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CRIMINAL LAW: INDIGENT DEFENDANT'S RIGHT TO INDEPENDENT PSYCHIATRIST

In *United States v. Schultz*¹ the Court of Appeals for the Eighth Circuit held that a federal bank robbery defendant, whose mental capacity to commit the crime was in considerable doubt, was entitled to an independent psychiatrist at government expense. This decision was based on interpretation of the discretion that lower courts have, in granting expert assistance such as psychiatrists to defendants who cannot afford one, under Section 3006A(e) of the Criminal Justice Act of 1964.² The court held that, "the courts ought to apply a more lenient standard in determining the need for services of experts in preparation for trial," and lack of such assistance in this case resulted in prejudice to the defendant.³

Ever since the landmark decision of the United States Supreme Court in *Griffin v. Illinois*,⁴ on the issue of the constitutional rights of the indigent⁵ accused in criminal prosecutions, there have been questions as to the extent of aid that the state and federal courts must provide to such defendants.⁶

¹ *United States v. Schultz*, 431 F.2d 907 (8th Cir. 1970).

² 18 U.S.C. § 3006A(e) (1964). The Act was amended on Oct. 14, 1970, but the changes do not affect the subject matter of this note.

³ 431 F.2d at 910.

⁴ 351 U.S. 12 (1956).

⁵ For purposes of this comment indigent is to include not only those individuals completely without funds to prepare their defense, but also those who may have sufficient funds to pay their counsel, but lack the additional funds for the psychiatrist.

⁶ *Gideon v. Wainwright*, 372 U.S. 335 (1963), right to counsel in felony cases; *Douglas v. California*, 372 U.S. 353 (1963), right to counsel on appeal; *Williams v. Illinois*, 399 U.S. 235 (1970), right not to be subject to imprisonment beyond the maximum statutory period for involuntary nonpayment of a fine or court costs.

Congress, recognizing the needs and public policies for equalizing the scales of justice with respect to those who cannot financially sustain an effective defense, enacted the Criminal Justice Act of 1964⁷ providing therein for counsel and other aid to all defendants in federal courts. Shortly thereafter a number of states followed, enacting similar statutes applicable to their state courts.⁸ Section 3006A(e) provides for the assistance of investigative, expert or other services, which includes the services of a psychiatrist where there is reasonable ground to establish an insanity defense.⁹

Considering the special nature of the insanity defense or the defense of partial responsibility,¹⁰ in most jurisdictions the need for the assistance of an independent psychiatrist is mandatory to an effective defense. In our adversary system of criminal proceedings, the truth is best realized when the opposing sides are approximately equal in the facilities available to them in preparation and at trial.¹¹ Lacking the assistance of an independent psychiatrist where the defense of insanity is interposed, the defendant is so bereft of that equality in preparation and at trial, whether in a federal or state court, as to have his case prejudiced as in *Schultz*.¹²

⁷ 18 U.S.C. § 3006A (1964).

⁸ See Lewin, *Indigency-Informal and Formal Procedures to Provide Partisan Psychiatric Assistance to the Poor*, 52 IOWA L. REV. 458, 479-80 (1966).

⁹ *Infra* note 82.

¹⁰ For a discussion of the doctrine of partial responsibility, see Weihofen and Overholser, *Mental Disorder Affecting The Degree of a Crime*, 56 YALE L. J. 959, 964 (1947). For a summary of the jurisdictions accepting the doctrine see Lewin, *Mental Disorder and the Federal Indigent*, 11 S. DAK. L. REV. 198, 251 (1966).

¹¹ *United States v. Brodson*, 241 F.2d 107, 115 (7th Cir.), cert. denied, 354 U.S. 911 (1957). Finnegan, J. dissenting: "[I]f society desires that courts engage in a search for truth, before punishing, then I would avoid being stingy with defense materials."

¹² 431 F.2d 907.

