IN THE

SUPREME COURT OF FLORIDA

U'DREKA ANDREWS, Petitioner, v. STATE OF FLORIDA, Respondent.	Case No. SC17-1034 Lower Tribunal No(s).: 1D16-733 2005-CF-2555

INITIAL BRIEF OF THE PETITIONER

MICHAEL UFFERMAN
Michael Ufferman Law Firm, P.A.
2022-1 Raymond Diehl Road
Tallahassee, Florida 32308
(850) 386-2345/fax (850) 224-2340
FL Bar No. 114227
Email: ufferman@uffermanlaw.com

CRYSTAL MCBEE FRUSCIANTE
Frusciante Law Firm, P.A.
11110 West Oakland Park Boulevard, Suite 388
Sunrise, Florida 33351-6808
(954) 495-7889/fax (866) 936-4546
FL Bar No. 802158
Email: frusciantelaw@me.com

Counsel for Petitioner **ANDREWS**

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C. STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

The issue in this case is whether an indigent defendant who is represented by private counsel *pro bono* is entitled to an *ex parte* proceeding concerning the entitlement to hire expert witnesses and investigators. As explained below, the trial court's refusal to permit such a procedure amounts to a departure from the essential requirements of the Equal Protection Clauses of the United States and Florida Constitutions.

The Petitioner was convicted following a jury trial of first-degree felony murder, burglary, and robbery. At the time of the alleged offenses, the Petitioner was only seventeen years old. For the first-degree felony murder count, the trial court sentenced the Petitioner to life imprisonment without the possibility of parole. Pursuant to this Court's September 21, 2015, order in case number SC14-1711, the Petitioner is entitled to be resentenced in conformance with chapter 2014-220, Laws of Florida, which has been codified in sections 775.082, 921.1401, and 921.1402 of the Florida Statutes. *See Falcon v. State*, 162 So. 3d 954 (Fla. 2015); *Horsley v. State*, 160 So. 3d 393 (Fla. 2015); *Miller v. Alabama*, 567 U.S. 460 (2012). The Petitioner has been declared indigent (A-2),[1] and undersigned counsel are

[1] References to the appendix attached to the Petitioner's petition for a writ of certiorari that was filed in the district court below will be made by the designation "A" followed by the appropriate page number.

representing the Petitioner on a *pro bono* basis.

Following *Miller* and *Graham v. Florida*, 560 U.S. 48 (2010), the law is now clear that juveniles are less culpable than adults because juveniles are underdeveloped from neurobiological, cognitive, and psychosocial standpoints.[2] Mature judgment has been shown to increase appreciably between the ages of sixteen and nineteen.[3] Even when an individual reaches a point at which their cognitive maturity is comparable to that of an adult, "adolescent judgment and their actual decisions may differ from that of adults as a result of psychosocial immaturity."[4] Psychosocial factors relating to peer pressure vulnerability, perceptions of risk, ability to imagine the future, and ability to self-manage all hinder an individual's ability to make good decisions. Juveniles place heavier weight on short-term consequences than adults, are more likely to accept risk, more likely to respond to aggressive impulses and less likely to

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[2] Laurence Steinberg and Elizabeth Scott, *Less Guilty By Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, AMERICAN PSYCHOLOGIST, vol. 58, no. 12 (Dec. 2003), pp. 1009-18 (hereinafter *Less Guilty By Reason of Adolescence*).

[3] *See* Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity and Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults,* 18 Behav. Sci. & Law, 741 (2000) (hereinafter *(Im)maturity and Judgment in Adolescence*).

[4] *Less Guilty By Reason of Adolescence*, 1009-18.

understand situations from the perspective of others.[5]

The Florida Legislature and this Court have both recognized and mandated that trial courts consider the aforementioned factors in sentencing individuals for offenses committed when they were juveniles. Based on the statutory requirements of section 921.1401(2) and *Miller*,[6] counsel representing a defendant in a *Miller* resentencing

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[5] *(Im)maturity and Judgment in Adolescence* at 741*;* Jari-Erik Normi, *How Do Adolescents See Their Future? A Developmental Perspective,* 12 Developmental Rev. 339 (1992).

[6] In *Falcon*, the Court held that at future juvenile resentencing proceedings, juvenile defendants should be resentenced in conformance with section 921.1401. Section 921.1401 states:

> (2) In determining whether life imprisonment or a term of years equal to life imprisonment is an appropriate sentence, the court shall consider factors relevant to the offense and the defendant's youth and attendant circumstances, including, but not limited to:
>
> (a) The nature and circumstances of the offense committed by the defendant.
>
> (b) The effect of the crime on the victim's family and on the community.
>
> (c) The defendant's age, maturity, intellectual capacity, and mental and emotional health at the time of the offense.
>
> (d) The defendant's background, including his or her family, home, and community environment.
>
> (e) The effect, if any, of immaturity, impetuosity, or failure to appreciate risks and consequences on the defendant's participation in the offense.
>
> (f) The extent of the defendant's participation in the offense.
>
> (g) The effect, if any, of familial pressure or peer pressure on the defendant's actions.
>
> (h) the nature and extent of the defendant's prior criminal history.
>
> (i) The effect, if any, of characteristics attributable to the

hearing must present to the trial court evidence that provides a full picture of both the adolescent defendant and the adult who will be sentenced. This includes not simply the defendant's age and maturity at the time of the offense, but also her intellectual capacity; mental and emotional health; family, home, and community environment; and the effect of any immaturity, impetuosity, or failure to appreciate risks and consequences on her participation in the offense, among other things. *See* § 941.1401(2)(c) – (e), Fla. Stat. Thus, preparation for a juvenile resentencing hearing is more akin to the penalty phase in a capital case than a run-of-the-mill sentencing for an adult in a non-homicide case, and indeed, the United States Supreme Court has compared a life without parole sentence for a juvenile (to which the Petitioner is subject in this matter) to the death sentence of an adult.[7] It is this comparison that led

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defendant's youth on the defendant's judgment.

