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## Criminal Law--Indigent's Payment for Depositions

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### Criminal Law—Indigent's Payment For Depositions

Defendant through his appointed counsel<sup>1</sup> asked the trial court to enter an order authorizing the taking of the deposition of a material nonresident witness; and further authorizing the employment of counsel practicing at or near the place of the taking of the deposition, or in the alternative to authorize the payment of the reasonable expenses of defendant's present counsel to travel to the place of the deposition to examine the witness in behalf of the defendant. The trial court granted defendant permission to take the deposition of the nonresident witness,<sup>2</sup> but refused to authorize the employment of out-of-state counsel or reasonable expenses for defendant's present counsel to take the deposition. The first error asserted in the Supreme Court of Appeals was the denial of the motion for payment of expenses in taking the deposition.<sup>3</sup> Defendant urged that by reason of his indigency his constitutional right to counsel was denied by the action of the trial court. *Held*, affirmed. The court said it was "not aware of any law which would have authorized the trial court to direct or to require the payment of public funds in accordance with the motion to take the deposition of the nonresident witness." *State v. Davis*, 172 S.E.2d 569, 574 (W. Va. 1970).

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<sup>1</sup> Defendant was declared an indigent and counsel was appointed for him by the trial court in compliance with the West Virginia Constitution, which states: "In all such trials, the accused shall . . . have the assistance of counsel . . ." W. VA. CONST. art. III, § 14. "Such trials" in the West Virginia Constitution refers to the trial of crimes and misdemeanors.

The word "indigent" has been defined as meaning the needy, the poor, those who are destitute of property and the means of comfortable subsistence. The maintenance of the indigent poor is a benevolent or charitable object of a public character. *Lynchburg v. Slaughter*, 75 Va. 57 (1880).

<sup>2</sup> W. VA. CODE ch. 62, art. 3, § 1 (Michie 1966) provides:

If any witness for the accused be a nonresident of the state, or absent therefrom in any service or employment, so that service of a subpoena cannot be had upon him in this State, or is aged or infirm so that he cannot attend upon the court at the trial, the accused, may present to he court in which the case is pending, or to the judge thereof in vacation, an affidavit showing such facts, and stating therein what he expects to prove by any such witness, his name, residence, or place of service or employment; and if such court or judge be of the opinion that the evidence of any such witness, as stated in such affidavit, is necessary and material to the defense of the accused on his trial, an order may be made by such court or judge for the taking of the deposition of any such witness upon such notice to the prosecuting attorney, of the time and place of taking the same, as the court or judge may prescribe. . . .

<sup>3</sup> In support of the motion, counsel for defendant relied upon W. VA. CODE ch. 62, art. 3, § 1 (Michie 1969), FED. R. CRIM. P. 15(c), U.S. CONST. amend. XIV, and W. VA. CONST. art. III, § 14.

The right of an indigent to counsel stems from the sixth and fourteenth amendments.<sup>4</sup> *Gideon v. Wainwright*<sup>5</sup> firmly established an indigent defendant's right to appointed counsel, holding the assistance of counsel is essential to a fair trial. Prior to the *Gideon* decision there was much controversy<sup>6</sup> as to whether the sixth amendment was applicable to state criminal prosecutions through the fourteenth amendment. *Gideon* dispelled this controversy, holding that the fourteenth amendment requires counsel to be appointed to represent an indigent in a state prosecution. *Gideon* established a federally protected right to counsel in state criminal proceedings. When the right to counsel is denied by a state court, recourse can be had to the federal courts.

The right of an indigent to counsel is also protected in the West Virginia Constitution, which provides that "in all such trials, the accused . . . shall have the assistance of counsel . . . ."<sup>7</sup> Since *Gideon* West Virginia courts have been more vigorous in the protection of the right to counsel guaranteed by the state constitution. In *May v. Boles*<sup>8</sup> the Supreme Court of Appeals announced that "the right to the assistance of counsel is a fundamental right, essential to a fair trial, and that by reason thereof the safeguard provided by the Sixth amendment is made obligatory upon the states under the due process clause of the fourteenth amendment."<sup>9</sup> The *May* case is illustrative of *Gideon's* influence upon state court decisions.

