IN THE SUPREME COURT OF FLORIDA

CASE NO. 73,436

HENRY JOSE ESPINOSA,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF
THE ELEVENTH JUDICIAL CIRCUIT OF
FLORIDA, IN AND FOR DADE COUNTY

AMICUS CURIAE BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS - MIAMI CHAPTER IN SUPPORT OF MOTION FOR REHEARING

BENEDICT P. KUEHNE, ESQ.
SONNETT SALE & KUEHNE, P.A.
One Biscayne Tower
Suite 2600
Two South Biscayne Blvd.
Miami, Florida 33131-1802
Telephone: 305/358-2000
Counsel for Amicus Curiae
National Association of
Criminal Defense Lawyers,
Florida Association of
Criminal Defense Lawyers,
and Florida Association of
Criminal Defense Lawyers -
Miami Chapter

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers (NACDL) is a District of Columbia non-profit corporation with a nationwide membership of approximately 25,000 members and associate members. NACDL was founded more than twenty-five years ago to promote study and research in the field of criminal defense law, to disseminate and advance the knowledge of the law in the field of criminal defense practice, and to encourage the integrity, independence, and expertise of criminal defense lawyers.

The Florida Association of Criminal Defense Lawyers (FACDL) is not-for-profit Florida corporation formed to assist in the reasoned development of the criminal justice system. Its statewide membership includes lawyers who are engaged daily in the defense of individuals accused of criminal activity. The founding purposes of FACDL include the promotion of study and research in criminal law and related disciplines, the promotion of the administration of criminal justice, fostering and maintaining the independence and expertise of the criminal defense lawyer, and furthering the education of the criminal defense community through meetings, forums, and seminars. FACDL members serve in positions which bring them into daily contact with the criminal justice system.

The Miami Chapter of the Florida Association of Criminal Defense Lawyers is the oldest of the regional FACDL organizations. Its membership, like the statewide FACDL, is comprised of lawyers who are involved in the defense of individuals accused of criminal activity. FACDL members contribute to the workings of the criminal

justice system, and dedicate their professional time and attention to a wide array of defendants, both indigent and non-indigent.

Among the stated objectives of both NACDL and FACDL is the promotion of the proper administration of the criminal justice system. Consequently, NACDL and FACDL are concerned with the protection of individual rights and the improvement of the criminal law, its practices, and its procedures. A cornerstone of these objectives, and of the criminal justice system as a whole, is the promotion of fair proceedings so that all individuals accused of criminal activity have an adequate opportunity to defend themselves. This opportunity extends to the indigent and the non-indigent alike. Criminal defense counsel, in effectively representing those persons accused of criminal activity, must utilize all available resources to challenge the oftentimes tremendous advantage which the prosecution brings to a criminal case. The ability of the defense to utilize expert witnesses to help prepare a case and to present evidence at trial is crucial in many criminal cases. NACDL and FACDL are very concerned that the court's decision in this case undermines or dilutes the constitutional guarantee of an effective defense by limiting the use of experts by indigent defendants.

ARGUMENT

The proper operation of the criminal justice system requires, at a minimum, that all parties have an opportunity to utilize available resources which will result in the providing of necessary legal services. Neither the prosecution nor the defense should be

strictly limited in the use of those tools which are reasonably likely to assist in preparing a case. This court's Espinosa decision conflicts with that necessary equipoise, and unfairly limits the ability of an indigent defendant to discover and utilize expert witnesses in defending against serious criminal charges.

The focus of this amicus brief is only on that part of the Espinosa opinion which construes §941.06, Florida Statutes (1987). The opinion held that the court did not err in denying a motion for expenses for fingerprint, serology, forensic pathology, and eyewitness experts under §941.06, Fla.Stat. (1987). That statute provides:

> **Compensation of expert witnesses in criminal cases.** In a criminal case when the state or an indigent defendant requires the services of an expert witness whose opinion is relevant to 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.

The court applied a due process standard to evaluate the propriety of a court's refusal to grant expert witness compensation. In so doing, this court announced a standard which goes far beyond the language of the statute and is inconsistent with analogous precedent and the practical needs of the defense in serious criminal cases.

The realities of criminal cases place a heavy burden on defense counsel to marshal all available resources when attempting to defend a client. When a defendant is indigent and expenses are available only upon prior approval by the court, defense counsel

must carefully evaluate the extent to which an expert can assist the defense in developing litigation strategies and in presenting trial evidence regarding the central issues in the case. Especially when the prosecution develops a case based upon its own use of expert witnesses, often supplied by the local crime lab or investigating law enforcement agency, defense counsel may well need the services of an expert simply to determine if relevant issues exist for which expert testimony would be helpful. Considerations governing effective assistance of counsel make clear that an adequate pretrial investigation includes identifying and interviewing potential witnesses. E.g., Sullivan v. Fairman, 819 F.2d 1382, 1391-1392 (7th Cir. 1987)(ineffective assistance of counsel when counsel failed to interview witnesses who possessed information contrary to that claimed by key prosecution witness).