(j) The possibility of rehabilitating the defendant.

[7] The United States Supreme Court stated in *Miller*:

> *Graham*'s treatment of juvenile life sentences as analogous to capital punishment[] makes relevant here a second line of our precedents, demanding individualized sentencing when imposing the death penalty. In *Woodson* [*v. North Carolina*], 428 U.S. 280 [(1976)], we held that a statute mandating a death sentence for first-degree murder violated the Eighth Amendment. We thought the mandatory scheme flawed because it gave no significance to "the character and record of the individual offender or the circumstances" of the offense, and "exclud[ed] from consideration . . . the possibility of compassionate or mitigating factors." *Id.* at 304. Subsequent decisions have elaborated on the requirement

the United States Supreme Court to conclude an automatic sentence of life without parole for a juvenile is unconstitutional.

In light of the foregoing, the Petitioner will be requesting the trial court to appoint one or more experts in her case to evaluate the factors set forth in section 921.1401. In anticipation of the motion for the appointment of experts, the Petitioner filed a "Motion for Leave to Submit Requests For Appointment of Experts and Costs *ex Parte* and Under Seal And to Require the Justice Administrative Commission To File Any Responses to Such Motions Without Service to the State and Under Seal Where Such Responses Contain Substantive Information Pertaining to Ms. Andrews' Defense." (A-3). The matter was considered by the trial court on January 13, 2016.

> that capital defendants have an opportunity to advance, and the judge or jury a chance to assess, any mitigating factors, so that the death penalty is reserved only for the most culpable defendants committing the most serious offenses. *See*, *e.g., Sumner v. Shuman,* 483 U.S. 66, 74-76 (1987); *Eddings v. Oklahoma,* 455 U.S. 104, 110-112 (1982).
>
> Of special pertinence here, we insisted in these rulings that a sentencer have the ability to consider the "mitigating qualities of youth." *Johnson v. Texas,* 509 U.S. 350, 367 (1993). Everything we said in *Roper* [*v. Simmons*, 543 U.S. 551 (2005),] and *Graham* about that stage of life also appears in these decisions. As we observed, "youth is more than a chronological fact." *Eddings*, 455 U.S. at 115. . . . We held: "[J]ust as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered" in assessing his culpability. *Id.* at 116.

Miller, 567 U.S. at 475-76 (some citations omitted).

(A-11). Notably, during the hearing, the prosecutor specifically stated that it was taking no position on the Petitioner's motion. (A-15) ("I don't have a position on that, Judge."). Nevertheless, following the hearing, the trial court issued an order denying the motion. (A-18). Notably, in the order, the trial court did not provide any reasoning for its decision:

> THIS CAUSE came before the Court upon the Defendant's Motion for Leave to Submit Requests for Appointment of Experts and Costs Ex Parte and Under Seal and to Require the Justice Administrative Commission to File any Responses to such Motions without Service to the State and Under Seal filed on January 12, 2016. The Court considered the request, reviewed the court record, and considered all relevant factors, it is hereby:
>
> ORDERED AND ADJUDGED that Defendant's motion is DENIED.

(A-18).

The Petitioner sought further review of the matter by filing a petition for writ of certiorari in the First District Court of Appeal. In the panel decision below, the majority found the Petitioner's position "persuasive," but the panel concluded that the Petitioner was unable to meet the heightened standard required for certiorari relief (i.e., that the trial court's order was a departure from the essential requirements of the law). *See Andrews v. State*, 218 So. 3d 466, 470 (Fla. 1st DCA 2017) ("[W]hile we find Petitioner's argument persuasive, we are constrained to deny her petition in light of our limited standard of review because the trial court's order does not violate a

clearly established principle of law."). However, the majority certified the following question to this Court:

> WHETHER AN INDIGENT DEFENDANT WHO IS REPRESENTED BY PRIVATE COUNSEL *PRO BONO* IS ENTITLED TO FILE MOTIONS PERTAINING TO THE APPOINTMENT AND COSTS OF EXPERTS, MITIGATION SPECIALISTS, AND INVESTIGATORS *EX PARTE* AND UNDER SEAL, WITH SERVICE TO THE JUSTICE ADMINISTRATIVE COMMISSION AND NOTICE TO THE STATE ATTORNEY'S OFFICE, AND TO HAVE ANY HEARING ON SUCH MOTIONS *EX PARTE*, WITH ONLY THE DEFENDANT AND THE COMMISSION PRESENT.

Id. The Honorable James R. Wolf wrote a concurring in part and dissenting in part opinion and explained that the trial court's order is contrary to constitutional equal protection principles:

> An indigent defendant who is represented by private counsel *pro bono* is entitled to an *ex parte* proceeding concerning the entitlement to hire expert witnesses and investigators.
>
> . . . .
>
> Thus, petitioner has demonstrated a departure from the essential requirements of the equal protection clauses of the United States and Florida Constitutions entitling her to certiorari relief.