Mere formal appointment of counsel does not satisfy the demands of the Federal Constitution.<sup>10</sup> The right to counsel is said to mean the right to "effective assistance of counsel".<sup>11</sup> Under the sixth amendment requirement, effective assistance of counsel includes: sufficient consultation, advice pertaining to the accused's constitutional rights, probing examination and cross-examination of witnesses, reasonable attempts to obtain and offer defensive evi-

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<sup>4</sup> The fourth amendment states that, "[No] state shall . . . deprive any person of life, liberty, or property without due process of law . . . ." The sixth amendment states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to assistance of counsel for his defense U.S. CONST. art. XIV.

<sup>5</sup> 372 U.S. 335 (1963).

<sup>6</sup> See 65 W. VA. L. REV. 297 (1963).

<sup>7</sup> W. VA. CONST. art. III, § 14.

<sup>8</sup> 149 W. VA. 155, 139 S.E.2d 177 (1964). See also Comment, *The Widening Scope of State Habeas Corpus Relief*, 67 W. VA. L. REV. 234 (1965).

<sup>9</sup> 149 W. VA. 155, 157, 139 S.E.2d 177, 179 (1964).

<sup>10</sup> U.S. CONST. amend. VI. "In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense."

<sup>11</sup> *Powell v. Alabama*, 287 U.S. 45 (1932); *Avery v. Alabama*, 308 U.S. 444 (1940); see *State v. Tucker*, 143 W. Va. 130, 100 S.E.2d 411 (1957).

dence, if possible, sufficient objection to the introduction of evidence by the state, and the presentation of oral arguments in behalf of the accused.<sup>12</sup> An indigent is entitled to the appointment of competent counsel who has the opportunity and time to present the indigent's case.<sup>13</sup> The right to counsel is more than a perfunctory representation.<sup>14</sup>

The issue raised by *State v. Davis* is whether an indigent's constitutional right to counsel encompasses the payment by the state of necessary expenses incurred in taking the deposition of a non-resident witness. Federal courts have dealt with the question of whether state payment for depositions is required to constitute effective assistance of counsel. In *United States v. Germany*<sup>15</sup> defendant's appointed counsel entered a motion asking for the payment of expenses for taking the deposition of a nonresident witness. The issue in that case was similar to *State v. Davis*, but a different conclusion was reached. The court stated, "[a]n essential ingredient to an attorney effectively representing a defendant in a criminal case . . . is funds to pay the necessary and essential expenses of interviewing the material witnesses. . . ."<sup>16</sup> The court in granting Germany's motion stated that the indigent is entitled to have his court-appointed attorney reimbursed for expenditures necessarily and reasonably incurred in taking the deposition of a nonresident witness.<sup>17</sup> The court further noted that failure by the government to provide such funds constituted a denial of counsel within the intent of the sixth amendment and entitled defendant to dismissal of his indictment and release from incarceration.<sup>18</sup> "Defendant's indigency cannot be allowed to thwart his constitutionally protected right to effective representation by counsel and such right may require that government reimburse an attorney or advance funds for expenses necessarily incident to adequate preparation for trial."<sup>19</sup>

In addition to Federal case law, Congress has provided for this compensation through the Federal Criminal Justice Act, and the Supreme Court has lent its support in the Federal Rules of Criminal Procedure. These sources of authority lend considerable weight to

<sup>12</sup> *King v. Beto*, 305 F. Supp. 636 (S.D. Tex. 1969). See also *Williams v. Beto*, 354 F.2d 698 (5th Cir. 1965); *Collingsworth v. Mayo*, 173F.2d 695 (5th Cir. 1949).

<sup>13</sup> *United States v. Germany*, 32 F.R.D. 421 (N.D. Ala. 1963).

<sup>14</sup> *United States v. Products Marketing*, 281 F. Supp. 348 (D. DEL. 1968).

<sup>15</sup> 32 F.R.D. 421 (N.D. Ala. 1963).

<sup>16</sup> *Id.* at 423.

<sup>17</sup> *Id.* at 424.

<sup>18</sup> *Id.* at 424.

