defense." Id. at 592.

2. State v. Lippincott, 307 A.2d 657 (N.J. 1973)

The indigent defendant was charged with driving while intoxicated. He was entitled to money for the services of an expert witness to testify as to the consumption, ingestion and absorption rate of alcohol and the effects of alcohol on the human body.

3. People v. Mencher, 248 N.Y.S.2d 805 (N.Y. Sup.Ct. 1964)

Defendant was entitled to money for a physician who is an expert on narcotics in this murder case where the defense moved to suppress the confession since it was obtained a few hours after the defendant had been administered a narcotic drug.

K. DRUG ANALYSIS - Determination of identity of substance

1. Patterson v. State, 232 S.E.2d 233 (Ga. 1977)

"...we recognize the general right of a defendant charged with possession or sale of a prohibited substance to have an expert of his own choosing analyze it independently. Where the defendant's conviction or acquittal is dependent upon the identification of the substance as contraband, due process of law requires that analysis of a substance not be left completely within the province of the state." Id. at 234.

See James v. Commonwealth, Ky., 482 S.W.2d 92 (1972). (A defendant is entitled to access to

substance for purposes of having it retested by his own expert.)

L. ELECTROENCEPHALOGRAM (EEG)

1. United States v. Hartfield, 513 F.2d 254 (9th Cir. 1975)

Defense in this attempted armed robbery case was entitled to money to have an EEG run when the defendant's defense "turned on his mental condition." Id. at 258.

M. ENFORCING FUNDS ORDER

1. Corenevsky v. Superior Court, 204 Cal.Rptr. 165 (Cal. 1984).

When the county auditor refused to pay, the court ordered amount of $13,314 for experts since the budgeted amount for court-ordered defense services was exceeded, a show cause hearing was conducted and the auditor was found in contempt. He was fined $500 and incarcerated until he complied with the court's order. Id. at 169-70.

When a court orders a county funding authority to pay for court-ordered defense services, a county cannot reduce the amount paid or veto it. Id. at 176. A county can challenge court orders through the court. Id. The fact that a county failed to budget sufficient monies to cover the costs is irrelevant to their duty to pay. Id. at 176-77.

N. EX PARTE APPLICATION

1. Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985)

Ake presumed that the hearings for funds had to be ex parte to be fair: "When the defendant is able to make an ex parte threshold showing to the trial court...." Id. at 1096.

2. Brooks v. State, 385 S.E.2d 81 (Ga. 1989)

The court held that an indigent criminal defendant was entitled to ask for funds for experts assistance ex parte to avoid prejudicing the indigent defendant by "forcing him to reveal his theory of the case in the presence of the district attorney." Id. at 84.

3. **McGregor v. State, 733 P.2d 416 (Okla.Ct.Crim.App. 1987).**

The Court addressed head on whether an ex parte hearing was constitutionally essential when there was a request for funds for experts by an indigent defendant: "The intention of the majority of the Ake Court that [the threshold showing] hearings be held ex parte is manifest...." Id.

McGregor noted the reason why ex parte hearings were so critical: "...we are compelled to agree with the petitioner's assertion that there is no need for an adversarial proceeding, that to allow participation, or even presence, by the State would thwart the Supreme Court's attempt to place indigent defendant's, as nearly as possible, on a level of equality with nonindigent defendants." Id.

4. **Corenevsky v. Superior Court, 204 Cal.Rptr. 165 (Cal. 1984) (In Banc)**

The counsel for the county funding source for expert funds is not entitled to be present at the ex parte hearing. Such a "procedure would create unnecessary conflicts of interests; in any event, county counsel's presence cannot be permitted because such petitions are entitled to be confidential." Id. at 172.

5. **United States v. Sutton, 464 F.2d 552 (5th Cir. 1972)**

Purpose of ex parte motion for funds is "to insure that the defendant will not have to make a premature disclosure of this case." Id. at 553.

6. **Marshall v. United States, 423 F.2d 1315 (10th Cir. 1970)**

"The manifest purpose of requiring that the inquiry be ex parte is to insure that the defendant will not have to make a premature disclosure of his case." Id. at 1318.

7. **Holden v. United States, 393 F.2d 276 (1st Cir. 1968)**

An indigent defendant is entitled to make his showing for money for a subpoena ex parte to prevent discovery by the prosecution under Federal Rule of Criminal Procedure 17(b).

8. **KRS 500.070(2)** is Kentucky's statutory recognition of the necessity for ex parte proceedings: "No court can require notice of a defense prior to trial time."

9. **18 U.S.C. § 3006A(e)**

10. **Federal Rule of Criminal Procedure 17(b)**

O. **FINGERPRINTS**

1. **State v. Bridges, 385 S.E.2d 337 (N.C. 1989)**

The defendant was convicted of robbery and murder and sentenced to death. The only direct evidence that the defendant killed the victim was 3 thumbprints found at the scene identified by the state expert as the defendant's.

The Court held that the defendant was entitled to funds to hire an independent fingerprint expert since "Without his own expert to examine the items found at the crime scene and to compare any latent prints to his own impressions, defendant was unable to assess adequately the conclusion of the State's experts that the latent prints from the crime scene correlated to his own fingerprints." Id. at 339.

2. **State v. Moore, 364 S.E.2d 648 (N.C. 1988)**

Based on the following showing, the Court held the defendant was entitled to funds for a fingerprint expert:

(1) The state's witness cannot identify the perpetrator of the crimes.
(2) What purports to be a palm print of the defendant was identified by an identification officer for the Gastonia City Police Department on an item found at the scene of the assault.
(3) The officers charged with responsibility for invesigating this case are co-workers of the identification officer.
(4) The state's palm print evidence is critical to the state's case.
(5) Defense counsel lacks the ability to assess the accuracy of the palm print evidence.
Id. at 656.

3. **United States v. Patterson, 724 F.2d 1128 (5th Cir. 1984)**

The Court held that the defendant was entitled to appointment and funding of a fingerprint analyst

under the federal indigent expert witness statute, 18 U.S.C. Section 3006A(e). That statute, like Kentucky's KRS 31.200, requires appointment when the expert is "necessary" for the defense.

In Patterson, the prosecution had introduced fingerprint evidence against the defendant along with eyewitness identifications. The defense expert was required not only because a defense expert "might have reached a different result" but also because "the assistance of an expert undoubtedly would have facilitated [the defendant's] cross-examination of the government's expert." Id. at 1131.

4. **United States v. Durant, 545 F.2d 823 (2nd Cir. 1976)**

Entitled to fingerprint experts to present defense as well as to assist defense attorney in preparing to cross state expert.

5. **A. Moenssens, R. Mosses and F. Inbau, Scientific Evidence in Criminal Cases 307, 345 (1973).**

The defense attorney who relegates omnipotence to the state's fingerprint expert often does his client a disservice. On the other hand, in order to effectively cross-examine the expert, the attorney must understand the subject matter himself.

6. **United States v. Fogarty, 558 F.Supp. 856, 857 (E.D.Tn. 1982)**

7. **Bradford v. United States, 413 F.2d 467 (5th Cir. 1969)**

P. **FIREARMS**

1. **United States v. Pope, 251 F.Supp. 234 (D. Neb. 1966)**

The defendant was entitled to have funds for expert witnesses who examined and tested the gun used to commit the offense even though the defendant admitted the killings and so testified at trial since the defense should be afforded the fullest opportunity to prepare their case.

"The rule in allowing defense services is that the Judge need only be satisfied that they reasonably appear to be necessary to assist counsel in their

preparation, not that the defense would be defective without such testimony." Id. at 241.

2. **Barnard v. Henderson, 514 F.2d 744 (5th Cir. 1975)**

The defendant is entitled to have the murder weapon and bullet examined by an expert of his own choosing.

"The question is not one of discovery but rather the defendant's right to the means necessary to conduct his defense. Justice Barham of the Supreme Court of Louisiana pointed out in his dissent to the majority opinion in Barnard that 'the only means by which the defendant can defend against expert testimony by the State is to offer expert testimony of his own.' 287 So.2d at 778. We agree. Fundamental fairness is violated when a criminal defendant on trial for his liberty is denied the opportunity to have an expert of his choosing, bound by appropriate safeguards imposed by the Court, examine a piece of critical evidence whose nature is subject to varying expert opinion." Id. at 746.

3. **Commonwealth v. Bolduc, 411 N.E.2d 483 (Mass.Ct.App. 1980)**

The defendant was entitled to a ballistics expert who would analyze the defendant's jacket to see if there was gun powder residue on it, indicating whether or not its wearer fired a weapon even though the prosecutor had the jacket analyzed by a police department criminalist who found no trace of gun powder.

"There is no question that the evidence desired by the defendant was relevant to one of the issues in the case, namely, the identity or not of the

defendant as one of the two participants in the holdup who had fired at the police. There was no question as to the admissibility of such evidence.... It is doubtful that the judge considered the amount of the requested expense in light of the other expenses the Commonwealth would necessarily incur in the course of a lengthy trial. The judge does not appear to have considered the likelihood that a solvent defendant, able to finance his own defense, would prefer to select and employ a competent expert of demonstrated credibility rather than rely on the testimony of a police criminalist of undisclosed qualifications who might well be a hostile witness. And the judge failed to recognize that the desired evidence might well be all the more valuable to the defendant because his substantial criminal record might deter him from taking the stand in his own behalf." Id. at 486.

Q. GRAND JURY

1. While no cases in this area are known, we can argue the right to funds for an expert so that we can present evidence to a Grand Jury on whether they should indict for a crime or for a lesser included crime. Possible areas include blood alcohol levels; affects of shock on blood level readings; ballistics.

R. HABEAS CORPUS/RCR 11.42

1. Gibson v. Jackson, 443 F.Supp. 239 (M.D. Ga. 1977)

In order not to be rendered a toothless tiger, a habeas corpus petitioner must be provided funds for lay and expert witnesses, and litigation expenses "as are determined by the state habeas court to be reasonably necessary for petitioner's habeas case to be factually and legally presented in his state habeas proceeding." Id. at 250.

2. See 18 U.S.C. § 3006A(g)

S. HYPNOSIS

1. Little v. Armontrout, 835 F.2d 1240 (8th Cir. 1987).

The defendant was convicted of rape and burglary and sentenced to 5 years in prison. His defense was alibi. The victim saw her assailant for between 2 and 60 seconds. Her memory was enhanced by hypnosis administered by a police officer who'd

had a 4 day course in the art. An audio tape of the session with the police officer and victim was made, and conveniently destroyed 15 days later.

The state public defender's request for funds to hire an expert in hypnosis was overruled. The Missouri Supreme Court affirmed this denial under peculiar rationale: "...there is a state university in Cape Girardeau with a psychology faculty and library facilities, and we are confident that a resourceful lawyer would not be helpless in obtaining expert information sufficient for a preliminary inquiry, at little or no expense." Id. at 1242.

The 8th Circuit in an en banc decision determined that the rule of Ake should be applied when the expert is not a psychiatrist and when the case is not capital. It also looked at the "perils of hypnotically enhanced testimony" and concluded that it is clear that an expert would have aided the defendant in his defense: "Given these perils of hypothetically enhanced testimony, it is clear that an expert would have aided Little in his defense. The expert could have pointed out questions asked by Officer Lincecum which were suggestive or could have caused confabulation. The expert could have presented the limitations of hypnosis, and explained theories of memory. This would probably have had far more impact on the judge at the suppression hearing and the jury at trial than Little's lawyer's attempts at impeaching the state's expert by reading from one of the psychology textbooks he found at a college library, or using information developed from interviewing a professor of psychology. As Justice (then Chief Judge) Cardozo once stated, a defendant is "at an unfair disadvantage if he is unable because of poverty to parry by his own [expert] witnesses the thrusts of those against him." Reilly v. Berry, 250 N.Y. 456, 461, 166 N.E. 165, 167 (1929). The State called its own expert on hypnosis to testify at the suppression hearing. It should not have denied Little a similar weapon. Id. at 1244-45.

T. IDENTIFICATION PROCEDURE

1. United States v. Baker, 419 F.2d 83 (2nd Cir. 1969).

In this case identification of the perpetrator was critical. The victim identified the perpetrator as black. There was a courtroom identification during trial by the victim of the defendant with the only

blacks in the courtroom being the defendant and 2 jurors.

The Second Circuit noted that the trial judge before trial encouraged defense counsel to use some ingenuity and bring other blacks into the courtroom. Defense counsel responded to the trial judge by saying he knew of no way to practically accomplish that. The Second Circuit observed that the expenses of bringing other blacks in would be appropriately paid under 18 U.S.C. §3006A(e). Id. at 90.

U. INADEQUACY OF EXPERT EXAM AND ASSISTANCE

1. Harris v. Vasquez, 901 F.2d 724 (9th Cir. 1990) application to vacate, stay denied, ___ U.S. ___, 110 S.Ct. 1799, 108 L.Ed.2d 781 (1990).

A circuit judge granted a certificate of probable cause to appeal from the district court's denial of a petition for a writ of habeas corpus, and stayed the execution until further action by the court.

The issue was whether the defendant received competent psychiatric assistance in the penalty phase.

Harris presented affidavits of a psychologist and psychiatrist that the psychiatric help given him at the penalty phase incompetent.

2. State v. Sireci, 536 So.2d 231 (Fla. 1988).

The Court held that the defense in this capital case where the defendant was sentenced to death did not receive adequate assistance from the court-appointed psychiatrist since the defendant had organic brain disorder when examined and the psychiatrist failed to discover this and order additional testing. The defendant was deprived of due process since he was denied "the opportunity through an appropriate psychiatric examination to develop factors in mitigation of the imposition of the death penalty." Id. at 233.

3. Kaplan and Sadock, **Comprehensive Textbook of Psychiatry** (5th ed. 1989).

An extensive work that details the standards for acceptable practice in a wide variety of areas, including the psychiatric interview, history of the person examined, psychological testing, physical exams, mental status exam and reports.

V. INEFFECTIVE ASSISTANCE

1. State v. Tokman, ___ So.2d ___ (Miss. 1990).

Captial trial counsel was ineffective for failing to present mental health mitigation at the penalty phase. "Psychiatric and psychological evidence is crucial to the defense of a capital murder case. Ake v. Oklahoma, 470 U.S. 68, 80, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985). Fifth Circuit case law makes it particularly clear that there is a critical interrelation between expert psychiatric assistance and minimally effective representation. See Beavers v. Balkcom, 636 F.2d 114, 116 (5th Cir. 1981); Wilson v. Butler, 813 F.2d 664, 672 (5th Cir. 1987); Greer v. Beto, 379 F.2d 923, 925 (5th Cir. 1967); Gray v. Lucas, 667 F.2d 1086, 1095 (5th Cir. 1982)." Id. at ___.

2. Loyd v. Louisiana, 899 F.2d 1416 (5th Cir. 1990).

Concerns ineffective assistance of counsel for failing to present psychiatric mitigation in capital penalty phase.

3. Commonwealth v. Cosme, 499 N.E.2d 1203 (Mass. 1986)

The defendant was entitled to have his case remanded for a hearing on whether his trial counsel was ineffective for failing to investigate the defense of lack of criminal responsibility, and for a showing of what evidence of that defense the defense lawyer could have produced.

4. Loe v. United States, 545 F.Supp. 662 (E.D.Va. 1982)

Reasonable grounds existed to question the mental condition of the defendant. Defense counsel invested substantial efforts in developing the issue and raised the issue at trial. He did not seek money for a defense psychiatrist. Instead, he relied on the testimony of Doctors who examined him for competency, lay witnesses, records of past psychiatric examinations and cross-examination of prosecution doctors. Defense counsel stated that he did not seek a private examination because "he felt it would not produce results helpful to the defendant." Id. at 669.

The Court held that counsel's failure to seek money for a private psychiatric examination of the defendant rendered his representation ineffective

since the defendant was deprived of the "partisan perspective" he was entitled to receive.

