IN THE

SUPREME COURT OF FLORIDA

HENRY JOSE ESPINOSA

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

No. ~~73,346~~ 73,436

AMICUS CURIAE BRIEF OF

THE FLORIDA PUBLIC DEFENDERS ASSOCIATION

in support of

APPELLANT'S MOTION FOR REHEARING.

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ON BEHALF OF THE FLORIDA PUBLIC
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STATEMENT OF INTEREST OF AMICUS CURIAE

The Florida Public Defender Association, Inc. (FPDA) is a non profit Florida corporation. Its membership comprises the Public Defenders of the twenty judicial circuits of Florida, their assistant public defenders, and their staff, charged under the Constitution and laws with the responsibility of providing representation to indigent persons charged with criminal law violations in the State of Florida. The FPDA seeks to improve the representation of indigent criminal defendants through various educational and professional activities and advocates criminal law and procedure issues of importance to its membership. The FPDA frequently files briefs as amicus curiae on issues which widely affect the right to counsel for criminal defendants. The FPDA is interested in construction of §914.06, Florida Statutes, because it directly affects the funding of the legal services its members provide.

SUMMARY OF THE ARGUMENT

Indigent defendants have a pressing need for expert assistance to provide an adequate defense. The National Government has long provided for such appointment. Expert testimony strongly affects juries, but is frequently unreliable. Indigent defendants need experts' help to challenge effectively unreliable expert testimony.

§914.06, Florida Statutes expanded provision of expert assistance to the State and indigent defendants. Requiring showing, to a reasonable probability, that the trial would be fundamentally unfair before appointing experts is more stringent than intended and cannot reasonably be applied to State requests therefore, although the statute's words apply to both indigent defendants and the State. The test does not fulfill the constitutional guarantees of effective assistance and due process. It provides little guidance because it leads to inconsistent results, as shown by the conflicting opinions in the very case this Court cites to adopt the test, all of which purport to apply the standard, but which reach different results.

This Court should follow federal cases which construe the federal statute on appointing experts for indigent defendants. These cases form a well-developed body of case law which gives guidance to interpreting Florida's law. They require experts be appointed when a reasonable attorney would independently engage such services for a client with the financial means to support his defenses. This test adequately protects the right to counsel; it is derived from counsel's duty to investigate reasonably the case.

ARGUMENT

COURTS SHOULD APPOINT EXPERT ASSISTANTS TO INDIGENT CRIMINAL DEFENDANTS UNDER §914.06, FLORIDA STATUTES, WHEN A REASONABLE INDEPENDENT ATTORNEY WOULD DO SO IF HIS CLIENT HAD THE FINANCIAL MEANS TO SUPPORT THE DEFENSE.

A. INDIGENT CRIMINAL DEFENDANTS HAVE A PRESSING NEED FOR EXPERT ASSISTANCE BECAUSE EXPERT OPINION IS OFTEN GIVEN UNDUE RELIANCE BY THE FINDER OF FACT.

Over half a century ago, Benjamin Cardozo wrote concerning expert witnesses, "In these and like cases, a defendant may be at an unfair disadvantage, if he is unable because of poverty to parry by his own witnesses the thrusts of those against him." Reilly v. Berry, 250 N.Y. 456, 166 N.E. 165, 167 (1929). In 1956, Jerome Frank opined:

> Furnishing [an indigent] with a lawyer is not enough: The best lawyer in the world cannot competently defend an accused person if the lawyer cannot obtain existing evidence crucial to the defense, e.g.,if the defendant cannot pay the fee of an investigator to find a pivotal missing witness or a necessary document, or that of an expert accountant or mining engineer or chemist.