It is the contention of this comment that the indigent accused is now entitled to independent psychiatric help at government expense, even absent a statute, on constitutional grounds. Eighteen years ago the Supreme Court held that a state did not have a duty to provide the indigent defendant with an independent psychiatrist.¹³ There has been no holding on this issue since the *Griffin* decision although a more recent case,¹⁴ remanded on other grounds, argued that such a denial is a violation of both the sixth amendment right to counsel, and the fourteenth amendment equal protection and due process guarantees. As the procedural requirements of defense of insanity or a defense under the doctrine of partial responsibility make the need for psychiatric assistance ever more mandatory to the preparation of an effective defense, a holding that such aid is constitutionally required should not be a surprise. In the words of the then Circuit Judge, now Chief Justice Burger, "I do not think the law grows by some sudden discovery. I think it unfolds. We find defects and we remedy defects and when we find that is not adequate we take another step."¹⁵

THE SPECIAL NATURE OF THE INSANITY PROCEEDING

There are definite public policy reasons to provide partisan psychiatric aid to those indigent criminal accused, who have a reasonable claim to an insanity defense. These reasons are the desire to use the best methods available to ascertain the truth and preserve the respect of judicial proceedings as well as the public interest in minimizing the cost of such proceedings.¹⁶

¹³ United States *ex rel.* Smith v. Baldi, 344 U.S. 561 (1953).

¹⁴ Bush v. Texas, 372 U.S. 586 (1963).

¹⁵ Proceedings of the Annual Judicial Conference of the 10th Judicial Circuit of the United States 32 F.R.D. 481, 561 (1962).

¹⁶ See note 19 *infra*.

It is interesting to note that the majority of the arguments raised opposing the providing of partisan psychiatrists at state expense to indigent accused are based on the high costs that thereby would be incurred by the state.¹⁷ The fear is that not only will every defendant plead a need for psychiatric help, but the defendants that show such need will exhaust state resources in "fishing expeditions" looking for the particular psychiatrist who will best present their individual cases.

Even assuming readily available government paid psychiatric aid, every defendant would not seek to interpose the defense of insanity. There exists a very practical restriction to such pleas, for under present laws an insanity plea, if successful, may be the worse alternative.¹⁸ In those cases where counsel for the indigent decides that a defense plea of insanity is warranted, the cost to the state of providing psychiatric assistance at the initial trial will probably be less than the cost of subsequent appeals attacking the denial of such assistance.¹⁹ The Federal experience under the Criminal Justice Act shows that such expenses are not at all unreasonable. The total expenditure for all subsection (e) services, in all federal district courts, for the first two years of operation was only \$88,000. This represented only about 1% of the cases in which counsel was appointed under the Criminal Justice Act.²⁰ Furthermore, subsection (e) covers all expert assistance, not just that of psychiatrists.

The insanity defense is based on the principle that one of the elements of the crime, intent, is lacking. In order to

¹⁷ Note, *Right to Aid in Addition to Counsel for Indigent Criminal Defendants*, 47 MINN. L. REV. 1054, 1076 (1963).

¹⁸ Strickman, *The Insanity Defense in Massachusetts: Some Unresolved Problems*, 53 MASS. L.Q. 195 (1968).

¹⁹ See, e.g., *Bush v. Texas*, 372 U.S. 586 (1963), where after appeal to the Supreme Court the state won a remand of the case after promising to provide a psychiatrist.

²⁰ *Christian v. United States*, 398 F.2d 517, 518 (1968), n. 2 citing *Oaks, The Criminal Justice Act in the Federal District Courts*, VIII 20 through 68.

punish someone for a criminal act the state must first prove that the accused committed each and every element of the crime. If the accused can show that he was mentally incapable of acting wilfully so as to comply with the intent element necessary to commit the crime he is not guilty.²¹ Such an individual is in the same position as an infant who commits an illegal act and neither is criminally responsible.²²

Although the legal standard of what constitutes insanity varies in different states and among the federal districts,²³ every jurisdiction recognizes the psychiatrist as an expert in such matters and provides him with the testimonial advantage of presenting his opinions. Thus, whenever the defendant wants to introduce the defense of insanity, no matter what the standard in his jurisdiction, he needs the expert assistance of a psychiatrist.²⁴

A number of states have attempted to resolve the dilemma of the indigent defendant seeking psychiatric help by providing him with access to a court appointed psychiatrist.²⁵ The reasoning usually given is that this will prevent a battle of experts. The court appointed psychiatrist or a government mental hospital which may be used to answer the question of

²¹ For a general discussion of the desirability of allowing an insanity defense see Comment, *Mental Illness and Criminal Responsibility*, 5 TULSA L.J. 171 (1968). See also, Waelder, *Psychiatry and the Problem of Criminal Responsibility*, 101 U. PA. L. REV. 378 (1952).

²² *State v. Pike*, 49 N.H. 399, 402 (1869).