5. **United States v. Fessel, 531 F.2d 1275 (5th Cir. 1976)**

Conviction reversed due to ineffective assistance because of the failure of defense counsel to seek defense expert assistance: "When an insanity defense is appropriate and the defendant lacks the funds to secure private psychiatric assistance, it is the duty of his attorney to seek such assistance through the use of Section 3006A(e)." Id. at 1279.

6. **United States v. Edwards, 488 F.2d 1154 (5th Cir. 1974)**

Defense counsel requested a defense psychiatrist to assist in the defense of the case supported by the attorney's affidavit listing reasons why. The court granted the request and appointed a psychiatrist who reported back to the court rather than confidentially to the defense.

The court determined: 1) "Dissemination of information critical to the defense permits the government to enjoy unauthorized discovery which is forbidden..." 2) the court should not appoint the expert; rather, the court determines if money for one is necessary and the defense selects the psychiatrist except in unusual circumstances; and 3) the defendant did not receive effective assistance of counsel because his counsel did not assure him the defense expert assistance he was entitled to.

W. INTERPRETER

1. **KRS 30A.420**

"**Payment out of state treasury.** In cases where compensation by the state is required or permitted interpreters' fees and ordinary and reasonable expenses shall be paid out of the state treasury according to the pay schedule of the judicial personnel system."

2. **United States v. Largan, 330 F.Supp. 296 (S.D.N.Y. 1971)**

An indigent defendant is entitled to funds to hire an interpreter. Id. at 297.

X. INVESTIGATION

1. Mason v. Arizona, 504 F.2d 1345 (9th Cir. 1974)

The "effective assistance of counsel guarantee of the Due Process Clause requires, when necessary, the allowance of investigative expenses or appointment of investigative assistance for indigent defendant's in order to insure effective preparation of their defense by their attorneys." Id. at 1351.

Y. JURY SELECTION EXPERT

1. Corenevsky v. Superior Court, 204 Cal.Rptr. 165 (Cal. 1984).

The trial court permitted $8,740 for a jury selection expert in this noncapital murder case. On a writ of mandate, the appellate court determined this was within the discretion of the trial court to grant. Id. at 173.

Z. MENTAL RETARDATION

1. State v. Moore, 364 S.E.2d 648 (N.C. 1988).

The court recognized the unique ability of an independant psychiatrist to impress on the "jury the frequent plight of the mentally retarded when they become embroiled in a criminal prosecution," Id. at 654, as this relates to the credibility of a mentally retarded's confession.

The case provides a good discussion of the critical nature of an expert's views on the effects of mental retardation, and it cites good resources. Id. at 654-56.

AA. LAW CLERKS

1. Corenevsky v. Superior Court, 204 Cal.Rptr. 165, 173-74 (Cal. 1984).

AB. MITIGATION/SENTENCING PHASE IN CAPITAL CASES

1. Holloway v. State, 361 S.E.2d 794 (Ga. 1987).

The defendant was convicted of capital murder and sentenced to death. He had been seen by a regional state psychologist, a state psychiatrist, and belatedly by a psychologist paid for out of the defense attorney's personal funds.

"The defendant's mental condition was not merely a 'significant issue, it was virtually the only issue, at both phases of the trial." Id. at 796.

"Holloway was entitled to the kind of independent psychiatric assistance contemplated in Ake v. Oklahoma, supra, on the questions of competency to stand trial, criminal responsibility, and mitigation of sentence." Id. at 796.

2. **State v. Gambrell, 347 S.E.2d 390 (N.C. 1986).**

Upon appropriate threshold showing, a defendant is entitled to assistance of a psychiatrist for "the purpose of not only examining defendant but also assisting defendant in evaluating, preparing, and presenting his defense in both the guilt and sentencing phases." Id. at 395.

3. **Perri v. State, 441 So.2d 606 (Fla. 1983)**

The Florida Supreme Court determined in this capital case that it was error to deny the defendant the assistance of a psychiatrist when the defendant had previous alcohol problems and mental hospital treatment even where there is no defense of insanity because the defendant was entitled to present psychiatric evidence on factors that, while not a defense, could mitigate his sentence:

> Perri did not testify during the guilt proceeding and did not testify during the sentence proceeding. His only testimony was given to the judge for the purpose of stating that he had been in mental institutions. This should be enough to trigger an investigation as to whether the mental condition of the defendant was less than insanity but more than the emotions of an average man, whether he suffered from a mental disturbance which interfered with, but did not obviate, his knowledge of right and wrong. A defendant may be legally answerable for his actions and legally sane, and even though he may be capable of assisting his counsel at trial, he may still deserve some mitigation of sentence because of his mental state.
> Id. at 609.

4. **Westbrook v. Zant, 704 F.2d 1487 (11th Cir. 1983)**

"We interpret Lockett v. Ohio and Gregg v. Georgia as vehicles for extending a capital defendant's right to present evidence in mitigation to the placing of an affirmative duty on the state to provide the funds necessary for production of the evidence. Permitting an indigent capital defendant to introduce mitigating evidence has little meaning if the funds necessary for compiling the evidence is unavailable." Id. at 1496.

5. **State v. Wood, 648 P.2d 71 (Utah 1982)**

The capital defendant had exhibited some bizarre behavior, and had a history of alcoholism with the possibility of some brain damage, and had suffered severe depression. The Court held that it was error to deny this indigent psychiatric assistance in the penalty phase, even if his defense did not rise to the level of insanity, because it denied the defendant the right to present relevant evidence on a defense to the crime and on matters that could mitigate his sentence, e.g., extreme mental or emotional disturbance, mental disease, intoxication, or influence of drugs, and diminished capacity. Id. at 86-88.

AC. NEUROLOGIST

1. **People v. Dumont, 294 N.W.2d 243 (Mich.Ct.App. 1980)**

A defendant who exhibits irrational behavior and who has previously had neurological exams evidencing brain damage was entitled to funds for a neurologist in a malicious destruction of property and resisting arrest case.

AD. PATERNITY BLOOD TEST

1. **Little v. Streater, 452 U.S. 1, 101 S.Ct. 2202, 68 L.Ed.2d 627 (1981).**

In the quasi-criminal paternity action, the Court held that under fourteenth amendment due process the state cannot deny the putative father blood grouping tests if he cannot otherwise afford them because the indigent father is entitled to a meaningful opportunity to be heard.

2. **Burns v. State, 312 S.E.2d 317 (Ga. 1984)**

The equal protection and due process clauses of the fourteenth amendment are violated when an indigent is denied a blood grouping test in a paternity case

since the test's results may be significant in determining if the person is the father.

AE. PATHOLOGIST

1. Williams v. Martin, 618 F.2d 1021 (4th Cir. 1980)

The defendant shot the victim who was paralyzed and who died 8 months later. The state medical examiner believed that death was caused by a pulmonary embolism resulting from a thrombosis that formed in her leg due to immobilization caused by the paralysis from the gunshot wound.

Defense counsel requested an independent pathologist since medical books said there are numerous causes of a pulmonary embolism, and since the 8 month length of time raised a complex issue of medical causation. The defense was self-defense.

The South Carolina Supreme Court found no error since 1) the autopsy demonstrated to the highest possible degree of medical certainty that the gunshot wound caused the death; and 2) there was no showing that another pathologist would have aided his defense.

The Fourth Circuit held that the defendant was denied equal protection, due process and effective assistance by the failure to be provided a pathologist since there was a substantial question over an issue requiring expert testimony for its resolution, and since the defense could not be fully developed without professional assistance.

AF. PHYSICIAN/PSYCHIATRIST - PHYSICAL AND MENTAL EVIDENCE IN SEX CASE

1. Turner v. Commonwealth, Ky., 767 S.W.2d 557 (1988)

In this rape and sexual abuse case of a 4 year old, the prosecutor presented a doctor who testified as to hymenal ring injuries, and that some of those injuries were due to penile penetration. The court held that the defense was entitled to a physical examination of the victim by their independent expert since such an examination "...might have permitted the appellant to offer evidence to contradict that offered by the Commonwealth as to whether there were, in fact, any injuries to the hymenal ring." Id. at 559.

While the case did not address this issue, if one is entitled to this kind of expert, then necessarily one is entitled to funds to employ such expert if indigent.

2. **People v. Hatterson, 405 N.Y.S.2d 297 (1978)**

The prosecution put on an expert in psychotherapy who testified the prosecutrix in this rape, sodomy, robbery trial was a "compliant," "obedient" person "suffering from an anxiety reaction" who would not try to escape from a captor but would rather appease them.

Also, the state's physician testified that the prosecutrix was examined and that seminal fluid was found in her vagina; and he concluded she had sexual intercourse within 72 hours.

The Court held it was error for the trial court to deny money for the defense to hire a physician and psychiatrist. The defendant's defense was that the prosecutrix went with her voluntarily and no sexual intercourse took place.

AG. POLYGRAPH

1. **Commonwealth v. Lockley, 408 N.E.2d 834 (Mass. 1980)**

A defendant is entitled to funds to hire a polygraphist when he makes a showing that such a service is "reasonably necessary" to a defense "as effective" as one which would be presented by a defendant with adequate resources. The trial court can consider the following factors: 1) the cost of the test; 2) the purpose for needing the test, 3) the defendant's defense; 4) whether the defendant has a criminal record which might deter him from testifying absent the ability to counteract the introduction of the priors with the results of the polygraph.

2. **United States v. Penick, 496 F.2d 1105 (7th Cir. 1974)**

Held it was not abuse of discretion for trial court to refuse to authorize funds for an expert polygraph examination and for obtaining expert testimony to establish its reliability; however, it did determine that if "special circumstances would appear to justify the use of the results of a polygraph examination, then, under the [legislation

allowing for funds for indigents] any such authorization would be within the sound discretion of the district court." Id. at 1110.

3. Annotation, **Right of Indigent Criminal Defendant to Polygraph Test at Public Expense,** 11 ALR 4th 733 (1982)

AH. PRIVATE COUNSEL: DEFENDANT IS ENTITLED TO FUNDS FOR EXPERTS IF INDIGENT EVEN IF DEFENDANT HAS PRIVATE COUNSEL

1. **State v. Manning, 560 A.2d 693 (N.J.Super. 1989)**

An indigent cannot be denied funds for experts "because he was represented by private counsel, whether that counsel was pro bono or paid by a third party." Id. at 699.

2. **English v. Missildine, 311 N.W.2d 292 (Iowa 1981)**

The sixth amendment required money for investigative services to indigents even if the defendant is represented by private counsel. The determinative question is the defendant's indigency.

3. **Arnold v. Higa, 600 P.2d 1383 (Hawaii 1979)**

The indigent defendants was represented by private counsel retained by the accused's parents. His retained counsel asked the trial court to provide funds to employ an investigator to assist in the presentation of the case. The trial court refused based on the fact that the defendant was represented by retained counsel.

The Supreme Court of Hawaii held that the trial court's conclusion that the defense was ineligible for funds solely because he was represented by private counsel was improper. The Court remanded the case for an ex parte hearing to allow the defense a particularized showing of why the requested services were essential to an adequate defense and to demonstrate the defendant's indigency.

Recognizing the "magnitude" of this error, the Court held that it was appropriate to be litigated by an extraordinary writ.

4. **Anderson v. Justice Court of San Benits County, 160 Cal.Rptr. 274 (Cal.Ct.App. 1979)**

AI. PSYCHIATRISTS

1. People v. Kegley, 529 N.E.2d 1118 (Ill.App. 1988).

"[T]here was sufficient evidence before the court of relevant psychological problems and substance abuse to meet Ake's requirement of a preliminary showing that defendant's sanity at the time of the offense would be a significant factor at trial," Id. at 1122.

2. Holloway v. State, 361 S.E.2d 794 (Ga. 1987)

The defendant was sentenced to death for capital murder. He was seen on court order by a regional state psychologist who found his IQ to be 49. The psychologist also said the defendant was an easily led person within a limited range of intelligence, and he had minimal social skills and had trouble dealing with anything less than concrete issues. The court also ordered him evaluated by a state psychiatrist who concluded he was competent even though he had marginal comprehension of the proceedings, and sane. The defendant's attempt to plead guilty was rejected by the judge who said he didn't understand what rights he was waiving. No competency hearing was held. The judge denied the defense an independent psychiatrist under Ake. Just before trial, the defendant was evaluated by a psychologist, who was employed by the defense attorney out of his own personal funds. The psychologist's report was not reported in time to be used at the guilt phase. The psychologist testified in the sentencing phase that the defendant was the bottom 10% of the 1% of the population that is mentally retarded, and that during the event the defendant's thinking was not there.

"The defendant's mental condition was not merely a 'significant' issue, it was virtually the only issue, at both phases of the trial." Id. at 796.

"Holloway was entitled to the kind of independent psychiatric assistance contemplated in Ake v. Oklahoma, supra, on the questions of competency to stand trial, criminal responsibility, and mitigation of sentence." Id. at 796.

3. Harris v. State, 352 S.E.2d 226 (Ga.Ct.App. 1987)

Based on the facts of the crime and the representation of defense counsel that insanity was the sole defense, it was error for the trial court

to summarily deny the request for funds for psychiatrist or psychologist. The Court remanded the case "with direction that a mental health expert be appointed to conduct a threshold examination... following which the trial court shall, in accordance with Ake, prove the appellant with such additional access to expert psychiatric assistance as appears reasonably necessary and appropriate to safeguard his due process rights." Id. at 228.

4. **People v. Vale, 519 N.Y.S.2d 4 (1987).**

The defendant had serious and longstanding psychiatric problems. He was convicted of sale of cocaine without the aid of a defense psychiatrist. He had been examined by state doctors for competency.

The appellate court held it error to deny his funds for a psychiatrist to assist in developing his insanity defense, even if the defendant's chances of prevailing on the defense were minimal. The defense does not have to show that the defense might succeed to be entitled to funds.

5. **United States v. Crews, 781 F.2d 826 (10th Cir. 1986)**

The defendant's defense was insanity. The trial court improperly refused to authorize money for a defense psychiatrist. "Such a psychiatrist is necessary not only to testify on behalf of the defendant, but also to help the defendant's attorney in preparing a defense.... Although four treating or court-appointed psychiatrists testified with respect to Crews' mental condition, Crews also was entitled to the appointment of a psychiatrist 'to interpret the findings of... expert witness[es] and to aid in the preparation of his cross-examination.'" Id. at 834.

6. **State v. Gambrell, 347 S.E.2d 390 (N.C. 1986)**

Defendant is entitled to psychiatrist where there was a sufficient threshold showing demonstrated. Under Ake, the question for the threshold showing "is not whether the defendant has made a prima facie showing of legal insanity," but rather is "under all the facts and circumstances known to the court at the time the motion for psychiatric assistance is made, defendant has demonstrated that his sanity when the offense was committed will likely be a significant factor." Id. at 394.

A defendant is not entitled to a psychiatrist of his own choosing. A state doctor may fulfill the state's constitutional obligation. But, the defendant must be given "a competent psychiatrist for the purpose of examining defendant and assisting defendant in evaluating, preparing, and presenting his defense in both the guilt and

sentencing phases." Id. at 395. The Court determined that the state doctor appointed in this case did not fulfill these requirements.

7. **United States v. Sloan, 776 F.2d 926 (10th Cir. 1985)**

The defendant was examined by a state doctor who found he had a borderline schizoid personality; was sane and competent. The defense asked for a defense psychiatrist since he had a history of psychiatric treatment; abnormal EEG activity; had been treated with anti-psychotic drugs. The court denied the request, and ordered the defendant again seen by the state doctor who ran an EEG and who had no different opinion.