United States v. Johnson, 238 F.2d 565 572 (2d Cir. 1956), cert. dimissed 357 U.S. 933 (1958)(Frank, dissenting). The National Government has accepted this view: at the urging of the Kennedy administration, Congress passed the Criminal Justice Act of 1964 which provides both for the appointment of counsel and expert assistance in the Federal courts. 18 U.S.C. §3006A.[1] President

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[1] Since amended, this statute now reads:

> **(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

Kennedy stated its purpose was:

> to assure effective legal representation for every man whose limited means would otherwise deprive him of an adequate defense against criminal charges . . . To guarantee a fair trial under such circumstances requires that each person have ample opportunity to gather evidence, and prepare and present his cause.

Letter of Transmittal by President Kennedy, 1964 U.S.Code Cong. & Ad.News 2993. Attorney General Robert Kennedy wrote of the provision on appointing experts:

> the bill establishes an adequate defense standard under which representation in a criminal case is recognized as involving more than a lawyer alone.

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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.

(2) **Without prior request** - (A) Counsel appointed under this section may obtain, subject to later review, investigative, expert, and other services without prior authorization if necessary for adequate representation. Except as provided in subparagraph (B) of this paragraph, the total cost of services obtained without prior authorization may not exceed $300 and expenses reasonably incurred.

(B) The court . . . may, in the interest of justice, and upon the finding that timely procurement of necessary services could not await prior authorization, approve payment for such services after they have been obtained, even if the cost of such services exceeds $300.

(3) **Maximum amounts** - Compensation to be paid to a person for services rendered by him to a person under this subsection, or to be paid to an organization for services rendered by an employee thereof, shall not exceed $1,000, exclusive of reimbursement for expenses reasonably incurred, unless payment in excess of that limit is certified by the court . . . as necessary to provide fair compensation for services of an unusual character or duration, and the amount of the excess payment is approved by the chief judge of the circuit . . . .

18 U.S.C. §3006A(e).

> It requires making available to counsel those auxiliary investigative, expert, and other services frequently essential to ascertaining the facts and making the judgments upon which to prepare and present the defendant's case.

Letter of the Attorney General, 1964 U.S.Code Cong. & Ad.News 2995.

The reasons for granting criminal defendants expert assistance are clear and compelling. Expert opinion evidence, cast in scientific terminology, strongly affects the finder of fact; for this reason, the courts control presentation of expert evidence, requiring the court declare a witness an 'expert,' before allowing opinion evidence, see Davis v. State, 44 Fla. 32, 32 So. 822, 823-4 (1902), and warning the jury not to give undue weight to expert testimony. See Fla.Std.J.Instr. 2.04(a); United States v. Barnett, 800 F.2d 1558, 1569 (11th Cir.), cert. denied 480 U.S. 935 (1988). The accuracy of expert testimony is very much open to question. In a study of 240 forensic labs by the Law Enforcement Assistance Administration in 1974, the agency sent various samples to the labs and asked for their conclusions. None of the labs were able to identify all twenty-one samples; 28% could not perform proper ballistics tests; 71% could not identify blood samples. Kurzman, Challenging "Scientific Evidence" Using the Results of the Laboratory Proficiency Testing Research Program, in RESULTS OF THE LABORATORY PROFICIENCY TESTING RESEARCH PROGRAM (National College For Criminal Defense 1979); Decker, Expert Services in the Defense of Criminal Cases: The Constitutional and Statutory Rights of Indigents, 51 U. Cincinnati Law R. 574 (1982). In one recent

instance, the State acknowledged a hair expert testified falsely, leading to a wrongful conviction for murder. Peek v. State, 488 So.2d 52, 53 (Fla. 1986)(trial court granted unappealed order on those grounds).

Defense counsel faced with opposing expert witnesses often need help to prepare an effective cross examination. By definition, experts possess specialized knowledge; defense counsel are not omniscient and cannot thoroughly learn on their own a body of specialized knowledge to discover whether and how an expert opinion might be wrong. Further, cross exam alone often will not put the full picture before the finder of fact: to successfully expose an unreliable opinion, defendants usually must call their own experts to express contrary opinions. Absent the assistance of experts, the likelihood is great that unreliable opinions will be put before the finder of fact without serious challenge.