²³ Burger, *Psychiatrist, Lawyers, and the Courts* 28 FED. PROBATION 1 (1964). Weihofen, *The Definition of Mental Illness* 21 OHIO ST. L.J. 1 (1960).

²⁴ See, e.g., *Ramer v. United States*, 390 F.2d 564 (9th Cir.), cert. denied, 393 U.S. 870 (1968).

²⁵ For a general discussion of available state psychiatric aid see Goldstein and Fine, *The Indigent Accused, the Psychiatrist, and the Insanity Defense*, 110 U. PA. L. REV. 1061 (1962).

defendant's insanity does not satisfy either the constitutional requirements or the requirements for an adversary proceeding.²⁶ Where the court orders an insanity examination of the defendant, it has been said that, "[t]he use of psychiatrists as agents of the court at the pretrial stage has the effect of giving defendants a psychiatric rather than a judicial trial".²⁷ Even where such court appointed psychiatrists appear in court, "[t]oo many writers and even some courts have been guilty of assuming that the function of a psychiatric expert called in connection with a defense of insanity 'is to aid the court to reach a proper decision rather than to aid an indigent defendant to prepare his case'."²⁸

There is yet another reason for the inadequacy of impartial psychiatric aid. Should such court appointed neutral psychiatrist testify against the defendant, the lack of a partisan defense psychiatrist denies defense counsel the requisite knowledge to prepare an effective cross examination.²⁹

Even in those states where the defendant is granted access to psychiatric assistance other than the impartial expert, such state aid provisions as exist, vary considerably in their effectiveness. In some of the states the qualifications of the examiners is questionable,³⁰ while in other states, although

²⁶ Lewin, *Indigency—Informal and Formal Procedures to Provide Partisan Psychiatric Assistance to the Poor*, 52 IOWA L. REV. 458, 466-7 (1966).

²⁷ Vann, *An Analysis of the Use of Psychiatric Information in the Administration of Criminal Justice*, 43 U. DET. L. REV. 13, 32 (1965).

²⁸ Lewin, *Mental Disorder and the Federal Indigent*, 11 S. DAK. L. REV. 198, 201 (1966).

²⁹ For a general discussion of the impartial expert rule see Orfield, *Expert Witnesses in Federal Criminal Procedure*, 20 F.R.D. 317, 346 (1957).

³⁰ *Krupnick v. United States*, 264 F.2d 213 (8th Cir. 1959); *Roach v. State*, 221 Ga. 783, 147 S.E.2d 299, cert. denied, 385 U.S. 935 (1966); *State v. Jones*, 201 S.C. 403, 23 S.E.2d 387 (1942).

the examiners are themselves qualified psychiatrists, their opportunity to examine the defendant is so limited as to be ineffective.

Under the common law the person accused of criminal conduct could absolve himself of responsibility for such conduct by showing insanity. The issue of insanity and thus the culpability for the crime was a factual issue to be decided by the jury. There was no separate test of what constituted insanity. Reformers, beginning in the nineteenth century and continuing to the present, have considered it unduly harsh to allow lay jurors to decide issues of mental responsibility. Rules were promulgated which established as a matter of law the conditions necessary for absolving a defendant from criminal responsibility on the grounds of insanity. The juries were left only with the decision as to whether the defendant was or was not incapable of formulating that amount of intent, at the time the act was committed, so as to make him criminally culpable under whatever test is used in that jurisdiction. When a defendant's mental condition must be shown to meet certain predetermined standards as a matter of law in order to excuse him from criminal responsibility, then we have in effect forced him to depend on psychiatrists to carry his argument. It is not the purpose of this comment to discuss the validity of the various tests for insanity, nor the issue of whether certain individuals should be absolved of criminal responsibility for their anti-social conduct; but rather, we limit ourselves to the narrow issue that once the privilege of an insanity defense is recognized as available to the defendant, it is the state's duty on constitutional grounds to provide the indigent defendant with independent psychiatric help. It is the very nature of the insanity defense that makes the need for partisan psychiatric aid such a vital prerequisite to the conduct of an effective defense.

