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The Right to Defense Experts

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THE RIGHT TO DEFENSE EXPERTS

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In many criminal cases, securing the services of experts to examine evidence, to advise counsel, and to testify at trial is critical. As the ABA Standards note, "The quality of representation at trial may be excellent and yet valueless to the defendant if his defense requires...the services of a handwriting expert and no such service[ ] is available." Standards Relating to Providing Defense Services 5-1.4 (2d ed. 1980).

Obtaining the services of experts is not difficult for the prosecution. Typically, the prosecution has access to the services of state, county, or metropolitan crime laboratories. *E.g.,* Kan. Stat. Ann. § 21-2502 (1981); La. Rev. Stat. Ann. § 33-1559.1 (West Supp. 1982); Ohio Rev. Code Ann. § 307.75 (Baldwin 1978). In addition, federal forensic laboratories often provide their services to state law enforcement agencies. For example, the services of the FBI Laboratory are "available without charge to all duly constituted state, county, and municipal law enforcement agencies of the United States and its territorial possessions." Williams, *The FBI Laboratory—Its Availability and Use by Prosecutors from Investigation to Trial,* 28 U. Kan. City L. Rev. 95, 99 (1960). *See also* Federal Bureau of Investigation, Handbook of Forensic Science 6 (Rev. ed. 1979). These services include both the examination of evidence and the court appearance of the expert.

Such services are generally not available to criminal defendants. This may account for the disparity between the defense and prosecution use of experts. The voiceprint cases illustrate this problem. As one study noted: "A striking fact about the trials involving voicegram evidence to date is the very large proportion in which the only experts testifying were those called by the state." National Academy of Sciences, On the Theory and Practice of Voice Identification 49 (1979). *See also* People v. Chapter, 13 Crim. L. Rep. 2479 (Cal. Super. Ct. 1973) ("In approximately eighty percent of the twenty-five [voiceprint] cases in which such expert testimony/opinion was admitted there was no opposing expert testimony on the issue of reliability and general acceptability of the scientific community....").

A number of statutory provisions, state and federal, attempt to provide expert assistance to indigent criminal defendants. In addition, some courts have recognized a constitutional right to expert assistance. Finally, trial courts have the authority to appoint experts to assist them.

STATUTORY PROVISIONS

Federal

In federal trials, the Criminal Justice Act provides for expert assistance for indigent defendants. Section (e)(1) of the Act reads:

> 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 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. 18 U.S.C. § 3006(A)(e)(1) (1976).

See generally Oaks, *Obtaining Compensation and Defense Services Under the Federal Criminal Justice Act,* in 1 Criminal Defense Techniques ch. 7 (1069); 3 C. Wright, Federal Practice and Procedure § 740 (1969); Annot., 6 A.L.R. Fed. 1007 (1971). The Act limits expenses for expert services to $300.00 unless the court certifies that a greater amount is "necessary to provide fair compensation for services of an unusual character or duration." 18 U.S.C. § 3006(A)(e)(3) (1976).

The general purpose of the Criminal Justice Act is to "achieve more meaningful and effective representation for defendants in Federal criminal cases." H.R. Rep. No. 1546, 91st Cong., 2d Sess. 4, *reprinted in* 1970 U.S. Code Cong. & Ad. News 3982, 3984. In interpreting section (e), the courts have identified a number of purposes: (1) "to

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redress the imbalance in the criminal process when the resources of the United States Government are pitted against an indigent defendant," U.S. v. Durant, 545 F.2d 823, 827 (2d Cir. 1976); (2) "to place indigent defendants as nearly as may be on a level of equality with nonindigent defendants in the defense of criminal cases," U.S. v. Tate, 419 F.2d 131, 132 (6th Cir. 1969); and (3) "to accord federal prisoners full constitutional rights under the Due Process and the Sixth Amendment." Mason v. Arizona, 504 F.2d 1345, 1352 (9th Cir. 1974), *cert. denied,* 420 U.S. 936 (1975).