<sup>19</sup> *United States v. Products Marketing*, 281 F. Supp. 348 (D. Del. 1968).

the argument that effective assistance of counsel in any meaningful sense must include this kind of aid for a lawyer representing a criminal defendant.<sup>20</sup>

The application of federal law to a state criminal prosecution can be seen in *Whittington v. Gaither*,<sup>21</sup> a United States District Court case involving a petition for a writ of habeas corpus. Defendant was unable to obtain bond and state procedure did not permit release on his personal recognizance. This prevented defendant from going to another state to interview a material witness. He was unable to bring the witness to his trial because he did not have funds to pay witness fees. Defendant contended that he was deprived of the only satisfactory procedure for establishing an alibi, and therefore was denied due process in violation of the fourteenth amendment. The court, in relying upon *United States v. Germany*,<sup>22</sup> ruled as follows:

The 6th amendment not only requires defendants to have counsel, but likewise that counsel have an opportunity "to prepare and present their indigent clients' case. "An essential ingredient to an attorney effectively representing a defendant in a criminal case, when it comes to determining whether that attorney has had an 'oportunity' to investigate and prepare the case is funds to pay the necessary and essential expenses of interviewing material witnesses." Funds in this case were not available to petitioner's attorney either from petitioner or the state. An essential ingredient of having competent counsel being lacking there is a 'denial of counsel' within the Sixth Amendment. To be deprived of effective counsel is so lacking in fairness as to be a denial of liberty without due process, contrary to the 14th Amendment.<sup>23</sup>

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<sup>20</sup> Rule 15 (c) of the Federal Rules of Criminal Procedure reflects this thought when it says "[i]f it appears that defendant at whose instance a deposition is to be taken cannot bear the expense thereof, the court may direct that the expenses of travel and subsistence of defendant's attorney for attendance at the examination shall be paid by the government." FED. R. CRIM. P. 15 (c).

The Criminal Justice Act of 1964 is intended, "[t]o promote the cause of criminal justice by providing for the representation of defendants who are financially unable to obtain an adequate defense in criminal cases in the courts of the United States." 18 U.S.C. § 3006A (d) (1970). This act provides for the necessary funds required by an indigent in presenting an adequate defense.

It should be noted that necessary and essential expenses under the sixth amendment right to effective assistance of counsel have been allowed only where the indigent had a court-appointed attorney. See *United States v. Bowe*, 360 F.2d 1 (2 Cir. 1966); *Corbett v. Patterson*, 272 F. Supp. 602 (D. Col. 1967).  
<sup>21</sup> 272 F. Supp. 507 (N.D. Tex. 1967), *rev'd on other grounds*, 391 F.2d 905 (5th Cir. 1968).

<sup>22</sup> 32 F.R.D. 421 (N.D. Ala. 1963).

<sup>23</sup> *Whittington v. Gaither*, 272 F. Supp. 507, 512 (N.D. Tex. 1967).

State court decisions have acknowledged an obligation to pay expenses in order to provide adequate assistance of counsel. The Supreme Court of New Jersey in *State v. Harton*<sup>24</sup> said that necessary defense expenses, such as experts, medical examinations, scientific tests, photographs, depositions, and transcripts are to be paid by the trial court from public funds.<sup>25</sup> The court concluded that:

[T]he constitutional obligation to furnish counsel to an indigent can sensibly only be construed to include as well that which is necessary to proper defense in addition to the time and professional efforts of an attorney and we have no doubt of the inherent power of the court to require such to be provided at public expense.<sup>26</sup>

The state of Georgia has a statute which provides for the payment of expenses "actually and prudently expended or incurred in the necessary preparation and investigation of the case. . . ."<sup>27</sup> The Georgia statute providing funds for depositions applies only to capital felonies, yet it is in some degree an application of the federal interpretation of the right to effective assistance of counsel.

The sixth amendment right to counsel as interpreted and applied in federal jurisdictions encompasses the necessary and essential expenses of an adequate defense. This interpretation has been applied to state criminal prosecutions and has been reflected in a limited way in statutory law. From the cases and statutes discussed above the trend is to pay expenses required by the indigent for an adequate defense. Such a payment is necessary to insure the indigent his right to effective assistance of counsel and a fair trial under the United States Constitution.

While the principle basis of the indigent's right to payment of expense as part of his right to counsel is the due process clause of the fourteenth amendment, another argument can be advanced in favor of this right. The concept of equal justice affords both the rich and the poor equal rights and protection under the United States Constitution.<sup>28</sup> In *Griffin v. Illinois*,<sup>29</sup> defendant was an indigent unable to afford a transcript for appellate review. Mr. Justice Black observed that:

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<sup>24</sup> 34 N.J. 518, 170 A.2d 1 (1961).