Reversing, the Tenth Circuit held that under Ake the defendant was entitled to a defense psychiatrist. A non-partisan state doctor won't do:

> The essential benefit of having an expert in the first place is denied the defendant when the services of the doctor must be shared with he prosecution. In this case, the benefit sought was not only the testimony of a psychiatrist to present the defendant's side of the case, but also the assistance of an expert to interpret the findings of an expert witness and to aid in the preparation of his cross-examination. Without that assistance, the defendant was deprived of the fair trial due process demands.
> Id. at 929.

8. **Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985)**

The trial court ordered the defendant to the state hospital for a mental exam. The psychiatrist was called by the state. The state did not provide the psychiatrist or the defense the bizarre confession of the defendant or a letter of the defendant. He found the defendant to be competent, and had no opinion on sanity.

The court held that a defendant, whose sanity at the time of the alleged crime is fairly in question, has at a minimum the right to access to a competent psychiatrist who will conduct an appropriate exam and assist in evaluation, preparation, and presentation of the defense as a matter of due process and effective assistance of

counsel. A state doctor who does not provide this is constitutionally inadequate. Id. at 532-33.

9. **Lindsey v. State, 330 S.E.2d 563 (Ga. 1985)**

When there is a showing that the defendant's mental state is in question in a capital case, a defendant is entitled to funds to employ a competent psychiatrist in preparing the defense.

The assistance must be from a psychiatrist, and the psychiatrist must be a defense expert, not a neutral state expert. Id. at 566-67.

In Lindsey the defendant had a history of mental problems, and had been prescribed anti-psychotic medication.

10. **Matlock v. Rose, 731 F.2d 1236 (6th Cir. 1984) (Keith, Jones, Joiner) (habeas corpus in Tennessee district court)**

a. Defendant was not entitled to another psychiatrist once a state's expert examined the defendant and found him sane.
b. "In order to render to indigents effective assistance of counsel, the state may be required to supply experts at its expense."
c. "The case law is still developing on the scope of the constitutional duty to supply experts. At a minimum, there must be a fair factual basis for the defendant's contention that his sanity is in doubt, and that issue must be a substantial one of his defense.... The Fourth Circuit requires some showing that the defense cannot adequately be developed without the aid of an expert.

***NOTE: that this is a pre-Ake case.**

11. **Perri v. State, 441 So.2d 606 (Fla. 1983)**

The Florida Supreme Court determined in this capital case that it was error to deny the defendant the assistance of a psychiatrist when the defendant had previous alcohol problems and mental hospital treatment even where there was no defense of insanity because the defendant was entitled to present psychiatric evidence on factors that, while not a defense, could mitigate his sentence:

> Perri did not testify during the guilt proceeding and did not testify during the sentence proceeding. His only testimony was

given to the judge for the purpose of stating that he had been in mental institutions. This should be enough to trigger an investigation as to whether the mental condition of the defendant was less than insanity but more than the emotions of an average man, whether he suffered from a mental disturbance which interfered with, but did not obviate, his knowledge of right and wrong. A defendant may be legally answerable for his actions and legally sane, and even though he may be capable of assisting his counsel at trial, he may still deserve some mitigation of sentence because of his mental state.
Id. at 609.

12. **Westbrook v. Zant, 704 F.2d 1487 (11th Cir. 1983)**

"We interpret Lockett v. Ohio and Gregg v. Georgia as vehicles for extending a capital defendant's right to present evidence in mitigation to the placing of an affirmative duty on the state to provide the funds necessary for production of the evidence. Permitting an indigent capital defendant to introduce mitigating evidence has little meaning if the funds necessary for compiling the evidence is unavailable." Id. at 1496.

13. **State v. Wood, 648 P.2d 71 (Utah 1982)**

The capital defendant had exhibited some bizarre behavior, and had a history of alcoholism with the possibility of some brain damage, and had suffered severe depression. The Court held that it was error to deny this indigent psychiatric assistance in the penalty phase, even if his defense did not rise to the level of insanity, because it denied the defendant the right to present relevant evidence on a defense to the crime and on matters that could mitigate his sentence, e.g., extreme mental or emotional disturbance, mental disease, intoxication, or influence of drugs, and diminished capacity. Id. at 86-88.

14. **United States v. Fogarty, 558 F.Supp. 856 (E.D.Tn. 1982)**

Funds for psychiatrist required to place the indigent defendant on the same level as non indigent defendant for his insanity defense where defendant was repeatedly hospitalized for emotional and mental conditions. Id. at 860-61.

15. **Gaither v. United States, 391 A.2d 1364 (D.C.Ct.App. 1978)**

Error to fail to give money to hire defense psychiatrist.

"In determining whether the services of a psychiatric expert are 'necessary to an adequate defense,' the question before the court is not whether the defendant was insane at the time he committed the offense, but whether the evidence of mental disorder is such that a reasonable attorney would pursue an insanity defense." Id. at 1367.

The trial judge should tend to rely on the judgment of defense counsel who has the primary duty of providing an adequate defense.

In determining whether psychiatric assistance is necessary, the court should consider:

a. defendant's prior psychological history;
b. any reports concerning his mental state;
c. the opinion of those who have seen him;
d. the judge's own evaluation of defendant's demeanor.

16. **United States v. Reason, 549 F.2d 309 (4th Cir. 1977)**

The trial court ordered an examination of the defendant for incompetency by the "neutral and detached" expert, and denied the request for money for a defense psychiatrist to explore the insanity of the defendant. The Fourth Circuit held: The defendant is entitled to his own psychiatrist to assist him in his defense; the "neutral" incompetency expert does not fill that necessity even if the incompetency expert makes a finding on criminal responsibility.

17. **Brinkley v. United States, 498 F.2d 505 (8th Cir. 1974).**

Trial court should grant defense request for money for an independent psychiatric examination to explore the possible effects of LSD on the defendant and whether these effects amounted to insanity. Here the defendant and his mother testified that he had 1) undergone psychological counseling; 2) was frequent LSD user; 3) suffered flashbacks; 4) had been knocked unconscious in a car accident; and 5) his personality had recently changed.

"We agree with Judge Wisdom's concurring opinion in Theriault, adopted by the Ninth Circuit in Bass, that the trial judge should tend to rely on the judgment of the defense attorney if the latter 'makes a reasonable request in circumstances in which he would independently engage such services if his client had the financial means to support his defenses.'" Id. at 510.

18. **United States v. Bass, 477 F.2d 723 (9th Cir. 1973)**

The defendant's father died in a mental institution, the defendant had twice attempted suicide, and had received treatment for mental problems in prison. The appointment by the court of two experts to investigate the defendant's competency and sanity "did not obviate the defendant's right to his own expert...." Id. at 725. The defense is entitled to an expert who can be a partison witness; whose conclusions are not reported in advance of trial or to the prosecution, and who gives pretrial and trial assistance.

"It is ordinarily desirable to appoint a psychiatrist preferred by the defendant." Id. at 726.

The "prosecutor should have no influence in the selection." Id.

19. **Williams v. United States, 310 A.2d 244 (D.C. Ct.App. 1973)**

The trial court must grant money to indigents for experts "when underlying facts reasonably suggest that further exploration may prove beneficial to the accused in the development of a defense to the charge." Id. at 246.

In this case, the defendant had been examined at the Forensic Psychiatry office with the psychiatrist concluding after 90 minutes of interviews and no review of prior records that the defendant was sane and competent.

The defense informed the Court that the defendant had a long history of mental illness; had been diagnosed as psychoneurotic, and had a serious drug problem.

In making its determination that funds were necessary, the District of Columbia Court of Appeals noted that "the evaluation of the mental

state of the accused is a demanding task for the medical expert":

> The basic tool of psychiatric study remains the personal interview, which requires rapport between the interviewer and the subject. Gill, Newman and Redlich, The Initial Interview in Psychiatric Practice (1954). See also Finesinger, Psychiatric Interviewing: Principles and Procedure in Therapy, 105 Am.J.Psychiat. 187 (1948). More than three or four hours are necessary to assemble a picture of a man. A person sometimes refuses for the first several interviews to reveal his delusional thinking, or other evidence of mental disease. Menninger, A Manual for Psychiatric Case Study, ch. 1-4 passim. (2d ed. 1962) . . .. See Noyes & Kolb, Modern Clinical Psychiatry, ch. 7 (with bibliography); Knight, Borderline States, 17 Bull. of Menninger Clinic, 1, 8 (1953). . . . From hours of interviewing, and from the tests and other materials, a skilled psychiatrist can construct an explanation of personality and inferences about how such a personality would react in certain situations. . . .
> Id. at 246-47.

20. United States v. Hamlet, 456 F.2d 1284 (5th Cir. 1972)

Failure to hold an ex parte hearing to determine if the defendant was entitled to a psychiatrist was error.

21. United States v. Chavis, 486 F.2d 1290 (D.C. Cir. 1973)

Defendant is entitled to at least one psychiatrist of his own choice with an adequate opportunity for examination and consultation. Having access to a court appointed psychiatrist for a 50 minute interview who was not fully qualified is not enough.

22. United States v. Theirault, 440 F.2d 713 (5th Cir. 1971)

The defendant requested an expert to testify as to his insanity defense. The trial court appointed a qualified prison psychiatrist who examined the defendant and submitted the report to the trial

court. Reversing the defendant's conviction because the trial court failed to provide the defendant with the services of a defense expert, the court stated:

> ...Usually the appellate court will be reviewing a trial court denial of a Section 3006A(e) motion in the light of only the information available to the trial court at the time it acted on the motion. But in this instance the application was denied because of the earlier appointment, and without the statutorily mandated hearing. There was no focus on necessity of an expert to prepare and present an adequate defense on remand it will not even be necessary for the court to conduct a hearing, because at the appellate level we are in the unusual position of having before us a complete trial record, which establishes with as much clarity as one could want the necessity of a Section 3006A(e) psychiatric expert to assist the defense in preparing for and presenting its case at another trial.
> Id. at 715-16.

23. United States v. Tate, 419 F.2d 131 (6th Cir. 1969)

Defendant had prior psychiatric treatment. He testified to fears, suspicions and uncontrollable impulses. The trial court denied the request for funds but gave an insanity instruction. The Sixth Circuit held that it was error to deny funds for a psychiatrist: "If the insanity defense was factually of sufficient substance to warrant a judicial charge, it is difficult to see how the expert witness' services which appellant's counsel sought for him could be deemed other than 'necessary.'" Id. at 132.

AJ. PSYCHOLOGIST - DIMINISHED CAPACITY

1. State v. Poulsen, 726 P.2d 1036 (Wash.Ct.App. 1986)

The defendant was convicted of second degree assault of his mother and father. He assaulted them after they refused to allow him to make long distance phone calls.

The defense asked for funds to hire a psychologist to determine if the defendant had organic brain disorder caused by physical abuse that kept him from forming the intent to commit the assaults, or that his capacity to form the intent was

diminished. The defense informed the court that the defendant had blows to his head; had severe headaches; exhibited irrational behavioral changes; had fits of rage, especially when drinking.

The Washington Court of Appeals held that the defendant was entitled to funds to employ a psychiatrist since Ake required funds where a defendant's mental condition is likely to be a significant factor at trial.

AK. QUALIFICATIONS OF DEFENSE EXPERT

1. Thornton v. State, 339 S.E.2d 240 (Ga. 1986)

The Court required appointment of a forensic dental expert who was at least as qualified as the state's expert: "the trial court shall appoint an appropriate professional, whose experience, at minimum, is substantially equivalent to that of the state's expert witness...." Id. at 241.

AL. QUESTIONED DOCUMENT ANALYST

1. United States v. Fogarty, 558 F.Supp. 856 (E.D.Tn. 1982)

2. People v. Watson, 221 N.E.2d 645, 649 (Ill. 1966)

3. People v. Mencher, 248 N.Y.S.2d (N.Y. Sup.Ct. 1964)

Defendant was entitled to money for a handwriting expert where there was an issue of whether a detective signed a report when he testified that the signature looked like his but was not his.

AM. REASONABLENESS OF FEE RATES AND TOTAL BILL

1. Matter of Machuca, 451 N.Y.S.2d 338 (1982)

The court determined that expert medical testimony in these times is very costly, and that the following rates in 1982 were reasonable:

Examination per 45 minutes - $95.00
Psychiatric report per hour - $125.00
Court attendance per hour - $175.00

2. United States v. Bryant, 311 F.Supp. 726 (D.C. 1970)

The total amounts billed for various experts was significant but necessary for full preparation of the defense.

AN. REBUTTAL OF AGGRAVATION

1. Buttrum v. Black, 721 F.Supp. 1268 (N.D.Ga. 1989).

Capital defendant is entitled to psychiatrist under Ake and Barefoot to rebut aggravation (anti-social, paraphilia, and sexual sadism) testified to by prosecution psychiatrist. Id. at 1308-13. The defendant does not need to make any showing to be entitled to a psychiatrist once the prosecution produces the aggravation. Id. at 1311.

...Ake is not limited to instances where future dangerousness is a statutory aggravating factor." Id. at 1311 n.9.

2. Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985).

As a matter of due process, the capital defendant was entitled to a psychiatrist to rebut the state's evidence of future dangerousness, to point up short comings in the reliability of such predictions.

3. Barefoot v. Estelle, 463 U.S. 880, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983).

The court determined that the prosecution could introduce psychiatric testimony of a defendant's future dangerousness if the defendant had access to an expert of his own. Id. at 3397 n.5.

AO. RETROACTIVITY

1. Harris v. Vasquez, 901 F.2d 724 (1990) (order of circuit judge) application to vacate, stay denied, ___ U.S. ___, 110 S.Ct. 1799, 108 L.Ed.2d 781 (1990)

Ake is retroactive.

AP. SEROLOGY

1. Bowen v. Eyman, 324 F.Supp. 339 (D.Ariz. 1970)

It was error to fail to appoint the defense requested expert to test the seminal fluid removed from the vaginal tract of the victim in this rape case.

AQ. STATE EXPERTS/AID VS. PRIVATE DEFENSE EXPERTS/AID

1. Marshall v. United States, 423 F.2d 1315 (10th Cir. 1970)

The defendant requested money for defense investigative assistance. The trial court appointed the FBI. The Tenth Circuit determined it was plain error to do this.

"Just as an indigent defendant has a right to appointed counsel to serve him as a loyal advocate he has a similar right under properly proven circumstances to investigative aid that will serve him unfettered by an inescapable conflict of interest. The Bureau, following leads furnished by an accused, is obviously faced with both a duty to the accused and a duty to the public interest. The dilemma, and danger, is glaringly apparent in the events that occurred in the case at bar." Id. at 1319.

AR. STATISTICS AND DEMOGRAPHY

1. Ford v. Scroggy, 841 F.2d 677 (6th Cir. 1988)

2. State v. Anaya, 438 A.2d 892 (Me. 1981)

"In conjunction with this challenge, defendant moved for the appointment of two experts in the fields of statistics and demography to aid her in analyzing the composition of the grand jury array. The request sought authority for a maximum expenditure of $500.00. This motion was denied after an adversary hearing at which defense counsel presented the court with evidence indicating that there were 148,000 licensed drivers in Cumberland County but that the county voter registration lists, from which the Grand Jury panel was selected, contain the names of only 90,000 persons. Counsel argued that this was prima facie evidence of the unrepresentative character of the jury.

"In light of defendant's attempted evidentiary showing, we find error in the trial court's decision to deny defendant expert assistance. Defendant made a timely request for reasonably necessary expert services under circumstance 'in which a reasonable attorney would engage such services for a client having the independent financial means to pay for them.' United States v. Bass, 477 F.2d 723, 725 (9th Cir. 1973) (interpreting a federal statute defining indigent defendant's right to expert assistance)." Id. at 895.

AS. SUBPOENING EXPERT

1. People v. McPeters, 448 N.W. 770 (Mich.Ct.App. 1989).

Defendant was found guilty but mentally ill of 4 crimes: second degree murder, voluntary manslaughter, assault, possession of a firearm. A notice of insanity defense was filed by his retained counsel. A psychiatrist was retained by the defendant, and after an examination concluded the defendant was mentally ill and insane. The trial court refused to pay the defense expert's full fee and the fee for further evaluation, preparation and testimony, and ordered the expert subpoenaed to testify to his opinions based on the work he had done up to a point with the defendants. The expert appeared and indicated he had no independent recollection of defendant's case. His testimony was a disaster.

