



Funding Expert Witnesses for Indigent Defendants

A Model for Unequal Protection

By **Jim Kolosowsky**

If liberty and equality, as is thought by some, are chiefly to be found in democracy, they will be best attained when all persons alike share in government to the utmost. — Aristotle

“[T]o a serious extent, the scales of justice in this country are weighted against the poor. Each year thousands are confronted with obstacles to obtaining justice because they are financially unable to obtain adequate defense.”¹ The Criminal Justice Act of 1964 was a direct response to the obvious inadequacies of indigent defense. Although the act eliminated many of the obstacles faced by indigent defendants in federal courts, some remain. Michigan requirements for obtaining expert assistance at public expense often deprive indigent defendants of due process and equal protection.

On February 24, 2014, the United States Supreme Court issued a per curiam reversal in the case of Alabama death-row inmate Anthony Ray Hinton. Applying “a straightforward application of [its] ineffective-assistance-of-counsel precedents,” the Court held that it is unreasonable for an attorney to fail to seek all available funding for a necessary expert witness.² Therefore, it is more important than ever that defense counsel seek adequate funding for expert assistance in cases involving indigent defendants.

Under Michigan law, however, a defendant is entitled to the appointment of an expert at public expense only if he or she demonstrates that there is a material witness in his or her favor without whose testimony the defendant cannot proceed safely to trial.³ To make this showing, defense counsel representing an indigent defendant must demonstrate to the court (and the prosecutor) a nexus between the facts of the case and the need for an expert.⁴

No defendant in a criminal trial is required to disclose trial strategy. However, requiring an indigent defendant to explain why the facts of the case show a need for an expert often violates this core tenet of due process and equal protection.

Federal courts recognize a constitutional right to an ex-parte hearing for the purpose of allowing defendants to make an initial showing of the need for an expert. However, no such protection is afforded to indigent defendants in Michigan's criminal courts. As such, they are deprived certain fundamental constitutional protections merely because they seek expert assistance. To truly be effective in the state criminal courts, counsel must demand an ex-parte hearing when expert assistance is sought at public expense.

Determine if your client is, in fact, indigent; it's not as clear as you may think

In some cases, determining whether a defendant is indigent is easy: the defendant has filed an affidavit of indigence, and you accepted the appointment from the court. In other cases, it is not so clear: you have been retained by the defendant's family members while the defendant is in custody with no assets or ability to earn income. In either case, it is important for defense counsel to demand a hearing to have the court rule on the issue of whether the defendant is, in fact, indigent.

There are no bright-line rules governing the determination of indigence.⁵ Deciding whether a defendant is indigent is done on a case-by-case basis and is guided by factors set forth in MCR 6.500(B). The fact that a defendant's family is able to procure funds to retain a lawyer does not inexorably lead to the conclusion that the defendant cannot be adjudicated indigent. Indigence is determined by the defendant's financial ability—not that of friends and relatives.⁶

As a cautionary note, however, the court will consider when the attorney was retained and when the defendant claimed indigence. The court is more likely to find a defendant indigent if he or she filed an affidavit of indigence before retaining a lawyer.⁷

Michigan's threshold requirement for public funding of expert witnesses

In light of the recent holding in *Hinton v Alabama*,⁸ it is more important than ever for defense counsel to seek adequate funding for expert assistance. Failure to do so violates the defendant's right to effective assistance of counsel.⁹ Indigent defendants are entitled to have an expert appointed at public expense in a criminal proceeding under both the 14th and 6th amendments of the

U.S. Constitution, the Michigan Constitution, and the Michigan Compiled Laws.

The state cannot condition this exercise of basic trial rights on a defendant's ability to pay, and must take steps to assure that the defendant has a fair opportunity to present his or her defense.¹⁰ If an expert witness is important to the defendant's preparation of the case, Michigan law entitles an indigent defendant to have an expert appointed by the court.¹¹ However, Michigan's process for funding expert witnesses in indigence cases is in tug of war with the 14th Amendment.

Michigan law authorizes the payment of fees only upon the appropriate showing of need.¹² But unlike federal law, the state statute is silent as to the process by which the defendant demonstrates need, and there is no provision for ex-parte relief. As such, the request for expert assistance is usually made in the typical adversarial setting whereby the motion is filed like any other motion and noticed for hearing, and the prosecutor is always present at the hearing.

In criminal cases, the right to not be compelled to disclose to the state the thought process or other information contributing to trial strategy is a fundamental precept of due process and equal protection, and is a guiding principle in contemporary criminal trial practice. But, in Michigan, an indigent defendant is required to demonstrate a nexus between the facts of the case and the need for an expert.¹³ As a result, defense counsel is forced (often unknowingly) to divulge constitutionally protected information. To make this threshold showing, counsel must show the court and the prosecutor exactly which facts they contest, why they contest them, and how the expert will help make their argument. In many cases, this information is the foundation for the theory of the case, and defense counsel essentially are compelled to hand the prosecutor a road map of how they intend to prove the theory.

There is no such restraint on a defendant with the financial ability to hire his or her own expert witness. If not for the indigence

FAST FACTS

In light of recent United States Supreme Court rulings, defense counsel must seek all available funding for expert assistance in cases involving indigent defendants.