A defendant seeking funds under the Act must meet a two-pronged test: "(1) The accused must satisfy the court that financial inability prevents him from obtaining the services he requests; and (2) The accused must show need for such services to present an adequate defense." U.S. v. Schultz, 431 F.2d 907, 908 (8th Cir. 1970). The most common type of expert requested pursuant to the statute is the psychiatrist in insanity defense cases. *E.g.,* U.S. v. Reason, 549 F.2d 309 (4th Cir. 1977); U.S. v. Bass, 477 F.2d 723 (9th Cir. 1973). *See generally* Comment, *Developing Standards for Psychiatric Assistance for Indigents Under the Criminal Justice Act,* 59 Iowa L. Rev. 726 (1974); Note, *Criminal Procedure: The Indigent's Right to Psychiatric Assistance at Trial,* 20 Wayne L. Rev. 1365 (1974); Note, *The Criminal Justice Act of 1964—The Defendant's Right to an Independent Psychiatric Examination,* 28 Wash. & Lee L. Rev. 443 (1971); Annot., 40 A.L.R. Fed. 707 (1978). Other requests have involved polygraph examiners, U.S. v. Penick, 496 F.2d 1105 (7th Cir. 1974), *cert. denied,* 419 U.S. 897 (1974); psychologists, U.S. v. Sims, 617 F.2d 1371 (9th Cir. 1980); fingerprint experts, U.S. v. Durant, 545 F.2d 823 (2d Cir. 1976); and handwriting examiners, U.S. v. Sailer, 552 F.2d 213 (8th Cir.), *cert. denied,* 431 U.S. 959 (1977). *See also* U.S. v. Moss, 544 F.2d 954 (8th Cir. 1976), *cert. denied,* 429 U.S. 1077 (1977) (optometrist); U.S. v. Harris, 542 F.2d 1283 (7th Cir. 1976) (clinical psychologist to assist in jury selection and request for urban sociologist).

Both the application for defense services and the proceedings to determine whether to grant the request are ex parte. As one court has noted, "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." Marshall v. U.S., 423 F.2d 1315, 1318 (10th Cir. 1970). In effect, the provision permits the expert to "be a partisan witness. His conclusions need not be reported in advance of trial to the court or to the prosecution." U.S. v. Bass, 477 F.2d 723, 726 (9th Cir. 1973).

The Act entitles indigent defendants to expert "services necessary for an adequate defense." 18 U.S.C. § 3006(A)(e) (1976). This standard has been interpreted by a number of courts. The Ninth Circuit has held that "[t]he statute requires the district judge to authorize defense services when the defense attorney makes a timely request in circumstances in which a reasonable attorney would engage such services for a client having independent financial means to pay for them." U.S. v. Bass, 477 F.2d 723, 725 (9th Cir. 1973). This includes "pretrial and trial assistance to the defense as well as potential trial testimony." *Id.* at 726. Other courts have adopted this interpretation and added further elaboration. *See* U.S. v. Armstrong, 621 F.2d 951 (9th Cir. 1980); U.S. v. Sims, 617 F.2d 1371 (9th Cir. 1980); U.S. v. Durant, 545 F.2d 823, 827 (2d Cir. 1976); Brinkley v. U.S., 498 F.2d 505, 509-10 (8th Cir. 1974). For example, the Second Circuit has stated that "'[n]ecessary' should at least mean 'reasonably necessary,' and 'an adequate defense' must include preparation for cross-examination of a government expert as well as presentation of an expert defense witness." U.S. v. Durant, 545 F.2d 823, 827 (2d Cir. 1976). Thus, the admissibility of an expert's testimony is not the only relevant factor in considering a request for a defense expert under the statute. U.S. v. Sims, 617 F.2d 1371, 1375 n.3 (9th Cir. 1980).

State

A number of state statutes and rules also provide for expert assistance for indigent defendants. These provisions, however, differ in many respects. Some explicitly provide for the services of experts, Minn. Stat. Ann. § 611.21 (West Supp. 1982), while others mention only investigative services. Alaska Stat. § 18.85.100 (1981). Still others refer merely to the reimbursement of reasonable or necessary expenses incurred by attorneys representing indigent defendants. Colo. Rev. Stat. § 21-1-105 (1973).