JUDICIAL RECOGNITION OF THE NEED FOR GOVERNMENT PAID
PSYCHIATRIC ASSISTANCE TO THE INDIGENT CRIMINAL DEFENDANT

The plight of the indigent criminal defendant has been recognized in numerous decisions,³¹ although none has specifically decided what is the duty that the states owe to such a defendant when a defense of insanity requires the aid of a psychiatrist. Since the decision in *United States ex rel. Smith v. Baldi*,³² where the Supreme Court held that there is no constitutional duty to provide an indigent defendant with partisan psychiatric aid when he has already received expert assistance from a court appointed impartial psychiatrist,³³ there have been a number of strong dissents and lower court decisions which argue that partisan psychiatric aid may indeed be constitutionally required.³⁴

The constitutional arguments advanced in favor of such assistance are based on the equal protection and due process clauses of the fourteenth amendment and on the right to be represented by counsel of the sixth amendment. Since the decision in *Baldi*, there has been a considerable expansion of what constitutes "fundamental fairness" and of the rights that states are constitutionally required to provide to the criminal defendant.

³¹ *Supra* note 6.

³² 344 U.S. 561 (1953).

³³ *Id.* at 568, Petitioner further asserts that he should have been given technical pretrial assistance by the State. Although the trial judge testified that defense counsel made no such request, petitioner here states that the trial court refused to appoint a psychiatrist to make a pretrial examination. We cannot say that the State has that duty by constitutional mandate.

³⁴ See, e.g. dissent in *United States ex rel. Smith v. Baldi*, 192 F.2d 540 (3rd Cir. 1951), *aff'd.* 344 U.S. 561 (1953); dissent in *United States v. Johnson*, 238 F.2d 565, 567 (2nd Cir. 1956), *vacated*, 352 U.S. 565 (1957).

Equal Protection Argument

The Supreme Court considered this clause in its decision in *Griffin v. Illinois*,³⁵ where it held that the denial of an appeal to an indigent defendant, when that right is conditioned upon the purchase of a required trial court transcript, was a violation of the constitutional guarantee of the fourteenth amendment. The Court there said, "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has."³⁶ The Court did not hold that the right of appeal itself is within the constitutionally protected guarantees, but that where a state creates such a right of appeal, it must make it accessible to both the affluent and the indigent.

The conventional limitations—that the discrimination must, to offend, be either intentionally discriminatory in purpose or else arbitrary in effect—do not apply where the discrimination results in something that shocks the fundamental sense of justice.³⁷

The Supreme Court reaffirmed the *Griffin* doctrine when in *Burns v. Ohio*³⁸ they held that the denial to the indigent of a petition for leave to appeal for lack of a filing fee violated the equal protection clause. "The imposition by the State of financial barriers restricting the availability of appellate review for indigent criminal defendants has no place in our heritage of Equal Justice Under Law."³⁹ A similar result was reached by the Court where a petitioner was required to pay a filing fee for a writ of habeas corpus. Mr. Justice Clark there said, "the Fourteenth Amendment weighs

³⁵ 351 U.S. 12 (1956).

³⁶ *Id.* at 19 (opinion of Black, J.)

³⁷ Willcox and Bloustein, *The Griffin Case—Poverty and the Fourteenth Amendment*, 43 CORNELL LAW Q. 1, 15 (1957) (footnotes omitted).

³⁸ 360 U.S. 252 (1959).

³⁹ *Id.* at 258.

the interest of rich and poor criminals in equal scale, and its hand extends as far to each."⁴⁰

In *Douglas v. California*,⁴¹ where the indigent defendant was required to perfect his appeal by himself, the Court again held that such distinctions between rich and poor are a violation of the equal protection clause.

There is lacking that equality demanded by the Fourteenth Amendment where the rich man . . . enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent . . . is forced to shift for himself.⁴²

The *Griffin-Douglas* doctrine does not place a duty on the state to provide every indigent defendant with unlimited resources in preparing a defense. It merely puts on the state an affirmative duty to provide such a defendant with that amount of assistance which will assure essential fairness.⁴³

Thus, where a state provides for the insanity defense, it must similarly make it accessible to all. Furthermore, since the implementation of an insanity defense requires the assistance of a psychiatrist,⁴⁴ it then follows that for indigent defendants the state has a duty to provide such assistance at its expense under the *Griffin* doctrine. In the words of the late Judge Frank,

... [A] man may be jailed for life, or even electrocuted, because he hasn't the money to discover a missing document necessary to win his case or to employ a competent hand-writing expert or psychiatrist. This is not democratic justice. It makes a farce of, 'equality

⁴⁰ *Smith v. Bennett*, 365 U.S. 708, 714 (1961).

⁴¹ 372 U.S. 353 (1963).