The appellate court held that this coercion of the psychiatrist to appear and testify was a denial of due process, "we find the alternative attempt to force [the psychiatrist's] testimony was prejudicial to the defendant, resulting in error requiring reversal." Id. at 772.

On retrial, the court ordered the trial judge to "either resolve the fee dispute with [the psychiatrist] to permit his testimony or to appoint an expert witness of defendant's choice to prepare and present the defendant's insanity defense...." Id.

AT. TIMING OF REQUEST

1. People v. Kegley, 529 N.E.2d 1118 (Ill.App. 1988)

Defendant's motion for psychiatric exam made 2 days before trial was timely despite fact that this was inconvenient to state and was a delaying tactic. Id. at 1122.

AU. THRESHOLD SHOWING/REASONABLY NECESSARY STANDARD

1. Harris v. State, 352 S.E.2d 226 (Ga.Ct.App. 1987)

Court held that it was error, based on facts of the crime and the representation by the defense that insanity was sole defense, to fail to appoint a mental health expert to conduct a "threshold examination" to determine whether entitled to an expert under Ake. Id. at 228.

2. **People v. Vale, 519 N.Y.S.2d 4 (1987)**

An "indigent need not show that on insanity defense 'might succeed' to obtain access to expert psychiatric assistance, but only that the issue of the defendant's sanity will be an important factor at trial." Id. at 7.

3. **State v. Hamilton, 448 So.2d 1007 (Fla. 1984)**

The Florida rule of criminal procedure is unequivocal that, when counsel for an indigent defendant has "reason to believe" that his client "may be incompetent to stand trial or that he may have been insane at the time of the offense," the defendant is entitled to have the court appoint one expert to assist in the preparation of his defense.

Thus, once an expert is appointed, all matters related to that expert are confidential. The rule is designed to give an indigent defendant the same protection as afforded to a solvent defendant. Further, and as important, in many instances the basis for the request for such an expert is founded on communications between the appointed lawyer and his client. Any inquiry into those communications would clearly violate the basic attorney-client privilege. Any inquiry into counsel's basis to believe that his indigent client is incompetent to stand trial or was insane at the time of the offense also impermissibly subjects the indigent defendant to an adversary proceeding concerning issues which may be litigated in the trial of the cause. No solvent defendant would be subjected to this type of inquiry or proceeding.

4. **Commonwealth v. Lockley, 408 N.E.2d 834 (Mass. 1980)**

In Massachusetts the standard for funds for experts is: "if the court makes a finding of indigency... it shall not deny any request with respect to extra fees and costs if it finds the document, service or object is **reasonably necessary** to assume the applicant as effective a prosecution or defense as he would have if he were financially able to pay." Id. at 838.

In explaining what this standard was and was not, the Court stated, "This standard is essentially one of reasonableness, and looks to whether a defendant who was able to pay and was paying the expenses himself, would consider the "document, service or object" sufficiently important that he would choose

to obtain it in preparation for his trial. The test is not whether a particular item or service would be acquired by a defendant who had unlimited resources, nor is it whether the item might conceivably contribute some assistance to the defense or prosecution by the indigent person. On the other hand, it need not be shown that the addition of the particular item to the defense or prosecution would necessarily change the final outcome of the case. The test is whether the item is reasonably necessary to prevent the party from being subjected to a disadvantage in preparing or presenting his case adequately, in comparison with one who could afford to pay for the preparation which the case reasonably requires.

In making this determination under that statute, the judge may look at such factors as the cost of the item requested, the uses to which it may be put at trial, and the potential value of the item to the litigant." Id. at 838.

5. **Mason v. Arizona, 504 F.2d 1345 (9th Cir.'1974)**

"In the nature of things it may be difficult, in advance of trial, for counsel representing an indigent defendant to demonstrate an undoubted need for [investigator] funds. However, he can at least advise the court as to the general lines of inquiry he wishes to pursue, being as specific as possible. He should also advise the court why it is not practicable for counsel himself to make the

investigation, with our without the allowance of out-of-pocket expenses. If a reasonable showing of this kind is made, the state trial court should probably view with considerable liberality a motion for such pre-trial assistance." Id. at 1352.

See also Corenevsky v. Superior Court, 204 Cal.Rptr. 165, 173 (Cal. 1984) citing Mason.

AV. TRANSCRIPTS

1. Woods v. Superior Court, 268 Cal.Rptr. 490 (Calif. Ct. App. 1990).

Due process entitles an indigent criminal defendant to a transcript of the testimony of witnesses in a prior civil proceeding concerning the same events which are the basis of the criminal action at which some of the same witnesses will testify. Id. at ___.

The defendant does not bear the burden of proving inadequate any suggested alternative. Id. at ___.

2. United States v. Scarpa, 691 F.Supp. 635 (E.D.N.Y. 1988)

Indigent defendant is entitled to a daily transcript if the prosecutor is receiving daily transcripts. Id. at 636.

3. McMillion v. State, 742 P.2d 1158 (Okl.Cr. 1987)

The defendant was appointed a public defender, who represented him at a preliminary hearing and who asked for a copy of the preliminary hearing transcript at public expense. The Court granted that request.

Subsequently, the defendant's family obtained a bond for his $10,000 bail. The defendant's public defender then moved to withdraw in light of the fact that the defendant's family posted bond. The trial judge refused to allow the withdrawal but did order the defendant to pay the $80-$90 for the preliminary hearing transcript, finding that the defendant had the money to pay for it "but chose to put it on his bail." Id. at 1160.

The appellate court held that it is a "violation of equal protection to deny indigents in a criminal proceeding access to a transcript of a preliminary hearing because of inability to pay." Id. They also determined that the error was not harmless due

to the fact that the defendant's counsel at trial was the same as at the preliminary hearing. Id. at 1160-61. According to the Court, the right to the transcript at public expense "is not based on any consideration of whether the transcript of the preliminary hearing is beneficial to the defense." Id. at 1161. The Court further found that the defendant's ability to make bail "has no bearing on his status as an indigent or his ability to retain competent counsel at the time he needs one." Id.

4. **Calhoun v. Foerster, 656 F.Supp. 492 (W.D.Pa. 1987)**

As a result of a class action suit, it was held that an indigent is entitled to free transcript of preliminary hearing.

5. **Wilson v. State, 701 P.2d 1040 (Okl.Cr. 1985)**

"An accused is entitled to a transcript of a preliminary hearing where: 1) defense counsel acted with due diligence to acquire the transcript; and 2) the transcript is necessary for cross-examination of witnesses at trial.... Failure to provide a transcript when these requirements are met will result in reversal of a subsequent conviction." Id. at 1041.

6. **United States v. Bari, 750 F.2d 1169 (2nd.Cir. 1984)**

"We believe it is an abuse of discretion to decline either to order such [daily] transcripts or provide for other means of adequate access when the government is receiving them. The government's need for such transcripts should be regarded as conclusive evidence of a similar need by the defendants under § 3006A." Id. at 1182.

7. **United States v. Young, 472 F.2d 628 (6th Cir. 1972).**

Error to fail to provide indigent defendant with transcript of first trial that ended with a deadlocked jury and of the preliminary examination.

8. **Britt v. North Carolina, 404 U.S. 226, 92 S.Ct. 431, 30 L.Ed.2d 400 (1971).**

"...there can be no doubt that the State must provide an indigent defendant with a transcript of prior proceedings when that transcript is needed for an effective defense or appeal." Id. at 433.

9. **Roberts v. LaVallee, 389 U.S. 40, 88 S.Ct. 194, 19 L.Ed.2d 41 (1967).**

   Denial of a free transcript of a preliminary hearing to an indigent in a criminal case violates equal protection guarantees. Id. at 196.

10. **United States v. Pope, 251 F.Supp. 234 (D.Neb. 1966)**

Indigent defendant entitled to money for daily transcripts and copies of any part of record obtained by the prosecutor. Id. at 240-41.

11. **Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956).**

Due process and equal protection require a defendant be provided a transcript or its equivalent in order to appeal a conviction. Id. at 591.

AW. TRAVEL

1. **United States v. Gonzales, 684 F.Supp. 838 (D.Vt. 1988)**

"The plain language of section [18 U.S.C.§] 4285, economic realities, and the dictates of the equal protection clause support the finding that, after appropriate financial inquiry, this Court may order the government to pay or arrange for the noncustodial transportation of defendant from Texas to Vermont to enter his guilty plea." Id. at 842.

AX. WITNESSES: IN-STATE

1. **KRS 421.015 Mileage allowance for witnesses in circuit and district courts.**

A witness who resides in a county other than that to which he is subpoenaed shall be allowed the same amount allowed state employees under KRS 44.060.

AY. WITNESSES: OUT-OF-STATE

1. **KRS 421.230-270: The Uniform Act to Secure the Attendance of Witnesses from within or without a State in Criminal Proceedings**

2. **OAG 75-682 (November 17, 1975)**

The Uniform Act only applies to prosecution witnesses.

3. **Kathi S. Kerr v. Commonwealth, Ky.App., No. 86-CA-2564-MR (Feb. 5, 1988) (unpublished)**

The defendant was convicted of trafficking in cocaine and possessing marijuana with intent to sell. The defendant and her paramour, a foreign national, were arrested on an informant's tip. The foreign national pled guilty and stated in his confession that Kern had not participated in the

illegal sales. Several months before trial, defense counsel subpoenaed the foreign national who was in the county jail. Prior to trial, the foreign national was transferred to a Florida federal prison for deportation. The defense obtained a writ of habeas corpus ad testificandum for the federal authorities to produce the prisoner, and an order was entered to require the county police to transport the prisoner to Kentucky but changed its mind on motion of the Commonwealth, saying the defendant could have deposed the witness when in the county jail.

The Court held the defendant had a statutory and constitutional right to have the costs of transporting the material witness paid by the county.

4. **Hancock v. Parker, 100 Ky. 143, 37 S.W. 594 (1896)**

The Court held that Section Eleven of the Kentucky Constitution required that a defendant be entitled to the paid compulsory process of an in-state prisoner regardless of the legislature's failure to make money available:

> It is contended, however, by counsel for plaintiff, that the order in this case ought not to have been made because there is no provision of law for paying the expenses incident to the production of this witness in the Fayette circuit court. If this were true, it would not affect the rights of the accused to have compulsory process to secure the attendance of the witness. The Commonwealth has the custody and control of the witness, and the accused cannot reach him except by compulsory process, to which he is entitled under the bill of rights. If there is no provision in the law for paying the expenses in such emergency, it should be made by the legislature, and the want of it is by reason of no fault of the accused. But we hold it is the duty of the court to ascertain and made allowance for the expenses of such removal and conveyance of this witness, such as are authorized by section 361 of the Kentucky Statutes, and that the same are payable out of the state treasury under the said section.
>
> For reasons given, it is the opinion of the court that the plaintiff should comply with the order, and produce the witness in court

to testify, and compliance with the order will be in discharge of the rule for contempt. The application for the writ of prohibition is therefore denied, and the petition dismissed.
Id. at 595.

5. **Commonwealth v. Fallings, 380 A.2d 822 (Pa. 1977).**

The Uniform Act to Secure the Attendance of Witnesses from Within or Without a State in Criminal Proceedings (KRS 421.230-270) is "a procedure which is equally available to the defense and to the Commonwealth." Id. at 825.

6. **Blazo v. Superior Court, 315 N.E.2d 857 (Mass. 1974).**

Fourteenth Amendment due process and equal protection require that the Commonwealth provide the necessary fees to insure the attendance of material defense witnesses. Id. at 859-61.

7. **KRS 44.010 and 020.**

> **44.010 Claims upon state treasury, how paid**
>
> All claims upon the state treasury that are authorized by law shall be paid when due by the state treasurer to the person entitled to the amount claimed. The warrant for such payment shall be issued by the department of finance upon such proof of services performed or of demand made as is required by law.
>
> **44.020 Claims allowed by courts; how proved; contest**
>
> (1) Within three 93) working days after the first and fifteenth of each month the clerk of any court of the Court of Justice shall make out and certify an alphabetical list of all claims payable out of the state treasury that have been allowed by the court, and transmit the list to the department of finance, and no warrant for any claims requiring the approval of a court shall be issued until the list has been received by the department of finance. The

alphabetical list of claims shall serve as a certified copy of orders of allowance by the court for each and every claim listed thereon, and notwithstanding any statutory provision to the contrary, a copy of the order of allowance shall not be required for any claim listed thereon before payment may be made unless deemed necessary by the department of finance. The department of finance shall keep a separate record of all claims allowed in each county, noting the number and amount of each warrant issued for the payment of such claims.

(2) The order of any court authorized by law to approve and allow fee-bills, settlements, credits, charges and other claims against the state treasury shall not be treated as a judgment, or made conclusive against the state, but shall only be regarded as prima facie evidence of the correctness and legality of the fee-bill, settlement, credit, charge or claim. The department of finance, if it believe such fee-bill, settlement, credit, charge or claim to be fraudulent, erroneous or illegal, may, upon the advice of the attorney general, refuse to pay and may contest the claim in the Franklin Circuit Court, which shall have exclusive jurisdiction of all actions against the department of finance to compel the payment of claims against the state treasury.

8. OAG 81-336 (September 15, 1981)

The impact of this opinion is that KRS 421.250 provides only for prosecution witnesses and not defense witnesses but that defense witness fees can be ordered by a court under 44.020.

AZ. WITNESSES - FEDERAL

1. Federal Rule of Criminal Procedure 17(6) provides, in part:

The court shall order at any time that a subpoena be issued for service on a named witness upon an ex parte application of a defendant upon a satisfactory showing that the defendant is financially unable to pay the fees of the witness and that the presence of the witness is necessary to an adequate defense.

BA. COMMONWEALTH FUNDS FOR EXPERTS

1. The Commonwealth seems to have money in large quantities and at will when it is dissatisfied with opinions rendered by state experts:

2. Representing in their "standard contract for personal services" that they have "concluded that either state personnel are not available to perform said function, or it would not be feasible to utilize state personnel to perform said function," the Commonwealth:

   a. hired on July 1, 1986 Dr. Robert P. Granacher, M.D., a psychiatrist, for the case of Kendrick v. Bland, 541 F.Supp. 21 (1981) for $100 per hour up to $4,500 plus $500 for hotel, meals and travel for touring state prisons, reviewing prison mental health programs and testifying as to their accessibility and suitability.

   b. Hired on July 8, 1987 William Weitzel, M.D., a psychiatrist, for the attempted murder case of Commonwealth v. Ulysses Davis, III (Fayette County) for $200 per hour up to $5000 for an opinion on the issue of sanity.

   c. Hired on September 14, 1987 Emanuel Tanay, M.D., a psychiatrist, for the multiple murder case of Commonwealth v. Donald Harvey (Laurel County) for $200 per hour up to $4,500 for an opinion on competency and sanity. This was a guilty plea case.

   d. Hired on January 21, 1988 Dr. Pran Ravani, M.D. a psychiatrist who was formerly employed at Grauman and KCPC, for the capital murder case of Commonwealth v. Clawvern Jacobs, (Knott County) at the rate of $150.00 per hour up to $3,450.00 for a criminal responsibility evaluation.

   e. Hired on July 1, 1989, Dr. William Weitzel, M.D., a psychiatrist, for the capital murder case of Commonwealth v. William Bennett

(Fayette Co.) for $200 per hour up to $3,000 for evaluation of the defendant, report and courtroom testimony.