B. CONSTRUING §914.06, FLORIDA STATUTES, TO REQUIRE DEFENDANTS SHOW, TO A REASONABLE PROBABILITY, THAT DENIAL OF EXPERT ASSISTANCE WILL RENDER THE TRIAL FUNDAMENTALLY UNFAIR CONTRAVENES THE PLAIN WORDS AND LEGISLATIVE INTENT OF THE STATUTE AND FAILS TO PROVIDE GUIDANCE ON WHEN EXPERTS SHOULD BE APPOINTED.

In 1985, the Florida Legislature passed Chapter 85-213, Laws of Florida, which amended §914.06, the statute authorizing payment of expert witnesses for both the state and indigent criminal defendants. The 1985 amendment extended compensation of experts from felonies to all crimes and clarified that compensation should include all services of an expert reasonably required, not just

compensation for attendance of the witness at trial.[2] Separate sections establish a funding mechanism and order counties compensate state attorneys and public defenders for "pretrial consultation fees for expert or other potential witnesses consulted before trial" by those officers. §§27.34(2) and 27.54(2), Fla.Stat. (1989). In Espinosa v. State, 16 F.L.W. S489 (Fla. July 11, 1991), this Court states indigent defendants are not entitled to appointment of experts under §914.06 unless demonstrating:

> "something more than a mere possibility of assistance from a requested expert . . . a defendant must show the trial court that there exists a reasonable probability both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial."

Id. at S491(e.a.), quoting Moore v. Kemp, 809 F.2d 702, 712 (11th Cir.)(en banc), cert. denied 481 U.S. 1054 (1987).

Nothing in the words of §914.06 show the Legislature intended the Moore test to obtain expert assistance, a test almost impossible to meet. Moore, charged with the rape and murder of a convenience store clerk, moved for appointment of an expert to review the tests because counsel alleged he did not know if the state testing was complete or if other tests could be performed.

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[2] The amendment reads:

> 914.06 Compensation of expert witnesses in criminal ~~felony~~ cases. -- In a criminal ~~felony~~ case when~~, on motion of~~ the state or an indigent defendant requires~~, the court may require~~ the services ~~attendance~~ of an expert witness whose opinion is relevant to the issues of the case~~,~~ the court shall award reasonable compensation to the expert witness that shall be taxed and paid by the county as costs in the same manner as other costs.

Chapter 85-213, section 5, Laws of Florida.

The state had conducted numerous tests of physical evidence, including blood, saliva, hair, ballistics, and shoe prints. The majority held the evidence in the record before the trial court when the motion was made did not show need to a reasonable probability: counsel failed to describe the kind of expert requested or what the expert would do. Moore 809 F.2d at 717-718. The majority opinion in Moore requires defendants, in essence, to possess the knowledge of an expert in order to show what the expert would do before obtaining their assistance; otherwise, the defendant could not show the trial would be fundamentally unfair. See Id. at 742-3 (Johnson, J., concurring and dissenting). Such a standard, if that is what this Court means to adopt,[3] would be impossible to meet.

The statute says nothing about requiring showing to a reasonable probability the trial be fundamentally unfair before appointing an expert, only that assistance must be provided when the defense (or state) "requires the services of an expert witness whose opinion is relevant to the issues of the case." §914.06 Fla.Stat. (1989). The Moore majority test conflicts with the plain words of the statute and intent of the Legislature in passing Chapter 85-213. The Legislature provided a substantially equal level of expert assistance for both the state and defense: §914.06 applies by its terms to both the state and indigent defendants and the remaining sections of the act identically provide state

[3] As noted below, the words of Moore can be read differently; this Court should at least clarify if it means to adopt the majority or dissenting view of the Moore test.

attorneys and public defenders compensation for pretrial consultation with experts. Requiring trial courts to grant expert assistance for prosecutors to prepare cases only when the denial renders the trial fundamentally unfair makes no sense whatsoever; yet, Espinosa apparently requires this showing for state requests for assistance based on §914.06.