⁴² *Id.* at 357-58.

⁴³ *Id.* at 357.

⁴⁴ To do otherwise would be to deny the defendant fundamental fairness. *Infra* note 57.

before the law,' one of the first principles of a democracy.⁴⁵

The opposing argument that providing psychiatric assistance will place additional burdens on the states so as to strain their orderly procedures was answered by Mr. Chief Justice Burger when, in *Williams v. Illinois*⁴⁶ the Court held that the equal protection clause bars the states from imposing a sentence greater than the statutory maximum against a defendant who is financially unable to pay a fine.

We are not unaware that today's holding may place a further burden on States in administering criminal justice. Perhaps a fairer and more accurate statement would be that new cases expose old infirmities which apathy or absence of challenge had permitted to stand. But the constitutional imperatives of the Equal Protection Clause must have priority over the comfortable convenience of the status quo.⁴⁷

Due Process Argument

The courts have not considered denial of partisan psychiatric assistance to an indigent defendant by the state to be violative of the due process guarantee of the fourteenth amendment. In *McGarty v. O'Brien*⁴⁸ the First Circuit Court of Appeals held that the availability of reports furnished by doctors at the state Department of Mental Health was sufficient to satisfy constitutional requirements. The court nevertheless, recognizing the disadvantage of the indigent, said:

⁴⁵ 15 F.R.D. 93, 101 (1954).

⁴⁶ 399 U.S. 235 (1970). For an argument to limit the duties of the states to provide assistance to the indigent see the dissent of Justice Harlan in *Douglas v. California*, 372 U.S. 353, 360 (1963).

⁴⁷ *Id.* at 245.

⁴⁸ 188 F.2d 151 (1st Cir. 1951), *cert. denied*, 341 U.S. 928.

How far the state, having the obligation to afford to the accused a fair trial, a fair opportunity to make his defense, is required under the due process clause to minimize this disadvantage is a matter which, in other contexts, may deserve serious examination.⁴⁹

What is required under the concept of due process is dependent on the time and the place of the proceedings, and the accepted practices of the jurisdiction.⁵⁰ "Concepts of due process change and as civilization progresses our ideas of fundamental fairness necessarily enlarge themselves."⁵¹ What the present day requirements of due process are is to be determined on the basis of fundamental fairness.⁵²

If the right to appeal is of such import as to bring it within the due process fairness test, then certainly the disadvantages faced by the indigent defendant in preparing a defense at the original trial is of equal merit.⁵³

In *United States ex rel. Smith v. Baldi*,⁵⁴ although a majority of four justices did not consider that due process required the state to furnish a partisan psychiatrist for the defendant,⁵⁵ three of the justices did so conclude in their

⁴⁹ *Id.* at 155.

⁵⁰ Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1 (1956).

⁵¹ *United States ex rel. Smith v. Baldi*, 192 F.2d 540, 560 (3rd Cir. 1951), Biggs, C.J. dissenting.

⁵² *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Douglas v. California*, 372 U.S. 353, (1963); see also *Smith v. Bennett*, 365 U.S. 708 (1961); *Burns v. Ohio*, 360 U.S. 252 (1959); *Griffin v. Illinois*, 351 U.S. 12 (1956); *Rochin v. California*, 342 U.S. 165 (1952).

⁵³ *Supra* note 37.

⁵⁴ 192 F.2d 540 (3rd Cir. 1951).

⁵⁵ *Id.* at 547. ". . . [W]e have great difficulty in accepting as a proposition of constitutional law that one accused of crime is entitled to receive at public expense all the collateral assistance needed to make his defense. . . . We do not think the requirements of due process go so far."

dissent. In the twenty years since this case was decided a number of lower court decisions have indicated a change in our concept of due process. The trial court in *United States v. Brodson*⁵⁶ held that the combined constitutional guarantees of due process and right to counsel required that the indigent defendant be furnished with the expert assistance of an accountant in a tax case. In 1964 the United States District Court for the Northern District of Texas held the denial of psychiatric aid to an indigent was a violation of due process, citing the fundamental fairness doctrine.

In order for Bush in the instant case to have the effective aid of counsel, it was necessary for his counsel to have the assistance of a qualified psychiatrist and a trial, without expert evidence as to sanity, which found him sane and resulted in a life sentence is so lacking in fairness as to be a denial of liberty without due process of law, contrary to the Fourteenth Amendment.⁵⁷

Thus, to satisfy the requirement of due process, merely furnishing the indigent defendant with counsel when he also needs the service of a partisan psychiatrist is not enough.⁵⁸

The Right to Counsel Argument

As long ago as 1932 the Supreme Court in *Powell v. Alabama*⁵⁹ held that the sixth amendment right to counsel means the right to an effective counsel.