3. **Commonwealth v. Chaney (Indictment No. 80-CR-219 (Pike Co.)**

The Commonwealth Attorney hired a psychiatrist, Dr. John Gergen of Frankfort

4. **Commonwealth v. Smith (Indictment No. 80-CR-166) (Pike Co.)**

The Commonwealth Attorney hired a psychiatrist, Dr. John Gergen of Frankfort.

5. **Commonwealth v. Bevins (Indictment Nos. 82-CR-16, 23) (Greenup Co.)**

The Commonwealth Attorney hired a psychiatrist, Dr. John Gergen of Frankfort.

6. **Unified Prosecutorial System Expert Witness Fund**

VIII. COMPENSATION OF ATTORNEYS

A. Capital Cases

Examples of appointed counsel fees in indigent capital cases.

STATE	AVERAGE FEE	MAXIMUM FEE KNOWN
ALABAMA	$10-14,000	--
CALIFORNIA	$60,000	$150,000
CONNECTICUT	$39,850	$ 39,850
GEORGIA	--	$150,000
MARYLAND	$20,000	$ 44,000
NEBRASKA	$10-20,000	$ 20,000
NEW JERSEY	$43,000	$100,000
OHIO	$25,000	$ 25,000
WASHINGTON	$40,000	$ 60,000
KENTUCKY	$ 2,500	$ 2,500

B. Non Capital Felony Cases

See Appendix A, infra.

IX. OTHER AUTHORITIES

A. Annotations

1. Annotation, **Right of Indigent Defendant in Criminal Cases to Aid of State by Appointment of Investigator or Expert**, 34 ALR.3d 1256 (1970).

2. Annotation, **Construction and Application of Provision in Subsection (e) of CJA of 1964 (18 U.S.C. § 3006(A)(e) Concerning Right of Indigent Defendant to Aid in Obtaining Services of Investigator or Expert**, 6 ALR Fed. 1007 (1971)

3. Annotation, **Right of Federal Indigent Criminal Defendant to Obtain Psychiatric Examination Pursuant to Subsection (e) of CJA of 1964 as Amended (18 U.S.C. §3006(A)(e))**, 40 ALR Fed. 707 (1978).

B. Reports and Commentaries

1. W. McKechnie, **Magna Carta: A commentary on the Great Charter of King John** (1914)

   "In the twentieth century, as in the thirteenth, justice cannot be had for nothing...." Id. at 395-96.

2. **Report of the Attorney General's Committee on poverty and the administration of federal criminal justice (1963).**

   This report of a distinguished committee of lawyers, state and federal judges, and academicians, states:

   > The need for such services has been recognized in all well-developed systems of representation for financially incapacitated defendants, both in this country and abroad. Until . . . such services are made available, the procedures in the federal court cannot fairly be characterized as a system of adequate representation. One of the assumptions of the adversary system is that counsel for the defense will have at his disposal the tools essential to the conduct of a proper defense . . . .. Id. at 45-46.

3. **N. Lefstein, Criminal Defense Services For The Poor: Methods and Programs For Providing**

Legal Representation And The Need For Adequate Financing (1982)

"Overall, there is abundant evidence...that defense services for the poor are inadequately funded. As a result, millions of persons in the United States who have a constitutional right to [assistance] are denied effective legal representation....There also are intangible costs, as our nation's goal of equal treatment for the accused, whether wealthy or poor, remains unattained." Id. at 2.

4. **Criminal Defense for the Poor, 1986 Bureau of Justice Statistics Bulletin (September, 1988)**

In September, 1988 the United States Department of Justice's Bureau of Justice Statistics compared resources available to the criminal defense of indigents between 1982 and 1986. In Criminal Defense for the Poor, 1986 it reported that in 1986 there were 4.4 million indigent criminal cases, a 40% increase from the 3.2 million cases in 1982. About $1 billion was spent in 1986 by state, county and other local sources on the defense of indigents in criminal cases. The national average amount of money allocated for a defense case was $223 in 1986, ranging from a low of $63 in Arkansas to a high of $540 in New Jersey. An average of $223 per case is a far cry from adequate funding.

5. **AN INTRODUCTION TO INDIGENT DEFENSE SYSTEMS (1986), ABA Standing Committee on Legal Aid and Indigent as Bar Information Program**

An overview of public defender systems in this country. It found that indigent defense compensation was inadequate and often caused "attorneys to ask that their names be removed from the list of lawyers willing to represent indigent defendants"

a. Regardless of the means used to set rates and pay attorneys, the fees paid by virtually all assigned counsel programs are too low. A survey of hourly fees and maximums conducted by The Spangenberg Group in March, 1986 showed that hourly fees for out-of-court work ranged from $10 to $50 per hour; averaging all state's out-of-court fees yields a figure in the low

thirties. In-court fees were typically $10 per hour higher....

While hourly fees of $10-25 per hour can best be described as wholly inadequate, the worst effects are caused not by low hourly rates but by limits on the maximum fee per case. Id. at 6.

C. **Law Reviews, Journals, Articles**

1. Monahan, **A Litigator's Guide to Fees for Attorneys Representing Indigent Criminal Defendants**, ABA Criminal Justice (Summer 1990) at ____.

2. Bright, **Keeping Gideon from being Blown Away**, ABA Criminal Justice (Winter 1990) at 10.

3. Monahan, **Obtaining Funds for Experts in Indigent Cases**, The Champion (August 1989) at 10.

4. Margualies, **Resource Deprovation and Right to Counsel**, 80 J. of Crim. L & Criminology, 673 (1990).

5. **Nonpsychiatric Expert Assistance and The Requisite Showing of Need: A catch-22 in the Post-Ake Criminal Justice System**, 37 Emory L.J. 995 (1988)

"Fewer than sixty years ago, the Supreme Court determined that the assistance of counsel was mandated constitutionally. Thirty years ago, a free transcript was deemed necessary to preserve an indigent's constitutional rights. Finally, in 1985, expert psychiatric assistance was recognized as a necessary incident to a fair trial. This progression represents a continuing redefinition of the adequate tools that must be furnished to an indigent defendant in order to meet constitutional standards."

"Experts, both psychiatric and nonpsychiatric, are an integral part of modern trials. Ake suggested that when the issue which would be addressed by an expert was to be a significant issue at trial, that expert presumptively was necessary. Ake dealt solely with the indigent's right to a psychiatric expert. Analysis of the reasoning of Ake and its constitutional underpinnings, however, suggests that the Ake mandate logically extends to nonpsychiatric assistance as well. Id. at 1032.

6. Wilson, **Litigative Approaches to Enforcing the Right to Effective Assistance of Counsel in**

Criminal Cases, 14 Review of Law & Social Change 203 (1986).

Highly practical discussion of litigation considerations by the former director of NLADA's Defender Division.

7. West, **Expert Services and the Indigent Criminal Defendant: The Constitutional Mandate of Ake v. Oklahoma**, 84 Mich.L.Rev. 1326 (1986)

This article discusses at length the view that a partisan defense expert, not a neutral expert, is constitutionally required. Id. at 1345-57.

8. Decker, **Expert Services in the Defense of Criminal Cases: The Constitutional and Statutory Rights of Indigents**, 51 Cin.L.Rev. 574 (1982)

This articles does a good job of discussing the need for defense experts due to the questionable reliability of a state experts' opinions. Id. at 577-79.

9. Shapiro, **The Enigma of the Lawyer's Duty to Serve**, 55 N.Y.U. L.Rev. 735 (1980)

Excellent discussion of the history in England of lawyers representing indigent civil and criminal clients without compensation. It also surveys the states on whether they require service without compensation, and the various legal arguments.

In 1980, a slight majority of states held pro bono representation in criminal cases could be required of attorneys. Id. at 756. Since 1980, several states have overruled prior cases. Thus the majority is now against uncompensated service. Shapiro's conclusion is, "At least absent adequate compensation, a lawyer should be able to decline an appointment for financial reasons whether or not it would cause 'unreasonable' hardship." Id. at 792.

10. Bowman, **The Indigent's Right to an Adequate Defense: Expert and Investigational Assistance in Criminal Proceedings**, 55 Cornell LR 633 (1970).

"The United States, which prides itself on notions of equality and progressiveness, lags behind other countries in providing funds for an indigent's effective defense. Great Britain provides nationwide payment of expenses for expert witnesses and investigation. The Swiss mandate that 'all are equal before the law has resulted in a variety of

services in addition to counsel being made available to all indigents.' The broadest programs of aid in criminal cases are those of the Scandinavian countries: in addition to receiving a court-appointed attorney, every criminal defendant, regardless of financial status, may make use of government laboratories, expert testimony, and investigation at government expense." Id. at 644.

D. Manuals

Amsterdam, **Trial Manual 4 for the Defense of Criminal Cases** (1984) §§ 298-301.

E. ABA Standards/Positions

1. **ABA Standards for Criminal Justice: Providing Defense Services, Standard 5-1.4 and 5-4.3 (1986)**

2. At its February, 1985 meeting, the American Bar Association's House of Delegates passed a resolution stating, "the American Bar Association opposes the awarding of government contracts for criminal defense services on the basis of cost

alone, or through competitive biding without reference to quality of representation."

3. ABA's Criminal Justice in Crisis Report (1986)

In 1986, at the request of the ABA Criminal Justice Section, the ABA created a special committee, the Special Committee on Criminal Justice in a Free society, to study the criminal justice system. Sam Dash chaired the committee that consisted of state and federal judges, public defenders, police, prosecutors and distinguished law school professors.

The Dash Committee found that underfunding of many aspects of the criminal justice system is related to "much of what the public dislikes about the criminal justice system." The underfunding of public defender services and the inappropriately high defender caseloads were areas the committee addressed:

"These caseloads are unmanageable regardless of how industrious the attorneys may be. The ABA supports the following maximum allowable attorney caseloads as adopted by the National Advisory Committee on Criminal Justice Standards and Goals...

a. 150 felonies per attorney per year; or
b. 300 misdemeanors per attorney per year; or
c. 200 juveniles cases per attorney per year; or
d. 200 mental commitment cases per attorney per year; or
e. 25 appeals per attorney per year.
Id. at 42-43.

F. NLADA Standards for the Appointment and Performance of Counsel in Death Penalty Cases (Nov. 16, 1988).

Standard 10.1 addressed compensation:

a. Capital counsel should be compensated for actual time and service performed. The objective should be to provide a reasonable rate of hourly compensation which is commensurate with the provision of effective assistance of counsel and which reflects the extraordinary responsibilities inherent in death penalty litigation.

b. Periodic billing and payment during the course of counsel's representation should be provided for in the representation plan. Id. at 50.

X. HELP FROM ORGANIZATIONS

Help is available from organizations.

A. NACDL. The National Association of Criminal Defense Attorneys has an Indigent Defense Committee that stands ready to provide litigation assistance, including counsel and testimony, in cases when appointed defense counsel is deprived of a fair fee or when counsel has his or her fee cut as punishment for energetic advocacy.

The Chair of the Committee is David Lewis, 225 Broadway, Suite 3300, New York, New York 10007, 212/285-2290. Its other two members are Mike Balnick, West Palm Beach, Florida, and James Boren, Baton Rouge, Louisiana.

NACDL makes an Indigent Defense Handbook available to any criminal defense attorney. Send $30 to: NACDL, 1110 Vermont Avenue, NW, Suite 1150, Washington, D.C. 20005, 202/872-8688. It is a 450-page manual of motions, memos, and other pleadings for obtaining attorney's fees, supplemental services, and for challenging state assigned counsel systems.

B. BIP. The ABA Bar Information Program is a subcommittee of the ABA Standing Committee on Legal Aid and Indigent Defense. John Arango is the project coordinator for BIP at P.O. Box 338, Algodones, New Mexico 87001, 505/867-3660. Lynn Sterman is the ABA's atttorney staff support for BIP: 750 N. Lakeshore Drive, Chicago, Illinois 60611, 312/988-5765. BIP's chairperson is Jim Neuhard, Michigan State Appellate Defender, 3rd Floor, North Tower, 1200 Sixth Avenue, Detroit, Michigan 48226, 313/256-2814.

BIP provides free technical assistance to state and local bar associations, county and state governments, courts and attorneys regarding improvements in the provision of indigent criminal defense. Assistance is available in the areas of training, surveys, court and legislative testimony, litigation assistance, and consultation. There are few boundaries on the nature of the assistance.

Along with others, BIP was involved in the successes in Georgia, New Mexico and Missouri, and in establishing the federal death penalty resource centers. (See Arthur W. Ruthenbeck, Dueling with Death in Federal Courts, ABA Criminal Justice, Fall 1989, at 3).

Jim Neuhard has observed that funding success usually has been a product of many efforts on multiple fronts. BIP's experience is that one limited effort rarely results in more money. Those who control the purse-

strings are persuaded over the course of time through a variety of methods, people and groups. Committed activity in many areas creates a broad recognition of the importance of criminal defense work and of the drastic need for adequate resources. Incremental successes are more likely with this broad-based method of persuasion.

C. SPANGENBERG GROUP. The Spangenberg Group, Robert L. Spangenberg, President, 1001 Watertown Street, West Newton, Massachusetts 02165, 617/969-3820 has provided invaluable assistance at the request of BIP and the ABA Post-Conviction Project on matters related to caseload limits, compensation levels, national surveys, and methods for improving indigent defense systems.

D. NLADA. Mary Broderick, 1625 K Street, N.W., 8th Floor, Washington, D.C. 20006, 202/452-0620.

E. ABA Post-Conviction Death Penalty Representation Project, Esther Lardent, 1800 M Street, N.W., Washington, D.C. 20036, 202/331-2273.

XI. CONSTITUTIONAL GROUNDS FOR RELIEF WHEN ASKING FOR FUNDS

A. United States Constitution, 14th Amendment Due Process

1. Due Process fairness
2. Due Process right to present a defense
3. Due Process right to disclosure of favorable evidence
4. Due Process right to fair administration of state-created right

   a. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 838-39, 83 L.Ed.2d 821 (1985)

5. Due Process right to rebut aggravation.

B. Kentucky Constitution, Section 2 Due Process:

1. Kaelin v. City of Louisville, Ky., 643 S.W.2d 590 (1982)

   Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority.

C. United States Constitution, 14th Amendment Equal Protection

D. United States Constitution, 14th and 6th Amendment Right to Effective Assistance of Counsel

E. Kentucky Constitution, Section 11 Right to Effective Assistance of Counsel

F. United States Constitution, 14th and 6th Amendment Right to Confrontation

G. Kentucky Constitution, Section 11 Right to Confrontation

H. United States Constitution, 14th and 6th Amendment Right to Compulsory Process

I. Kentucky Constitution, Section 11 Right to Compulsory Process

J. United States Constitution, 14th and 8th Amendment Reliable Sentencing, Produce Mitigating Evidence, Rebuttal of Aggravation

XII. MAKING THE THRESHOLD SHOWING TO TRIAL JUDGE

Contrary to what one would hope and expect, since Ake many courts across the country continue to deny funds to indigent defendants for experts. This is no doubt due to the ultra conservative nature of judges but it is also often, much too often, due to a grossly inadequate threshold showing by the defendant's lawyer. We can win more of these cases on appeal, and get more relief at the trial level if we do a good, thorough job of making a threshold showing of necessity that convinces a trial judge and/or appellate court.

At a minimum, the threshold showing should include the following in the ex parte hearing:

a) **type of expert:** state to the judge the specific types of experts being requested, e.g., expert in hair, blood analysis, psychiatrist, pharmacologist, social worker;

b) **type of assistance:** With specificity, tell the judge the types of assistance needed from the experts:

1) investigating, testing, consulting and testifying for the defense on **pretrial issues:**
2) investigating testing, consulting and testifying for the defense on **guilt/innocence phase issues**
3) investigating, testing, consulting and testifying for the defense on **sentencing phase issues;**
4) assisting in effective **cross examination of prosecution experts** pretrial, trial sentencing

c) **name, qualifications, fees:** Relate the specific names, credentials, fees of requested experts, e.g., Dr. Smith is a practicing clinical forensic psychologist, here is his vitae, he charges $70 per hour for out-of-court work and $100 per hour for in-court work and he estimates his total fee to be between $1,500-$2,000 for his testing, interviews, report, testimony, and assisting in cross.