Id. at 471-72 (Wolf, J., concurring in part and dissenting in part).

D. SUMMARY OF ARGUMENT

An indigent defendant who is represented by private counsel *pro bono* is entitled to an *ex parte* proceeding concerning the entitlement to hire expert witnesses and investigators. The trial court's refusal to permit such a procedure amounts to a departure from the essential requirements of the Equal Protection Clauses of the United States and Florida Constitutions.

E. ARGUMENT AND CITATIONS OF AUTHORITY

An indigent defendant who is represented by private counsel *pro bono* is entitled to an *ex parte* proceeding concerning the entitlement to hire expert witnesses and investigators.

1. Standard of Review.

The issue in this case is a pure question of law and therefore the standard of review is *de novo*. *See Keck v. Eminisor*, 104 So. 3d 359, 363 (Fla. 2012) (explaining that the standard of review for pure questions of law is *de novo*).

2. Argument.

In order to avoid revealing privileged information or work-product to the Office of the State Attorney, the Petitioner sought permission to file all of her motions for appointed experts and miscellaneous costs quasi-*ex parte* and under seal, with service to the Justice Administration Commission (hereinafter "JAC") and proper notice to the State Attorney of such filings.[8] Notably, *comparable defendants*

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[8] Authority for this procedure is found in Florida Rule of Judicial Administration 2.420(c)(9)(A)(i) & (vii), which states:

> (c) Confidential and Exempt Records. The following records of the judicial branch shall be confidential:
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> . . . .
>
> (9) Any court record determined to be confidential in case decision or court rule on the grounds that
>
> (A) confidentiality is required to
>
> (i) prevent a serious and

represented by private counsel would not be required to divulge details to the prosecution regarding the hiring of experts, nor would similarly-situated defendants who are represented by the Office of the Public Defender or the Office of Criminal Conflict and Civil Regional Counsel. The Petitioner should not be prejudiced simply because she is represented by *pro bono* counsel and is indigent for costs. The Petitioner is entitled to the same due process and equal protection rights under the state and federal constitutions as these comparable defendants. There is no need for the Office of the State Attorney or the Attorney General to be a party to funding matters that are handled by the JAC. The trial court's order in this case is a departure from the essential requirements of law that will cause material and irreparable harm to the Petitioner as she prepares for her resentencing hearing (and the error cannot be corrected on postjudgment appeal).

In *Ake v. Oklahoma*, 470 U.S. 69, 82-83 (1985), the United States Supreme Court established that an indigent defendant has the right to the assistance of experts at the government's expense, explicitly holding that right to exist in both guilt and sentencing phases of criminal trials. As the United States Supreme Court properly

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> imminent threat to the fair, impartial, and orderly administration of justice;
>
> . . . .
>
> (vii) comply with established public policy set forth in the Florida or United States Constitution or statutes or Florida rules or case law[.]

observed, the due process requirement of fundamental fairness as well as equal protection of the laws compels such a rule:

> This Court has long recognized that when a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense. The elementary principle, grounded in significant part on the Fourteenth Amendment's due process guarantee of fundamental fairness, derives from the belief that justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake.

Id. at 76. Though *Ake* specifically concerned the appointment of a mental health expert to evaluate the defendant and testify as to his sanity, its progeny clearly establishes that the rule applies to other types of expert assistance as well. *See e.g.*, *Caldwell v. Mississippi*, 472 U.S. 320, 324 n.1 (1985) (concerning the appointment of a criminal investigator, a fingerprint expert, and a ballistics expert); *Little v. Armontrout*, 835 F.2d 1240, 1243 (8th Cir. 1987) (discussing the scope of *Ake* and concluding that "there is no principled way to distinguish between psychiatric and non-psychiatric experts); *Cade v. State*, 658 So. 2d 550 (Fla. 5th DCA 1995) (using rationale of *Ake* to hold that trial court's failure to appoint DNA expert was prejudicial error).

In order for an expert to be appointed, a defendant must make a preliminary showing "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." *Moore v. Kemp*, 809 F.2d 702, 712 (11th Cir. 1987). However, because such a showing necessarily requires a defendant to expose confidential work-product information to justify the request, the only proper forum for that showing is a quasi-*ex parte* proceeding outside the presence of the Office of the State Attorney.[9]

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[9] The procedure proposed by the Petitioner does not involve a true *ex parte* hearing. Rather, the procedure proposed by the Petitioner would provide notice to the State of any hearing on a motion to appoint an expert and JAC would appear at the hearing and represent the State's financial interests. The procedure proposed by the Petitioner is a procedure that was utilized in the Eleventh Judicial Circuit before the responsibility for indigent costs shifted from the counties to the State:

> When an indigent defendant needs to hire an investigator in order to prepare his or her case, the defendant applies to the court to authorize the expenditure of public funds. The cost is paid by the county.
>
> By local practice in the Eleventh Judicial Circuit, monetary requests of this type are heard in a quasi *ex parte* hearing. Under this procedure, the defense serves the motion requesting funds on the county attorney but not the State. The written motion is filed under seal.
>
> The court conducts a hearing on the funding request which is attended by the defense and an assistant county attorney. The County Attorney's Office is given the opportunity to be heard, and voice any opposition it may have, because the county is responsible for paying the investigative costs which are awarded.
>
> The proceedings at the hearing are considered to be confidential and are not revealed to the State. The hearing is attended by a court reporter and if a transcript is ordered, it is filed under seal. The written order on the defendant's funding request is also sealed.