[I]t is the duty of the court, whether requested or not, to assign counsel for him as a necessary re-

⁵⁶ 136 F.Supp. 158 (E.D. Wis. 1955), *rev'd. on other grounds*, 241 F.2d 107 (7th Cir. 1957), *cert. denied*, 354 U.S. 911.

⁵⁷ *Bush v. McCollum*, 231 F.Supp. 560, 565 (N.D. Tex. 1964), *aff'd. per curiam*, 344 F.2d 672 (5th Cir. 1965).

⁵⁸ "The appointment of counsel for a deaf mute would not constitute due process of law unless an interpreter also was available" dissent in *United States ex rel. Smith v. Baldi*, 192 F.2d 540, 559 (3rd Cir. 1951).

⁵⁹ 287 U.S. 45 (1932).

quisite of due process of law; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case.⁶⁰

Although the right to the assistance of effective counsel in *Powell* was limited to indigent defendants in capital cases, this ruling was extended to all federal felony prosecutions in the case of *Johnson v. Zerbst*⁶¹ and applied to the states in *Gideon v. Wainwright*.⁶²

The effective assistance of counsel has been considered from both the opportunity that counsel has to prepare a defense and his competence in implementing his assigned duty.⁶³ Courts have been reluctant to rule on the qualitative performance of counsel, but where there has been a denial of opportunity in terms of both time and access to the defendant, the courts have generally held such to be a denial of constitutional guarantees.⁶⁴

In those special situations where it is reasonable to interpose a defense of insanity, or where the doctrine of partial responsibility may be applicable, the lack of a psychiatrist to the defense would so limit the preparation of the defense as to constitute a denial of opportunity to prepare and thus

⁶⁰ *Id.* at 71.

⁶¹ 304 U.S. 458 (1938).

⁶² 372 U.S. 335 (1963).

⁶³ *E.g.* *Avery v. Alabama*, 308 U.S. 444, 446 (1940); "But the denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel." See Note, *Effective Assistance of Counsel for the Indigent Defendant*, 78 HARV. L. REV. 1434 (1965).

⁶⁴ *Brown v. Beto*, 377 F.2d 950 (5th Cir. 1967); *Thomas v. District of Columbia*, 90 F.2d 424, (D.C. Cir. 1937); *King v. Beto*, 305 F. Supp. 636 (S.D. Tex. 1969), *aff'd. per curiam*, 429 F.2d 221 (1970).

be in violation of the constitutional right to counsel.⁶⁵ The issue the courts must decide is whether the defendant can present a meaningful defense without the aid requested.⁶⁶ This was the reasoning of the early cases⁶⁷ and it ought to apply to the issue of psychiatric assistance. If the lack of a psychiatrist of his own choice⁶⁸ prevents the defendant from obtaining a meaningful defense, then the presence of counsel is not enough.

Before the passage of the Criminal Justice Act,⁶⁹ a federal district court in the case of *United States v. Germany*⁷⁰

⁶⁵ *Bush v. McCollum*, 231 F.Supp. 560, 564 (N.D. Tex. 1964).

Denial of motions of Bush's counsel prior to trial to commit him to a mental hospital for examination or provide funds for employment of a qualified psychiatrist or otherwise make available to the jury and to court appointed counsel psychiatric evidence as to Bush's sanity deprived him of the only satisfactory procedure for determining sanity.

By overruling Bush's motions and failing to provide him an opportunity to prepare his defense, the State denied him a fair trial as required by the Fourteenth Amendment.

⁶⁶ *Id.* at 565, "[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 which the case requires."

⁶⁷ In *Powell v. Alabama*, 287 U.S. 45, 58-59 (1932) the Court held that the right to counsel includes competent counsel, time and opportunity to prepare an adequate defense. See also *United States v. Wade*, 388 U.S. 218, 225 (1967) where the Court held: "The plain wording of this guarantee thus encompasses counsel's assistance whenever necessary to assure a meaningful 'defence'."

⁶⁸ In *Glasser v. United States*, 315 U.S. 60, 70 (1942) the Supreme Court held that the right to assistance of counsel includes the right to counsel of defendant's choice.