Determining whether your client is indigent is not as clear as you may think.

The current state of the law in Michigan forces indigent defendants to choose between funding an expert witness and protecting trial strategy.

of the defendant, this information would never be disclosed. As a result of this exchange, defense counsel is placed in a precarious—if not impossible—position: fulfilling the 6th Amendment duty to seek adequate funding for an expert while guarding the defendant's rights to due process and equal protection.

Satisfying due process and equal protection

The defendant's constitutional right to an ex-parte hearing is supported by a compelling analogy to the Criminal Justice Act of 1964. The claim for an ex-parte hearing involves the interchange between two subsections of the Criminal Justice Act of 1964—18 USC 3006A(b)¹⁴ and 18 USC 3006A(e).¹⁵ Subsection (b) defines the appropriate inquiry by the court for the defendant's need for appointed counsel. Subsection (e) sets forth the protocol by which the court tests the necessity of "investigative, expert, or other services" to the conduct of the accused's defense.

Like the Michigan statute, the Criminal Justice Act of 1964 allows for the appointment of expert assistance upon the appropriate showing of need. However, there is a major procedural difference. The difference stems from United States Supreme Court and federal circuit court opinions that have consistently protected the indigent defendant's right not to reveal the theory of the case. Therefore, to ensure the defendant will not make a premature disclosure of the case, subsection (e) allows the inquiry concerning the need for expert assistance to be conducted ex parte. There remains no such protection for indigent defendants in Michigan's criminal courts.

With *Gideon v Wainwright*¹⁶ now five decades old, it is clear that Michigan continues to struggle to implement its constitutional mandate. There is virtually no guidance from the state's appellate courts as to whether there is a fundamental right to an ex-parte hearing under these circumstances. Time and time again, indigent defendants are forced to tip their hand merely because they are poor. For this reason, it is all the more important that defense counsel seeking expert assistance for an indigent defendant request an ex-parte hearing.

Trial courts are not always receptive to this argument. When the request for an ex-parte hearing is made, it is often denied. But there has been limited success. In late 2013, I filed a motion in a felony murder case in the 2nd Circuit (Berrien County) based on this argument. After I was retained, the defendant was adjudicated indigent. We sought the assistance of a forensic expert at public expense. I filed a motion for an ex-parte hearing and it was granted. Incidentally, the jury acquitted the defendant.

Other lawyers who have used the motion have told me they have been successful as well. The argument seems to be gaining some momentum, and there are clear opportunities for advocacy to pay huge dividends in this area. But until this becomes accepted practice, Michigan's indigent defendants will continue to be deprived of fundamental rights, and the structural framework for funding expert assistance will remain a model for unequal protection.

Conclusion

Indigent defendants in Michigan are often compelled to disclose information that is the basis of their trial strategy merely because they are indigent and seek the assistance of an expert witness. The fact that no such restraint is placed on defendants who can afford their own experts illustrates the due process/equal protection dilemma playing out in Michigan's criminal courts. Demanding an ex-parte hearing for a motion requesting public funding for expert assistance is critical to effective assistance of counsel, protects the defendant's due process and equal protection rights, and preserves an important constitutional issue in case of an appeal. ■



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ENDNOTES

- Alexander, *Assistance in Addition to Counsel for Indigent Defendants: The Need for, The Lack of, The Right to*, 16 Vill L R 323 (1970) (quoting statement of Robert F. Kennedy, in Hearings on SB 63 and 1057 before the Senate Committee on the Judiciary, 88th Cong., 1st Sess. 7 (1963)).
- See *Hinton v Alabama*, 571 US ___; 134 S Ct 1081, 1087; 188 L Ed 2d 1 (2014).
- MCL 775.15; *People v Tanner*, 469 Mich 437; 671 NW2d 728 (2003).
- People v Jacobsen*, 448 Mich 639, 641; 532 NW 2d 838 (1995); *People v Carnicom*, 272 Mich App 614, 617; 727 NW2d 399 (2006).
- People v Chism*, 17 Mich App 196, 199; 169 NW2d 192 (1969).
- People v Arquette*, 202 Mich App 227, 230; 507 NW2d 824 (1993); MCR 6.500(B).
- Id.* at 230.
- Hinton*, 571 US ___.
- Id.*
- See *Ake v Oklahoma*, 470 US 68; 105 S Ct 1087; 84 L Ed 2d 53 (1985); *Britt v North Carolina*, 404 US 226, 227; 92 S Ct 431; 30 L Ed 2d 400 (1971); *Griffin v Illinois*, 351 US 12, 17-19; 76 S Ct 585; 100 L Ed 891 (1956).
- People v Leonard*, 224 Mich App 569, 580; 569 NW2d 663 (1997).
- MCL 775.15.
- Jacobsen*, 448 Mich at 641.
- 18 USC 3006A(b) states, in pertinent part:
(b) **Appointment of Counsel.**— . . . [T]he United States magistrate judge or the court, if satisfied after appropriate inquiry that the person is financially unable to obtain counsel, shall appoint counsel to represent him.
- 18 USC 3006A(b) states, in pertinent part:
(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 adequate representation 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 judge if the services are required in connection with a matter over which he has jurisdiction, shall authorize counsel to obtain the services.
- Gideon v Wainwright*, 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 (1963).