Typically, in any complex criminal case, competent defense counsel will evaluate the evidence and seek the assistance of experts to give preliminary assessments on potentially relevant issues, such as blood typing in a sexual battery case, or fingerprint comparison in an identification case, or ballistics expertise in a firearms case. That preliminary assessment, usually for a moderate expert witness fee, will educate defense counsel about the case and allow counsel to determine whether further steps need to be taken in using an expert to pursue relevant issues. Where the prosecution has noticed its own experts as possible witnesses, the need for a defense expert simply to assist in developing a meaningful examination of the state's expert is essential. Yet,

at these stages of the case, counsel will have, at most, only a reasonable basis for believing that preliminary retention of the expert "may prove beneficial to the accused in the development of a defense to the charge." United States v. Schultz, 431 F.2d 907, 911 (8th Cir. 1970).

This is in keeping with the role and responsibility of defense counsel in criminal cases. The American Bar Association Standards for Criminal Justice provide in §4-1.1(b):

> The basic duty the lawyer for the accused owes to the administration of justice is to serve as the accused's counselor and advocate with courage, devotion, and the utmost of his or her learning and ability and according to law.

Defense counsel owes a duty to investigate the case, regardless of the enormity of the evidence against the client. Standard 4-4.1 states as follows:

> **Duty To Investigate** - It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer or facts constituting guilty or the accused's stated desire to plead guilty.

ABA, Standards for Criminal Justice §4-4.1 (1980). The failure of counsel to make adequate preparation for trial during the discovery stage of the case may be grounds for a finding of ineffective

assistance of counsel. See United States v. DeCoster, 487 F.2d 1197, 1202, 1204 (D.C. Cir. 1973).

It is to this end that courts generally have given substantial deference to counsel's preliminary assessment that an expert may be useful in a case. Consider, for example, the Supreme Court decision in Ake v. Oklahoma, 470 U.S. 68, 105 S. Ct. 1087 (1985), which held that when a defendant has made a preliminary showing that sanity at the time of the offense is likely to be a significant factor at trial, due process requires that the state provide access to a psychiatrist if a defendant cannot otherwise afford one. In reaching that result, the court recognized that the truth finding process of the criminal justice system is enhanced by providing effective tools to the defense:

> The private interest in the accuracy of a criminal proceeding that places an individual's life or liberty at risk is almost uniquely compelling. Indeed, the host of safeguards fashioned by this Court over the years to diminish the risk of erroneous convictions stands as a testament to that concern. The interest of the individual in the outcome of the State's effort to overcome the presumption of innocence is obvious and weighs heavily in our analysis.

Id. at 78, 105 S. Ct. at 1093. That Court recognized that limiting a defendant in acquiring the necessary means by which to developing a defense is unfair:

> Thus, also unlike a private litigant, a State may not legitimately assert an interest in maintenance of a strategic advantage over the defense, if the result of that advantage is to cast a pall on the accuracy of the verdict obtained.

Id. at 79, 105 S. Ct. at 1094.

The clear tenor of the Supreme Court's Ake decision is that defense counsel is in the best position to ascertain whether exploration of the case by an expert would be helpful to insure an adequate defense. This is a quite different standard from this court's use of a due process standard applicable to review of habeas corpus cases, which was adapted from Moore v. Kemp, 809 F.2d 702, 712 (11th Cir.), cert. denied, 481 U.S. 1054, 107 S. Ct. 2192 (1987). That habeas standard requires not only that a defendant show a reasonable probability that an expert would be of assistance to the defense, but also that the denial of such assistance would result in a fundamentally unfair trial. That standard may well be suitable for a court's post-conviction assessment of the constitutional adequacy of a case, but it is certainly an unacceptable and unworkable standard for a trial court's initial evaluation of a request for expert assistance.

Without unduly burdening trial courts, this court can articulate a more workable and fairer standard for evaluating requests for expert witness assistance in indigent cases. The first level of analysis is defense counsel's good faith basis for requesting the preliminary use of an expert. Brinkley v. United States, 498 F.2d 505, 510 (8th Cir. 1974)("The 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 defense.'"). So long as defense counsel makes a

showing that the expert will be of assistance in developing a "plausible" defense, initial approval is warranted. See United States v. Rinchack, 820 F.2d 1557, 1564 (11th Cir. 1987)("A court may refuse to authorize §3006A(e) expert services on grounds that they are not 'necessary' when it concludes that the defendant does not have a plausible claim or defense.").