⁶⁹ 18 U.S.C. § 3006A (1964).

⁷⁰ 32 F.R.D. 343 (M.D. Ala. 1963). *But see*, *United States v. Bows*, 360 F.2d 1 (2d Cir. 1966), *cert. denied*, 385 U.S. 961,

held that denial to an appointed attorney of extra funds to enable him to interview the material witness, and to view the scene of the alleged crime was such a limitation as to deny the indigent defendant his constitutional right to the effective assistance of counsel.⁷¹

The special nature of the defenses of insanity and diminished responsibility is such as to make the assistance of a psychiatrist concomitant with the requirement for the effective aid of counsel. The New Jersey court in *State v. Rush* said,

The obligation of the State to provide the indigent with the means for an appropriate defense rises from an interplay of the constitutional rights to counsel, to a fair trial, and to equality before the law.⁷²

where court upheld denial of trip expenses to privately retained counsel of indigent defendant for failure to show that such aid was required to obtain effective assistance of counsel.

⁷¹ 32 F.R.D. at 344,

There is no question but that the Sixth Amendment to the Constitution of the United States, in providing that, '[i]n all criminal prosecutions, the accused shall * * * have the Assistance of Counsel for his defense,' requires that the assistance of counsel be more than a mere formal appointment or an empty gesture. *Powell v. Alabama*, *Johnson v. Zerbst*, *Avery v. Alabama*. These cases that require not only the formal appointment of counsel, but the appointment of competent counsel, effective counsel, and counsel that have, 'an opportunity' and 'time' to prepare and present their indigent clients' cases, have been recognized time and again by the Supreme Court of the United States and the various circuit courts of appeal. See *Johnson v. United States*, 352 U.S. 565 (1957) and *Mitchell v. United States*, 259 F.2d 787 (D.C. Cir. 1958), *cert. denied*, 358 U.S. 850, wherein numerous cases from the various courts of appeal are referred to, construing the question of what constitutes effective assistance of counsel.

⁷² 46 N.J. 399, 416, 217 A.2d 441, 450 (1966).

LEGISLATIVE RECOGNITION

The state of New Jersey, in 1795, enacted what is probably the very first statute providing for the assistance of counsel to the indigent.⁷³ "The court before whom any person shall be tried upon indictment, is hereby authorized and required to assign to such person, if not of ability to procure counsel, such counsel, not exceeding two, as he or she shall desire"⁷⁴

That such assistance should include psychiatric assistance to the indigent defendant in murder prosecutions was decided in *State v. Horton*.⁷⁵ This concept was subsequently reaffirmed in non-murder cases.⁷⁶

Other states have followed with a variety of measures to provide necessary assistance to the indigent accused interposing a defense of insanity.⁷⁷ These provisions have, for the most part, consisted of mental examinations by a state mental facility or by a psychiatrist appointed by the court.⁷⁸

⁷³ Trebach, *The Indigent Defendant*, 11 RUTGERS L. REV. 625, 629 (1957).

⁷⁴ PENNINGTON, LAWS OF THE STATE OF NEW JERSEY, 1703-1820 p. 184 (1820).

⁷⁵ 34 N.J. 518, 170 A.2d 1,9 (1961), "The constitutional obligation to furnish counsel to an indigent can sensibly only be construed to include as well that which is necessary to proper defense in addition to the time and professional efforts of an attorney and we have no doubt of the inherent power of a court to require such to be provided at public expense."

⁷⁶ *State v. Rush*, 46 N.J. 399, 217 A.2d 441 (1966).

⁷⁷ Goldstein and Fine, *The Indigent Accused, The Psychiatrist, and the Insanity Defense*, 110 U. PA. L. REV. 1061, 1092 (1962); WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE (1954).

⁷⁸ Lewin, *Indigency—Informal and Formal Procedures to Provide Partisan Psychiatric Assistance to the Poor*, 52 IOWA L. REV. 458, 472-87 (1966).

Through the years the United States Congress also has enacted legislation providing some assistance to the indigent accused pleading insanity in federal courts.⁷⁹ These provisions were not considered adequate,⁸⁰ resulting in the passage of the Criminal Justice Act of 1964.⁸¹ This law provides for the appointment at government expense of psychiatrists to aid the defendant in his defense upon a showing in an ex parte proceeding that an expert is required.⁸²

This new Federal Law did not limit aid to the absolutely indigent criminal defendant but expanded it to include all those financially unable to afford their own psychiatrist. Thus, a defendant who may have sufficient funds to secure his own attorney would not be denied the help of a psychiatrist on an insanity defense merely because his funds are insufficient to cover the cost of both attorney and expert.