Defendants are entitled to experts at least as qualified as those used by the prosecution. In Thornton v. State, 339 S.E.2d 240 (Ga. 1986) the court required appointment of a forensic dental expert who was at least as qualified as the state's expert: "[t]he trial court shall appoint an appropriate professional, whose experience, at minimum, is substantially equivalent to that of the state's expert witness...." Id. at 241.

d) reasonableness of costs: Demonstrate the reasonableness of the amount of the hourly rate and overall fee. If necessary, this can be demonstrated with affidavits of other similar experts in the community. See Matter of Machuca, 45 N.Y.S.2d 338 (1982).

e) **factual basis in this case:** It is critical to demonstrate the specific factual reasons why these experts are

necessary for the guilt and penalty phases of this case. For instance, my client needs the assistance of a psychiatrist and psychologist because he had a serious car accident in 1984 with a head injury; he was unconsciousness; he is a frequent drug user; he has had seizures and has a history of high fevers; he is adopted; his father died in 1983; there was a significant change in his personality in 1983; his sister is in a psychiatric hospital; the facts of the case indicates it was committed by a person who has severe mental and emotional difficulties; I have talked to the above-named psychiatrist and psychologist and they have told me that these facts indicate a person with significant mental difficulties; There is the question of whether this person was insane, whether he acted with intention, whether he acted under extreme emotional disturbance, whether his waiver of his Miranda rights was voluntary and knowing and whether his confession was voluntary and knowing."

Some courts have held that an expert must be appointed to conduct a threshold exam to determine if the defense is entitled to an expert. Harris v. State, 352 S.E.2d 226 (Ga.Ct.App. 1987).

f) **counsel's observations:** relate, to the extent appropriate, your own observations in dealing with your client. For instance, "my client has exhibited delusional thinking and bizarre behavior to me in the following ways...." As attorneys, we have a lot of contact and a significant relationship with our clients so that the weight of our observations and conclusions is important to relate to the court.

g) **legal necessity:** Inform the judge precisely of the specific legal reasons why these experts are necessary for the guilt and penalty phases of this case, e.g., there is a duty to explore all possible defenses; in this case the defense of insanity, intoxication, extreme emotional disturbance must be explored; whether the mental state of the client was intentional or wanton must be explored; must have ability to investigate and present statutory and nonstatutory mitigating factors including whether emotionally or mentally disturbed, whether mental difficulties less than insanity, his personality type, his possibilities for rehabilitation, the influence of his family and others on who he is and his actions, why he is involved with drugs, what effect drugs had on him, who the client is and why he acts as he does; the influence of his being adopted, his father's death.

h) **entitlement to defense experts:** While all courts do not agree, Ake necessarily implies when it says we are entitled to help in cross-examining state experts that we are entitled to independent or defense experts who work confidentially and at our direction, just as a person with means would be able to obtain. See, e. g., Curry v. Zant, 371 S.E.2d 647 (Ga. 1988); Commonwealth v. Plank, 478 A.2d 872, 874 n.3 (Pa.Super. 1984).

i) **inadequacy of state experts:** Relate the specific reasons why state facilities are inadequate for our defense needs.

KCPC

For KCPC, this means demonstrating that they will only examine in limited areas, like insanity and incompetency, and not on all suppression issues or all defenses and not for mitigating factors or on sentencing issues; they are not defense experts; they report to the court; confidentiality is not assured; they will not affirmatively explore all matters favorable to the defense; they will not work at the direction of the defense attorney; they will not help cross-examine prosecution experts.

KSP

For the Kentucky State Police Crime Lab, this may mean demonstrating that the Lab is a law enforcement agency headed by a Captain in the state police; they are not defense experts; confidentiality is not assured; there is a conflict since they have already tested evidence in this case at the request of the police and they now have a vested interest and the integrity of their employee is at stake; that they are clearly Commonwealth experts since they contact the Commonwealth with results and contact the Commonwealth when a defense lawyer talks to them and since they do not talk to the defense alone if the Commonwealth prohibits them from doing so; that they are clearly part of the Commonwealth team since they operate at the direction of the police; see Marshall v. United States, 423 F.2d 1315, 1319 (10th Cir. 1970).

Evidentiary Hearing

You'll probably want an evidentiary hearing to prove this via the testimony of the heads of the cabinets and/or the experts.

You may want to call defense attorneys who have been forced to use KCPC as their expert and who have had breaks of confidentiality.

In Commonwealth v. Destil Eugene Troxell, (Wayne Co.) (Ind. No. 85-CR-108) KCPC violated the judge's order to keep their report confidential. It wound up in the possession of both the jury and Commonwealth Attorney. The defense attorney in Troxell was George Sornberger, Assistant Public Advocate, 224 Cundiff Square, P.O. Box 672, Somerset, Kentucky 42501, (606) 679-8323.

In Commonwealth v. Stevie Rudolph, (Jefferson Co.) (Ind. No. 85-CR-1729) KCPC again violated the order to keep their report confidential by sending it to both the judge and Commonwealth Attorney. The defense attorney in Rudolph was Jay Lambert, Assistant Public Defender, 200 Civic Plaza, Louisville, Kentucky 40202, (502) 625-3800.

At the evidentiary hearing before the federal district judge in Kordenbrock v. Scroggy, 889 F.2d 69 (6th Cir. 1989) Dr. Bland, on cross-examination, testified that as a KCPC psychiatrist in 1980 confidentiality would not be possible and he would not and could not provide the defense with all that Ake constitutionally required. The defense attorney in that case was Ed Monahan. Bland's testimony was:

> Q. Now, as a psychiatrist as Grauman in 19 and 80 and '81 you did not act as a defense expert, did you?
>
> A. Not in an exclusive sense, no, I did not.
>
> Q. You were not available then for defense planning of a case, were you?
>
> A. Only in a limited way. If I -- I certainly would meet with defense attorneys regarding a case but not in the sense that I would be available to a defense attorney at all times or for extensive planning of the case, no.
>
> Q. And you see a real difference between a neutral psychiatrist like you were at Grauman back then and a defense psychiatrist, don't you?
>
> A. Yes. There's a difference.
>
> Q. In fact, you told me it was a real and substantial difference, haven't you.
>
> A. I would say a substantial difference, yes.
>
> Q. The psychiatric investigation in the psychiatric presentation of a defense case is in your opinion improved by having a defense psychiatrist, is it not?
>
> A. In general I would agree with that, yes.
>
> Q. That's because requests by an attorney to investigate a particular area of the defendant or of the case

do not have to be followed by neutral Grauman psychiatrist but would have to be followed by a defense psychiatrist employed by the defense. Isn't that correct?

A. I certainly agree that it wouldn't necessarily have to be followed by a neutral psychiatrist. And it certainly would be expected to be followed by one retained by defense.

Q. And because of that difference favorable information may be developed by a defense psychiatrist that would otherwise not be developed by a neutral psychiatrist at Grauman?

A. Yes, that could happen.

Q. In fact a defense psychiatrist's focus is really different from a neutral psychiatrist's focus in that the defense psychiatrist affirmatively investigates all favorable areas to the defense whereas that's not the -- necessarily the duty of a neutral Grauman psychiatrist?

A. I would say it would be the duty of a Grauman psychiatrist to report -- or to investigate and report all pertinent issues. But that might not and potentially would not include the depth of areas that might be pursued by a defense-only psychiatrist in terms of looking for everything possible in favor for the defendant. A neutral psychiatrist might spend equal time looking at other issues too.

Q. Therefore, as I understand you, a defense psychiatrist's search for favorable evidence is in all likelihood going to be more in depth and more thorough than what would be possible or what would have been the actual practice of psychiatrist at Grauman?

A. I agree that it -- that it certainly in many instances would be more potentially in depth for a defense psychiatrist.

Q. In fact, you see a qualitative and quantitative difference in that regard, don't you?

A. Yes.

Q. Now, if you were ordered by a court to keep all communications confidential with only the defense lawyer, would you have followed that when you were working as a psychiatrist at Grauman?

A. If I were ordered by the court to do so, yes.

Q. And if you were so ordered back then, would those records be available to other people at a later time, for instance people in corrections, the parole board, or if the defendant were later committed on this charge or any other charge, unrelated, would they then remain confidential to all other persons or would they not?

A. It's my opinion that they would not remain confidential.

. . . .

Q. You would not as a psychiatrist at Grauman have assisted defense lawyers in preparing penalty phases, would you?

A. In a limit -- only in a limited way.

Q. As a psychiatrist at Grauman in 1980 to '81 you would not have assisted the defense in preparing its cross-examination of any state psychiatrist that would testify, would you?

A. No.

Q. As a psychiatrist at Grauman you were not required to investigate every area requested or directed by a defense lawyer, were you?

A. No.

Q. I show you, Doctor, what is marked Petitioner's exhibit 1 and ask if you have seen this letter.

A. Yes.

Q. This is a letter written by Dr. Grady Stumbo in May of 19 -- May 19th, 1980. Is that not correct?

A. Yes.

Q. And it was a letter written to me, was it not?

A. Yes.

Q. And at the time Grady Stumbo was the Secretary of the Department for Human Resources, was he not?

A. Yes.

Q. And that was the department in which Grauman was situated?

A. Correct.

Q. Now, Doctor, you readily admit that that letter can be read to mean that Grauman psychiatrist would not examine defendants for anything beyond competency or insanity determination, don't you?

A. It could be so construed.

. . . .

(FTE 2/11/88 29-36) (emphasis added).

Ake requires access to an expert to help determine the viability of a mental defense and:

> to present testimony, and to **assist in preparing the cross-examination of a State's psychiatric witness....** Ake, supra, at 1096 (emphasis added).

j) **supporting information:** make the showing with specific supporting documents and testimony. Affidavits from your proposed experts on the nature of the expertise, the opinion that his assistance is necessary for particular reasons and his detailing that they are aspects of the expertise or opinion of the states expert that need clarifying or retesting.

Affidavits can be obtained from lawyers about the necessity of funds for experts in capital cases and in this case, and from experts on their qualifications, fees and what they can do in this case.

Letters or affidavits can be obtained from state facilities setting out their limitations.

k) **question the state expert on voir dire:** To make or bolster your threshold showing you will want to consider questioning the state's expert prior to his or her testifying out of presence of the jury. This can occur at a pretrial hearing or prior to testifying at trial. This may allow you to prove some things otherwise difficult or impossible to show. It can also give your issue more persuasive clout since you are proving or corroborating through the state's witnesses. The state expert is likely to testify favorably in this area since it is in the expert's self-interest to support the profession's purpose and necessity, and the expert's own worth.

In Brown v. Rice, 693 F.Supp. 381 (W.D. N.C. 1988) at the pretrial funds hearing, the trial judge permitted defense counsel to question state police investigators on the number of investigators assigned to the case, how many hours of investigation, the number of lab technicians and chemists assigned to the case.

Questions like the following are possible areas of inquiry:

IT IS AN EXPERTISE

1. The area you are testifying on is an area of expertise?

2. It's not an area that is within a layperson's knowledge?

3. You've studied a long time and have a lot of experience?

4. What is all the training you've had?

5. Who has trained you?

6. What is all the experience you've had?

7. Your expertise has a lot of tests not within layperson's knowledge?

8. You've conducted those tests in this case?

9. Your opinion is one of an expert's and is based on training, experience and testing, not within competence of laypersons?

10. I'm not qualified to render an expert opinion in this area, am I?

TIME/REASONABLE FEE/AVAILABILITY OF DEFENSE EXPERTS

1. How long have you spent analyzing evidence in this case?

2. It took a long time?

3. What is the going rate for an expert in private practice to do this kind of testing and analysis and testifying?

4. Are there any experts in this state, region or country that can do this kind of testing in criminal cases that do not work for law enforcement agencies?

5. Are there other people as experienced and as capable to do the analysis testing and to render an opinion?

6. Are there experts more experienced than you?

STATE EXPERT NOT NEUTRAL

1. You work for the Kentucky State Police Lab?

2. Your ultimate boss is the Commissioner of State Police?

3. The person in charge of the state Lab system in Kentucky is a Captain in the state police?

4. You refused to talk to me without first notifying the prosecutor, without the prosecutor being present?

5. You do not work at my direction?

6. You test based on police requests?

7. You returned test results back to police?

8. You are not a defense expert?

9. You would not help me cross examine one of your co-workers?

10. [If you know the answer and it is favorable.] How many times have you testified at the request of the prosecution, and how many times at the request of the defense?

POSSIBILITIES OF DIFFERENT RESULTS/OPINION; MORE TESTING POSSIBLE

1. Your expertise involves standard tests?

2. What are they?

3. Which did you do?

4. What other tests could be done but were not?

5. Other experts can do those tests?

6. In doing your tests, you don't always get exactly, identical results each time you do the test on the same sample?

7. The opinion you rendered involves doing tests, observing what is there and what isn't there, analyzing the results and employing a judgmental procedure to reach your conclusion?

8. The art of rendering an opinion, reaching a conclusion involves your professional judgment based on your training, experience, analysis and test results?

9. That's one reason why two experts can disagree?

10. Because their judgments, based on the same data, can be different?

11. It is possible that a different examiner could come to a different conclusion than you, isn't that so?

1) **questions of judge:** if you are denied any or all funds, you may want to ask the judge some questions to make your record better. For instance, you could ask: 1) do you agree that we have the right to experts if "reasonably necessary"; 2) do you agree that we have a right to introduce evidence on pretrial matters, our defense and on mitigating evidence; 3) how can we do that fully and completely without experts; 4) do you agree we have the right to cross-examine the state's expert with the assistance of our expert; 5) what additional do we have to show you to obtain funds for experts; 6) have you ever granted funds for experts before; 7) if you could order the state treasury to pay the bills

instead of your local elected county fiscal court, would you do that in this case?

m) **expert help is reasonably necessary.** Most courts, statutes, and rules have followed the lead of the federal statute's standard of "reasonably necessary." Ake's standard for when a defendant is entitled to the help of a psychiatrist is: "when the mental state of the defendant is seriously in question."

Commonwealth v. Lockley, 408 N.E.2d 834 (Mass. 1980) explains at length its understanding of the meaning of reasonably necessary. Id. at 838.

Use all the above information to convince the judge that the standard used in your state has been met.

Some states have a standard that is much less than "reasonably necessary" or the Ake standard. In State v. Hamilton, 448 So.2d 1007 (Fla. 1984) the court determined that the Florida rule of criminal procedure is "unequivocal that, when counsel for an indigent defendant has 'reason to believe' that his client 'may have been insane at the time of the offense,' the defendant is entitled to have the court appoint one expert to assist in the preparation of his defense." Id. at 1008.

XIII. SAMPLE SUPPORTING AFFIDAVIT OF EXPERT

AFFIDAVIT

I, _____, declare as follows:

1. I am (describe position): _____

_____

_____

2. I am employed by prosecution and defense attorneys as an expert in forensic hair and fiber analysis, firearms examination and tire comparisons.

3. Attached is my resume.

4. I have been contacted by [defense attorney], who represents _____. I have briefly reviewed the attached reports and testimony. The defense attorney wishes to retain me to evaluate laboratory reports of the Kentucky State Police Crime Lab, re-evaluate their results, and do confirmation testing on the hair, blood, semen, tire, fiber and firearms evidence collected in this case and introduced into evidence.

5. Attached is a schedule of my fees. I would expect the testing and analysis to take approximately ____ hours.

6. Hair, fiber, blood, semen, tire and firearms analysis are expertises that require significant knowledge, training and, experience and judgment to understand and apply. They are not matters within the understanding of laypersons.