<sup>25</sup> *Id.* at 534, 170 A.2d at 9.

<sup>26</sup> *Id.* at 534, 170 A.2d at 9.

<sup>27</sup> Ga. Code Book 10A, Title 27, 3001 (Supp. 1969).

<sup>28</sup> U.S. CONST. amend. XIV. "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

<sup>29</sup> 351 U.S. 12 (1956).

In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color. Plainly the ability to pay costs in advance bears no rational relationship to a defendant's guilt or innocence and could not be used as an excuse to deprive a defendant of a fair trial. . . . Such a denial [of appellate review due to the poverty of a defendant] is a misfit in a country dedicated to affording equal justice to all and special privileges to none in the administration of its criminal law. There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts.<sup>30</sup>

The question arises here whether or not defendant in the *Davis* case was denied equal justice and a fair trial because he was poor.

The equal protection clause of the fourteenth amendment should guarantee a poor man the same justice as a rich man. In reality the poor man does not often have the funds available to prepare an adequate defense. True, the indigent may have an appointed counsel who receives one hundred dollars for defending him in a misdemeanor and two hundred dollars in a felony from the state for his services,<sup>31</sup> but this sum is paid by the state as a counsel fee and is not intended to cover additional expenses incurred in the preparation of an adequate defense. An indigent defendant has no means to take the deposition of a material non-resident witness. Since such expenses are often necessary for an adequate defense, it may be that an indigent in West Virginia will not always receive a fair trial in criminal prosecutions.

The Supreme Court of Appeals in *Davis* properly relied upon West Virginia Code Chapter 62, article 3, § 1 in upholding the granting of defendant's motion to take the deposition of a non-resident witness. Defendant contended that this statute also permits payment for such a deposition in the case of indigency. The portion of the statute relied upon by defendant reads as follows: "The court or judge may authorize the employment of counsel, practicing at or near the place where the deposition is to be taken, to cross-examine the witness on behalf of the State, the reasonable expense whereof shall be paid out of the Treasury of the State,

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<sup>30</sup> *Id.* at 17.

<sup>31</sup> H. B. #612, Seventy-first session amending W. VA. CODE ch. 62, art. 3, § 1 (Michie 1966).

upon certificate of the court wherein the case is pending."<sup>32</sup> The statute clearly reads that expenses will be paid to protect the state's interest, but the indigent's interest is unprotected. The prosecution is supplied with funds to cross-examine defendant's witness, but this is unnecessary if defendant cannot afford the expense to take the deposition. It is ironic that the state's interest is so completely protected while the indigent is left to shift for himself. The court in affirming the denial of defendant's motion for payment of public funds to take the deposition of a nonresident witness stated that there was no law authorizing the trial court to make such payments.<sup>33</sup> It would seem that any denial of the essential expenses required for the adequate defense of an indigent is a deprivation of a poor person's right to effective assistance of counsel as guaranteed by the sixth amendment of the United States Constitution. If defendant should petition in the Federal Courts for a writ of habeas corpus, it will be interesting to note the determination of this issue.

*Joseph Wagoner*

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<sup>32</sup> *Id.*

<sup>33</sup> The Supreme Court of Kansas handled the lack of statutory authorization thus:

The granting or denying of a motion to provide supporting services to counsel for an indigent defendant is a matter within the discretion of the trial court, whose ruling will not be disturbed in the absence of a showing that such discretion was abused to the extent that the defendant's substantial rights were prejudiced.

Kansas v. Young, 203 Kan. 296, 300, 454 P.2d 724, 728 (1969).

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### **Domestic Relations—Antenuptial Agreements In Contemplation Of Divorce**

Husband was granted a divorce from Wife, the decree providing that Husband pay six hundred dollars per month alimony. The amount of alimony was agreed upon in an antenuptial agreement between the parties, but the lower court held the alimony agreement was not binding. On appeal, the intermediate appellate court affirmed the divorce decree and an award of child support, and stated that there were alternative views concerning the amount of alimony agreed upon in the antenuptial agreement. The three theories were: