THE PRESENTATION OF EX PARTE MOTIONS

Second Edition
March, 1999

By Michael Mears
Multi-County Public Defender

INTRODUCTION

This booklet is designed as an aid for the criminal defense attorney who is representing an indigent person charged with a criminal offense. One of the critical elements in the defense of any person is the ability of that person, or the defense attorney, to obtain sufficient funds to properly investigate and present a defense. Far too often the quality of justice in our country is dependent upon a person's ability to access sufficient funds necessary to properly defend against the charges brought by the State. It is the duty of the advocate to not only stand beside the criminally charged person at the time of trial, but also to demand that the promises of our Constitutions be kept.

As Dr. Martin Luther King, Jr. said on the steps of the Lincoln Memorial in Washington, D.C.

> When the architects of our great republic wrote the magnificent words of the Constitution and the Declaration of Independence, they were signing a promissory note to which

> every American was to fall heir.
>
> This note was a promise that all men, yes, black men as well as white men, would be guaranteed to the inalienable rights of life liberty and the pursuit of happiness.

Unfortunately, the quality of justice is quite often reduced to the equation of who has the necessary amount of funding to properly present a defense. Those citizens who are poor and outside the pale of the upper and middle classes are too often excluded from the promises of the Constitution.[1] The defense attorney must recognize that one of the paramount duties thrust upon the function of the defense is to seek out and obtain all necessary resources to insure that the guarantees of the Georgia Constitution and the Constitution of the United States do not become unpaid promissory notes.

In 1962, the United States Supreme Court held

> [I]n our adversary system of criminal justice, any person hauled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to

---

[1] Indeed, the very essence of being an American is the concept of being treated equally and not being penalized because of poverty. See, *Down N' Outer*, "I'm just a bank account away from America," song by Nanci Griffith, *Late Night Grande Hotel*, copyright 1991, MCA Records, Inc.

> prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. . . . *Gideon v. Wainwright*, 372 U.S. 385, 83 S.Ct. 792, 9 L.Ed.2d 799 (1962).

One of the most noble and enduring aspects of the American system of justice is found within these words. Quite plainly, the United States Supreme Court was affirming the basic tenet upon which this nation was founded and flourished. The belief that no one should be treated differently because of their wealth or lack of wealth is the bedrock of the Equal Protection Clause of the Fourteenth Amendment and the cornerstone of the Due Process Clause of the Fifth Amendment. These noble sentiments are meaningless, however, unless the court system ensures procedures whereby the poor have access to lawyers and the means to defend themselves.

<u>BACKGROUND</u>

In 1975, the United States Fifth Circuit Court of Appeals held that "Fundamental fairness is violated when a criminal defendant on trial for his liberty is denied the opportunity to have an expert of his choosing, bound by appropriate safeguards imposed by the Court, examine a piece of ***critical evidence*** whose nature is subject to varying expert opinion." *Barnard v. Henderson*, 514 F.2d 744, 746 (5th Cir. 1975). (Emphasis supplied) Whether or not evidence is ***critical*** was discussed in *White*

v. Maggio, 556 F.2d 1352 (5th Cir. 1977). The Circuit Court held that "[t]he evidence must be both 'critical' and 'subject' to varying expert opinion. . . . 'Critical evidence' is material evidence of substantial probative force that 'could induce a reasonable doubt in the minds of enough jurors to avoid conviction.' " *Id.* at pp 1356-1358.

In 1981, the Georgia Supreme Court held that a "defendant on trial for his liberty is entitled on motion timely made to have an expert of his choosing,[2] bound by appropriate safeguards imposed by the court, examine critical evidence whose nature is subject to varying expert opinion." *Sabel v. State*, 248 Ga. 10, 18, 282 S.E.2d 61 (1981). The Court in *Sabel* relied upon the Fifth Circuit decision in *White v. Maggio*, *supra*, for a definition of what is "critical evidence."

The Georgia Supreme Court, in 1986, received a case on an interlocutory appeal from Cobb County dealing with the request of an indigent defendant for funds to hire an expert. Unlike the defendant in *Sabel*, the defendant in *Thornton* was unable to hire an expert, however, the Supreme Court found that the evidence which was to be tested on his behalf was "critical evidence" as defined by *Sabel* and *White v. Maggio*, *supra*. The case was *Thornton v. State*, 255 Ga. 434, 339 S.E.2d 240 (1986). Nathaniel Thornton was indicted for the murder of Mary Frances Moss. The state obtained,

---

[2] It is critical to note, however, that in *Sabel*, the defendant was not requesting funds for an expert. Rather he was prepared to retain, at his own expense, an expert. The issue was access to the "critical evidence" for the purpose of testing the evidence.

involuntarily from Thornton, certain dental impressions, so that his teeth might be compared to marks appearing in an autopsy photograph of the victim. Thornton's attorney filed a pre-trial motion requesting sufficient funds to hire a forensic dental expert. The trial court denied Thornton's request for funds. The basis for the request was contained in an affidavit asserting that the dental impression evidence was the one single item of evidence linking Thornton to the murder and that the experts that had consulted would be able to challenge the reliability of the state's dental impression evidence.

In overturning the trial court's decision to deny funds for the requested expert, the Supreme Court noted that "[t]he rule in *Sabel* must not be construed as to entitle an indigent criminal defendant to choose his own expert, at the expense of the public." *Id.* at 255 Ga. 435. The Court, however, held that "Thornton's request undoubtedly involves critical evidence, which, in light of its novelty, is likely to be the subject of varying expert opinions. The request was made in a timely pre-trial motion, and Thornton has demonstrated adequately his entitlement to state funds, in a reasonable amount to aid in the preparation of his defense. The trial court shall appoint an appropriate professional, whose experience, at minimum, is substantially equivalent to that of the state's expert witness, to examine the state's evidence on behalf of Thornton. The trial court shall also approve the payment of reasonable compensation for such services, to be provided from public funds." *Id.* at 255 Ga. 435.

The need for any particular expert will, of course, depend upon the nature of the case, the evidence to be presented or challenged. There is no bright-line rule that in every case experts must be used nor is there a bright-line rule which will guarantee the defense attorney access to the assistance of experts, however, defense counsel must be prepared to make the necessary showing of the need for expert assistance whenever possible.[3]

In two very critical footnotes, however, the Court set forth specific limitations on the decision to provide funds to Thornton. In footnote number one, the Court noted that "Scientific evidence is not 'critical' where there is overwhelming evidence of defendant's

---

[3] *See, e.g.*, *Little v. Armontrout*, 835 F.2d 1240 (8th Cir. 1987) (en banc) (state's failure to provide indigent defendant with hypnotic expert violated defendant's right to fair trial. *Ake* applied even though expert sought was not a psychiatrist; "[t]here is no principled way to distinguish between psychiatric and non-psychiatric experts"). *Moore v. Kemp*, 809 F.2d 702, 711 (11th Cir.) (*Ake* applied to intoxication expert), *cert denied*, 481 U.S. 1054, 107 S.Ct. 2192, 95 L.Ed.2d 847 (1987). *United States v. Durant*, 545 F.2d 823, 827 (2d Cir. 1976) (defendant entitled to fingerprint expert). *United States v. Patterson*, 724 F.2d 1128 (5th Cir. 1984) (defendant entitled to expert when expert testimony is pivotal). *Williams v. Martin*, 618 F.2d 1021 (4th Cir. 1980) (defendant denied equal protection, due process and effective assistance by court's failure to provide a pathologist to assist with defense). *State v. Carmouche*, 528 So. 2d 159 (La. 1988) (holding that, in capital cases, "any reasonable request of the defendant" for expert assistance "should be granted"; trial court should have granted defendant's requests for "a neurologist, psychiatrist, and any additional experts that these doctors deem necessary" as well as "experts in fingerprint analysis and serology"), *clarifying* 527 So. 2d 307 (La. 1988). *Washington v. State*, 800 P.2d 252 (Okla. 1990) (*Ake* applied to defendant's motion for psychiatrist, forensic odontologist and chemist). *State v. Coker*, 412 N.W.2d 589 (Iowa 1987) (defendant entitled to intoxication expert to "assist him in the evaluation, preparation, and presentation of his intoxication defense"). *State v. Moore*, 364 S.E.2d 648, 656-58 (N.C. 1988) (*Ake* extends to any expert as to which defendant makes threshold showing of need, including, *inter alia*, fingerprint expert). *State v. Bridges*, 385 S.E.2d 337 (N.C. 1989) (failure to grant defendant's motion for fingerprint expert at public expense was reversible error); *Patterson v. State*, 238 Ga. 204, 232 S.E.2d 233 (1977) (Narcotics analyst). *United States v. Patterson*, 724 F.2d 1128 (5th Cir. 1984) (fingerprint specialist). *Bernard v. Henderson*, 514 F.2d 744 (5th Cir. 1975) (firearms expert). *Williams v. Martin*, 618 F.2d 1021 (4th Cir. 1980) (pathologist). *United States v. Fogarty*, 558 F.Supp. 856 (E.D. Tenn. 1982) (handwriting analyst). *Bowen v. Eyman*, 324 F. Supp. 339 (D. Ariz. 1970) (serologist).

guilt." *Id.* footnote 1 at 255 Ga. 435. The second footnote the Court provided that "[I]n making such an appointment, the court should follow a defendant's preference, if, in its discretion, such appears to be appropriate as to qualifications, availability, cost to the public, and other pertinent factors." *Id.* footnote 2.

Therefore, a defendant requesting funds to retain an expert to assist in the preparation of the defense must satisfy the trial court that the evidence is of such a nature that it is subject to varying expert opinions and that the evidence is critical and that there is not overwhelming evidence of guilt. Defense counsel should be acutely aware that these are not insubstantial burdens and significant effort must be expended to provide a record upon which error can be alleged if funds are denied for experts. For example, in *McMichen v. State*, 265 Ga. 598, 458 S.E.2d 833 (1995), the Georgia Supreme Court refused to overturn the trial court's decision to deny the defendant's request for funds with which to hire a forensic pathologist and a ballistics expert. In that case, the defendant argued that he had sufficiently demonstrated a critical need for independent expert assistance in preparing for cross-examination of the state's experts regarding the bullet trajectories and wounds. The defendant further argued that the experts were needed to enable his attorneys to demonstrate that the physical evidence was consistent with his claim of self-defense. The defendant testified at trial that he shot the victims while defending himself against an attack by victim. The defendant claimed that the victim had "pinned him against a truck, bent over him face