The coverage of these provisions also differs with respect to the type of crime charged. Some are limited to felony or capital cases, *e.g.,* Fla. Stat. Ann. § 914.06 (West 1973) (felony cases); Ga. Code Ann. § 27-3001(a) (1978) (capital cases). An Ohio statute is limited to controlled substance prosecutions. Ohio Rev. Code Ann. § 2925.51 (Baldwin 1979). Moreover, some statutes provide for the payment of reasonable expenses, Fla. Stat. Ann. § 914.06 (West 1973), while others specify a maximum amount, Ga. Code Ann. § 27-3001(a) (1978) ($500). A number of the latter statutes provide for expenses above the maximum in some circumstances. N.H. Rev. Stat. Ann. § 604-A:6 (1974) ($300 except in extraordinary circumstances). The procedures specified for obtaining expert assistance also vary. A number of statutes follow the Criminal Justice Act and provide for ex parte proceedings. *E.g.,* Kan. Stat. Ann. § 22-4508 (1981); Minn. Stat. Ann. § 611.21 (West Supp. 1982). Other statutes contain no such provision.

CONSTITUTIONAL REQUIREMENTS

The right of an indigent defendant to the services of expert witnesses may be based on several different constitutional grounds: effective assistance of counsel, equal protection, due process, or compulsory process. The courts, however, are divided over this issue. Annot., 34 A.L.R. 3d 1256 (1970). *See generally* Margolin & Wagner, *The Indi-*

gent Criminal Defendant and Defense Services: A Search for Constitutional Standards, 24 Hastings L.J. 647 (1973); Note, *The Indigent's Right to an Adequate Defense: Expert and Investigational Assistance in Criminal Proceedings,* 55 Cornell L. Rev. 632 (1970); Note, *Right to Aid in Addition to Counsel for Indigent Criminal Defendants,* 47 Minn. L. Rev. 1054 (1963).

The U.S. Supreme Court has considered the issue only once. In U.S. ex rel. Smith v. Baldi, 344 U.S. 561 (1953), a murder defendant argued that "the assistance of a psychiatrist was necessary to afford him adequate counsel" in the presentation of his insanity defense, and thus the state was obligated to provide such assistance. In rejecting this argument, the Court stated, "We cannot say that the State has that duty by constitutional mandate." *Id.* at 568. The precedential value of *Baldi,* however, seems questionable. First, the case was decided in 1953, well before the right to counsel and the compulsory process clauses were applied directly to the states and before more recent cases delineating the scope of equal protection and due process rights were decided. Second, two defense psychiatrists did testify at the defendant's trial. Immediately after writing that the duty to provide expert assistance was not compelled by "constitutional mandate," the Court wrote: "As we have shown, the issue of petitioner's sanity was heard by the trial court. Psychiatrists testified. That suffices." *Id.* This may indicate only that the defendant did not have a right to an *additional* expert witness.

Effective Assistance of Counsel

In Gideon v. Wainwright, 372 U.S. 335 (1963), the U.S. Supreme Court held the Sixth Amendment right to counsel applicable to the states. Accordingly, the state must provide counsel to indigent defendants. As the Court noted in *Gideon,* "[I]n our adversary system of criminal justice, any person hailed into court who is too poor to hire a lawyer cannot be assured a fair trial unless counsel is provided for him." *Id.* at 344. The right to counsel includes the right to effective assistance of counsel. Cuyler v. Sullivan, 446 U.S. 335 (1980); Holloway v. Arkansas, 435 U.S. 475 (1978). Several courts have found ineffective assistance where defense counsel has failed to obtain the services of expert witnesses. "The failure of defense counsel to seek such assistance when the need is apparent deprives an accused of adequate representation in violation of his sixth amendment right to counsel." Proffitt v. U.S., 582 F.2d 854, 857 (4th Cir. 1978), *cert. denied,* 447 U.S. 910 (1980), *Accord* U.S. v. Fessel, 531 F.2d 1275, 1279 (5th Cir. 1976) ("when an insanity defense is appropriate and the defendant lacks funds to secure private psychiatric assistance, it is the duty of his attorney to seek such assistance through the use of [the Criminal Justice Act].").

