"Fundamental Fairness": Indigent Defendants' Rights to Expert Witnesses

In *Hobak v. Alabama*,[1] the Fifth Circuit Court of Appeals affirmed the dismissal by the United States District Court for the Northern District of Alabama of petitioner's habeas corpus petition after he had been convicted of murder in an Alabama court. Appellant's claim for relief was based on a contention that the state's denial of his request for pretrial expert assistance violated his constitutional guarantees of due process and equal protection of the laws. In affirming the district court, the Fifth Circuit indicated that even if appellant were provided the experts he sought, the facts of the case were so strongly indicative of his guilt that findings by experts in his favor would not change the verdict.[2] However, the court suggested in dicta that there would in the future come a situation in which provision of such experts by the state for an indigent defendant would be required in order to meet the constitutional guarantee of due process.[3]

Charles William Hobak was seen driving with three others late in the afternoon of the night of the murder. One of these was Jimmy Ford White, whom Hobak is accused of murdering. Early in the evening, Hobak and the others were in a package store located some eight miles from the murder scene and the store's proprietor testified to having seen the knife, found later at the murder scene, in Hobak's hand while he was in the store. He also indicated that all four were highly intoxicated. About 10:00 p.m. Hobak came to the home of John William Holder who lived one and one half miles from the scene of the crime. He was without shirt or shoes, had blood on his stomach, and told Holder he thought he had knifed two men. At the murder scene two bodies were found on the front seat of the car driven earlier by Hobak. Each had had his throat cut by a knife. Appellant's shoe was found beside the car and another shoe and a knife were found close by in some vines. The knife was identified as the one Hobak had displayed earlier in the package store.[4]

Hobak's only defense was that the ambulance driver coming to pick up the bodies had reported seeing what may have been a man. However, po-

1. 607 F.2d 680 (5th Cir. 1979).
2. *Id.* at 682-83.
3. *Id.* at 682.
4. *Id.* at 681-82.

lice found no indication that anyone had been there.[5]

The court said that in its mind the strongest argument appellant made for expert assistance was that a fingerprint expert may have found fingerprints other than his on the knife. The court dismissed this, however, saying that even if others' prints were found and assuming the most favorable testimony for appellant by the expert, the evidence was so conclusive that not enough jurors would have been doubtful of Hobak's guilt to avoid his conviction.[6] The court therefore affirmed the district court, saying that the state was not required in the instant case to provide either expert witnesses or investigators in order to ensure effective assistance of counsel or fair trial and that the state court's refusal to grant appellant a continuance was not an error.[7]

The remarkable aspect of this case is that the court is issuing a loud and clear statement that in the proper factual situation it will require the state to provide an indigent defendant with expert pretrial assistance in order to satisfy the requirements of due process and fundamental fairness.[8] The fact that the court announced this in an opinion in which fairness and due process did not require experts seems to indicate a clearly articulated philosophical direction for the future. The opinion specifically states that no test has been determined and no decision has been made as to what showing an indigent defendant would have to make to secure such services,[9] but a definite statement of direction has been issued.

The sixth amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."[10] In 1932, the Supreme Court determined in *Powell v. Alabama* that right to counsel would be empty indeed unless the counsel were to be effective.[11] Appointment of counsel in time that he may investigate the facts was seen as a requisite for effective representation.[12] In 1963, the Court in *Gideon v. Wainwright* stated that the sixth amendment right to counsel was one of the fundamental rights binding on the states through the fourteenth amendment.[13] Thus the *Gideon* decision, coupled with that of *Powell,* requires that effective

5. *Id.* at 682.
6. *Id.*
7. *Id.* at 683.
8. *Id.* at 682.
9. *Id.* Some state legislatures have passed statutes that make available expert assistance for indigent defendants. The criteria for appointment and the amounts appropriated in state funds vary. *See* CAL. EVID. CODE § 730 (West 1966), IOWA CODE ANN. §§ 815.4,-.5 (West 1979).
10. U.S. CONST. amend. VI.
11. 287 U.S. 45 (1932).
12. *Id.* at 71.
13. 372 U.S. 335 (1963).

counsel be made available to all defendants subject to state and federal prosecution in felony cases.

The question as to what constitutes effective counsel as repeatedly mandated by the United States Supreme Court remains open and disputed. The only case in which the Supreme Court has specifically dealt with the question of indigent defense services at the pretrial level and whether they are constitutionally mandated is *United States ex rel. Smith v. Baldi.*[14] The Court stated in dicta that it could not say that the state has a duty to provide experts at pretrial for indigent defendants as a constitutional requirement.[15] However, the facts of the case indicate that there had been impartial psychiatric testimony at trial which satisfied the Court. The case was not one in which the interests of the defendant were substantially disregarded.