The Florida Legislature is perfectly capable of specifying different standards for appointing experts for the state and defense, if the Legislature desires to do so. The Legislature is fully able to order only the barest of protections for its citizens accused of crimes if it desires. §914.06 does neither by its own terms. This Court is not justified in overturning the legislative determination appearing in §914.06 on when defendants - and the state - should be provided with expert assistance in the course of a criminal case, yet the Moore majority standard does just that.

The test adopted by this Court also does not provide guidance for the lower courts on when assistance should be granted. The confusion on how to apply this test appears in the Moore opinion itself. Five of the judges who joined Tjoflat's majority opinion wrote separately and flatly stated that the showing of need was probably adequate, instead concurring because they believed the constitutional requirement for expert assistance is limited to psychiatric assistance when sanity is at issue. Id. at 736 (Hill, J., concurring and dissenting). The dissenters in Moore agreed the defendant must show a reasonable probability exists that an expert would be of assistance and denial would cause a fundamentally

unfair trial, but criticized the majority for requiring defendants to possess the knowledge they seek to obtain in requesting experts, and so misapplying the standard. Id. at 742-3 (Johnson, J., concurring and dissenting). Thus, although all the judges of the Eleventh Circuit purport to follow the test quoted by this Court as Florida's, they were hopelessly divided on how it applied to the facts of Moore's case. Florida judges, without further elucidation, will not know when they should appoint experts. The test also will lead to midtrial requests for experts since the crucial nature of expert evidence may well appear to counsel and the bench during trial rather than before.

Moreover, the standard in Moore, accepting the majority opinion as the actual opinion of that court, conflicts with the precedent of the Supreme Court. The Supreme Court in Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087 (1985) held defendants need meaningful access to justice for trials to be fundamentally fair under the Fourteenth Amendment. The Court applied a flexible due process test, considering: the weight of the private interest affected by state action; the weight of the governmental interest affected if the proposed procedural safeguard is provided; and the probable value of the safeguard sought and risk of erroneous deprivation if denied. See Mathews v. Eldridge, 424 U.S. 319 (1976). The private interest when a person's life or liberty is at stake, "is almost uniquely compelling" and "weighs heavily" on the scale. Ake, 470 U.S. at 78. Governmental interests are twofold: financial and the interest in prevailing at trial, but the interest

in providing fair and accurate proceedings limits the interest in prevailing. The probable value of psychiatric assistance is great because a psychiatrist is crucial to an insanity defense and the likelihood of an incorrect diagnosis by any one psychiatrist is high. Thus, "When 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." Id. at 82-3. Ake plainly made such a showing, for his guilt and penalty defenses.[4] However, a bare assertion of need is not enough. In Caldwell v. Mississippi, 472 U.S. 320, 323 n.1, 105 S.Ct. 2633 (1985), the Court held "Given that petitioner offered little more than undeveloped assertions that the requested assistance would be beneficial, we find no deprivation of due process in the trial judge's decision." Ibid.

The readily apparent showing in Ake and the bare assertion of need in Caldwell mark the extremities of the possible showings of need. However, nothing in Ake suggests the defendant must show the trial would be rendered 'fundamentally unfair' in the absence

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[4] Ake was charged with the murdering a couple and wounding their children. His behavior was so bizarre that the trial judge sua sponte ordered him examined for competency, and committed him to a state hospital after an exam by a psychiatrist. Six months later, a psychiatrist from the hospital testified that Ake was a paranoid schizophrenic; the trial court found Ake incompetent. Six weeks passed and another psychiatrist informed the Court that Ake, on an anti-psychotic drug, was competent to stand trial. The court refused to appoint experts to determine Ake's sanity at the time of the offense. Ake's jury rejected an insanity defense: Ake could present no expert testimony. At sentencing, the psychiatrists who examined Ake testified he would likely be dangerous in the future. The defense could not present psychiatric evidence in mitigation or rebuttal.

