ORIGINAL

980131

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota,	)	Supreme Court No. 980131
	)	
Defendant/Appellee,	)	
	)	
vs.	)	
	)	
Lynn C. Goulet,	)	
	)	
Defendant/Appellant.	)	

AMICUS CURIAE BRIEF
OF
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Appeal from the District Court
South Central Judicial District
Burleigh County, Norht Dakota
The Honorable Gail Hagerty, Presiding

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JURISDICTION

Amicus Curiae National Association of Criminal Defense Lawyers ("NACDL") submits this brief with the permission of the North Dakota Supreme Court. Under N.D.R.App.P. 29, "[a]n amicus curiae brief may be filed with leave of court."

ISSUES PRESENTED

I. Under the Constitution of the United States of America and the Constitution of the State of North Dakota, an indigent accused has the right to require that his or her application to the Court for the funds necessary to present an adequate defense be handled in an *ex parte* manner.

II. The federal government and many other states have procedures to ensure that an indigent defendant's application for funds is handled in an *ex parte* manner.

III. Any retreat from the position that an indigent defendant's application for funds, necessary to provide an adequate defense, are to be handled *ex parte* and not shared with the prosecution will have a chilling effect on applications for funds by indigent defendants in the future.

STATEMENT OF THE CASE

The Appellant, Mr. Lynn Goulet, is an indigent who was charged with assault. He was represented below by court-appointed counsel, Chad McCabe. During the litigation below, on or about January 14, 1998, Attorney McCabe submitted to the Court an *Ex Parte* Application for Funds to Depose Witness Jason Baca. This application sought Court approval for the payment of funds necessary for Mr. Goulet's attorney to notice and take Mr. Baca's deposition in Texas. By order dated January 14, 1998, the South Central Judicial District, Hon. Gail Hagerty presiding, denied this application. The Court, however, went one step further and also refused to seal the *Ex Parte* Application. The Application and the Order were received and filed by the Burleigh County Clerk of District Court on January 15, 1998.

On April 24, 1998, Mr. Goulet was convicted of assault in District Court. On April 30, 1998, the Notice of Appeal was filed in this matter.

By motion dated August 26, 1998, Amicus Curie NACDL sought leave to file an amicus curiae brief in this matter on the issue of *ex parte* requests for indigent funds subsequently disclosed to the prosecution. In a letter from the Court dated August 27, 1998, this motion was granted.

ARGUMENT

I. Introduction

An issue in this case is whether the trial court erred in refusing to seal the Defendant's *ex parte* application for funds to depose a witness. Amicus Curie NACDL writes: (1) to alert this Court to the fundamental constitutional nature of an indigent accused's right to *ex parte* application for the funds necessary to present an adequate defense; (2) to inform the Court of the national recognition of the right of an indigent defendant to make application for funds in an *ex parte* manner; and (3) to urge this Court to reverse the conviction in this case because to affirm would have a chilling effect upon future applications for funds by indigent defendants.

II. Under the Constitution of the United States of America and the Constitution of the State of North Dakota, an indigent accused has the right to require that his or her application to the Court for the funds necessary to present an adequate defense be handled in an *ex parte* manner.

An indigent defendant's rights under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and Article I, Section 12 of the North Dakota Constitution, are violated when, as in this case, the indigent defendant is denied the right to make an *ex parte* application for funds to secure witness testimony and the government becomes aware of the defendant's theory of the case, impressions, and work product because of this denial.[1] It is not the

[1] The Fifth Amendment of the Constitution of the United States of America provides: (1) "No person shall . . . be deprived of life, liberty, or property without due process of law, . . . ;" and (2) "No person . . . shall be compelled, in a criminal case, to be a witness against himself. . . ." U.S. Const., Amend. 5. The

denial of the funds which creates a constitutional violation in such a case. Rather, it is the court's refusal to handle the application in an *ex parte* manner and the subsequent publishing of a defendant's case theory, impressions, and work product to the prosecution that is unconstitutional. When this occurs, the indigent defendant's federal and state constitutional right to counsel, to due process, to compulsory process, and against self-incrimination have been violated. Additionally, in such a situation, the indigent defendant, who must seek funds for his or her defense from the court, is given less protection than the wealthy defendant who is not required to approach the court for funds. This results in a denial of the indigent defendant's right to equal protection under the law.