State v. Nolasco, 803 So. 2d 757, 758 (Fla. 3d DCA 2001).

As clearly expressed throughout its opinion, the United States Supreme Court's decision in *Ake* was guided by principles of fundamental fairness and equal protection:

> We recognized long ago that mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and that a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense.

Ake, 470 U.S. at 77. In reaffirming the principle that indigent defendants must have access to the "basic tools of an adequate defense" available to non-indigent defendants, the United States Supreme Court held that those "tools" necessarily include the assistance of experts in appropriate cases. *Id*. (quoting *Britt v. North Carolina*, 404 U.S. 226, 227 (1971)). However, the United States Supreme Court also made clear that its holding did not entitle an indigent defendant to "all the assistance that his wealthier counterpart might buy;" rather, a defendant is entitled only to that which is reasonably necessary to fairly present his defense. *Ake*, 470 U.S. at 77 (citing *Ross v. Moffitt*, 417 U.S. 600 (1974)).

Therefore, an indigent defendant must make a threshold showing of need in order to trigger the State's obligation under *Ake* to provide expert assistance. *See Kemp*, 809 F.2d at 712. However, because making that showing necessarily requires the defendant to reveal work-product and strategy to justify the requests for

assistance, principles of fairness and equal protection require that such a showing only be made in an *ex parte* hearing. Indeed, the United States Supreme Court in *Ake* expressly anticipated that the defense be allowed to make the required demonstration of the need for expert services in an *ex parte* setting: "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 assistance of a psychiatrist is readily apparent." *Ake*, 470 U.S. at 82-83.

To require the Petitioner to submit her requests in a public forum open to the State Attorney would undermine the holding in *Ake* and violate the Petitioner's constitutional rights. First, making the requisite showing of need for an expert necessarily requires the Petitioner to expose – at minimum – work-product information including strategy. Thus, the mere presence of the State Attorney immediately provides opposing counsel the tactical advantage of being able to use any information learned at the hearing to better prepare for the sentencing hearing. This forced premature exposure of defense strategy not only implicates the Petitioner's Sixth Amendment right to effective assistance of counsel, but it also thwarts the United States Supreme Court's attempts in *Ake* to preserve fundamental fairness by substituting one disadvantage for another, violating the Petitioner's due process rights under the Fifth and Fourteenth Amendments. *See* U.S. Const. amends.

V, VI, & XIV; Fla. Const. art. I, §§16, 9. *See also McGregor v. State*, 733 P.2d 416 (Okla. Crim. App. 1987) ("[T]o allow participation, or even presence, by the State would thwart the Supreme Court's attempt [in *Ake*] to place indigent defendants, as nearly as possible, on a level of equality with nonindigent defendants"). Moreover, the State Attorney's presence effectively places the Petitioner in the position of having to choose whether to protect her sentencing strategy or fully support her motion, further undermining her right to expert assistance as provided in *Ake* and infringing on her rights under the Fifth, Sixth, and Fourteenth Amendments. *See* U.S. Const. amends. V, VI, & XIV; art. I, §§ 9 & 16, Fla. Const. *See also Williams v. Texas*, 958 S.W.2d 186, 193-94 (Tex. Crim. App. 1997) ("We decline to hold that in order for an indigent defendant to avail himself of one of the 'basic tools of an adequate defense,' he may be compelled to disclose defensive theories to the prosecution. We hold that an indigent defendant is entitled . . . to make his *Ake* motion *ex parte*.").

Second, depending on the type of expert assistance sought, the requisite showing might also require disclosure of confidential or privileged communications between the Petitioner and her counsel, investigators, or experts. In such a case, the presence of the State Attorney would violate attorney-client privilege and the Petitioner's Fifth Amendment privilege from self-incrimination. *See* U.S. Const.

amend. V; art. I, § 9, Fla. Const. *See also Maness v. Meyers*, 419 U.S. 449, 461 (1975) ("The protection does not merely encompass evidence which may lead to criminal conviction, but includes information which would furnish a link in the chain of evidence that could lead to prosecution, as well as evidence which an individual reasonably believes could be used against him in a criminal prosecution."). And these concerns are not necessarily limited to a motion seeking an expert's appointment; experts (particularly mental health experts) often find that after their initial interviews with the client, further testing or evaluation is needed. Nonetheless, any motions seeking additional costs would still require the Petitioner to make the requisite showing of need, and that need will likely be based on far more specific and potentially damaging information if revealed to the State Attorney, again violating the Petitioner's Fifth Amendment privilege against self-incrimination. *See* U.S. Const. amend. V; art. I, § 9, Fla. Const.

Finally, because these hearings are only applicable for indigent defendants who are represented by private counsel, denying the Petitioner's request to have these motions heard *ex parte* denies her of the same Sixth Amendment and due process rights afforded other defendants who are not indigent or are represented by the Office of the Public Defender, thereby denying the Petitioner's equal protection of the law as guaranteed by the Eighth and Fourteenth Amendments. *See* U.S. Const. amends.

V, VI, VIII, & XIV; art. I, §§ 2, 9 & 16, Fla. Const. *See also United States v. Meriwether*, 486 F.2d 498, 506 (5th Cir. 1973) ("When an indigent defendant's case is subjected to pre-trial scrutiny by the prosecutor, while the monied defendant is able to proceed without such scrutiny, serious equal protection questions are raised . . . ."). Thus, removing the *ex parte* hearing from the procedure recreates the equal protection violation that the United States Supreme Court's holding in *Ake* attempted to alleviate.