to face so that [the defendant] was bent backwards, and was choking [the defendant] to unconsciousness when [the defendant] fired the two fatal shots. Yet the evidence adduced at trial indicated that [the defendant] took the gun from his right pocket with his right hand and shot [the defendant] in the right ear. The evidence further indicated that the bullet traveled horizontally through [the defendant]'s brain. There is no dispute that [the second victim] stood a few feet away when the shots were fired. Yet the evidence showed that the bullet which struck [the second victim] in the heart traveled at an angle downward before exiting through her back. Therefore, [the defendant]'s defense is clearly inconsistent with the physical evidence, and [the defendant] has failed to make the requisite showing that the issues to be addressed by the requested experts are subject to varying expert opinion." *Id.* at 265 Ga. 604. Defense counsel must be prepared to make a detailed showing of why the expert is needed and why the evidence to be examined or evaluated is "critical."

PRESENTING
EX PARTE MOTIONS

BACKGROUND

In *Brooks v. State*, 259 Ga. 562, 385 S.E.2d 81 (1989), the Georgia Supreme provided that access to proper funding of the defense in an indigent case should not require the waiver of those other rights guaranteed by statute and constitution. The Georgia Supreme Court provided that access to proper funding of the defense in an indigent case should not require the waiver of those other rights guaranteed by statute and constitution. The Court held that an indigent defendant could approach the trial court with an application for funds for expert assistance outside the presence the state prosecutors. The Court reasoned that the purpose of allowing an indigent defendant to approach the court is to allow the defendant to show the court why certain funds are necessary for his or her proper defense.

A year earlier, in *Roseboro v. State*, 258 Ga. 39, 41, 365 S.E.2d 115 (1988), the Court held

> A motion on behalf of an indigent criminal defendant for funds with which to obtain the services of a scientific expert should disclose to the trial court, with a reasonable degree of precision, why certain evidence is critical, what type of scientific testimony is needed, what that expert proposes to do regarding the evidence, and the anticipated costs for services.

In order to ensure equal protection and due process, the indigent defendant has the right to approach the court outside of the presence, and interference, of the prosecutors. The approach to the court is made in an *ex parte* proceeding.

WHAT ARE EX PARTE PROCEEDINGS?

According to Black's Law Dictionary the phrase *ex parte* defined as: on one side only; by and for one party; done for, in behalf of, on the application of, one party only. Ex parte motions are motions filed under seal and not served on the district attorney. Generally, the motions seek funds to retain the services of experts -- don't say witnesses because they are not always witnesses -- or, to obtain funds to cover attorney or witness expenses, i.e., travel expenses necessary to interview out of state witnesses.[4]

Practically speaking, defense counsel must insure that the hearing being conducted is truly an “ex parte” proceeding. The sheriff’s deputies or police officers must be removed from the courtroom. The only court personnel who should be present during the ex parte proceeding is the court reporter. Defense counsel must insure that the court makes explicit instructions on the record to the court reporter concerning the conduct of the proceedings and the handling of the transcript, motions, affidavits, etc.

[4] Counsel must be aware of the significant difference between an *ex parte* hearing and an “in camera” hearing. An “in camera” hearing is defined as one from which all spectators are excluded from the courtroom. As commonly defined, an “in camera” hearing does not necessarily contemplate the removal from the courtroom of the trial participants such as the district attorney, sheriff, or courtroom staff.

which must all be placed under seal.

THE RIGHT TO FILE EX PARTE MOTIONS

It is well established that when a state brings its judicial power to bear on an indigent defendant in a criminal case "it must take steps to assure that the defendant has a fair opportunity to present his defense." *Almond v. State*, 180 Ga. App. 475, 349 S.E.2d 482, 485-86 (1986)(quoting *Ake v. Oklahoma*, 470 U.S. 68 (1985). In *Ake*, the United States Supreme Court held that where the assistance of an expert is needed to prepare and present a defense, an indigent defendant has a constitutional right to the services of an independent expert at state expense.

> [When a] question . . . [is] likely to be a significant factor in his defense . . . [the defendant is] entitled to the assistance of a[n expert] on this issue and the denial of that assistance deprive[s] him of due process.

Id. at 86-87. *Ake* involved the denial of an independent psychiatrist in a capital case which presented issues of insanity and future dangerousness. In analyzing under what circumstances expert assistance is constitutionally required, the Court explicitly held that a showing of need was to be made ex parte:

> When the defendant is able to make <u>an ex parte threshold showing</u> to the trial court that his sanity is likely to be a significant factor in his defense, the need for the assistance of a psychiatrist is readily apparent. . . . [T]he State must [then], at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate

> examination and assist in evaluation, preparation, and presentation of the defense.

Id. at 82-83. (Emphasis supplied).

Counsel must be prepared to argue and assert that *Ake* applies to experts in fields other than psychiatry. The *Ake* decision applies to all services and expenses reasonably necessary for an effective defense. Similar, and perhaps more obvious, considerations apply when a court contemplates an application for appointment of counsel. The United States Supreme Court's decision in *Ake* was based on its recognition that to deny an indigent person basic, critical rights and expert assistance while the State may utilize the services of any attorney and has virtually unfettered access to any expert of its choosing would render a criminal trial fundamentally unfair. The truth finding function of the adversary process would be completely lost if the prosecution were allowed to simply overwhelm the indigent defendant with the wealth of its resources:

> 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. . . . [This Court] has often reaffirmed that fundamental fairness entitles indigent defendants to "an adequate opportunity to present their claims fairly within the adversary system."