The United States Supreme Court has recognized the necessity of an *ex parte* proceeding when an indigent defendant makes an application to the court for assistance necessary to his or her defense. In Ake v. Oklahoma, 470 U.S.

Sixth Amendment of the Constitution of the United States of America provides that, "in all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor; and the assistance of counsel for his defense." U.S. Const., Amend 6. The Fourteenth Amendment of the Constitution of the United States of America incorporates the protections found in the Fifth and Sixth Amendments as to actions by the States and also provides that: "No state shall make any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. 14.

Article I, Section 12, of the Constitution of the State of North Dakota provides: (1) "in a criminal prosecution in any court whatever, the party accused shall have the right . . . to have the process of the court to compel the attendance of witnesses in his behalf; and to appear and defend in person and with counsel; . . ."; (2) "No person shall . . . be deprived of life, liberty, or property without due process of law; . . . "; and (3) "No person shall . . . be compelled in a criminal case to be a witness against himself. . . . " N.D. Const. Art. I, § 12.

68, 105 S.Ct. 1087 (1985), the United States Supreme Court acknowledged that an indigent defendant's application to the trial court for assistance of a psychiatric expert in an insanity defense should be on an *ex parte* basis. In Ake, the Supreme Court held that an indigent defendant has a constitutional due process right to the assistance of a psychiatric expert when raising an insanity defense. The Court noted that, "[w]hen the defendant is able to make an *ex parte* threshold showing to the trial court that his sanity is likely to be a significant factor in his defense, the need for the assistance of a psychiatrist is readily apparent." 470 U.S. at 82-83.

The Supreme Court's assumption that an indigent defendant's application for a court-appointed expert would be *ex parte* evidences an appreciation of the standard imposed upon defense counsel when seeking funds from the court. In such a situation, the defendant logically has the burden of convincing the trial court that his or her request for funds is necessary for an adequate defense. To meet that burden, defense counsel must often explain the defense theory to the court and may also have to disclose counsel's impressions and work product. If the defendant were not indigent, counsel would not be forced to disclose this information to the court or the prosecution.

Several courts have found that refusal to handle applications to the court for funds or other assistance in an *ex parte* manner results not only in a violation of statute or procedural rules, but also in a violation of an indigent defendant's constitutional rights. In United States v. Meriwether, 486 F.2d 498 (5th Cir. 1973), the Fifth Circuit addressed the issue of whether an indigent defendant's

application for subpoenas under Fed.R.Crim.P. 17(b) must be handled on an *ex parte* basis. The Court noted that, if the proceeding were not *ex parte*, then the "indigent defendants [would be required] . . . to reveal many of the theories of their defense to the prosecution, although defendants able to pay for witnesses [would be] . . . able to have blank subpoenas issued." 486 F.2d at 505. The Court held that applications for subpoenas under Rule 17(b) must be handled *ex parte* because the government should not be able to obtain a list of adverse witnesses when a defendant is unable to pay their fees, since it is not able to do so in the case of defendants able to pay witness fees. The Court noted: "[w]hen an indigent defendant's case is subject to pre-trial scrutiny by the prosecutor, while the monied defendant is able to proceed without such scrutiny, serious equal protection questions are raised. . . ." 486 F.2d at 506.