This Court has recognized in an analogous situation the paramount importance of an indigent defendant's right to keep confidential his communications with his attorney and any possible defense strategies. *See State v. Hamilton*, 448 So. 2d 1007 (Fla. 1984). In *Hamilton*, the defense requested the appointment of a psychiatric expert in accordance with Florida Rule of Criminal Procedure 3.216(a).[10] When defense counsel refused to communicate to the trial court and the State Attorney the underlying basis for the request, desiring instead to preserve the confidentiality of the attorney-client relationship, the trial court refused to appoint the expert. The Court

[10] The rule states in pertinent part, "When in any criminal case a defendant is adjudged to be indigent . . . and counsel has reason to believe that the defendant may be incompetent to proceed or that the defendant may have been insane at the time of the offense . . . , counsel may so inform the court who shall appoint 1 expert to examine the defendant in order to assist counsel in the preparation of the defense. The expert shall report only to the attorney for the defendant and matters related to the expert shall be deemed to fall under the lawyer-client privilege." Fla. R. Crim. P. 3.216(a).

upheld the appellate court's mandamus (essentially reversing the trial court), noting that

> in many instances the basis for the request for such an expert is founded on communications between the appointed lawyer and his client. Any inquiry into those communications would clearly violate the basic attorney-client privilege. Any inquiry into counsel's basis to believe that his indigent client is incompetent to stand trial or was insane at the time of the offense also impermissibly subjects the indigent defendant to an adversary proceeding concerning issues which may be litigated in the trial of the cause. *No solvent defendant would be subjected to this type of inquiry or proceeding.*

Hamilton, 448 So. 2d at 1008-9 (emphasis added). The Court then pointed out that the rule clearly states that the expert "shall report only to the attorney for the defendant and matters related to the expert shall be deemed to fall under the lawyer-client privilege." *Hamilton*, 448 at 1008 (quoting Fla. R. Crim. P. 3.216(a) (1984)). As the Court explained, the rule "is designed to give an indigent defendant the same protection as afforded to a solvent defendant." *Id.*

The rationale for rule 3.216's protections as expressed in *Hamilton* is equally applicable in the Petitioner's case, particularly when the Petitioner must make a threshold showing of need to the trial court before it is obligated to appoint an expert. Given the necessary disclosure of defense work-product required for an *Ake* appointment, the need for protection of that work-product from the State Attorney is far greater, and the only adequate mechanism with which to "give an indigent

defendant the same protection as afforded to a solvent defendant" is an *ex parte* hearing. *Hamilton*, 448 at 1008.

In his concurring in part and dissenting in part opinion below, Judge Wolf stated the following:

> I concur in the majority's certification of the question of great public importance. I dissent, however, from that portion of the opinion that determined the trial court's order denying the *ex parte* proceeding did not constitute a departure from the essential requirements of law. An indigent defendant who is represented by private counsel *pro bono* is entitled to an *ex parte* proceeding concerning the entitlement to hire expert witnesses and investigators.
>
> To obtain certiorari relief, a petitioner must demonstrate "'(1) a departure from the essential requirements of the law, (2) resulting in material injury for the remainder of the case, (3) that cannot be corrected on postjudgment appeal.'" *Citizens Prop. Ins. Corp. v. San Perdido Ass'n, Inc.*, 104 So. 3d 344, 351 (Fla. 2012) (quoting *Williams v. Oken*, 62 So. 3d 1129, 1132-33 (Fla. 2011)).
>
> > In other words, before certiorari can be used to review non-final orders, the appellate court must focus on the threshold jurisdictional question: whether there is a material injury that cannot be corrected on appeal, otherwise termed as irreparable harm. Assuming this requirement is met, the court must *then* determine whether the decision below departed from the essential requirements of law. . . .
>
> *Id.* at 351 (internal citations omitted) (emphasis added).
>
> Thus, an appellate court does not reach the departure element until irreparable harm is demonstrated. Here, I believe petitioner has demonstrated the threshold requirement of irreparable harm. While the majority opinion does not specifically mention irreparable harm, it has in fact decided this issue by reaching the merits of the claim. This reading is consistent with the fact that irreparable harm is not seriously

in dispute in this case. The improper disclosure of defense strategies and potential expert witnesses by allowing the State to attend the hearing requesting authorization to hire these witnesses is classic "cat out of the bag" material. Revealing such material has always been determined to meet the test of irreparable harm. *See Lender Processing Servs., Inc. v. Arch Ins. Co.*, 183 So. 3d 1052, 1058 (Fla. 1st DCA 2015).

I would also find that a departure from the essential requirements of law has been demonstrated. The majority enumerates the correct principle of law for establishing a departure from the essential requirements of law and I will repeat it here: a ruling departs from the essential requirements of law when it constitutes a violation of a clearly established principle of law resulting in a miscarriage of justice. *State Dep't of Revenue ex rel., Carnley v. Lynch*, 53 So. 3d 1154, 1156 (Fla. 1st DCA 2011).