A number of courts have recognized that the right to effective assistance of counsel places an affirmative duty upon the state to provide expert assistance to indigent defendants. *See* Hintz v. Beto, 379 F.2d 937, 941 (5th Cir. 1967) ("effective assistance of counsel . . . may necessitate a psychiatric examination of a defendant."); Greer v. Beto, 379 F.2d 923, 925 (5th Cir. 1967) (state policy of not providing psychiatric experts for defense "cannot . . . avoid the federal constitutional right to the effective assistance of counsel."); *In re* Ketchell, 68 Cal.2d 397, 399, 438 P.2d 625, 627, 66 Cal. Rptr. 881, 883-84 (1968); People v. Worthy, 109 Cal. App.3d 514, 167 Cal. Rptr. 402 (1980); State v. Rush, 46 N.J. 399, 217 A.2d 441 (1966); State v. Second Judicial District Court, 85 Nev. 241, 453 P.2d 421 (1969). As one court has noted, "[T]he right to counsel is meaningless if the lawyer is unable to make an effective defense because he has no funds to provide the specialized testimony the case requires." Bush v. McCollum, 231 F. Supp. 560, 565 (N.D. Tex. 1964), *aff'd,* 344 F.2d 672 (5th Cir. 1965).

The leading case is Williams v. Martin, 618 F.2d 1021 (4th Cir. 1980), in which an indigent murder defendant requested the appointment of an independent forensic pathologist to determine the victim's cause of death. The request was denied by the state trial court. In granting habeas relief, the Fourth Circuit based its decision, in part, on the right to counsel. "There can be no doubt that an effective defense sometimes requires the assistance of an expert witness." *Id.* at 1025. Under this theory, expert assistance would be required if necessary for counsel to render reasonably effective assistance; that is, "whenever the expert services are necessary to the preparation and presentation of an adequate defense." Proffitt v. U.S., 582 F.2d 854, 857 (4th Cir. 1978), *cert. denied,* 447 U.S. 910 (1980).

Equal Protection

The equal protection argument for the appointment of defense experts had its genesis in Griffin v. Illinois, 351 U.S. 12 (1956), in which an indigent defendant challenged a state practice of conditioning appellate review upon the availability of a transcript that the defendant could not afford. The Supreme Court held that failure to provide a free transcript denied the indigent defendant due process and equal protection. "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Id.* at 19. Douglas v. California, 372 U.S. 353 (1963), extended the *"Griffin* principle" to the appointment of counsel for a first appeal as of right. Other cases also echoed this principle. *"Griffin v. Illinois* and its progeny established the principle that the State must, as a matter of equal protection, provide indigent prisoners with the basic tools of an adequate defense or appeal, when those tools are available for a price to other prisoners." Britt v. North Carolina, 404 U.S. 226, 227 (1971).

Several courts have relied on this line of cases in recognizing an indigent's right to expert assistance. For example, one court has written: "It is obvious that only [the defendant's] inability to pay for the services of a psychiatrist prevented a proper presentation of his case. The Supreme Court has unmistakably held that in criminal proceedings it will not tolerate discrimination between indigents and those who possess the means to protect their rights." Jacobs v. U.S., 350 F.2d 571, 573 (4th Cir. 1965). The leading case is Williams v. Martin, 618 F.2d 1021 (4th Cir. 1980), in which an indigent defendant requested the services of a forensic pathologist to evaluate the victim's cause of death in a homicide prosecution. The Fourth Circuit held that the trial court's refusal to appoint an expert "denied [the defendant] equal protection of the law." *Id.* at 1027. According to the court, the standard for determining whether expert assistance is constitutionally required is "(a) whether a substantial question requiring expert testimony arose over the cause of death, and (b) whether Williams' defense could be fully developed without professional assistance." *Id.* at 1026. The court's examination of the record revealed that a substantial question about the cause of death did exist and that the absence of an expert witness hampered the development of this defense. In this regard, the court held that "[i]t is not incumbent upon Williams to prove...that an independent expert would have provided helpful testimony at trial. An indigent prisoner...should not be required to present proof of what an expert would say when he is denied access to an expert." *Id.* at 1026-27.

