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

REPLY BRIEF OF THE PETITIONER

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C. 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.

For all of the reasons set forth in the Initial Brief, the Petitioner continues to assert that 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. Initially in its Answer Brief, the State asserts that "the motion for appointment of experts is not a sensitive matter because Andrews ultimately will have to disclose all of the information regarding his [sic] defense mental health expert during discovery and the prosecutor will be able to depose that expert prior to the resentencing." Answer Brief at 17 (citation omitted). But later in its Answer Brief, the State concedes that the requirement of disclosing an expert witness occurs *only if the defense decides to present the testimony of the expert witness during the resentencing hearing*:

> Florida law provides for confidential mental health experts in certain situations by explicit rules of court. But, if defense counsel intends to call that mental health expert to testify, those same rules the[n] require the defense to disclose the expert and the expert is subject to being deposed prior to the trial by the prosecution.

Answer Brief at 22 (citation omitted). This concession by the State is the key to the instant case. At this stage of the proceedings, the Petitioner has not made any decisions about which expert witnesses she will be presenting at the resentencing

hearing because no expert has been appointed and no expert has conducted an evaluation. The Petitioner does not dispute that if she chooses to present the testimony of an expert witness at the resentencing hearing, then she will be required to disclose that expert to the State (and the State will be afforded the opportunity to depose the expert prior to the resentencing hearing). But at this early stage of the proceeding, the State has no right to be privy to the names of potential experts who may never be utilized by the defense.[1] 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

[1] Without citing to any authority, the State seemingly asserts that any defense expert who is appointed in this case will be *required* to testify at the Petitioner's resentencing hearing. *See* Answer Brief at 26 n. 6 ("[T]he expert in this case would have to testify, so the distinction between testifying and non-testifying experts does not matter."). Contrary to the State's assertion, the Petitioner does not have any burden of proof in this case and nothing compels the defense to present the testimony of any expert witness. After an expert is appointed, the expert will analyze the case, defense counsel will consult with the expert, and then the defense will make a strategic decision regarding whether to present the expert as a witness (and if the expert will testify, then the expert will be disclosed to the State and the State will have a right to depose the 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).[2] The Petitioner requests the Court to adopt Judge Overstreet's well-reasoned analysis.[3] *See also Thomas v. State*, 191 So. 3d 500 (Fla. 4th DCA

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

[3] As explained in the amicus brief filed by the Florida Association of Criminal Defense Lawyers and the Florida Juvenile Resentencing and Review Project, the denial of an indigent defendant's right to file a quasi *ex parte* motion for the appointment of experts will result in the disclosure of confidential and protected work product and irreparable harm. 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

2016) (holding that work product protection applies to defense expert witnesses who do not testify).

In its Answer Brief, the State concedes that in the context of capital cases, Florida law authorizes the appointment of confidential mental health experts:

> [I]n a capital case, often defense counsel hires a confidential mental health expert to determine if the defense is going to present mental mitigation at the penalty phase at all. If the mental health expert does not help the mitigation case, defense counsel decides [to] not present any mental mitigation and no mental mitigation is presented during the penalty phase. *In such a case, the defense mental health expert remains confidential*. But once defense counsel decides to present mental mitigation in a capital case, the defense mental health expert's name and report are discoverable.

Answer Brief at 23 (emphasis added). A *Miller*[4] resentencing hearing is analogous to a capital sentencing hearing and therefore the Petitioner requests the Court to apply

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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 State v. Hamilton*, 448 So. 2d 1007, 1009 (Fla. 1984) ("No solvent defendant would be subjected to this type of inquiry or proceeding.").

[4] *Miller v. Alabama*, 567 U.S. 460 (2012).

the capital case confidential expert procedure to the instant case.

Additionally, as explained in the Initial Brief, 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 the Justice Administration Commission ("JAC") would appear at the hearing and represent the State's financial interests.[5] And as pointed out in the amicus brief, 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

[5] The State asserts that "[t]he appointment of a defense expert is mandatory under the statute, so there is no real need for any hearing . . . ." Answer Brief at 20. Undersigned counsel appreciate the State's concession, but unfortunately JAC does not always agree. In particular, in the *McGill* case, JAC objected to the appointment of an expert and a hearing was held during which defense counsel were required to make the requisite showing of need (and Judge Overstreet ultimately appointed the expert in question). But even the disclosure of just the expert's name and area of expertise makes readily apparent the attorneys' strategy in choosing that particular expert from among all possible professionals (i.e., knowing the person's area of psychological, medical, or forensic expertise will allow the prosecution to easily discern the mitigation strategies being considered by the defense).

> 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). *See also Criminal Specialist Investigations, Inc. v. State*, 58 So. 3d 883, 884 (Fla. 1st DCA 2011) (explaining that the trial lawyer was permitted to file an *ex parte* motion for fees for a mitigation coordinator).

Lastly, in its Answer Brief, the State relies on the Fourth District Court of Appeal's 2016 decision in *Jackson v. State*, 202 So. 3d 97 (Fla. 4th DCA 2016). *Jackson*, however, is distinguishable. The issue in *Jackson* was whether the defense is entitled to the issuance of *ex parte* subpoenas duces tecum and the Fourth District explained that "no statute, rule, or Florida case entitles a criminal defendant to secretly have the trial court issue subpoenas to assist in investigating a defense." *Id.* at 100. As stated above, in its Answer Brief, the State concedes that Florida law authorizes the defense to hire confidential mental health experts. *See* Answer Brief at 23 ("If the mental health expert does not help the mitigation case, defense counsel decides [to] not present any mental mitigation and no mental mitigation is presented

during the penalty phase. In such a case, the defense mental health expert remains confidential.").

The Petitioner again requests the Court to adopt Judge Wolf's well-reasoned opinion below. As explained by Judge Wolf:

> This case involves a departure from [a clearly established and essential constitutional] 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.

Andrews v. State, 218 So. 3d 466, 471-472 (Fla. 1st DCA 2017) (Wolf, J., concurring

in part and dissenting in part). Judge Wolf correctly reasoned that 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. *See also United States v. Wells*, – F.3d –, –, 2017 WL 6459199 at *6-7 (9th Cir. Dec. 19, 2017) (explaining that "[t]he prosecution is typically precluded from participating in the determination of a defendant's eligibility for [court]-appointed counsel" and stating that "the Government should tend to its own knitting").

Finally, the Petitioner again 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, and one of the proposed rule amendments concerns *the exact procedure* being requested by the Petitioner in this case. As explained in the Initial Brief, 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 in the Initial Brief – and consistent with the reasoning 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). *Comparable defendants 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.

D. 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.

E. CERTIFICATE OF SERVICE

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

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F. CERTIFICATE OF COMPLIANCE

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

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