

JTIP Supplemental Materials

Lesson 15 – Competence to Stand Trial

Sample Ex Parte Motion for Appointment of Psychological Expert

****EX PARTE MOTION – DO NOT FILE IN COURT JACKET****

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Family Division – Juvenile Branch

In the Matter of : **Docket No. X-2222-22**
: **Social File No. 003333**
**** : **Honorable Judge Name**
: **Status Date: November 10, 2004**
Youth :

**EX PARTE APPLICATION FOR APPOINTMENT OF THE CHILD GUIDANCE
CLINIC AS PSYCHOLOGICAL EXPERT**

*****, through undersigned counsel, respectfully moves this Honorable Court, pursuant to D.C. Code § 11-2605(a) and the Fifth and Sixth Amendments to the United States Constitution, to appoint Dr. Expert, PhD, or his authorized designate from the Child Guidance Clinic, to evaluate ***** and advise undersigned counsel regarding issues related to the impact of past traumatic events on his alleged conduct on October 19, 2004. In support of this motion, counsel states the following on information and belief:

1. ***** is charged with one count of threats to do bodily harm, in violation of D.C. Code Section 22-407. *****’s status hearing is scheduled for November 10, 2004. ***** expects to schedule a trial date at the upcoming status hearing.
2. The charges against ***** stem from his arrest on October 20, 2004, for threats allegedly made during the course of an interview at the ***** Center on October 19, 2004.
3. ***** was brought to the ***** Center to be interviewed because he is currently the subject of a neglect proceeding. ***** was allegedly abused and neglected by the individual that he allegedly threatened during the interview. The neglect proceeding is

Lesson 15 – Competence to Stand Trial

- docketed at X-555-55, and is scheduled to be tried in front of Judge Name on December 13, 2004.
4. Counsel believes that in order to adequately prepare *****’s defense in the above-captioned case, it is essential to seek the advice of an expert with significant experience in abuse and neglect issues. Counsel is requesting a court order and payment for the services of Dr. Expert, who has agreed to assist in this matter upon appointment by the Court.
 5. Dr. Expert has extensive experience in conducting psychological evaluations of adolescents. Dr. Expert is the Supervisory Clinical Psychologist at the ***** Clinic for the District of Columbia Superior Court. His training and many years of experience render him eminently qualified to provide the services for which funding is requested herein.
 6. Because the Child Guidance Clinic employs Dr. Expert, the present request will cost the Court considerably less than a traditional defense expert. *****’s request also will not require the use of the voucher system, as appointment of Dr. Expert will only require the Court’s signature on the attached *ex parte* order for evaluation and testimony. Moreover, the overall cost of this case is already much less than it would be if the Georgetown University Law Center (GULC) Clinical Program had not become involved. As the Court knows, the ***** Juvenile Justice Clinic does not bill the Court for the cost of investigation, litigation, consultation, legal research and a range of other services. Thus, the Court’s appointment of Attorney, supervised by Attorney Supervisor, from the Juvenile Justice Clinic has already garnered considerable savings for the Court.
 7. Under D.C. Code § 11-2605, ***** has a statutory right to court payment of a psychological expert because he is unable to afford the services of such an expert, and defense counsel has determined that such an expert is necessary to the preparation of an adequate defense.
 8. ***** also has a constitutional right to court payment of the services of an expert. *See Ake v. Oklahoma*, 470 U.S. 68, 76 (1985).