Ake, at 77 (quoting *Ross v. Moffit*, 417 U.S. 600, 612, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974). Due process and fundamental fairness thus forbid the State from "legitimately

assert[ing] an interest in maintenance of a strategic advantage over the defense, if the result of that advantage is to cast a pall on the accuracy of the verdict obtained." *Ake*, at 79.

All presentations to the court must be made ex parte. In order to protect the defendant's Sixth Amendment rights and the right to privileged attorney-client communications, information submitted to the Court during the request for expert assistance must be made privately and without disclosure to the State. *See*, *McGregor v. State*, 754 P.2d 1216, (Oklahoma Ct. Crim.App. 1988). In *Lindsey v. State*, 254 Ga. 444, 330 S.E. 2d 563 (1985), the Georgia Supreme Court, cited *Ake* and held that the findings of the defendant's experts were privileged to the defendant. To require indigent defendants to reveal information about trial strategy and the types of experts needed to present the defense would compromise the most fundamental right to a fair trial. The reason for the ex parte hearing is, obviously, to put the indigent defendant on the same footing as those defendants who can afford to hire experts without having to ask the court for assistance. In *U.S. v. Meriwether*, 486 F.2d 498, 606 (5th Cir. 1973), the Court stated:

> The names of witnesses to be called by the defendant could easily aid the government in determining the strategy the defendant plans to use at trial. The government should not be able to obtain a list of adverse witnesses in the case of a defendant unable to pay their fees when it is not able to do so in the cases of defendants able to pay witness fees. When an indigent defendant's case is subjected to pretrial scrutiny by

> the prosecutor, while the monied defendant is able to proceed without such scrutiny, serious equal protection questions are raised. . . .

This is not new law, but well-established legal principles. The United States Supreme Court recognized these principles of fairness in *Griffin v. Illinois*, 351 U.S. 12, 19, 76 S.Ct. 585, 100 L.Ed.891 (1956) when it held that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has . . . [a]ll people charged with [a] crime must, so far as the law is concerned, stand equally before the bar of justice in every American court."

The Georgia Code recognizes that there will be times when ex parte motions and hearings must be heard by a tribunal in a criminal case. *O.C.G.A.* §17-1-1 Filing and service of pleadings, motions, and other papers provide that

> (a) Unless otherwise provided by law or by order of the court, every pleading subsequent to the entry of the initial indictment or accusation upon which the defendant is to be tried; every order not entered in open court; every written motion, ***unless it is one as to which a hearing ex parte is authorized***; and every written notice, demand, and similar paper shall be served upon each party.
>
> (b) (1) Where service is required to be made, the service shall be made upon the party's attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by leaving it with the clerk of the court. (Emphasis supplied)

Trial counsel must also be alert to the necessity of proceeding ex parte during any interlocutory appeals. If a matter has been heard by the trial court during an interlocutory hearing and there are appeals required for a court of review, then those appeals must also proceed ex parte. A motion with the appellate court for permission to proceed ex parte should be filed and argued before the appellate court.

The Court should be petitioned for an order allowing the defendant to present appellate argument(s) ***under seal and ex parte***. In this manner, the defendant can effectively and adequately set forth the factual reasons why the trial court's denial of access to expert assistance in this case was in error.

To allow the prosecution to have a voice in the consideration of the appellate court's determination whether or not the trial court was in error would amount to impermissible discrimination against the defendant solely on the basis of financial status. The State cannot assert any interest in being involved in such proceedings that could outweigh the defendant's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the *United States Constitution*, Article I, Section I, Paras. 1, 2, 12, 14, 15 and 17 of the *Georgia Constitution*, and *O.C.G.A.* Sections 17-12-31, 17-12-44, 24-9-20 and 24-9-21. In addition to petitioning the appellate court for an order allowing the appeal to proceed ex parte as to those matters which were ex parte at the trial level, defense counsel must also insure that the clerk of the trial court, whether it is State Court or Superior Court, keeps all ex parte matters under seal when preparing the

records and transcripts for delivery to the appellate court.

WHY FILE MOTIONS EX PARTE?

Defense counsel must file funds motions ex parte so that the prosecution will not be made aware of the defendant’s theory of the defense EVEN IF that theory is seemingly apparent. At some point defense lawyers come to the realization that the trial court doesn't like ex parte motions and consequently those lawyers become hesitate to risk incurring the wrath of the trial court or District Attorney. The defense lawyer’s client’s liberty, and possibly life, are at stake and there should be no short cuts. Defendants and their attorneys are entitled to an ex parte hearing for the purpose of requesting expert assistance! As part of that right, the defense attorney must seize the opportunity to educate the Court about the defendant’s theory of the case as it develops. It is essential that the defense counsel prepare to present all appropriate defenses to the charges against the defendant and, in the cases where the state is seeking the death penalty, the sentencing phase of the case as well. This preparation must begin immediately upon developing a theory of defense.

At a minimum, defense counsel should request funds to retain an investigator and also someone who can develop the defendant's life history, gather the corresponding records and conduct the related interviews with family, friends, teachers, etc.