Once such a showing is made, a trial court can properly limit the amount of compensation available to the expert, which is intended to allow the expert to make a preliminary factual assessment of the case. At that point, defense counsel can make a more thorough showing that an issue exists which will be enhanced by the expert's assistance or services. With this information, the trial court is in a unique position to assess the extent to which the services of an expert are relevant to central issues in the case. At this stage, a court can assess the extent to which the defense needs assistance in responding to evidence offered by the prosecution's experts.[1/]

This court's construction of §914.06 may well cut off the ability of an indigent defendant to utilize an expert under almost

---

[1/] Since the purpose of §914.06 is to formalize the availability of experts for both the defense and the prosecution, the very same considerations govern the state's request for compensation of an expert. Although in many cases the state may have more "in house" experts and therefore less need to rely on the provisions of §914.06, defense counsel appointed by a court is often without any resources to engage an expert. Consequently, the court's restrictive interpretation of the applicable statute may well put defendants represented by court appointed counsel at a severe disadvantage compared to the prosecution or those defendants represented by an Assistant Public Defender.

any circumstance. Unless defense counsel can articulate the precise assistance which the expert will bring to the trial and how the denial of that assistance will result in a fundamentally unfair trial, expert assistance can be denied by the trial court. Yet, without consulting an expert, the defense may not know what an expert can say. The end result may well be that the trial is over before it begins, because without the use of experts, the prosecution's case may become overwhelming. Thus, the circular logic becomes a self-fulfilling prophecy of defeat for the defense: without expert assistance, the state's case is overwhelming; but without preliminary use of an expert, the defense can make no credible showing that an expert "would be" of assistance. Criminal cases, the ultimate search for the truth, have never turned on such technical requirements.

The court's decision may well result in a denial of equal protection for indigent defendants and especially for indigent defendants represented by court appointed counsel. Whereas public defenders are authorized to receive funding for expert assistance under a separate statute, §27.54(3), Fla.Stat. (1989), defendants represented by court appointed counsel have an almost impossible burden when attempting to enlist the aid of an expert.

What is perhaps more fundamentally at stake in this case is the disastrous impact on the Sixth Amendment right to effective assistance of counsel. Any decision which so firmly restricts the ability of defense counsel to investigate a case most certainly infringes on a defendant's fundamental right to effective assis-

tance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); McMann v. Richardson, 397 U.S. 759, 771 n. 14 (1970); Knight v. State, 394 So.2d 997 (Fla. 1981)(counsel's assistance which is measurably below that of competent counsel and which is prejudicial to the defense merits finding of ineffective counsel). As this court recognized in Atkins v. Dugger, 541 So.2d 1165, 1166 (Fla. 1989), "[o]ne tactic available to counsel is to present expert testimony." A corollary of that statement is that defense counsel must have the means by which to determine whether expert testimony should be presented. Espinosa takes away that means.

CONCLUSION

This court's construction of §914.06 is incorrect, unnecessary, and in conflict with constitutional principles. This court should conclude that compensation of an expert witness in a criminal case depends upon a party's reasonable showing of a good faith basis for requesting the use of an expert. The statute then permits the trial court to allow limited access to an expert, for the purpose of determining whether an expert will be in a position to provide valuable assistance or render an opinion relevant to the issues in the case. By so construing the statute, this court will enable indigent defendants to utilize those reasonable tools necessary to mount an effective defense. For these reasons, this

court should grant rehearing of this case on this issue.

Respectfully submitted,

SONNETT SALE & KUEHNE, P.A.

One Biscayne Tower, #2600
Two South Biscayne Blvd.
Miami, Florida 33131-1802
Telephone: 305/358-2000

By: Benedict P. Kuehne
BENEDICT P. KUEHNE
Counsel for Amicus Curiae
National Association of
Criminal Defense Lawyers,
Florida Association of
Criminal Defense Lawyers,
and Florida Association of
Criminal Defense Lawyers -
Miami Chapter

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail this 30th day of July 1991 to Michael J. Neimand, Esq., Assistant Attorney General, 401 N.W. 2d Avenue, Suite N-921, Miami, Florida 33128; Sheryl J. Lowenthal, Esq., 2550 Douglas Road, Suite 206, Coral Gables, Florida 33134; and to Eric M. Cumfer, Esq., Assistant Public Defender, 301 North Olive Avenue, 9th Floor, West Palm Beach, Florida 33401.

By: Benedict P. Kuehne
BENEDICT P. KUEHNE