Lesson 15 – Competence to Stand Trial

9. Because the threats in this case were allegedly made during an investigative interview in which the Child Advocacy Center was exploring allegations of physical abuse by the complainant towards *****, counsel believes that this case may raise issues that affect *mens rea*, such as battered child syndrome, provocation and/or Post Traumatic Stress Disorder. The effects of abuse and neglect, and the bearing of those effects on *mens rea* and culpability, are not easily explored by a layperson or presented to the fact-finder absent the assistance of an expert with training in child psychology and the effects of traumatic events.
10. Counsel asks the Court to grant this motion seeking a court order for expert services, because the Court will be in a much better position to decide this case with Dr. Expert's assistance.
11. Counsel submits that she cannot adequately prepare *****'s defense without the advice and assistance of a psychological expert at the investigatory and trial preparation stages. Counsel also believes that Dr. Expert's findings may also be admissible at trial to support a defense relating to provocation and intent. Counsel's determination that Dr. Expert's services are necessary to the preparation of an adequate defense, however, is independent of whether Dr. Expert's testimony would ultimately be admitted as evidence on *****'s behalf.
12. Counsel asks the Court to sign the attached order supporting counsel's *ex parte* application for appointment of the Child Guidance Clinic as a psychological expert. Because counsel seeks Dr. Expert's assistance as a defense expert, counsel asks the Court to order that any evaluation or written report generated by the Child Guidance Clinic in connection with this matter shall not be disclosed to the Court or to the government unless and until the youth authorizes such disclosure.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ***’S EX PARTE APPLICATION FOR APPOINTMENT OF THE CHILD GUIDANCE CLINIC AS PSYCHOLOGICAL EXPERT**

I. INTRODUCTION

Undersigned counsel, after reviewing the facts and circumstances of the present case, submits to the Court that she cannot adequately prepare a defense nor sufficiently fulfill her obligations to ***** or the Court without the services of an expert witness who is able to evaluate ***** and advise counsel regarding the effects of his past history of abuse and neglect on his alleged actions on October 19, 2004. ***** is without funds to retain an expert. ***** requests that the Court grant his motion for court appointment of the Child Guidance Clinic as an expert on both statutory and constitutional due process grounds.

II. THE COURT MUST PROVIDE *** WITH THE SERVICES OF AN EXPERT BECAUSE HE IS UNABLE TO AFFORD THE SERVICES AND THE SERVICES ARE NECESSARY TO AN ADEQUATE DEFENSE.**

A. *** has a constitutional and statutory right to court order of the services of an expert where such services are necessary to an adequate defense.**

The right to court order of expert services is grounded in the fundamental constitutional principle that all persons accused of crimes are entitled to “meaningful access to justice.” *See Ake*, 470 U.S. at 76. In *Ake*, the Supreme Court held that when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, due process requires that a state provide access to a psychiatrist’s assistance on this issue if a defendant cannot otherwise afford one. In so holding, the Supreme Court acknowledged 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. This 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 at which his liberty is at stake. *Id.* at 76.

Lesson 15 – Competence to Stand Trial

The constitutional due process right to assistance of expert services in certain circumstances has been expanded and codified in the District of Columbia by D.C. Code § 11-2605(a). Under D.C. Code § 11-2605(a), “the court must provide a defendant with expert services... whenever there has been a showing that the accused is financially unable to obtain the service and the service is ‘necessary to an adequate defense.’” *Dobson v. United States*, 426 A.2d 361, 367 (D.C. 1981). In considering a request for such services, “the trial court should tend to rely on the judgment of defense counsel who has the primary duty of providing an adequate defense.” *Gaither v. United States*, 391 A.2d 1364, 1368 (D.C. 1978). Requests for expert services must be evaluated according to a standard of reasonableness, focusing on whether a “reasonable attorney would pursue” such services in aid of a defense.

B. A reasonable attorney would pursue the services of a psychological expert in aid of ***’s defense because the effects of a history of abuse and neglect are relevant to his defense in ways not commonly known by laypersons.**

***** is charged with making threats to do bodily harm. The threats were allegedly made at an interview at the ***** Center. ***** was brought to the CAC for an interview because he is the subject of a neglect proceeding. ***** was allegedly abused and neglected by the individual that he allegedly threatened during the interview.

Evidence of past child abuse in cases involving allegations of violent acts by children against parents has been deemed relevant by courts. Additionally, courts have also permitted expert testimony on that issue to assist the finder of fact in understanding the very complex issues raised by such evidence. See, e.g., *Ohio v. Nemeth*, 82 Ohio St.3d 202, 694 N.E.2d 1332 (1998) (holding that battered child syndrome is a valid topic for expert testimony in the defense of parricide); *Washington v. Janes*, 121 Wash.2d 220, 850 P.2d 495 (1993) (holding that evidence of battered child syndrome is admissible to help prove self-defense whenever such a defense is relevant). The dynamics and effects of past instances of abuse are complex, and are not readily understood by lay people. See, e.g., RUTH S. AND C. HENRY KEMPKE, CHILD ABUSE (1978).