of the expert and that requirement conflicts with the reasoning employed in Ake. The private interest weighs heavily in favor of providing the safeguard sought in Ake's analysis; the governmental interest is primarily financial. If the safeguard reduces the risk of erroneous deprivation, then it should be granted. When even defense counsel, as in Caldwell, cannot say how providing experts would help, the increased risk in not providing them is weightless. However, when the defendant has a plausible defense and shows experts might assist therein, the reliability of the proceeding is thrown in doubt, and the analysis tilts in favor of providing the safeguard. This is true even when the defendant cannot show the trial, in reasonable probability, was rendered fundamentally unfair. Moore's misapplication of the Ake test is understandable: that test is very case specific and difficult to apply consistently. A more reliable test appears in federal case law on appointment of experts to fulfill the right to counsel.

C. §914.06 SHOULD BE CONSTRUED TO GIVE EFFECT TO THE RIGHT TO COUNSEL, FOLLOWING FEDERAL CASES WHICH CONSTRUE THE FEDERAL STATUTE ON APPOINTMENT OF EXPERTS.

As noted above, the Criminal Justice Act (the CJA) was intended to give full effect to the Sixth Amendment right to counsel. The Florida Legislature should be presumed to have followed the Constitution in passing this act enabling indigent criminal defendants to obtain expert assistance. Given their parallel purposes, Federal case law construing 18 U.S.C. §3006A is persuasive authority for §914.06, Florida Statutes. In addition to fulfilling the constitutional guarantee of effective assistance

of counsel, referencing federal case law provides a well-developed body of law to guide application of Florida's statute.

The test for appointing experts under 18 U.S.C. §3006A does not require defendants show the trial was fundamentally unfair in the absence of the expert. Most of the circuit courts of appeal follow some version of a reasonableness test, the most widely followed being the 'reasonable independent attorney' test.[5] The Eighth Circuit Court of Appeals says:

> While a trial court need not authorize an expenditure . . . for a mere "fishing expedition," [footnote omitted] it should not withhold its authority when underlying facts reasonably suggest that further exploration may prove beneficial to the accused in the development of a defense to the charge. Considering the purpose of §3006A(e) of the Criminal Justice Act to provide the accused with a fair opportunity to prepare and present his case, the application of accused's counsel for such services must be evaluated on a standard of reasonableness. We need not explore the full dimensions of the standard . . . .

United States v. Schultz, 431 F.2d 907, 911 (8th Cir. 1970). That court later refined the test:

> [T]he trial judge should tend to rely on the judgment of the defense attorney if the latter 'makes a reasonable request in circumstances in which he would independently engage such services if his client had the financial means to support his defenses.'

Brinkley v. United States, 498 F.2d 505, 510 (8th Cir. 1974),

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[5] The Tenth, Fifth and Eleventh Circuits have adopted a more open-ended reasonableness test, to be decided on a case by case basis, which appears to rely heavily on a judgment of the strength of the defense. See United States v. Crews, 781 F.2d 826, 834 (10th Cir. 1986); United States v. Patterson, 724 F.2d 1128, 1130 (5th Cir. 1984); United States v. Rinchack, 820 F.2d 1557, 1563-4 (11th Cir. 1987). The First and Third Circuits have not explicated any standard for appointments.

quoting United States v. Theriault, 440 F.2d 713, 717 (5th Cir. 1971), cert. denied 411 U.S. 984 (1973)(Wisdom, concurring). This test is the most widely followed one among the Federal circuits.[6] See United States v. Durant, 545 F.2d 823, 827 (2d Cir. 1976); United States v. Alden, 767 F.2d 314, 318 (7th Cir. 1984); United States v. Bass, 477 F.2d 723, 725 (9th Cir. 1973). The Sixth Circuit has adopted a similar test:

> It seems obvious that the Congressional purpose in adopting this statute was to seek to place indigent defendants as nearly as may be on a level of equality with nonindigent defendants in the defense of criminal cases. Certainly counsel for a nonindigent defendant who was intending such a defense would seek expert testimony to support it as part of an "adequate defense."