The Court in *Baldi* cited the 1951 decision of the First Circuit in *McGarty v. O'Brien.*[16] The circuit court had held that the failure of a state court to appoint a requested independent expert did not deprive an indigent defendant of due process.[17] The defendant argued that court appointed counsel would be ineffective and negligible unless the state was obligated to provide services necessary to an adequate defense.[18] In *McGarty,* however, two impartial psychiatrists had been appointed as court witnesses and this satisfied the court in the absence of a challenge to their impartiality.[19]

United States circuit courts following the *Baldi* decision have varied in their approaches to rights of indigent defendants to pretrial services. The Tenth Circuit in *Watson v. Patterson*[20] determined that the fundamental fairness test[21] of due process was not violated where the defendant had one ballistics expert, even though the State had retained three such experts.[22] The court found it significant that no cases had been cited by the defendant in which a court had directly held that the appointment of

---

14. 344 U.S. 561 (1953).

15. *Id.* at 568.

16. 188 F.2d 151 (1st Cir.), *cert. denied,* 341 U.S. 928, *rehearing denied,* 341 U.S. 957 (1951).

17. 188 F.2d at 157.

18. *Id.* at 155.

19. *Id.* at 157.

20. 358 F.2d 297 (10th Cir. 1966).

21. Recent cases and articles indicate that though the courts have traditionally looked at the due process question as one of fundamental fairness, there is also an equal protection basis on which indigent defendants should be provided expert services. *See, e.g.,* Douglas v. California, 372 U.S. 353 (1963), Griffin v. Illinois, 351 U.S. 12 (1956), Margolin & Wagner, *The Indigent Criminal Defendant and Defense Services: A Search for Constitutional Standards,* 24 HASTINGS L.J. 647 (1973).

22. 358 F.2d at 298.

experts was a constitutional requisite.[23]

The Ninth Circuit indicated in *Mason v. Arizona* that the due process clause required indigent defendants to be provided with investigative assistance when it was necessary to the preparation of an effective defense.[24] However, the requirement is not automatic, but should be determined on a case by case basis,[25] and *Mason* was a case in which such assistance was not judged necessary.

In *United States ex rel. Robinson v. Pate*,[26] the Seventh Circuit Court stated that "[i]n many cases unless a defendant had the opportunity to compel witnesses to appear in his behalf, the right to counsel would be meaningless."[27] Pursuant to *Brady v. Maryland*[28] the court said that the "denial of a reasonable request to obtain the services of a necessary psychiatric witness is effectually a suppression of evidence violating the fundamental right of due process."[29] No funds had been provided for an expert and the court said that failure to grant a continuance for one day so that an expert could be called from a public agency denied the defendant the opportunity to obtain necessary services. The issue was not, as in *Hobak*, whether the state should provide experts, but whether the expert was necessary to an adequate defense. However, recognition that an expert may be necessary at all is but one step removed from a recognition that the state should provide the necessary expert for the indigent defendant.

In the Fifth Circuit, psychiatric services have been the only type of expert assistance the court has required states to provide for indigents.[30] In *Bush v. McCollum*, the court held that in a case where insanity was seriously at issue, the state must provide competent psychiatric testimony for an indigent defendant in order to satisfy fourteenth amendment requirements.[31] The appellate court stated that without such testimony the defendant would be denied a fair trial and effective assistance of counsel.[32]

In *Hintz v. Beto*,[33] the issue was whether the court had denied fundamental fairness to the defendant by failing to allow a reasonable time in

---

23. *Id.*
24. 504 F.2d 1345 (9th Cir. 1974), *cert. denied*, 420 U.S. 936 (1975).
25. 504 F.2d at 1352.
26. 345 F.2d 691 (7th Cir. 1965), *affirmed in part and remanded*, 383 U.S. 375 (1966).
27. 345 F.2d at 697.
28. 373 U.S. 83 (1963). The Court held that suppression of evidence likely to exculpate a defendant is a violation of due process. *Id.* at 87.
29. 345 F.2d at 695.
30. 607 F.2d at 682 n.1.
31. 231 F. Supp. 560 (N.D. Tex. 1964), *aff'd*, 344 F.2d 672 (5th Cir. 1965).
32. 344 F.2d at 672.
33. 379 F.2d 937 (5th Cir. 1967).

advance of trial for a lawyer to examine a psychiatric evaluation of the defendant, not whether the court should appoint such an expert. The court held that an indigent defendant has a federal constitutional right to a lawyer who has had an opportunity to prepare, and this includes time to study experts' reports.[34] The court had appointed a psychiatrist, but had failed to do so in time for the report to be filed sufficiently before trial for the lawyer to study it. Though the case does not speak to the issue of the obligation of states to appoint experts, it does indicate the importance placed by the court upon adequate opportunity to prepare a defense, and in this case the defense included a court appointed expert.