The principal problem with this line of cases is Ross v. Moffitt, 417 U.S. 600 (1974), which commentators believe substantially undercuts the *Griffin-Douglas* rationale. *See* L. Tribe, American Constitutional Law 1119 (1978) *(Douglas* "effectively sterilized" in *Ross);* Kamisar, Poverty, Equality, and Criminal Procedure: From Griffin v. Illinois and Douglas v. California to Ross v. Moffitt, in National College of District Attorney, Constitutional Law Deskbook 1-78 (3d ed. 1978). *Ross* involved the appointment of counsel for discretionary appeals. The Supreme Court held that a state practice not to appoint counsel in such cases satisfied the equal protection guarantee. According to the Court, the equal protection clause "does not require absolute equality or precisely equal advantages." 417 U.S. at 612. Although the Court recognized the disadvantage an indigent suffered in comparison with a nonindigent in this context, it held that the "duty of the State...is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process." *Id.* at 616. Thus, the focus of the Court's analysis was not the disparity between indigent and nonindigent, but whether the indigent had an "adequate opportunity" to present his case. This approach smacks more of a due process than an equal protection analysis. *See* Kamisar, *supra,* at 1-101. Earlier in the opinion the Court had pointed out that equal protection analysis "emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable," whereas due process "emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated." 417 U.S. at 609.

Although *Ross* weakens the equal protection argument for expert assistance, it does not completely undercut it. Without an expert witness, an indigent may not have an "adequate opportunity" to present a defense.

Due Process

There are several lines of due process analysis that may support the right to defense experts. First, a defendant has a due process right to present a defense. As the Supreme Court has noted, "Few rights are more fundamental than that of an accused to present witnesses in his own defense." Chambers v. Mississippi, 410 U.S. 284, 302 (1973). An indigent defendant may need the services of an expert to present a defense. The leading case is Little v. Streater, 452 U.S. 1 (1981), in which an indigent defendant in a paternity action argued that the state's failure to provide funds for blood grouping tests deprived him of due process. The Supreme Court agreed. Referring to paternity actions as "quasi-criminal," the Court applied a three-step analysis. First, the Court identified the "private interests at stake"—the financial burden on the defendant if he is adjudged to be the father and the creation of a parent-child relationship. The Court found these interests to be substantial. Second, the Court considered the "risk that the procedures used will lead to erroneous results and the probable value of the suggested procedural safeguard." Here, the Court held that "access to blood grouping tests for indigent defendants... would help to insure the correctness of paternity decisions...." *Id.* at 14. Third, the Court considered the "governmental interests affected." Although the Court recognized the state's financial interest if required to provide blood tests, it did not find that interest to be significant. In sum, the Court found that the state's failure to provide funds for blood grouping tests deprived the defendant of his due process right to "a meaningful opportunity to be heard." *Id.* at 16.

Applying these three elements to a case in which an indigent defendant in a criminal case requests expert assistance is straightforward. First, a criminal defendant's interest in a criminal prosecution would be significantly greater than a civil defendant's stake in a paternity action. Second, the denial of the use of scientific evidence that has been recognized as reliable would create a substantial risk of erroneous results. Third, the state's interest, as in *Streater,* is financial. In many

cases the expense would be greater in a criminal case than in a paternity case, but it is doubtful that such an interest would outweigh the defendant's interest in liberty.

A second due process argument is based on the state's providing expert assistance to the prosecution while denying such assistance to the defense. "'Due process' emphasizes fairness between the State and the individual dealing with the State...." Ross v. Moffitt, 417 U.S. 600, 609 (1974). Thus, in discussing the right to expert assistance under the Criminal Justice Act, one court has noted: "If the fairness of our system is to be assured, indigent defendants must have access to minimal defense aids to offset the advantage presented by the vast prosecutorial and investigative resources available to the Government." U.S. v. Hartfield, 513 F.2d 254, 258 (9th Cir. 1975). *See also* U.S. v. Stifel, 433 F.2d 431, 441 (6th Cir. 1970), *cert. denied,* 401 U.S. 994 (1971) ("[I]f the government sees fit to use this time consuming expensive means of fact-finding [neutron activation analysis], it must both allow time for a defendant to make similar tests, and in the instance of an indigent defendant, a means to provide for payment for same.").