THE PRACTICAL ASPECTS OF FILING EX PARTE MOTIONS

File a "Motion to Proceed Ex Parte, In Camera, and on a Sealed Record With Regard to Applications for Expert and Investigative Assistance." Prepare and attach a proposed order to be submitted to the judge at the time of the hearing. Examples of appropriate motions and sample orders are available upon request from the Multi-County Public Defender's Office. However, every motion should be conformed to the specific facts of each defendant's case. A sample motion requesting leave to proceed ex parte is attached in *Appendix A*.

The trial court should grant the motion to proceed without argument. If, for some reason defense counsel must argue this motion, counsel must be familiar with *Brooks v. State*, 259 Ga. 562, 385 S.E.2d 81 (1989), cert. denied, 494 U.S. 1018 (1990) and its progeny. Pursuant to *Brooks*, an indigent defendant has the right to proceed ex parte when requesting funds for expert and investigative assistance. *Brooks* also held that records and transcripts of ex parte hearings are to be placed under seal. Remember, ex parte means out of the presence of the District Attorney. The prosecution has no standing even to object to the court's allowing the defendant to proceed ex parte. The rationale underlying ex parte proceedings is recognition of certain equal protection rights -- but for the defendant's indigency, defense counsel would not have to come before the court requesting funds. Rather, defense counsel would consult various

experts and never have to advise either the trial court or the prosecution unless that expert was going to testify. One's economic status then cannot undercut the right to present a defense and the state's burden of proof.

Be sure that when the court grants the motion to proceed ex parte that the various players understand that they will be excluded from whatever hearing date is set for the ex parte motions, e.g., the DA’s staff, the Sheriff and deputies, bailiffs, the Clerk, and all other court personnel except the court reporter. It may be necessary to waive the defendant's presence if the Sheriff has security concerns and balks about being ousted from the courtroom. If this is the case, defense counsel must take the time to explain to the defendant why counsel would waive his or her presence. Defense counsel should review the motions beforehand with the defendant and explain why counsel seeking the expert assistance.

After the defendant has been granted leave to file ex parte motions for funds, defense counsel must then prepare for the individual ex parte motions. It is <u>critical</u> that counsel make a sufficient showing of need for the expert assistance and the scientific principle or technique that is at issue. Otherwise, the trial court can and will deny the request for funds. *See Mobley v. State*, 265 Ga. 292, 455 S.E.2d 61 (1995); *Baxter v. Thomas*, (11th Cir. 1995); *Messer v. Kemp*, 831 F.2d 946 (11th Cir. 1987) (*en banc*) <u>*cert. denied*</u> 485 U.S. 1029 (1988); *Moore v. Kemp*, 831 F.2d 702 (11th Cir. 1987) (*en banc*) *cert. denied* 481 U.S. 1054 (1987); *Thornton v. State*, 255 Ga. 39, 41, 365 S.E.2d

115 (1988); *Tatum v. State*, 259 Ga. 284, 380 S.E.2d 253, 255 (1989). If you do not make a sufficient showing of need for expert assistance, it could well form the basis for a successful ineffectiveness claim.

The *Brooks* Court carved out a "procedure" for the application of funds and stressed that the application for funds must comport to the showing proscribed in *Roseboro v. State*, 258 Ga. 39, 365 S.E.2d 115 (1989). In *Roseboro*, the Georgia Supreme Court indicated that an application for public funds MUST show with a reasonable degree of precision:

1. why certain evidence is critical
2. what type of scientific assistance is needed
3. what the expert proposes to do
4. the anticipated costs for services

File early and file often . . . that is, file ex parte motions as soon as possible. As more information is gathered about the case, additional ex parte requests may need to be filed. Draft the ex parte motion(s) and file the motions under seal. It is suggested that all pleadings, including orders, affidavits, motions, exhibits, etc. be placed in a manila envelope with a case caption affixed to the outside of the envelope. Counsel should prepare, as part of the caption to be affixed to the outside of the envelope, an order to be signed by the trial court directing that the envelope, once sealed, is not to be opened without express written order of the court. Defense counsel should not take for granted the need to have the ex parte motion, orders, affidavits, etc. sealed, in the

courtroom, in the presence of the court reporter. The caption on the envelope, along with the signed order from the trial court, should be taped securely to the front of the envelope with some type of identifying notation such as "Defendant's Ex Parte Motion Number______" contained therein.

Defense counsel can keep a record of the numbers of each ex parte motion so that reference can be made to the individual sealed motions at a later time. Prepare an order for the Judge to sign and attach the signed order to the front of the envelope in which the sealed pleading has been placed. Once the judge has signed the order directing the sealing the pleading, counsel should hand deliver the sealed envelope with the order affixed to the Clerk's office. Counsel should be sure that any copies of the motion and transcripts of the ex parte motion's hearings are returned to counsel or destroyed. After the clerk has filed and stamped the motion, counsel should periodically check the clerk's file to be sure that the envelope has not been opened by anyone who might have access to the file. Counsel should be sure that the Clerk does not log the name of the actual ex parte request.