In United States v. Brown, 535 F.2d 424 (8th Cir. 1976), the defense objected to a local rule in the Eastern District of Missouri, which required that copies of subpoena applications under Fed.R.Crim.P. 17(b) be sent to the prosecution. The Eighth Circuit noted that this

> rule unfairly discriminated against indigent defendants in at least two respects. It required disclosure of subpoenaed witnesses by an indigent defendant without requiring concomitant disclosure of government's witnesses [a due process violation]. It also discriminated against a defendant unable to pay since a defendant of means was not required to disclose his or her witnesses before trial [an equal protection violation].

Brown, 535 F.2d at 429.

In State v. Ballard, 428 S.E.2d 178 (N.C. 1993), the North Carolina Supreme Court addressed the issue of whether a defendant's request for the

court to review information supporting the appointment of a psychiatric expert to assist the defendant in preparation of his defense should be handled *ex parte*. The Ballard Court held that an *ex parte* proceeding was constitutionally required. If the proceeding was open to the prosecution, it would "necessarily impinge upon the defendant's right to the assistance of counsel and his privilege against self-incrimination." 428 S.E.2d at 180. The Court held that the "constitutional rights and privileges, guaranteed by the Fifth, Sixth, and Fourteenth Amendment to the United States Constitution, entitled an indigent defendant to an *ex parte* hearing on his request for a psychiatric expert." 428 S.E.2d at 180.

Finally, in United States v. Florack, 838 F.Supp. 77 (W.D.N.Y. 1993), the United States District Court faced the question of whether an indigent defendant's request for subpoenas duces tecum under Fed.R.Crim.P. 17(c) should be handled *ex parte*. The Court held that the Fifth Amendment mandated an *ex parte* proceeding. The Court found that an indigent defendant's right to *ex parte* application for subpoenas to present witnesses and evidence rests not only on Rule 17(b), but also on "the Fifth Amendment right not to be subject disabilities by the criminal justice system because of financial status." 838 F.Supp. at 79 (citations omitted).

In the cases discussed above, it was necessary for the indigent defendants to make disclosures of their case theory, impressions, and work product to the Courts in order to obtain funds for subpoenas or experts necessary for an adequate defense. The Courts all held, however, that there was no reason these disclosures should be revealed to the prosecution and that

to do so would result in a violation of the indigent defendants' conditional rights. Simply put, a defendant's indigence cannot justify the additional compelled disclosure of information concerning his defense.

III. The federal government and many other states have procedures to ensure that an indigent defendant's application for funds is handled in an *ex parte* manner.

Given the important constitutional ramifications discussed above, it is not surprising that North Dakota has a rule in place to ensure that applications for subpoenas and the funds to pay for the service costs and fees associated with those subpoenas, by an indigent defendant are to be made on an *ex parte* basis. N.D.R.Crim.P. 17(b) governs this procedure. It provides:

> 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. If the court orders a subpoena to be issued, the costs incurred by the process and the fees of the witnesses so subpoenaed must be paid in the same manner in which similar costs and fees are paid in the case of a witness subpoenaed in behalf of the prosecution.

N.D.R.Crim.P. 17(b).

North Dakota is not alone in enacting a rule that allows for an indigent defendant to seek financial assistance from the Court to ensure an adequate defense on an *ex parte* basis. Congress recognized the need for *ex parte* procedures in these situations when it enacted 18 U.S.C. § 3006A(e)(1). That statute enables "[c]ounsel for [an indigent] person" in the federal system, to apply to the district court *ex parte* for funds "to obtain investigative, expert or other services necessary for adequate representation." In capital cases, requests for

necessary financial assistance can be made under 21 U.S.C. § 848(q)(4)(B) and (q)(9) of the Anti-Drug Abuse Act of 1988. Those provisions "authorize[ ] federal habeas corpus courts to provide funds for all 'reasonably necessary' investigative and expert services requested by indigent habeas corpus petitioners challenging the constitutionality of their convictions and death sentences. In order to allow petitioners to establish need without providing unilateral discovery of their cases to the state or the government, the Anti-Drug Abuse Act permits motions for funds for investigative, expert and other services to be filed *ex parte*." James S. Liebman & Randy Hertz, Federal Habeas Corpus Practice and Procedure, § 19.3, 512-13 (1994) (footnotes omitted).