Under D.C. Code § 11-2605, defense attorneys are entitled to considerable deference in determining what services are necessary to provide an adequate defense. See, e.g., *Brown v.*

Lesson 15 – Competence to Stand Trial

District of Columbia, 727 A.2d 865, 870-71 (D.C. 1999) (holding trial court committed reversible error in denying defendant’s *ex parte* motion to engage the services of an expert child psychologist to determine whether defendant’s daughter suffered from school phobia, where such diagnosis may have established an affirmative defense). An expert is necessary to aid in the preparation of *****’s defense because of the nature of the allegations, and because ***** may assert a claim of provocation. Traumatic events experienced by ***** prior to October 19, 2004, will significantly impact the claim of provocation. Laypersons, such as counsel, would have difficulty fully understanding the interplay between abuse and neglect, and the threats alleged on October 19. Thus, a reasonable attorney would most certainly seek to employ the services of a psychological expert such as Dr. Expert under these circumstances in attempting to prepare and present a defense.

C. The determination of whether *** is entitled to court payment of expert services is wholly independent of any determination regarding the admissibility of Dr. Expert’s testimony at trial.**

The Court’s determination of whether ***** is entitled to court payment of expert services should be made without regard for whether Dr. Expert’s testimony will ultimately be admitted at trial. The statutory standard for determining whether an indigent defendant is entitled to court payment of expert services asks only whether the defendant can afford the services of the expert, and whether expert services are “necessary to an adequate defense.” *See* D.C. Code § 11-2605(a). Neither the statutory language nor cases applying this statute in any way indicate that the Court’s determination with respect to payment of expert services depends upon the ultimate admissibility of such expert testimony. *See, e.g., Dobson*, 426 A.2d at 367; *Gaither*, 391 A.2d at 1368.

Instead, courts in the District of Columbia have focused on the reasonableness of the defense attorney’s determination that the services of an expert are necessary to prepare a defense. This standard contemplates not only the potential evidentiary value of a proposed expert, but more importantly the potential assistance that an expert may provide in identifying issues that will be important during the investigatory stages of trial preparation, and in identifying potential areas of cross-examination of government witnesses. As the court concluded in *Gaither*, “when

Lesson 15 – Competence to Stand Trial

an expert is appointed under § 11-2605(a), he is not primarily an aide to the court. To the contrary, the very purpose is to provide expert service necessary to an adequate defense. He can be a partisan witness.” *Gaither*, 391 A.2d at 1368. Moreover, as a respondent has no obligation whatsoever to put on an affirmative defense, it would seem contrary to that principal to interpret § 11-2605(a) to depend upon the admissibility of a proposed expert’s testimony.

WHEREFORE, for the foregoing reasons and any others that may arise, ***** respectfully requests that the Court grant this motion and appoint Dr. Expert or his designate from the Child Guidance Clinic to evaluate ***** and to provide undersigned counsel with assistance in preparing *****’s defense.

Respectfully submitted,

Attorney, #77777
Student attorney for *****

Attorney Supervisor, #888888
Supervising attorney
Organization
Address
Phone

DATE FILED: November __, 20__

JTIP Supplemental Materials
Lesson 15 – Competence to Stand Trial

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**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
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**** : **Honorable Judge Name**
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ORDER

This matter having come before the Court on *****'s *Ex Parte* Application for Appointment of the Child Guidance Clinic as a Psychological Expert, it is this _____ day of _____, 2004,

ORDERED that *****'s Motion is GRANTED. Dr. Expert, or an authorized designate from the ***** Clinic, shall evaluate youth, *****; shall consult with *****'s defense counsel; and shall testify if deemed appropriate and necessary by defense counsel. Any evaluation or written report generated by the ***** Clinic in connection with this matter shall not be disclosed to the Court or to the government unless and until the youth authorizes such disclosure.

Judge Name
Superior Court of the District of Columbia
Address

cc: Attorney
Address
Phone