I also do not dispute the general principle that normally to demonstrate a clearly established principle of law, the petitioner must demonstrate existing precedent on the issue. However, unlike the majority, I stress that as stated by the Florida Supreme Court, clearly established principles of law derive not only from controlling case law but also from constitutional law. *Allstate Ins. Co. v. Kaklamanos*, 843 So. 2d 885, 890 (Fla. 2003). None of the cases cited by the majority denying certiorari relief involve a departure from a clearly established and essential constitutional principle. This case involves a departure from such a principle, which is that equal protection mandates that we do not treat two equally situated criminal defendants differently, especially when there is no rational basis for doing so.

In the instant case, petitioner demonstrated that:

> (1) Non-indigent and, more importantly, other indigent defendants represented by public defenders can obtain expert witnesses and investigative support without revealing their thought processes in front of the prosecuting authority;
> (2) These types of witnesses and investigations are essential, if not critical, in representing a defendant on resentencing pursuant to section 942.1401(2), Florida Statutes (2016); and
> (3) There is no rational basis for the state attorney to be

> present at these hearings. The State acknowledged that its only interest in being present at these hearings was financial. These financial interests are more properly represented by the Judicial Administration Commission at an ex parte hearing. *See, e.g., State v. Nolasco*, 803 So. 2d 757 (Fla. 3d DCA 2001). In fact, the state attorney did not oppose defense counsel's request for an ex parte hearing in this case.
>
> Thus, petitioner has demonstrated a departure from the essential requirements of the equal protection clauses of the United States and Florida Constitutions entitling her to certiorari relief.
>
> I would also find that petitioner's request is supported by the reasoning, if not the holdings, of *Ake v. Oklahoma*, 470 U.S. 68 (1985), and *State v. Hamilton*, 448 So. 2d 1007 (Fla. 1984), as well as the explicit holdings in *United States v. Abreu*, 202 F.3d 386, 387-91 (1st Cir. 2000), and *Ex parte Moody*, 684 So. 2d 114, 120-21 (Ala. 1996). Thus, I would grant the petition for writ of certiorari.

Andrews, 218 So. 3d at 471-72 (Wolf, J., concurring in part and dissenting in part). The Petitioner requests the Court to adopt Judge Wolf's well-reasoned opinion. As explained by Judge Wolf, the trial court's refusal to permit the Petitioner to file motions pertaining to the appointment and costs of experts *ex parte* and under seal amounts to a departure from the essential requirements of the Equal Protection Clauses of the United States and Florida Constitutions.

The Petitioner also relies on the persuasive orders from the Fourteenth Judicial Circuit in *State v. McGill*, 95-0111-G (September 10, 2015) – a *Miller* resentencing case granting the defendant's motion to file motions for appointment of experts *ex parte* (A-9); and the order from the Twelfth Judicial Circuit in *State v. Kleppinger*,

case number 96-CF-19482-002 (May 21, 2013) – a *Graham* resentencing case granting the defendant's motion to file motions for appointment of experts *ex parte*.). (A-10). As explained by the Honorable Michael C. Overstreet during the *State v. McGill* hearing:

> Well, if I had to guess what they're concerned about beyond what you've discussed is the possibility that you [the State] may try to inquire of an expert that they are permitted to hire who they don't intend to call at trial. And that, periodically that happens in that, in civil litigation the lawyer will find an expert, they will discover that the expert has discovered things that are not, do not enure to their benefit so they don't intend to use them, they certainly don't want that expert being made a witness by the opposition.
>
> . . . .
>
> . . . [W]hat interest do you have in knowing the name of an expert or its field of expertise that they don't intend to call as a witness? You have no interest, you shouldn't have any interest.
>
> . . . .
>
> . . . If they have an expert that they intend to use you're going to be able to dissect the expert and all their analysis. But if they have an expert they want to use and they discover that the expert isn't somebody they want, they don't want you knowing that and you wouldn't know that. But for the fact that this client is indigent for cost you wouldn't know it. If one of our private counsel was trying to plot a strategy to hopefully prevail in a case against you and you know they're doing it all the time they're out talking to people and you have no clue who they are talking to nor do you have a right to know.
>
> . . . .
>
> I'm not aware of any case in criminal or civil matters where the defendant has to disclose their strategy or where the defendant has to

> disclose witnesses they're considering to enhance their strategy when they change their mind that they're not going to use. I'm just not aware of that. And that's really not an issue of secrecy as much as it is, it is a species of work product. Work product isn't just client-attorney communication. So my issue is when would that be okay, when would it be all right to make somebody disclose what their strategy is. And I've just never seen a case that permitted that.

(A-41, 47, 51, 61-62). The Petitioner also requests the Court to adopt Judge Overstreet's well-reasoned analysis.[11] *See also Thomas v. State*, 191 So. 3d 500 (Fla. 4th DCA 2016) (holding that work product protection applies to defense expert witnesses who do not testify).