> In adopting section 848(1), Congress recognized that petitioners often cannot demonstrate the "reasonable necessity" of investigative and expert services without disclosing confidential work product, attorney theories and conclusions, and expert consultative advice – information that parties to litigation usually are permitted to withhold from their adversaries, at least until trial. To solve this problem, Congress permitted petitioners to make the showing of need for support services *ex parte*.

Id. at 513 n. 17.[2]

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[2] Many federal courts have emphasized the importance of *ex parte* proceedings. See, e.g., Smith v. McCormick, 914 F.2d 1153, 1159-60 (9th Cir. 1990) (order conditioning expert assistance on criminal defendant's pretrial disclosure of expert's findings regardless of whether defendant elects to use expert violates due process, privilege against self-incrimination, and right to effective assistance of counsel); United States v. Meriwether, 486 F.2d 498, 506 (5th Cir. 1973), *cert. denied*, 417 U.S. 948 (1974) (holding an *ex parte* hearing would "shield the theory of [the indigent's] defense from the prosecutor's scrutiny"); United States v. Sutton, 464 F.2d 552, 553 (5th Cir. 1972) (per curiam) (district court's failure to conduct hearing *ex parte* on defendant's motion for investigator requires reversal of conviction).

Not only has the Supreme Court and Congress recognized the importance of *ex parte* proceedings, but many states have also recognized an indigent defendant's interest in seeking funds in an *ex parte* proceeding by enacting statutes or adopting court rules that authorize such a procedure. See, e.g., Cal. Penal Code § 987.9 (West Supp. 1995) (providing for confidential application by defense counsel for experts in capital cases); see also, Corenevsky v. Superior Court, 682 P.2d 360, 368 (Cal. 1984) (en banc) (acknowledging defendant's right to *in camera* procedure in non-capital cases); Del. Sup. Ct. Crim. Proc. R. 44(e)(4) ("assigned counsel may apply *ex parte* for funds to pay for transcripts, witness' travel expenses, or investigative, expert or other services necessary for adequate representation."), see also, Del. Com. Pl. Ct. Crim. Proc. R. 44(e) (same); D.C. Code Ann. § 11-2605 (a) (1995 Repl. Pamp.) ("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 shall authorize counsel to obtain the services."); Kan. Stat. Ann. § 22-4508 (1988) ("An attorney other than a public defender who acts as counsel for a defendant who is financially unable to obtain investigative, expert or other services necessary to an adequate defense in the defendant's case may request them in an *ex parte* application addressed to the district court where the action is pending. Upon finding, after appropriate inquiry in the *ex parte* proceeding, that the services are necessary and that the defendant is financially unable to obtain

them, the district court shall authorize counsel to obtain the services on behalf of the defendant."); Minn. Stat. § 611.21 (a) (1995 Supp.) (same); Nev. Rev. Stat. § 7.135 (1986) ("The attorney appointed ... to represent a defendant is entitled ... to be reimbursed for expenses reasonably incurred by him in representing the defendant and may employ, subject to the prior approval of the magistrate or district court in an *ex parte* application, such investigative, expert or other services may be necessary for an adequate defense."); N.Y. County Law § 722-c (McKinney 1991) ("Upon a finding in an *ex parte* proceeding that investigative, expert or other services are necessary and that the defendant ... is financially unable to obtain them, the court shall authorize counsel ... to obtain the services on behalf of the defendant ..."); Or. Rev. Stat. § 135.055(3) (1944 Supp.) ("The person for whom counsel has been appointed is entitled to reasonable expenses for investigation, preparation and presentation of the case. The person or the counsel for the person may upon motion, *which need not be disclosed to the district attorney prior to the conclusion of the case*, secure approval and authorization of payment of such expenses as the court finds are necessary and proper in the investigation, preparation and presentation of the case ..." (emphasis added)); S.C. Code Ann. § 17-3-50(B) (Law. Co-op. 1994 Cum. Supp.) ("Upon a finding in *ex parte* proceedings that investigative, expert, or other services are reasonably necessary for the representation of the defendant, the court shall authorize the defendant's attorney to obtain such services on behalf of the defendant ..."); S.C. Code Ann. § 16-3-26(C)(1) (Law Co-op. 1994 Cum. Supp.) (same provision for capital cases); Tenn. Code Ann. § 40-14-207(b)