At the ex parte hearing, defense counsel should make the proffer step by step. Defense counsel should start the proffer by giving the trial court an outline of what expert assistance is being asked for, why it is needed, who the proposed experts are, and how much it will cost. Defense counsel should get the experts to give a break down of costs. Is it a straight hourly rate? Is the fee for testifying higher, or is the fee for

reviewing documents lower? Defense counsel can suggest to the experts that these graduated fees are often more acceptable to the Court. Each motion should be individually argued and make proffers must be made in detail to the court. Defense counsel cannot assume that the court has read or understands the motions. Counsel can build on the assertions that have been made in the written motions by relating the specifics of the theory of the defense and why this expertise is essential. Often, by relating the theory of the case, defense counsel can get the court interested in the case. Counsel should be certain that he or she has enough of an understanding of the expert assistance themselves before attempting to explain it to a judge. Counsel needs to be knowledgeable enough in the field to persuade the judge that of the need for the expert. It should be remembered, that the defense expert is not limited to simply testifying at trial. The role of an expert is to assess the evidence, to then help defense counsel in the preparation of the defense including the preparation of cross examination of the state's experts. *Lindsey v. State*, 254 Ga. 444, 330 S.E.2d 563, 566-67 (1985); *Cowley v. Stricklin*, 929 F.2d 640 (11th Cir. 1991); *Buttram v. Black*, 721 F. Supp. 1268, 1312-1313 (N.D. Ga. 1989) *aff'd*, 908 F.2d 695 (11th Cir. 1990).

Despite defense counsel's best efforts, some trial courts will still refuse the requests for funds or, if they grant funds, the amount of the grant is just a small portion of the requests. If the court gives only a portion of the funds requested, counsel must be prepared to file supplemental motions detailing why the amount allowed won't

accomplish the tasks that are needed. Defense counsel can do this in the form of an affidavit from the expert. Defense counsel must not give up. Counsel can file a motion for reconsideration detailing why the denied funds are essential. This sometimes works and at the very least, counsel will have a record for appeal. As trial preparation and investigation in the case proceeds and the need for assistance becomes more apparent, counsel should continue renewing the funds requests, making a detailed appellate record.

Also, in cases where the State is seeking the death penalty and the Unified Appeal procedures are applicable, the trial court must conduct a hearing to determine if an interim appellate review of pretrial rulings is appropriate. The denial of a request for funds may be something defense counsel will want to seek interim review in the Georgia Supreme Court. (See Section II D in the Unified Appeal).

THE LIMITATIONS ON THE RESPONSE OF THE STATE PURSUANT TO *BROOKS V. STATE*

Brooks v. State, 259 Ga. 562, 385 S.E.2d 81 (1989), *cert. denied*, 494 U.S. 1018 (1990) involved a death penalty trial which originated in the Muscogee County Superior Court and which was transferred to the Oconee Judicial Circuit. In *Brooks*, the defendant's attorneys submitted a request to present their application for funds for expert assistance outside the presence of counsel for the State. The Supreme Court in upholding the trial court's decision to grant the application for an ex parte hearing on the application for funds, held that

> If an indigent defendant in justifying his need for expert assistance is compelled to reveal his theory of the case in the presence of the district attorney, he might be denied due process and equal protection vis-a-vis the non-indigent defendant who does not need to apply for public funds for assistance, and he might suffer an abridgment of his constitutional privilege against self-incrimination, his right to counsel and his right to present a defense. Noting that the hearing on **a motion for funds is non-adversarial** (emphasis supplied), the court found that the state has no interest in being present. The state argues that as the representative of the people of Georgia, it has a fundamental interest in being present at any hearing on an application for funds by defendant. . . .

Brooks v. State, supra. at 563. Justice Clarke, writing for a unanimous Court, went on to hold that

> [I]t is clear that in making the requisite showing defendant could be placed in a position of revealing his theory of the

case. He therefore has a legitimate interest in making that showing ex parte. On the other hand, the state **may have an interest in examining the defendant concerning his indigence.** (Emphasis supplied)This examination would not prejudice the defendant by forcing him to reveal his theory of the case in the presence of the district attorney. We find, further, that under ordinary circumstances, the trial court can evaluate the necessity for expert assistance without the benefit of cross-examination of the defendant by the state.

We affirm the trial court's order that an application for funds be presented to the court in chambers. The matter will be heard ex parte. The state may submit a brief, which will be considered at the time of the ex parte hearing. The ex parte proceeding shall be reported and transcribed as part of the record but shall be sealed in the same manner as are those items examined in camera. The court in its discretion may reserve issues to be heard at a separate hearing at which the state will be present. The state may always be represented when the defendant is examined as to his indigence.

Going beyond the argument that the hearing need not be ex parte, the state contends that defendant is not entitled to public funds. This argument is based on a discussion of the limits of *Ake* and on *Sabel v. State* (cites omitted). In *Sabel* this court found that where evidence of guilt is overwhelming, scientific evidence is not critical and not subject to independent examination. According to the state, evidence of Brooks' guilt is overwhelming; therefore, he is not entitled to public funds for such examination. *Sabel*, supra, deals with the defendant's right to complain on appeal of the denial of funds for an expert witness for trial. Since the weight of the evidence of defendant's guilt cannot be known before the trial, *Sabel* is not applicable to the present situation.

Brooks, *supra* at 566.