The Fifth Circuit vacated a district court judgment in *Cherry v. Estelle*[35] and remanded the case with special instructions to the court. Cherry, an indigent defendant, claimed that he had been denied a fair trial because the state had refused to provide an independent ballistics expert to testify in his behalf. He appealed to the district court for habeas relief, which the district court denied without consulting the state court record. The Fifth Circuit's instructions to the district court were that relief should not be denied without an examination of the state court record.[36] The implication is that the court feels that provision of experts for an indigent defendant is a significant question, one not to be summarily decided.

The Fifth Circuit denied an indigent defendant the right to a state provided competency examination in *Pedrero v. Wainwright*.[37] However, the basis for this judgment was that there was no bona fide doubt as to the defendant's competency and therefore, there was no federal constitutional duty to provide a hearing on that issue.[38] This decision does not in any way seem to undermine the emphasis placed by the court in other decisions on fair trial and the opportunity to provide an adequate defense through effective counsel.

In *Gray v. Rowley*[39] the Fifth Circuit clarified its test as to the requirements of fundamental fairness regarding physical evidence in a trial. Gray, who was convicted of rape and murder, contended that he had been denied due process by the court's refusal to allow him to have an expert of his own choosing examine a piece of evidence.[40] Once again, the issue

34. *Id.* at 942.

35. 507 F.2d 242 (5th Cir. 1975).

36. *Id.* at 243. On remand the court found that when an independent ballistics expert had been made available but was not used through the unilateral action of defense counsel, defendant was not entitled to habeas corpus relief on the theory that he was denied such an expert. 424 F. Supp 548 (1976).

37. 590 F.2d 1383 (5th Cir. 1979).

38. *Id.* at 1391.

39. 604 F.2d 382 (5th Cir. 1979).

40. *Id.* at 383.

was not state appointment of an expert, but denial of the expert altogether. The court, quoting in part *White v. Maggio*,[41] said:

> "Fundamental fairness is violated when a criminal defendant . . . is denied the opportunity to have an expert of his choosing . . . examine a piece of critical evidence whose nature is subject to varying expert opinion". . . . The evidence must be both "critical" and "subject to carrying [varying] expert opinion.". . ."Critical evidence" is material evidence of substantial probative force that "could induce a reasonable doubt in the minds of enough jurors to avoid a conviction."[42]

The court was dealing specifically with evidentiary matters in affirming Gray's conviction, but in its definition of fundamental fairness recognized the need for defendants sometimes to have independent experts. The court left untouched the question as to whether the state should provide them.

In *Hobak* the court in one step moves to the threshold of holding that the need for an indigent defendant to have expert assistance in preparing his defense is such that states should be required to provide it. The missing element is the proper factual situation. And though the court announces that it has developed no test, the citation of *Gray* and *White* would indicate at least the initial considerations the court would deem important to determining the need for a state paid expert to assist in the defense. One can speculate that an indigent defendant will soon accept the invitation issued by the Fifth Circuit Court in *Hobak* and supply the court with the proper fact situation in which fundamental fairness cannot be satisfied without provision by the state of expert witnesses to aid in his defense.

That this will be a positive step for society cannot be doubted. As Justice Douglas said in *Brady v. Maryland:* "Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly."[43] Denying an indigent defendant's request for a state paid expert to examine and testify regarding critical evidence which might raise a reasonable doubt in jurors' minds, enough doubt to avoid conviction, would surely seem to be treating the accused unfairly.

However, any extension of the rights of indigents within the judicial process will necessarily raise problems. One serious problem is economic. Courts will need more money for conducting trials, and an estimation of how much more may be difficult to determine. Indigent defendants and

---

41. 556 F.2d 1352, 1355 (5th Cir. 1977), *quoting* Barnard v. Henderson, 514 F.2d 744, 746 (5th Cir. 1975).

42. 604 F.2d at 383-84 (citations omitted).

43. 373 U.S. 83, 87 (1963).

their attorneys may be led to request state paid experts more often than needed, but the court seems to be anticipating that problem and trying to avoid it by developing guidelines allowing for such experts only when deemed crucial to fairness. Another issue which will surely surface is whether the state should provide experts for the indigent equal in number to those called by the state prosecutor. This question has been answered negatively in *Watson v. Patterson*,[44] although it may not yet have been fully laid to rest.

The Fifth Circuit has indicated in *Hobak* a desire to assure society and indigent criminal defendants that our system of justice is concerned with fairness. In this sentiment we hear echos of Justice Black's statement in *Griffin v. Illinois:* "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[45]

PATRICIA WALKER BASS

44. 358 F.2d 297 (10th Cir. 1966).
45. 351 U.S. 12, 19 (1956).