(1993 Supp.) ("In capital cases where the defendant has been found to be indigent by the court of record having jurisdiction of the case, such court in an *ex parte* hearing may in its discretion determine that investigative or expert services or other similar services are necessary to ensure that the constitutional rights of the defendant are properly protected."); see, Owens v. State, 908 S.W.2d 923, 1995 WL 615649 *1 (Tenn. Oct. 23, 1995) ("We conclude that [Tenn. Code Ann. § 40-14-207(b)] applies in post-conviction capital cases, and that when certain procedural criteria are satisfied, an indigent petitioner in a post-conviction capital case is entitled to an *ex parte* hearing on a motion for expert or investigative services.").

Courts in other states whose statutes lack *ex parte* provisions have permitted, and often required, that defense motions for experts be filed *ex parte*, even without the presence of a particular statute or court rule establishing such a procedure. See, e.g., Block v. State, 646 So.2d 604 (Ala. 1994) (Alabama Supreme Court denied state's writ challenging the Court of Criminal Appeals' decision to permit defense counsel "to proceed *ex parte* 'with the trial court alone and outside the presence of the district attorney' in connection with her request for funds for expert assistance"); Wall v. State, 715 S.W.2d 208, 209 (Ark. 1986) ("When the defendant is able to make an *ex parte* showing to the trial court that his sanity is likely to be a significant factor in his defense, the need for the assistance of a psychiatrist is readily apparent." (citing Ake)); Brooks v. State, 385 S.E.2d 81, 84 (Ga. 1989), *cert. denied sub nom.* Brooks v. Georgia, 494 U.S. 1018 (1990) ("It is clear that in making the requisite showing defendant

could be placed in a position of revealing his theory of the case. He therefore has a legitimate interest in making that showing *ex parte*."); Arnold v. Higa, 600 P.2d 1383, 1385 (Haw. 1979) (interpreting Haw. Rev. Stat. § 802-7 to require an *ex parte* hearing when requested by the defense to "allow counsel to particularize his reasons for the services without disclosing his defense theory or tactics to the prosecution."); State v. Touchet, 642 So.2d 1213, 1219 (La. 1994) ("an indigent defendant seeking governmental funding for the assistance of expert witnesses is entitled to make an initial *ex parte* application with the trial court"); State v. Ballard, 428 S.E.2d 178, 180 (N.C.), *cert. denied*, 114 S.Ct. 487 (1993) ("A hearing open to the State necessarily impinges upon the defendant's right to the assistance of counsel and his privilege against self-incrimination. We hold that these constitutional rights and privileges, guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, entitle an indigent defendant to an *ex parte* hearing on his request for a psychiatric expert."); see also, State v. Phipps, 418 S.E.2d 178, 191 (N.C. 1992) (although "an *ex parte* hearing is not constitutionally required in every case," the court acknowledged that "[t]here are strong reasons for conducting the hearing *ex parte*," including the defendant's right to obtain the expert assistance necessary to preparing his defense without losing the opportunity to present the defense in secret); State v. White, 457 S.E.2d 841 (N.C. 1995), *petition for cert. filed* Sept. 20, 1995 (No. 95-6156) (decision to grant an *ex parte* hearing requesting funds for a non-psychiatric/psychological expert is within the trial court's discretion); McGregor v. State, 733 P.2d 416 (Okla. 1987) ("to allow participation,