Nowhere in *Brooks* is the State given the right to address the Court about the analysis to receive expert or investigative assistance. Nowhere in *Brooks* is the State given the right to interfere with the defendant's presentation of the request for funds sufficient to prepare and present the appropriate defense. It should be noted that in the *Brooks* decision, the Georgia Supreme Court cited to *United States v. Meriwether*, 486 F.2d 498 (5th Cir. 1973), *cert. denied*, 417 U.S. 948 (1974). In *Meriwether*, the Fifth Circuit Court of Appeals affirmed the defendant's right to proceed ex parte in the application for funds necessary to subpoena witnesses. The Court held that the reason a defendant had the right to proceed ex parte in an application for funds for the subpoenas (and consequently did not have to disclose the names of potential witnesses to the prosecutors) was to protect the defendant from revealing his theory of the defense of his case to the prosecutors. The Court's reasoning centered on the difference between an indigent and non-indigent defendant. As the Court pointed out, forcing an indigent defendant to reveal the names of witnesses in order to secure funds to subpoena those witnesses when, at the same time, a non-indigent defendant would not have to reveal the names of witnesses in order to subpoena them raised serious equal protection questions. "[W]hen 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." *See United States v. Meriwether*, 486 F.2d 498 (5th Cir. 1973), *cert.denied*, 417 U.S. 948 (1974).

In *Zant v. Brantley*, 261 Ga. 817, 411 S.E.2d 869 (1992), the Georgia Supreme Court upheld a trial court's decision to bar the District Attorney from a hearing on a challenge to the Court's jurisdiction to enter an ex parte order to the warden of a correctional institution permitting an expert evaluation of an inmate. The Supreme Court of Georgia, in upholding the trial court's authority to have an ex parte hearing, cited its previous holding in *Brooks*. The Court noted

> [I]n *Brooks*, we determined that an indigent defendant had a legitimate interest in making an application for funds for investigative or expert assistance ex parte so that an indigent defendant would not be put in a position of revealing his theory of the case to the prosecution. Therefore, the prosecution, embodied in the district attorney, was not entitled to be present at the hearing where the trial court's grant of the defendant's ex parte request was at issue.

Zant v. Brantley, *supra* at 818-819.

In *Zant v. Brantley*, supra. the Court further held that

> [T]he courts unquestionably have inherent powers since the state constitutional provision mandating the separation of powers of the three branches of government (Art. I, Sec. II, Par. III)
>
> Invests those officials charged with the duty of administering justice according to law with all necessary authority to efficiently and completely discharge those duties the performance of which is by the constitution committed to the judiciary and to maintain the dignity and independence of the courts. *Lovetee v. Sandersville R. Co.*, 199 Ga. 238, 239, 33 S.E.2d 905 (1945).

Id. at 817.

The Office of The District Attorney is charged with the responsibility of representing the state in all criminal cases in the superior court of his or her circuit. Article VI, Section VIII, Paragraph I(d) of the *Constitution of the State of Georgia*. Nowhere in the Georgia Constitution is the office of any district attorney given authority to become the guardian of public funds appropriated by the General Assembly or by local county governments. Unless there is a violation of state and/or local laws with respect to the handling of public funds, the district attorneys, collectively, have no legitimate interest in interfering with the lawful distribution of funds which have been appropriated by state and county governments for the defense of indigents.

CONCLUSION

The denial of the defendant's right to an ex parte proceeding not only presents a Hobson's choice regarding effective trial advocacy but also undermines the independence of counsel which is required by Georgia law. *The Georgia Indigent Defense Act* specifically provides that defense services must be made available to the indigent accused of a crime and that the independence of the indigent's counsel must be ensured. *See O.C.G.A.* §§ 17-12-31, 17-12-44 (also refer to Uniform Superior Court Rule Number 29.11 which provides that indigent defense programs must be structured in such a way as to preserve the independence of counsel required by the Sixth Amendment to the *Constitution of the United States*.) If defense counsel were denied the right to approach the Court ex parte whenever seeking financial assistance in order to properly defend his or her client, there would be no independence of counsel. To deny an indigent defendant the right to seek assistance through an ex parte hearing would require the defendant to relinquish the right not to incriminate himself. The absence of a meaningful ex parte hearing would also destroy the statutory privileges of attorney - client communications and attorney work product. In *Marshall v. United States*, 423 F.2d 1315 (10th Cir. 1970), the Court reversed a defendant's conviction because his attorney was required to make a request for investigative assistance in the presence of the prosecutor. In reversing the conviction the Court held:

> Certainly the [defendant] cannot be said to "waive" disclosure of his case and his concomitant rights against self-incrimination and to due process by [requesting services]. . . . [The request cannot] be used, as a means of frustrating the Fifth Amendment right prohibiting self-incrimination.

The Court has the responsibility of determining whether funds will be allowed for experts assistance in a criminal case. The prosecutor has no function whatsoever within that decision making process. It is not as if the prosecutor has ever intimated that the defendant in a criminal case has any such reciprocal rights with regards to the types, names and qualifications of the state's experts. The granting of funds is an obvious attribute of the judiciary's authority. It is the duty of the courts to assure that proper financing is available for the defense of an indigent case. This is a basic separation of powers issue and cannot be usurped or abandoned by the Courts. The Mississippi Supreme Court succinctly stated in *Hosford v. State*, 525 So.2d 789 (1988), if the Judiciary is to exist, it must have the authority to order adequate funding:

> The same constitutional requirement for our courts to exist obviously carries with it the duty on the part of the legislative branch to provide sufficient funds and facilities for them to operate independently and effectively. Any holding otherwise would emasculate the constitutional mandate for three separate and coequal branches of government by reducing the courts to supplicants only of the legislature.