A third due process argument centers on the prosecutor's duty to disclose favorable material defense evidence under Brady v. Maryland, 373 U.S. 83 (1963). A number of courts have regarded the failure of the state to provide expert assistance as a denial of the right to present exculpatory defense evidence. Thus, one court has written: "[T]he denial of a reasonable request to obtain the services of a necessary psychiatric witness is effectually a suppression of evidence violating the fundamental right of due process." U.S. *ex rel.* Robinson, 345 F.2d 691, 695 (7th Cir. 1965), *aff'd in part, remanded in part on other grounds,* 383 U.S. 375 (1966). *Accord* Bowen v. Eyman, 324 F. Supp. 339, 340 (D. Ariz. 1970) ("refusal to run the tests is tantamount to a suppression of evidence such as there was in *Brady*...").

Compulsory Process

In Washington v. Texas, 388 U.S. 14 (1967), the U.S. Supreme Court held that the compulsory process clause applied in state trials. Moreover, the Court adopted a liberal view of the clause; it was not limited to the right to subpoena witnesses, but also included the right to present defense evidence. "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." *Id.* at 19. Although *Washington* did not involve expert witnesses, "it is scarcely conceivable that defendants could be constitutionally denied the opportunity to call experts to give opinion evidence about such matters as fingerprints, bloodstains, sanity, and other matters that routinely arise in criminal litigation." Western, *Compulsory Process II,* 74 Mich. L. Rev. 192, 203 (1975).

A number of courts have based a defendant's right to expert testimony on the compulsory process right. In Flores v. Estelle, 492 F.2d 711 (5th Cir. 1974), for example, the defendant attempted to elicit expert opinion testimony from a state toxicologist who had been subpoenaed by the defense. The expert refused to give an opinion because he had not been retained as an expert witness and the trial court declined to require him to testify. The state and federal courts which reviewed the case agreed "that the trial court erred in refusing to require [the expert] to testify, thereby depriving Flores of effective compulsory process for obtaining witnesses in his favor, *Washington v. Texas*...." *Id.* at 712.

The leading case is People v. Watson, 36 Ill.2d 228, 221 N.E.2d 645 (1966), in which an indigent forgery defendant requested the appointment of a handwriting expert. The Illinois Supreme Court held that the refusal to appoint the expert violated the defendant's right to compulsory process:

> The court recognizes that there is a distinction between the right to call witnesses and the right to have these witnesses paid for by the government, but in certain instances involving indigents, the lack of funds with which to pay for the witness will often preclude him from calling that witness and occasionally prevent him from offering a defense. Thus, although the defendant is afforded the shadow of the right to call witnesses, he is deprived of the substance. *Id.* at 233.

The court went on to conclude "[w]hether it is necessary to subpoena witnesses in order to assure a fair trial will depend upon the facts in each case." *Id.* at 234. *Watson* was such a case because the "issue of handwriting goes to the heart of the defense" and the expert's testimony "may have been crucial" to the defense. *Id.*

COURT-APPOINTED EXPERTS

A trial court has inherent authority to appoint expert witnesses. *See* Advisory Committee's Note, Fed. R. Evid. 706 ("The inherent power of a trial judge to appoint an expert of his own choosing is virtually unquestioned."); C. McCormick, Evidence § 17 (2d ed. 1972); Sink, *The Unused Power of a Federal Judge to Call His Own Expert Witnesses,* 29 S. Cal. L. Rev. 195 (1957). This authority has been codified in statutes and court rules in many jurisdictions. *See* 2 J. Wigmore, Evidence § 563 (Chadbourn rev. 1979) (listing rules and statutes). For a discussion of Ohio law on this subject, *see* P. Giannelli, Ohio Evidence Manual § 702.07 (1982).