Support for the Petitioner's position that *ex parte* hearings are required under *Ake* can be found elsewhere in both federal and state law. The federal statute regulating the appointment of investigators and experts reflects the important

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[11] For example, in a felony murder case where the defendant is charged as a principal, in order to demonstrate that "[t]he extent of the defendant's participation in the offense" was minimal, *see* § 921.1401(2)(f), Fla. Stat., an indigent defendant may seek the appointment of a cellphone tower expert in an effort to show the placement of the defendant at the time of the murder. Until the expert conducts an analysis, defense counsel will not know whether the expert's testimony will be helpful or harmful. If the expert's conclusion is not helpful or inconclusive, then the defense will not present the expert as a witness. However, if the State is involved in the expert appointment process, then the State will be alerted to an issue that it may not otherwise have been investigating – possibly leading to the State presenting damaging testimony from its own cellphone tower expert. But if this scenario involved a nonindigent defendant, then the State would never be alerted to the issue because the State would have no knowledge of the experts retained by the defense who ultimately do not testify. *See Hamilton*, 448 So. 2d at 1009 ("No solvent defendant would be subjected to this type of inquiry or proceeding.").

understanding that an *ex parte* determination is necessary, directing that "Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for adequate representation may request them in an *ex parte* application." 18 U.S.C. § 3006A(e)(1) (2012). *See United States v. Abreu*, 202 F.3d 386, 391 (2000) (noting that the federal rule's "manifest purpose of requiring that the inquiry be *ex parte* is to insure that the defendant will not have to make a premature disclosure of his case" and further asserting that "[d]efendants who are able to fund their own defenses need not reveal to the government the grounds for seeking a psychiatrist . . . , [because t]o require indigent defendants to do so would penalize them for their poverty") (citing *Marshall v. United States*, 423 F.2d 1315, 1318 (10th Cir. 1970)).

Following the federal example, several states require a defendant's *Ake* motions to be heard *ex parte* by statute. *See* Cal. Penal Code § 987.9(a) (West 2012); Kan. Stat. Ann. § 22-4508 (2012); Minn. Stat. Ann. § 611.21(a)(2012); Nev. Rev. Stat. Ann. § 7.135 (2011); N.Y. County Law § 722-c (McKinney) (2012); S.C. Code Ann. § 16-3-26(c)(1) (2012); Tenn. Code. Ann. § 40-14-207(b) (2012).

Additionally, many state courts have also concluded that the *ex parte* determination is constitutionally required, including those in Florida's Eleventh

Circuit sister states, Alabama and Georgia.[12] *See Ex Parte Moody*, 684 So. 2d 114, 120 (Ala. 1996) (holding criminal defendant entitled to *ex parte* hearing on whether expert assistance is necessary based on Fifth, Sixth, Fourteenth Amendments to Constitution); *Brooks v. Georgia*, 385 S.E.2d 81, 84 (Ga. 1989) (deciding indigent defendant entitled to *ex parte* hearing to determine entitlement to public funds); *Arnold v. Higa*, 600 P.2d 1383, 1385 (Haw. 1979) (determining indigent defendant entitled to *ex parte* hearing so that he can demonstrate indigency or particularize reasons for request for litigation expenses without disclosing defensive theories to State); *Moore v. Maryland*, 889 A.2d 325, 341-42 (Md. 2005) (*ex parte* hearing required because "[i]ndigent defendants seeking state funded experts should not be required to disclose to the State the theory of the defense when non-indigent defendants are not required to do so"); *McGregor v. State*, 733 P.2d 416 (Okla. Crim. App. 1987) (holding hearing to determine if defendant was entitled to court-appointed psychiatrist on motion must be *ex parte*); *Tennessee v. Barnett*, 909 S.W.2d 423, 429

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[12] Interestingly, in arriving at their conclusion that the *ex parte* hearing is required, at least two state courts counted Florida as among those states that had already required such hearings to be held *ex parte*, though authority for that conclusion is somewhat ambiguous. *See Moore v. Maryland*, 889 A.2d 325 (Md. 2005); *Ex Parte Moody*, 684 So. 2d 114, 120-21 (Ala. 1996) (citing *Clark v. State*, 467 So. 2d 699 (Fla. 1985)). Though *Clark* cites the language in *Ake* mentioning an *ex parte* showing as part of the "explicit holding in *Ake*," and thus could be interpreted to mean Florida has such a requirement, the court does not directly address the issue of requiring such a hearing. *See Clark*, 467 So. 2d at 701-02.

(Tenn. 1995) (holding that when indigent defendant seeks psychiatric assistance, the hearing should be *ex parte*); *Williams v. Texas*, 958 S.W.2d 186, 193-94 (Tex. Crim. App. 1997) (deciding that an indigent defendant is allowed an *ex parte* proceeding because the defendant should not have to disclose defensive theories to prosecution in order to obtain "basic tools of an adequate defense").

Though Louisiana, North Carolina, Ohio, and Indiana have not explicitly found that *ex parte* hearings are *always* required as a matter of constitutional right, each has acknowledged that *ex parte* proceedings would be required under certain facts. *See Louisiana v. Touchet*, 642 So. 2d 1213 (La. 1994) (providing procedure in which defendant initially submits *ex parte* motions that are reviewed by the court *in camera* to determine whether sufficient need has been shown for subsequent hearing to be held *ex parte*); *North Carolina v. Phipps*, 418 S.E.2d 178, 191 (N.C. 1992) (holding decision on whether to grant *ex parte* hearing is within trial court's discretion, stating "though such a hearing may in fact be the better practice, it is not always constitutionally required under *Ake*"); *Ohio v. Peoples*, 640 N.E.2d 208, 212 (Ohio App. 4 Dist. 1994) (acknowledging *ex parte* hearing may be necessary at times to protect counsel's defense strategy); *Stevens v. Indiana*, 770 N.E.2d 739, 759 (Ind. 2002) (holding though no "automatic constitutional entitlement" to *ex parte* hearings, trial courts do have discretion to permit *ex parte* requests for funds upon showing of good cause). In fact, of all the states that have reviewed this issue, *only three* have