7. From my experience, there is a real chance that the results and conclusions reached by the KSP Crime Lab are incorrect. Incorrect test results or conclusions could mean that it was not the defendant's hair, fiber, blood, semen, weapon and tires.

8. Results in these areas of expertise, and testing and evaluation depend on the way the tests were conducted, the nature of the sample and other factors.

9. Our lab and myself have the capability to do more testing on the evidence than the testing done by the KSP Lab. These additional tests include: _____

_____

10. I would be able to analyze and testify to the characteristics of the hairs and fibers, the KSP Crime Lab's methodology, their process of examination and their mounting, whether enough hairs and fibers were used and considered; whether there was a presence or absence of any unusual characteristics. I would be able to testify that hairs and fibers are not a positive form of identification; that hairs do not possess a sufficient number of unique individual microscopic characteristics to be positively identified as having originated from a particular person or place to the exclusion of all others. I would be able to testify that hairs and fibers can be similar in all characteristics and not from the same person or place.

11. I would be able to analyze and testify to characteristic of serology examinations, the KSP methodolgy,

their process of examination, and that when there is, as in this case, a Type A secretor victim raped by an O secretor man, swabs taken from her will show A and H blood group substances because she is an A secretor. As a result, nothing can be concluded about the blood group of the perpetrator because the seminal blood group substances are masked by those of the victim's secretions.

More the affiant saith not.

XIV. ALPHABETICAL INDEX OF CASES

CONCLUSION

We know that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has." Griffin v. Illinois, 351 U.S. 12, 19 (1956) (Justice Hugo Black). Many or most criminal cases now are pled or go to trial without the assistance of experts or without properly compensated counsel because the defendant cannot afford them. We have to do better at educating ourselves and judges of the critical nature of expert assistance and fair counsel fees in criminal defense work, and we have to more effectively advocate and obtain funds for experts for our clients on counsle fees for us. Otherwise, "...justice is denied the poor - and represents but an upper-bracket privilege." United States v. Johnson, 238 F.2d 565, 572 (2nd Cir. 1956) (Judge Jerome Frank, dissenting).

This Country's major contribution to the advancement of civilization is that it has a Constitution which has 1) institutionalized fairness and its process, and 2) assured that if fairness and a fair process are not available to everyone, they should not be available to anyone.

This bedrock of fair treatment has its greatest meaning when an indigent person's freedom or his life is at stake at the hands of the state. The degree to which fairness is assured an accused individual is in our hands as criminal defense advocates. The extent to which fairness and its process expands is up to us. The increased access of indigents to funds for experts and fairly compensated counsel in their criminal defense is no small part of the ever expanding concept of process that is due each of us.

APPENDIX A

Prepared for the ABA Bar Information Program by the Spagenberg Group of 1001 Watertown Street, West Newton, Mass., 02165, 617-969-3820

NON-CAPITAL FELONIES

State	Authority	Change	Hourly Rate	Maximum
Alabama	1982 Statute		$20/$40	$1,000
		Alabama Judicial Study Commission: 1990 Proposal	$40/$60	$3,500
Alaska	1982 Court Rule		$40/$40	No max.
		No change		
Arizona	1982 Local Judge		$40/$45	$1,000-$2,500
		1990 Phoenix, Tucson	$45/$50/hr.	No max.
Arkansas	1982 Local Judge -Statute		$50/$50	$350 (Statute)
		No change		
California	1982 Local Judge		$20/$25 to $45/$50	No max
			$45 to $85/hr.	
Colorado	1982 Supreme Ct. Rule		$25/$35	$1,500
		New Supreme Ct. Rule Eff:1/1/91	$45/$50	$5,000
Connecticut	1982 Chief State P.D.		$12.50/hr.	No max
		No change		

State	Authority	Change	Hourly Rate	Maximum
Delaware	1982 Local Judge		$25/$35	No max
		Superior Ct. Rule	$50/hr.	No max.
D.C.	1982 Statute		$20/$30/hr.	$1,000
		No change		
Florida	1982 Local Judge -Statute		$20/$25 to $50/$65	$1,500-$2,000 (statute)
		No change		
Georgia	1982 Local Judge		$15/$20 to $30/$35	$400 to $1,000
		Georgia Indigent Defense Council 9/89	$35/$45/hr.	No max
Hawaii	1982 Statute		None	$750
			$40/$60/hr.	$3,000
Idaho	1982 Local Judge		$30/$30 to $35/$45	No max
			$40/$50/hr.	No max.
Illinois	1982 Statute		$30/$30	$1,000
			$30/$40/hr.	$1,250
Indiana	1982 Local Judge		$30/$30	$1,500
		No change		

State	Authority	Change	Hourly Rate	Maximum
Iowa	1982 Local Judge		$35/$40	No max
			$40 to $80/hr.	No max
Kansas	1982 Kansas Bd. of Supervisors		$20/$30	No max
		State Bd. of Indigent Defense Svcs. Effective 7/1/89	$50/hr.	$5,000
Kentucky	1982 Statute		$25/$35/hr.	$1,250
		1990 General Assembly reviewing rates		
Louisiana	1982 Local Judge		$25/$35/hr.	$1,000
		No change		
Maine	1982 Supreme Ct. Rule		$25/$35/hr.	$1,500
		S.J.C. Order: 2/21/89	$40/hr.	$2,500
Maryland	1982 State P.D.		$20/$25/hr.	$1,000
		Rate varies at discretion of District P.D.'s (12)	$30/$35/hr.	$1,000
Massachusetts	1982 Supreme Ct. Rule		$25/$35/hr.	$1,000
		CPCS Rates:	$25/$35/hr.	No max

State	Authority	Change	Hourly Rate	Maximum
Michigan	1982 Local Judge		$30/$30/hr.	Varies by county
Minnesota	1982 Local Judge		$35/hr.	Varies by county
		No change		
Mississippi	1982 Local Judge -Statute		$20/$30/hr.	$1,000 (Statute)
		2 cases pending St. Supreme Ct.		$5,000
Missouri	1982 State P.D.		$20/$20	$500-$750
		State P.D.	Reasonable & customary	No max
Montana	1982 Local Judge State Supreme Ct.		$20/$30/hr.	$5,000 (St. Supreme Court)
		No change		
Nebraska	1982 Local Judge		$35/hr.	No max.
		1989 Supreme Ct. case computes bill @ $50/hr. Rate varies @ judicial discretion.	$40 to $80/hr.	No max.
Nevada	1982 Statute		$40/$60/hr.	$2,500
		No change		

State	Authority	Change	Hourly Rate	Maximum
New Hampshire	1982 Supreme Ct.		$20/$30/hr.	$1,500
		Petition by state to Supr. Ct. 12/89. Will hold hearings to establish new rates.		
New Jersey	1982 State P.D.		$15/$23/hr.	No max.
		1990 bill pending:	$40/$60/hr.	No max.
New Mexico	1982 State P.D.		$20/$30/hr.	$800
		State P.D.	Varies	$4,000
New York	1982 Statute		$15/$25/hr.	$750
			$25/$40/hr.	$1,200
N. Carolina	1982 Local Judge		$30/$40/hr.	$200-$500
		Recommendation Supr. Ct. Committee	None	$3,000
North Dakota	1982 N.D. Legal Counsel Indigents Commission		$50/$50/hr.	No max.
		No change		
Ohio	1982 State P.D.		$30/$40/hr.	$1,000
		State P.D. may go to $50/$60/hr. in 1990	$40/$50/hr.	$2,000

1/19/90

State	Authority	Change	Hourly Rate	Maximum
Oklahoma	1982 Statute		$40/$40/hr.	$500
		State Bar recommendation/Proposed legislation 1990	$75/hr.	$5,000
Oregon	1982 Statute -Local Judge		$30/$30 (statute)	No max.
		State Bar recommendation to Legislature 1990	$50/hr.	No max.
Pennsylvania	1982 Local Judge Statute		$15/$25/hr.	$800 (Statute)
			$20/$50/hr.	$1,500-$6,000
Rhode Island	1982 Supreme Ct. Rule		$20/$30/hr.	$2,000
			$20/$30/hr.	No max.
S. Carolina	1982 Statute		$10/$15/hr.	$500
		State Bar Blue Ribbon Task Force to Legislature 1990	$40/hr.	$1,200
South Dakota	1982 Local Judge		$30/$40/hr.	$200-$500
		Effective Jan. 1990	$45/hr.	No max.
Tennessee	1982 Statute		$20/$30/hr.	$500
			$20/$30/hr.	$1,000

1/19/90

State	Authority	Change	Hourly Rate	Maximum
Texas	1982 Local Judge		None	No max.
		No change		
Utah	1982 Local Judge		$25/$30/hr.	No max.
			$30 to $75/hr.	No max.
Vermont	1982 Local Judge		$25/$25/hr.	$700
		Supreme Ct. Rule	$25/$30/hr.	$1,000
Virginia	1982 Local Judge -Statute		None	$382 (Statute)
		Supreme Ct. Guidelines	$40/$60	$575
Washington	1982 Local Judge		$30/$30/hr.	$1,000-$2,500
		No change		
W. Virginia	1982 Statute		$20/$25/hr.	$1,000
		Supreme Ct. Decision: Effective 7/1/90	$45/$60/hr.	No max.
Wisconsin	1982 State P.D.		$25/$35/hr.	No max.
			$35/$45/hr.	No max.

State	Authority	Change	Hourly Rate	Maximum
Wyoming	1982 Local Judge		$40/hr.	No max.
		Effective 6/89: State P.D. rules allow $25/$50. P.D. pays $50 across the board.	$50/hr.	No max.

California Appellate Project

345 Franklin Street
San Francisco, CA 94102
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a non-profit corporation established by the State Bar of California

APPENDIX B

February 16, 1990

Honorable John F. Moulds
United States Courthouse, Rm 4025
650 Capitol Mall
Sacramento, California 95814

Dear Judge Moulds:

In response to your request for my thoughts regarding possible benchmarks for attorney compensation in federal habeas corpus death penalty cases, I offer the following observations:

1. CAP currently does not have benchmarks governing federal habeas corpus death penalty cases. (We do have such benchmarks for death penalty appeals before the California Supreme Court, which we have developed over the past five years. Although the fees and expenses requested in each case must always be assessed on an individual basis, these benchmarks have been very useful in establishing a guide to reasonableness and in shaping the expectations of counsel and the court.)

2. We look forward to developing such benchmarks based on our experience in the federal courts during the next two years. To do so, we will need to develop, with the assistance of the courts and the AO, a process for accumulating the relevant data and then fashioning appropriate standards. CAP will be pleased to participate in this process, but we will not be able to formulate standards without access to the predicate information.

3. In the meantime, until we have developed our own data it seems appropriate to refer to the relevant data that has been accumulated from other jurisdictions with more experience in federal habeas corpus litigation. The primary source of this information is Robert Spangenberg of the Spangenberg Group in Massachusetts. Spangenberg's firm has been retained to conduct several surveys regarding the expenditure of attorney time in such cases. They recently conducted a productivity study of the California State Public Defender Office for the National Center for State Courts, so they are also familiar with California practice. I have reviewed their reports, and I have discussed this matter at length with Robert Spangenberg.

4. Based on the information that Spangenberg has gathered, and with the understanding that each case is unique and has to be

evaluated in its own terms, I think the following are plausible guides to use until more California-based empirical data are available:

a. Time needed to conduct one complete round of federal habeas corpus litigation in a typical California case (in which the record is considerably longer than the records in other jurisdictions), based on one pass straight through the federal courts (i.e., assuming denial of first habeas corpus petition, affirmance on appeal, and denial of certiorari)

1. Where state counsel continues on the case: 1250 attorney hours

2. Where new counsel enters the case: 1500 attorney hours

b. Time needed to conduct federal habeas corpus litigation in the district court alone, on a first habeas petition in a typical California case:

1. Continuing counsel: 650 hours

2. New counsel: 900 hours

Thus in a jurisdiction that compensates counsel at a rate of $100-150 per hour, the compensation for continuing counsel in the district court can plausibly be expected to be on the order of $65,000 - $95,000.

5. We have also tried to get a handle on requests for funds for the investigators and experts who are necessary to prepare the habeas corpus petitions. For this analysis we have reviewed all of the requests made in the California Supreme Court and in the federal courts in California in which this information was available to us at CAP. Based on our survey, we have concluded that the following are plausible ranges of requests for funds in a typical case in which the work has not already been performed in state court:

a. Investigation (of innocence, undeveloped mitigation, use of perjured testimony, juror misconduct,etc.): $10,000- 15,000

b. Psychiatric experts (psychiatrists, psychological testing, neurological examinations, etc): $7,000 - $11,000

c. Miscellaneous other experts (forensic experts, attorney experts, etc.): $2,000 - $6,000

Thus we consider a range of $19,000 to $32,000, with a median figure of approximately $25,000, to be a plausible request in a typical California case. This figure is for the work necessary to prepare the petition; if an evidentiary hearing is ordered, there will be additional expenses associated with the testimony of the experts. (I might also suggest that where feasible requests for funds for investigators and experts be reviewed by a magistrate or judge other than the magistrate or judge who will hear the petition. In that way, there will be no appearance of impropriety that might arise where the factfinder has previously been exposed to the ex parte representations and preparatory efforts of one party.)

6. I recognize that expenditures of this magnitude (on the order of $80,000 for continuing counsel and $25,000 for experts and investigators) are not likely to be familiar to the federal judiciary based on its experience with non-capital habeas corpus litigation. Nevertheless, I believe such expenditures are appropriate, and my understanding is that the funding for them is available. In my view, the Anti-Drug Abuse Act of 1988 is a statement that Congress wants both a federal death penalty and the appointment of qualified counsel to handle death penalty representation in the federal courts, and that Congress is prepared to pay for that representation. 21 U.S.C. Section 848,(q)(10), authorizes each federal district court judge to fix compensation and fees and expenses "at such rates or amounts as the court determines to be reasonably necessary to carry out the requirements of [the Act]." Thus Congress has effectively repealed the compensation limits of the Criminal Justice Act with respect to death penalty cases. It has also vested complete discretion with respect to payment in the presiding judicial officer and has eliminated the review by the Chief Judge of the Court of Appeals that takes place under the Criminal Justice Act in all other appointed counsel compensation above certain levels.

I have discussed this matter at length with Ted Lidz, the Chief of the Defender Services Division of the Administrative Office of the United States Courts, and with other members of his staff. They have informed me that the Defender Services

Committee of the Judicial Conference is taking additional steps to ensure that all federal judges are aware that new procedures are in place, that the Defender Services Appropriation for FY 1990 contains funding adequate to pay for anticipated federal habeas corpus litigation in the United States, and that the federal judiciary can therefore rule on defense requests for compensation and expenses based solely on the merits. Because funds are available. such payments will not compromise the funding of the federal defender and CJA panel attorney programs.

7. I am also informed by the AO that, in light of the elimination of the review of attorney compensation by the Chief Judge of the Circuit, the procedures for withholding one-third of interim payments to counsel that are set forth in the Guidelines for the Administration of the Criminal Justice Act, Volume 7, Guide to Judiciary Policies and Procedure, Appendices E and F, are not required for death penalty cases. Interim payments are essential to many lawyers to enable them to accept appointment in these lengthy cases. Withholding a substantial fraction of the interim payments is an administrative burden that undermines the value of this beneficial procedure; it is a helpful development that withholding is no longer necessary in death penalty cases.

8. Finally, I would encourage the scheduling of a meeting between the district court judge and appointed counsel at the outset of each case to discuss their expectations regarding the litigation. This discussion could cover the rate of compensation for lead counsel, the rate of compensation for second counsel, a plausible number of hours counsel might expect to spend on the case, and plausible figures for necessary expert or investigative services. Having everyone on the same wavelength at the start of the case will minimize the prospect of dissatisfaction along the way. I should also note that the Ninth Circuit Judicial Conference recently adopted a resolution providing that before reducing payment on any voucher submitted by appointed counsel, the trial or appellate court shall communicate to the attorney in writing its reasons for making any proposed reduction, and shall offer the attorney on opportunity to respond in writing regarding the propriety and reasonableness of the voucher. Following this procedure is important to counsel, who feel deeply aggrieved by unexplained cuts in their fees and expenses.