The Act did not give the indigent defendant an unlimited right to partisan psychiatric aid in each criminal proceeding.

⁷⁹ 18 U.S.C. §§ 4244-48. Procedures to discover and dispose of incompetents both before and during trial. RULE 28, FED. R. CRIM. P. Procedure by which court may appoint expert witness. RULE 17(b), FED. R. CRIM. P. Procedure by which power of subpoena is extended to indigent defendants.

⁸⁰ See REPORT OF ATTORNEY GENERAL'S COMM. ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE 6 (1963) [often cited as ALLEN REPORT, after the chairman of the committee Francis A. Allen]. For a discussion of federal procedures prior to the Act see Lewin, *Mental Disorder and the Federal Indigent*, 11 S. DAK. L. REV. 198 (1966).

⁸¹ 18 U.S.C. § 3006A (1964).

⁸² 18 U.S.C. § 3006A(e) (1964):

Counsel for a defendant who is financially unable to obtain investigative, expert, or other services necessary to an adequate defense in his case 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 defendant is financially unable to obtain them, the court shall authorize counsel to obtain the services.

The assignment of such psychiatric assistance was left to the discretion of the district courts upon an *ex parte* showing of necessity.⁸³ In *Christian v. United States*⁸⁴ Judge Murrah held that the court has a duty to provide such services when the need is established.⁸⁵ That this discretion should not be unduly restrictive is the holding of the court in *United States v. Schultz*⁸⁶. The *Schultz* Court further held that the defendant is entitled to a government paid independent psychiatrist even where an impartial psychiatrist had already examined the defendant, thus negating the sufficiency of the impartial expert.⁸⁷

The Congress has recognized that the adversary procedure requires that parties in a criminal proceeding have an equal opportunity to prepare and conduct such proceedings with the assistance of required experts such as psychiatrists.⁸⁸

A number of states have enacted local statutes similar to the Criminal Justice Act since 1964.⁸⁹ The tendency in all states has been to interpret narrowly the discretion granted

⁸³ See e.g. *Ramer v. United States*, 390 F.2d 564 (9th Cir. 1968).

⁸⁴ 398 F.2d 517 (10th Cir. 1968).

⁸⁵ *Id.* at 519:

"Where the defendant satisfactorily establishes the need for subsection (e) services the district court has a *duty* to authorize such services for the proper preparation of the defendant's case."

⁸⁶ 431 F.2d 907 (8th Cir. 1970).

⁸⁷ *Supra* note 29.

⁸⁸ Lewin, *Mental Disorder and the Federal Indigent* 11 S. DAK. L. REV. 198, 250 (1966):

The scales of justice are balanced. The indigent defendant in the federal process now has an opportunity to secure a psychiatric defense without relying upon the charity of the prosecution or upon devices that either were in the nature of impartial expert testimony or were weighted heavily in favor of the prosecution.

⁸⁹ See Annot., 18 A.L.R.3d 1074, 1091 (1968).

to the courts in providing for the assistance of partisan psychiatrists, or of other experts as authorized by the statutes to indigent defendants. That the statutes exist at all is an indication of the recognition of the public policy supporting the need for equality of opportunity to prepare an effective defense. That the statutes are narrowly construed is probably due to the lack of higher court decisions that such assistance is a matter of constitutional right.

CONCLUSION

As the courts increase their reliance on the testimony of psychiatrists where insanity is at issue, and as the complexity of such defense increases, the indigent defendant and his assigned counsel are placed at an increasing disadvantage should they be lacking the aid of a psychiatrist. That a duty exists for the government to provide the indigent with partisan psychiatric assistance has been recognized by the Congress and by the lower federal courts in recent years. Most of the states, however, have not enacted specific legislation providing the indigent defendant with the psychiatric aid necessary to meet the constitutional guarantees.

These states have usually left it up to the local court to formalize the rules and procedures under which the defendant may be granted such expert assistance.

To ensure that such local rules will provide the sufficient aid necessary, it is up to the Supreme Court to decide when the due process right to counsel encompasses the furnishing of government paid partisan psychiatric aid to the indigent.

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