held that there is no constitutional basis for an *ex parte* hearing when seeking the appointment of an expert under *Ake*: Arizona, Virginia, and South Dakota. *See Arizona v. Apelt*, 861 P.2d 634, 649-50 (Ariz. 1993) (largely relying on canon of judicial conduct forbidding *ex parte* proceedings except where specifically authorized by law and a then-lack of precedent from other jurisdictions finding otherwise); *Ramdass v. Virginia*, 437 S.E.2d 566, 571 (Va. 1993) (rejecting both federal and state constitutional arguments largely based on lack of "persuasive argument or authority"), *vacated on other grounds*, 512 U.S. 1217 (1994); *South Dakota v. Floody*, 481 N.W.2d 242, 256 (S.D. 1992) (holding "South Dakota statutes which permit, but do not require, adversarial hearings prior to appointment of expert witnesses" did not violate defendant's due process or equal protection rights). Examining these cases, however, it is worth noting that the first two based their decision (at least in part) on a void in persuasive authority from other jurisdictions that has clearly since been filled, and the third seems to imply that *ex parte* hearings may actually still be discretionary.

Finally, the Petitioner notes that on July 15, 2017, The Florida Bar's Criminal Procedure Rules Committee published in the Bar News the proposed rule amendments anticipated to be included in the Committee's 2018 regular-cycle report. One of the proposed rule amendments concerns the exact procedure being requested

by the Petitioner in this case:

> RULE 3.111. PROVIDING COUNSEL TO INDIGENTS
>
> (f) Motion for Defense Related Costs for Indigent Defendants.
>
> (1) Any defendant who has been found by the court to be indigent for costs, and is not represented by the office of the public defender, office of the regional conflict counsel, or the office of capital collateral regional counsel, may file a motion for funds for the appointment of an investigator, expert, or any other services necessary for an adequate defense.
>
> (2) The defendant may file such motion ex parte and under seal pursuant to Florida Rule of Judicial Administration 2.420 with notice and service on the Justice Administration Commission.
>
> (3) Any hearing on defense related costs shall be ex parte with only the defendant and Justice Administration Commission present. The trial court shall determine reasonable compensation for the requested service. The court may, in the interest of justice, and on a finding that timely procurement of necessary services could not await prior authorization, ratify such service after they have been obtained.

The Bar News states that the proposal was overwhelmingly approved by the Committee by a 21-4 vote.

Accordingly, for all of the reasons set forth above and articulated in Judge Wolf's opinion below, due process, fundamental fairness, and equal protection require that the Petitioner be permitted to file under seal all motions pertaining to the appointment and costs of experts, mitigation specialists, and investigators (and to hold any oral arguments pertaining thereto *ex parte* and outside the presence of the Office of the State Attorney). *See Cowley v. Stricklin*, 929 F.2d 640, 644 (11th Cir. 1991) (noting that expert assistance provided for indigent defendants must be

independent of the state in order for the defendant to receive the full benefit of the right). Requiring the Petitioner to disclose her defense strategy to the Office of the State Attorney would violate her rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and article I, sections 2, 9, 16, and 17 of the Florida Constitution, as well as attorney-client privilege and the work-product doctrine.

F. CONCLUSION

The appropriate remedy is to quash the district court's decision and to remand with directions that the trial court allow the Petitioner to file all motions for appointment of experts and approval of costs *ex parte* and under seal, with service to JAC and notice of such filings to the Office of the State Attorney.

G. CERTIFICATE OF SERVICE

Undersigned counsel hereby certify that a true and correct copy of the foregoing instrument and the appendix have been furnished to:

Senior Assistant Attorney General Charmaine M. Millsaps
The Capitol, PL-01
Tallahassee, Florida 32399-1050
Email: crimapptlh@myfloridalegal.com
Charmaine.Millsaps@myfloridalegal.com

by email delivery this 14th day of August, 2017.

Respectfully submitted,

/s/ Michael Ufferman
MICHAEL UFFERMAN
Michael Ufferman Law Firm, P.A.
2022-1 Raymond Diehl Road
Tallahassee, Florida 32308
(850) 386-2345/fax (850) 224-2340
FL Bar No. 114227
Email: ufferman@uffermanlaw.com

/s/ Crystal McBee Frusciante
CRYSTAL MCBEE FRUSCIANTE
Frusciante Law Firm, P.A.
11110 West Oakland Park Boulevard, Suite 388
Sunrise, Florida 33351-6808
(954) 495-7889/fax (866) 936-4546
FL Bar No. 802158
Email: frusciantelaw@me.com

Counsel for Petitioner **ANDREWS**

H. CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certify pursuant to Florida Rule of Appellate Procedure 9.210(a)(2) that the Initial Brief of the Petitioner complies with the type-font limitation.

/s/ Michael Ufferman
MICHAEL UFFERMAN
Michael Ufferman Law Firm, P.A.
2022-1 Raymond Diehl Road
Tallahassee, Florida 32308
(850) 386-2345/fax (850) 224-2340
FL Bar No. 114227
Email: ufferman@uffermanlaw.com

/s/ Crystal McBee Frusciante
CRYSTAL MCBEE FRUSCIANTE
Frusciante Law Firm, P.A.
11110 West Oakland Park Boulevard, Suite 388
Sunrise, Florida 33351-6808
(954) 495-7889/fax (866) 936-4546
FL Bar No. 802158
Email: frusciantelaw@me.com

Counsel for Petitioner **ANDREWS**