There are now 29 California death penalty cases in federal habeas corpus litigation. That number will undoubtedly double in the near future and continue to grow after that. Much needs to be learned to operate a new system of this magnitude efficiently.

I hope the above observations are useful as a preliminary approach to these matters. I assure you that the California Appellate Project is prepared to provide whatever assistance we can to the federal judiciary over the coming years.

Sincerely,

Michael G. Millman

Michael G. Millman
Executive Director

MGM/tc

cc: Chief Judge Robert E. Coyle
Judge Lawrence K. Karlton

Chief Judge William A. Ingram
Judge Charles A. Legge
Judge Robert F. Peckham

Chief Judge Manuel L. Real
Judge Richard A. Gadbois, Jr.

Chief Judge Gordon Thompson, Jr.
Judge William B. Enright

Ted Lidz
Joe Franaszek

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

MICHAEL EUGENE CARTER, WILLIAM CARTER BROOKS, ROBERT PRESLEY, TORY TOLBERT, and WALTER HOLLOWAY, individually and on behalf of all others similarly situated,	
Plaintiffs,	CIVIL ACTION No. 88T-1196E
v.	
JAMES AVARY, in his official capacity as as Circuit Judge of the Fifth Circuit; HOWARD BRYAN, in his official capacity as Circuit Judge of the Fifth Circuit; DALE SEGREST, in his official capacity as Circuit Judge of the Fifth Circuit; JOEL HOLLEY, in his official capacity as District Judge of Chambers County, Alabama; and GUY HUNT, in his official capacity as Governor of the State of Alabama,	SECOND AMENDED COMPLAINT
Defendants.	

NATURE OF THE ACTION

1. This civil action, brought pursuant to 42 U.S.C. § 1983 and the Sixth and Fourteenth Amendments to the United States Constitution, challenges the indigent defense system operated and maintained by the defendants in Chambers County, Alabama.

2. Defendants' practices deny and threaten to continue to deny plaintiffs the effective assistance of appointed counsel to which they are constitutionally entitled. This deprivation of effective assistance of counsel in turn threatens to deny the plaintiffs of their rights to bail, jury trials, speedy trials, fair trials, equal protection, and due process. Plaintiffs seek declaratory and injunctive relief.

JURISDICTION

3. This action arises under 42 U.S.C. § 1983 and the Sixth and Fourteenth Amendments to the United States Constitution. Jurisdiction is invoked pursuant to 28 U.S.C. §§ 1331 and 1343. Plaintiffs' request for declaratory relief is authorized by 28 U.S.C. § 2201.

PARTIES

A. Plaintiffs

4. The plaintiffs in this case are Michael Eugene Carter, William Carter Brooks, Robert Presley, Tory Tolbert, and Walter Holloway. They bring this suit on their own behalf and as class representatives pursuant to Rule 23 of the Federal Rules of Civil Procedure. The class consists of all indigent criminal defendants awaiting trial in Chambers County who have been appointed counsel or are eligible for appointed counsel and all such persons who may be so situated in the future. See Order (Nov. 20, 1989).

B. Defendants

5. James Avary is the Presiding Circuit Judge of the Fifth Judicial Circuit of the State of Alabama. He is sued in his official capacity.

6. Howard Bryan is a Circuit Judge of the Fifth Judicial Circuit. He is sued in his official capacity.

7. Dale Segrest is a Circuit Judge of the Fifth Judicial Circuit. He is sued in his official capacity.

8. Joel Holley is the District Judge of Chambers County. He is sued in his official capacity.

9. Guy Hunt is the Governor of the State of Alabama. He is sued in his official capacity.

10. Regarding all actions set out in this complaint, the defendants have acted and continue to act under color of the laws, rules, customs, and usages of the State of Alabama.

STATEMENT OF FACTS

11. The system of indigent defense used in Chambers County is determined by a majority of the circuit judges of the Fifth Judicial Circuit of the State of Alabama. See Alabama Code § 15-12-2(a)(2). The judges of the Circuit are defendants Avary, Bryan, and Segrest.

12. The presiding circuit judge for the Fifth Judicial Circuit administers the indigent defense system in Chambers County and is authorized to appoint an indigent defense commission. See Alabama Code §§ 15-12-3; 15-12-4(a).

13. Defendants Avary, Bryan, Segrest, and Holley maintain the indigent defense system in Chambers County by ascertaining whether appointment of counsel is necessary, by appointing counsel, and by determining the amount of compensation to be paid to appointed counsel. See Alabama Code §§ 15-12-20; 15-12-21.

14. Defendants Avary, Bryan, Segrest, and Holley have not set guidelines for, or supervised, the operation of the indigent defense system in Chambers County so as to ensure that indigent defendants are afforded effective assistance of counsel.

15. Poor people charged with criminal offenses in Chambers County are not afforded criminal process equal to that afforded people of means.

16. Most lawyers who are appointed to criminal cases under the indigent defense system in Chambers County are not engaged in the regular practice of criminal law and have less criminal law expertise than attorneys who are engaged in the regular practice of criminal law. Many lawyers who are appointed criminal cases under the indigent defense system in Chambers County would like to avoid such appointments.

17. Appointed lawyers under the indigent defense system in Changers County are likely to invest less overall effort in preparing a case for trial than are retained lawyers.

18. Appointed lawyers under the indigent defense system in Chambers County are likely to provide a less vigorous defense for their clients than are retained lawyers.

19. Alabama law provides that for trial work appointed counsel shall be compensated at the rate of $40 per hour for in-court time and $20 per hour for out-of-court time. It imposes caps on the total legal fees payable in particular cases: $1,000 in non-capital cases; and $1,000 for out-of-court work (per attorney) in capital cases (with an additional out-of-court payment for the sentencing hearing) and those involving a possible sentence of life without parole (with no cap for in-court work). See Alabama Code §15-12-21(d).

20. The statutory limits on fees for appointed counsel are inflexible. The statute does not permit a judge to exercise discretion and award additional fees or expenses even in extraordinary cases that require an unusually large amount of legal work.

21. Because of the unreasonably low hourly fees and inflexible caps, the indigent defense system discourages appointed counsel from investing time and resources in meeting with indigent criminal defendants, speaking with them over the telephone, and investigating and researching the underlying issues of their cases. The system discourages appointed counsel from filing standard pre-trial motions and from assisting indigent criminal defendants at hearings, trials, and sentencing proceedings. It encourages appointed counsel to advise indigent criminal defendants to plead guilty rather than assert their right to trial by jury. As a result, the indigent defense system denies and threatens to continue to deny indigent criminal defendants their rights to reasonable bail, jury trials, speedy trials, and fair trials.

22. Criminal defendants are brought before the courts in Chambers County in the name of the State of Alabama, and it is the responsibility of the State to assure that effective assistance of counsel is provided to indigent defendants.

23. As Governor of the State of Alabama, defendant Hunt is invested with the supreme executive power of the State. He has the duty to take care that the laws are faithfully executed. See Alabama Const. art. V, §§ 113, 120.

24. The Governor appoints the Director of Finance, the chief financial officer of the state, who heads the Department of Finance and holds office at the pleasure of the Governor. See Alabama Code § 41-4-30. The Director of Finance -- with the Governor's approval -- appoints the Comptroller, who heads the Division of Control and Accounts. See Alabama Code § 41-4-51.

25. The Comptroller has the duty to review requests for payment and approve payment to appointed counsel for indigent defendants. See Alabama Code §§ 15-12-21(e); 15-12-22(e).

26. The Treasurer of the State of Alabama issues payment only for fees that are approved by the State Comptroller. See Alabama Code §§ 15-12-21(e); 15-12-22(e).

27. Even in cases in which a trial court has approved a higher fee, the Comptroller has failed to authorize payment for fees in excess of the statutory limit.

28. Defendant Hunt is aware of the failures and inadequacies of the indigent defense system but has failed to act to alleviate or remedy them.

CAUSES OF ACTION

29. The actions of defendants Avary, Bryan, Segrest, Holley, and Hunt in operating and maintaining the indigent defense system in Chambers County have violated and threaten to violate the plaintiffs' rights to effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and protected by 42 U.S.C. § 1983.

30. The actions of defendants Avary, Bryan, Segrest, Holley, and Hunt in invidiously discriminating against indigent criminal defendants have violated and threaten to violate plaintiffs' rights to equal protection and due process guaranteed by the Fourteenth Amendment and protected by 42 U.S.C. § 1983.

PRAYER FOR RELIEF

Because plaintiffs face a significant likelihood of substantial and immediate irreparable injury and have no adequate remedy at law, they must call upon equity for effective relief.

WHEREFORE, plaintiffs pray that this Court:

1. Maintain the plaintiff class as previously certified in this action.

2. Declare that the indigent defense system in Chambers County and the actions of defendants Avary, Bryan, Segrest, Holley, and Hunt, in operating the indigent defense system violate plaintiffs' rights guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and protected by 42 U.S.C. § 1983;

3. Order the defendants Avary, Bryan, Segrest, Holley, and Hunt to develop an indigent defense system that will protect plaintiffs' rights guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and protected by 42 U.S.C. § 1983, and that will meet minimum constitutional standards in the provision of criminal defense services;

4. Award plaintiffs reasonable costs and attorneys' fees; and

5. Grant plaintiffs such other relief as the Court deems necessary and just.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

MICHAEL EUGENE CARTER, et al.,

Plaintiffs,

vs.

CHAMBERS COUNTY, ALABAMA, et al.,

Defendants.

CIVIL ACTION NO. 88-T-1196E

CONSENT DECREE

1. This action was filed on November 23, 1988, as a pro se complaint and class action on behalf of indigent criminal defendants in Chambers County, Alabama. On April 12, 1989, counsel appeared on behalf of the named plaintiff and putative class. On May 1, 1989, plaintiffs' counsel filed an amended complaint that challenged the indigent defense system in Chambers County and the conditions of confinement at the Chambers County Jail.

2. The Court has been advised by the parties that subsequent to the filing of the amended complaint the District Court for Chambers County -- which has jurisdiction over pre-indictment criminal defendants -- voluntarily implemented procedures under the supervision of the presiding Circuit Judge of Chambers County aimed at addressing some of the concerns voiced in plaintiffs' amended complaint. The Court specifically notes that on May 25, 1989, the District Court of Chambers County issued standing orders establishing formal policies designed to

ensure that indigent criminal defendants (a) are advised, in a timely manner, of their right to request court appointed counsel, as well as their rights to bail and to preliminary hearings under Alabama law, and (b) are appointed, in a timely manner, counsel in the event they are indigent and request that counsel be appointed.

3. Also subsequent to the filing of the amended complaint, the parties began a good faith and constructive dialogue concerning ways of resolving, without costly proceedings, various of plaintiffs' claims and concerns in light of the implementation of the formal policies described above.

4. It is the purpose of this Decree to acknowledge, for the purposes of this action, those issues which to-date have been capable of amicable resolution.

5. Before entering this Decree as its own order, the Court, after notice, held a fairness hearing, heard evidence concerning the propriety of the terms of the Decree, and considered the views of counsel. Based upon the entire record in this case, and upon the agreement and stipulations of the parties, it is ORDERED, ADJUDGED and DECREED as follows:

JURISDICTION

6. This Court has jurisdiction over the subject matter of this action and the parties hereto.

PARTIES

7. The plaintiffs are the class of all indigent criminal defendants awaiting trial in Chambers County who have been appointed counsel or are eligible for appointed counsel and all such persons who may be so situated in the future.

8. The defendants subject to this Decree are presiding Circuit Judge Avary and District Judge Holley, in their official capacities only. Defendant Circuit Judges Bryan and Segrest are hereby dismissed by consent of the parties as to those claims in the complaint pertaining to the timely appointment of counsel for indigent defendants.

EFFECT OF DECREE

9. Although this Decree settles fewer than all the claims in this case and involves fewer than all the parties, the Court expressly finds that there is no just reason for delay in entering the Decree as a final order.

10. This Decree shall become effective immediately upon the date of its entry. To the extent they have not done so already, the defendants shall implement all provisions contained herein within thirty (30) days.

11. The Court has been advised that the Alabama Supreme Court has recently promulgated Rules of Criminal Procedure to become effective on or about June 1, 1990. These Rules may address some or all of the issues covered in this Decree. At such time as the Rules become effective, either party may petition the Court to modify, alter, amend, or vacate this Decree.

AGREEMENT AND STIPULATIONS

12. The Court finds that the following procedures have been implemented in Chambers County or are scheduled to be implemented within thirty (30) days.

A. By standing order of the District Court of

Chambers County, the Sheriff's Office (or custodian of the Jail) has been directed to make a daily list of all persons who have been detained in the Chambers County Jail during the preceding day and to forward that list to the Office of the District Court Judge.

B. All persons detained in the Chambers County Jail are brought before the District Judge within four days of their arrest for Initial Appearance Hearings. Persons who have been released from custody are also given an opportunity to attend such hearings. As described below, such hearings are held twice a week, and additional time therefor has been set aside by the District Court.

C. At Initial Appearance Hearings, all persons are advised of their bond requirements; their rights to reasonable bail; their rights to preliminary hearings; and their rights to court appointed counsel if they are indigent. In the event that bail has not been set for a defendant, the District Judge determines whether the defendant is entitled to bail and, if so, in what amount. In the event that bail has been set, the District Judge reviews the bail to ensure that it is reasonable. (No inference regarding indigency will be drawn from a defendant's ability to make bail.) In the event that a person requests appointed counsel and is indigent, counsel is appointed and notified of the appointment in a timely fashion. All persons present are to receive handouts substantially similar to Exhibit A hereto and to have explained to them the contents of the handouts.

D. In the event a person is released on bond or otherwise prior to being brought before the District Court for an Initial Appearance Hearing, the person shall, prior to being released, be advised by the Sheriff's Office of the right to appointed counsel, the opportunity to request counsel if indigent at an Initial Appearance Hearing, the right to a preliminary hearing, and the manner in which a preliminary hearing may be secured. All such persons are to receive handouts substantially similar to Exhibit B hereto which they are required to acknowledge. The provisions of this sub-paragraph shall not apply to persons arrested on misdemeanor charges who are released by municipal police departments; however, this exception shall not be construed to in any way to diminish or waive any constitutional or statutory rights of such persons.

E. Those criminal defendants who do not desire appointed counsel or have indicated an intent to retain their own attorney, as well as those defendants that the District Court determines are presently ineligible for appointed counsel, are advised at the Initial Appearance Hearing that they have a continuing right to request counsel in the event their circumstances change. Those defendants are directed to notify the District Court if they wish to exercise their continuing right to request court appointed counsel.

F. To help ensure that the procedures for appointing counsel and advising defendants of their rights function as intended, the Sheriff (or the custodian of the Jail) will forward a list of all inmates at the Jail to the Circuit Court Clerk twice each month. The Clerk will forward the name of any inmate who has not had an Initial Appearance Hearing and is not already scheduled for such a hearing to Judge Holley or Judge Avary. They will ensure that such inmates are afforded the protections set forth above.

JUDGMENT AND DECREE

13. The Court finds that it is in the best interest of justice that the procedures outlined above should be incorporated into a decree that shall be binding on all parties. It is so ordered.

14. The defendants shall maintain records of the implementation of the procedures described above. Such records shall be made available to counsel for plaintiffs for inspection and copying upon reasonable notice.

15. The Court expressly reserves the taxation of costs and attorneys' fees pending a final resolution of all remaining issues in this case.

ORDERED, ADJUDGED & DECREED, this the 24th day of January, 1990.

Myron H. Thompson
United States District Judge

AGREED AS TO FORM:

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