United States v. Tate, 419 F.2d 131, 132 (6th Cir. 1969). The Fourth Circuit has adopted a like standard as a matter of due process, equal protection, and the right to counsel. See Williams v. Martin, 618 F.2d 1021, 1025 (4th Cir. 1980)(Habeas relief granted: "There can be no doubt that an effective defense sometimes requires the assistance of an expert witness . . . Had Williams been financially able to afford his own defense, competent counsel undoubtedly would have consulted a pathologist.").

This test is similar to the one required under Rule 3.216(a), Florida Rules of Criminal Procedure. If counsel for an indigent defendant has reason to believe his client is incompetent or was

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[6] The Eighth Circuit recently recited a 'fair trial' prong for its test in deciding necessity under 18 U.S.C. §3006A, but does not distinguish or overrule its older cases on the appropriate standard. See United States v. Spotted War Bonnet, 882 F.2d 1360, 1362 (8th Cir. 1989), vacated 110 S.Ct. 3267 (1990).

insane, the trial court must appoint an expert to examine the defendant and assist counsel. Rule 3.216(a), Fla.R.Crim.P. Under this test, the court has no discretion to review counsel's judgment. See State v. Hamilton, 448 So.2d 1007, 1008 (Fla. 1984). The policy underlying this rule, that defense counsel must have some authority in controlling the preparation of the defense, should be applied to §914.06 which similarly concerns the appointment of experts.

Adopting this test for requests for experts under §914.06 would require an ex parte hearing as provided in 18 U.S.C. §3006A, but the same requirement would hold true under the Moore test.[7] Otherwise the defense must often disclose otherwise confidential information. See United States v. Greschner, 802 F.2d 373, 379 (8th Cir. 1986), cert. denied 480 U.S. 908 (1987)(citing cases); see also Ake, 470 U.S. at 82 (due process requires ex parte hearing for showing of need).

This test will not give defense attorneys a blank check to draw on public funds for indigents. It does not authorize 'fishing expeditions.' There must some showing of a plausible defense for an expert to be beneficial. See United States v. Alden, 767 F.2d 314, 318-9 (7th Cir. 1985)(citing cases). One circuit defines a 'plausible' defense as one in which the evidence suffices to warrant a judicial charge:

> If the insanity defense was factually of sufficient

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[7] This Court will soon consider the ex parte question in a petition for mandamus. Copeland v. McClure, Case number 77,467 (Order to show cause entered June 14, 1991).

> substance to warrant a judicial charge, it is difficult to see how the expert witness' services which appellant's counsel sought for him could be deemed other than "necessary."

Tate, 419 F.2d at 132.

Most important, this 'reasonable independent attorney' test fulfills constitutional guarantees of counsel and due process. When reasonable independent counsel would investigate a defense, the refusal of the state to provide funds to do the same violates the right to counsel. The Ninth Circuit has incorporated its interpretation of the CJA to apply to the states as a matter of providing constitutionally effective counsel. See Mason v. Arizona, 504 F.2d 1345, 1352 (9th Cir. 1974), cert. denied 420 U.S. 936 (1975); see also Williams, 618 F.2d at 1027 (equal protection, due process, and right to counsel violated by not providing expert assistance when substantial question arose about which expert could testify). The Supreme Court has explicitly left open application of the Sixth Amendment to requests for expert assistance. See Ake v. Oklahoma, 470 U.S. 68, 87 n.13 (1985). However, its case law strongly suggests it will hold the constitutional right to counsel includes the right to expert assistance where that is reasonably indicated. Counsel has a duty to investigate the case; a choice not to investigate must be based on reasonable professional judgment. Strickland v. Washington, 466 U.S. 668, 690-1 (1984); Burger v. Kemp, 483 U.S. 776, 794 (1987). Direct restrictions imposed on counsel by the state contrary to counsel's professional judgment cause counsel to be constitutionally ineffective. See Geders v. United States, 425 U.S. 80 (1976)(defendant and counsel