or even presence, by the State would thwart the Supreme Court's attempt [in Ake v. Oklahoma] to place indigent defendants, as nearly as possible, on a level of equality with non-indigent defendants"); State ex rel. Dressler v. Circuit Court for Racine County, Branch 1, 472 N.W.2d 532, 540 n. 12 (Wis. App.), *review denied*, 475 N.W.2d 585 (1991) ("At this time there is no formalized process for a defendant to make a showing of particularized need for expert witnesses. We would recommend that such a process take this form: (1) Defendant shall make an *ex parte* application to the trial court for expert assistance, see 18 U.S.C. 3006(A)(e)(1); (2) The application is reviewed in camera and sealed until resolution of the pending charges....").[3]

In sum, the requirement that an indigent defendant be allowed to seek funds on an *ex parte* basis is recognized by the United States Supreme Court, Congress, many state legislatures, and the courts of various states.

IV. Any retreat from the position that an indigent defendant's application for funds, necessary to provide an adequate defense, are to be handled *ex parte* and not shared with the prosecution will have a chilling effect on applications for funds by indigent defendants in the future.

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[3] See also, People v. Loyer, 425 N.W.2d 714 (Ct. App. Mich. 1988) (indigent defendant entitled to request subpoenas and witness fees in an *ex parte* proceeding); State v. Newcomer, 737 P.2d 1285, 1291 (Wash. App. 1987) ("Ake makes clear a defendant must 'make an *ex parte* threshold showing to the trial court that his sanity is likely to be a significant factor in his defense' before the court is constitutionally required to provide a defense psychiatric expert at public expense. Ake, 105 S. Ct. at 1097."); but see, State v. Floody, 481 N.W.2d 242, 256 (S.D. 1992) ("We do not believe South Dakota statutes which permit, but do not require, adversarial hearings prior to appointment of expert witnesses violated [the defendant's] due process rights or his right to equal protection of the law.") and State v. Apelt, 861 P.2d 634 (1993)(en banc).

This Court should reverse the conviction in this case. To do otherwise will have a chilling effect on future applications by North Dakota lawyers representing indigent defendants to the District Courts for the funds necessary to provide an adequate defense. If this Court holds that the District Court's decision to refuse to seal the *ex parte* application in this case is not reversible error, then attorneys for indigent defendants will face an impossible dilemma in the future.

Under current law, lawyers for indigent defendants are able to make a full, open, and complete application to the District Court setting forth why certain funds are necessary for the defense of their client. They are able to explain how the funds requested will fit into their theory of defense and free to disclose impressions and work product to the Court in support of their application. They are able to act in this way because they can be sure that the proceeding is *ex parte* and that the prosecution will not learn of the information contained in the application.

However, if the Court affirms the District Court's actions in this case, the certainty that the prosecution will never see the contents of an application for assistance will be taken away. When making future applications, attorneys for indigent defendants will face a "Hobson's choice." Do they request the funds, subpoenas, or experts needed for an adequate defense and risk that the information in their application may end up in the hands of the prosecutor, or do they simply decide to forgo the application altogether, thereby weakening their defense?

Only by reversing the conviction in this case can this Court ensure that attorneys who represent indigent defendants are able to freely and openly make applications for funds to the Court. An opinion affirming the District Court will mean that these attorneys will be put in the position of needing funds to present an adequate defense, but hesitant to fully disclose why funds are needed out of fear that the prosecution may be given access to the information contained in the application. They will be forced, in essence, to attempt to zealously represent their indigent clients with one hand tied behind their back. Their clients will be forced to face a handicap that more well heeled defendants do not.

CONCLUSION

Therefore, for the reasons set forth above, this Court should reverse the District Court's conviction in this case due to the fact that the District Court refused to seal the material contained in the *ex parte* application for funds, thereby violating several of Mr. Goulet's federal and state constitutional rights.

Respectfully submitted this 8th day of September, 1998.

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