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).


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
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).


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 assure 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 circum-

stances 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


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-

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, "[t]he adversary system of criminal justice, any person haled 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. 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 has 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, means to provide for payment for same.").

A third due process argument centers on the prosecutor's duty to disclose favorable material 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: "If the denial of expert assistance is tantamount to a suppression of evidence such as is present in Brady v. Maryland, 373 U.S. 83 (1963), the failure of the state to provide expert assistance is tantamount to a suppression of evidence such as is present in Brady v. Maryland, 373 U.S. 83 (1963)", which the court recognized that there is a distinction between the right to call witnesses and the right to have the defense 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 improve his case. 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 "whether it is necessary to subpoena witnesses in order to assure a fair trial will depend upon 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 ap-
pointed 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 op-
portunity to participate. A witness so appointed shall
advise the parties of his findings, if any; his deposi-
tion may be taken by any party; and he may be called
to testify by the court or any party. He shall be sub-
ject 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 ap-
pointed lies within the discretion of the trial court.
Rule 706(d) recognizes the right of the parties to
call their own experts, notwithstanding the ap-
pointment of an expert by the court. See generally
3 D. Louisell & C. Mueller, Federal Evidence §
404-06 (1979); 3 J. Weinstein & M. Berger, Weins-

There are several disadvantages associated with
the court appointment of expert witnesses. First, if
the jury is informed of the appointment, the wit-
ness 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 en-
titled . . . .” Second, the motion for the appoint-
ment of an expert may disclose a defense theory
previously unknown to the prosecution. In con-
trast, the motion for the appointment of a defense
expert under the Criminal Justice Act is ex parte,
thus precluding prosecution discovery in most
cases.

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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 corrobo-
ration 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 refus-
ing to identify himself during a lawful investigatory
stop.

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.

the open fields doctrine is applicable to an
1,800-acre open field that is fenced by barbed wire,
locked, and posted.

police may seize and detain personal luggage rea-
sonably suspected of containing narcotics for the
purpose of inspection by a narcotics detection
dog.

beeper surveillance of the location or movement of
an object that is within a private area requires a
warrant.

defendant has the burden of proof for release after
an insanity acquittal commitment.

stop at an airport based on the drug courier profile
is valid under the Fourth Amendment.

Right to Counsel

the Sixth Amendment entitles a criminal defendant
to demand continued representation by the same
public defender who represented him earlier in the
proceedings.

assigned counsel is required to raise every nonriv-
olous issue requested by a defendant on appeal
from conviction.

Prosecutorial Misconduct

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.

Whether the evidentiary use of a drunk driver’s
refusal to take a blood-alcohol test violates the
Fifth Amendment.