must be allowed to consult during overnight recess); Brooks v. Tennessee, 406 U.S. 605 (1972)(restricting counsel to calling defendant first or not at all impermissible restriction). Direct exclusion of defense experts whose testimony is relevant to a defense violate fundamental due process concerns. See Boykins v. Wainwright, 737 F.2d 1539 (11th Cir. 1984), cert. denied 470 U.S. 1059 (1985); United States v. Leuben, 812 F.2d 179, modified 816 F.2d 1032 (5th Cir. 1984); see also Chambers v. Mississippi, 410 U.S. 284 (1973)(defendant has right to present reliable, relevant evidence). Refusing payment to appoint such experts has the same effect. It violates the defendant's fundamental right to present a defense; it constitutes a state restriction on reasonable investigation by counsel, contrary to the right to counsel.

Article I, §§9 and 16 of the Florida Constitution similarly guarantee the accused the due process of law and the assistance of counsel. §21 provides "justice shall be administered without sale, denial, or delay." Fla.Const. Art.I, §21. This Court has long been vigilant to assure that circumstances outside counsel's control do not undermine the effectiveness of counsel. See Hatten v. State, 561 So.2d 562 (Fla. 1990)(ordering public defender be allowed to withdraw, if need be, because of overly heavy appellate caseload and other counsel be appointed); Scott v. Dugger, 15 F.L.W. S578 (Fla. October 29, 1990)(ordering execution stayed because new counsel on case not able to respond). The policy of these cases and the requirements of the Florida Constitution, that counsel be effective and justice dispensed without sale or denial,

additionally support the adoption of the 'reasonable independent attorney' test.

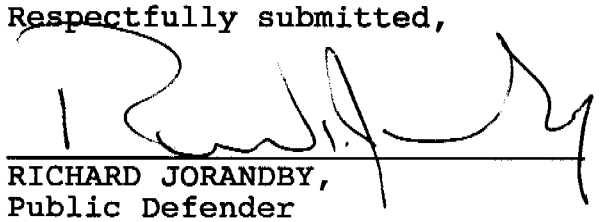
This statute should be construed with these constitutional provisions in mind, like the federal cases construing 18 U.S.C. §3006A. Adopting the 'reasonable independent attorney' standard eases the burden of Florida's courts in applying this provision by referencing settled case law. It fulfills the constitutional guarantee of effective counsel and the legislative intent behind passing §914.06. This Court should revisit its decision of July 11 and review the record of this case under the 'reasonable independent attorney' standard for appointment of expert assistants.[8]

[8] Amicus has not reviewed the record and so cannot attempt to apply the correct standard to the facts of this case.

CONCLUSION

For the above reasons, the FPDA urges this Court to rehear its decision of July 11, 1991 and review Mr. Espinosa's claim under the 'reasonable independent attorney' standard for appointment of expert assistance.

Respectfully submitted,



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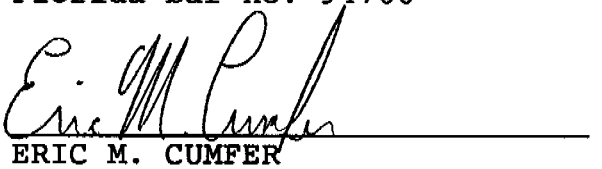

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by First Class U.S. Mail to: Sheryl Lowenthal, Esq., Suite 206, 2550 Douglas Road, Coral Gables, Florida, 33134, Counsel for Appellant, and Michael Neimand, Esq., Assistant Attorney General, Department of Legal Affairs, Ruth Bryan Owen Rohdes Building, 401 N.W. 2d Avenue, Suite N921, Miami, Florida 33128, Counsel for Appellee, on this 25th day of July, 1991.

ERIC M. CUMFER
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