Federal Evidence Rule 706(a) provides:

> The court may on its own motion or on the motion of any party enter an order 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 par-

ties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless he consents to act. A witness so appointed shall be informed of his duties by the court in writing, a copy of which shall be filed with the clerk, or 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; his deposition may be taken by any party; and he may be called to testify by the court or any party. He shall be subject to cross-examination by each party, including a party calling him as a witness.

Rule 706(c) provides that the decision whether to disclose to the jury that the expert has been appointed lies within the discretion of the trial court. Rule 706(d) recognizes the right of the parties to call their own experts, notwithstanding the appointment of an expert by the court. *See generally* 3 D. Louisell & C. Mueller, Federal Evidence § 404-06 (1979); 3 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 706[01] (1981).

There are several disadvantages associated with the court appointment of expert witnesses. First, if the jury is informed of the appointment, the witness may be cloaked with the authority of the court, at least in the eyes of the jury. The Advisory Committee's Note to Rule 706 acknowledges this problem: "court appointed experts [may] acquire an aura of infallibility to which they are not entitled. . . ." Second, the motion for the appointment of an expert may disclose a defense theory previously unknown to the prosecution. In contrast, the motion for the appointment of a defense expert under the Criminal Justice Act is ex parte, thus precluding prosecution discovery in most cases.

* * *

RECENT DEVELOPMENTS

The U.S. Supreme Court docket for the 1982-83 term has begun to take shape. The Court has granted review in the following cases.

Arrest, Search and Seizure

Illinois v. Gates, 102 S. Ct. 997 (1982): (1) Whether detailed information provided by an anonymous informer, coupled with government corroboration of information, provides probable cause for issuance of a search warrant; (2) Whether the Court should recognize a good faith exception to the exclusionary rule.

Kolender v. Lawson, 102 S. Ct. 2033 (1982): Whether an individual may be punished for refusing to identify himself during a lawful investigatory stop.

Texas v. Brown, 102 S. Ct. 2926 (1982): Whether warrantless seizure of a bulging tied-up balloon, which the police officer, based on his professional experience with illicit narcotics trade, allegedly had probable cause to believe contained illegal drugs, is valid under the Fourth Amendment.

Florida v. Brady, 102 S. Ct. 2266 (1982): Whether the open fields doctrine is applicable to an 1,800-acre open field that is fenced by barbed wire, locked, and posted.

U.S. v. Place, 102 S. Ct. 2901 (1982): Whether police may seize and detain personal luggage reasonably suspected of containing narcotics for the purpose of inspection by a narcotics detection dog.

U.S. v. Knotts, 31 102 S. Ct. 2956 (1982): Whether beeper surveillance of the location or movement of an object that is within a private area requires a warrant.

Jones v. U.S., 102 S. Ct. 999 (1982): Whether the defendant has the burden of proof for release after an insanity acquittal commitment.

Florida v. Royer, 102 S. Ct. 631 (1982): Whether a stop at an airport based on the drug courier profile is valid under the Fourth Amendment.

Right to Counsel

Morris v. Slappy, 102 S. Ct. 1748 (1982): Whether the Sixth Amendment entitles a criminal defendant to demand continued representation by the same public defender who represented him earlier in the proceedings.

Jones v. Barnes, 102 S. Ct. 2902 (1982): Whether assigned counsel is required to raise every nonfrivolous issue requested by a defendant on appeal from conviction.

Prosecutorial Misconduct

U.S. v. Hastings, 102 S. Ct. 2232 (1982): Whether the harmless error doctrine should be applied to a prosecutor's comment on defendant's failure to testify.

Trial Proceedings

Pillsbury Co. v. Conboy, 102 S. Ct. 998 (1982): Whether civil deposition testimony which repeats prior testimony given under a use immunity statute is information directly or indirectly derived from such testimony and whether such testimony is unavailable for use against the deponent in any subsequent prosecution.

South Dakota v. Neville, 102 S. Ct. 2232 (1982): Whether the evidentiary use of a drunk driver's refusal to take a blood-alcohol test violates the Fifth Amendment.