In order to protect the defendant's constitutional rights to file an application for funds to hire the necessary experts, the defendant's attorney must be given an

opportunity to present those requests in an ex parte setting safe from disclosure to the prosecutors.

Defense counsel will meet with resistance from the trial court, the prosecutor, and the clerks of the courts, but persistence will reap dividends for the client's case. Counsel must be prepared to argue vigorously for the defendant's right to proceed ex parte when requesting funds and assistance. Remember, if the defendant were wealthy and could afford to hire and retain the experts needed to properly prepare his or her case, ex parte hearings would not be necessary. Defense counsel should always ask themselves, "if my client had enough money, would disclosure be required?" If the answer is no, then proceed ex parte!

APPENDIX A

This motion is drafted for a death penalty case. This would be the only Motion associated with the ex parte proceedings which would be served upon the District Attorney. All other related ex parte motions would be filed under seal and not served upon the District Attorney.

MOTION FOR LEAVE TO PROCEED *EX PARTE*, *IN CAMERA* AND ON A SEALED RECORD WITH REGARD TO APPLICATIONS FOR EXPERT AND INVESTIGATIVE ASSISTANCE

Comes now <THE DEFENDANT IN THIS CASE>, by and through counsel, and moves for leave to proceed *ex parte*, *in camera* and on a sealed record with regard to any applications for expert and investigative assistance which may be necessary for <him> to adequately defend the charges against <him>. Such *ex parte* proceedings are essential to protect confidential attorney-client communications and attorney work-product material which must be disclosed to make a showing of need for the requested assistance. Disclosure of this information would violate <THIS DEFENDANT>'s rights to present a defense, to the effective assistance of counsel, to compulsory process to secure witnesses, to confront the evidence against <him>, to due process, to equal protection of the laws, to freedom from cruel and unusual punishment, and to freedom from compulsory self-incrimination, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, by Article I, § I, ¶¶ I, II, IV, V, XI, XII, XIII, XIV, XV, XVI, XVII and XVIII of the Constitution of the State of Georgia, by O.C.G.A. §§ 17-12-31, 17-12-44, 24-9-20, and 24-9-21, by Brooks v. State, 259 Ga. 562, 385 S.E.2d 81 (1989), and by

all other applicable law.

INTRODUCTION

1.

This is the capital prosecution of <THIS DEFENDANT> and these proceedings could result in <his> death by electrocution. The State, through the District Attorney, has announced its intention to kill <THIS DEFENDANT>, a human being. "The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special 'need for reliability in the determination that death is the appropriate punishment' in any capital case." Johnson v. Mississippi, 486 U.S. 578, 584, 108 S.Ct. 1981, 100 L.Ed.2d. 575 (1988) (quoting Gardner v. Florida, 430 U.S. 349, 363-64, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977) (White, J., concurring) (quoting Woodson v. North Carolina, 428 U.S. 280, 305, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976))). It is now well established that when a defendant's life is at stake, a court must be "particularly sensitive to insure that every safeguard is observed." Gregg v. Georgia, 428 U.S. 153, 187, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). As this Court is acutely aware, the penalty of death is qualitatively and profoundly different from any other sentence. E.g., Ford v. Wainwright, 477 U.S. 399, 411, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986) ("In capital proceedings generally, this Court has demanded that fact finding procedures aspire to a heightened standard of reliability. This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different." (citations omitted)); California v. Ramos, 463 U.S. 992, 998-99, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983) (recognizing "the qualitative difference of death from all other punishments"); Eddings v. Oklahoma, 455 U.S. 104, 110, 102 S.Ct. 869,

71 L.Ed.2d 1 (1982) ("the imposition of death by public authority is . . . profoundly different from all other penalties"). For this reason, our system of justice must go "to extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake." Eddings v. Oklahoma, 455 U.S. at 118 (O'Connor, J. concurring) (emphasis added). These "extraordinary measures" must be taken at both stages of any capital trial. Beck v. Alabama, 447 U.S. 625, 638, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980).

2.

Certain parts of the criminal process are carried out *ex parte*. For example, <THIS DEFENDANT> has not been consulted by the District Attorney to assist in the decision as to which Assistant District Attorneys should be involved in this case. Neither <THIS DEFENDANT> nor <his> counsel was summoned to the grand jury.

3.

It is now well established 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.'" Almond v. State, 180 Ga. App. 475, 479, 349 S.E.2d 482 (1986) (quoting Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985)). In Ake, the United States Supreme Court held that where the assistance of an expert is needed to prepare to present a defense, an indigent defendant has a constitutional right to the services of an independent expert at state expense. The Court held that when a

> question . . . [is] likely to be a significant factor in his defense . . . [the defendant is] entitled to the assistance of a[n expert] on this issue and . . . the denial of that assistance deprive[s] him of due process.

470 U.S. at 86-87. Ake involved the denial of an independent psychiatrist in a capital case which presented issues of insanity and future dangerousness. In analyzing under what circumstances expert assistance is constitutionally required, the Court explicitly held that a showing of need was to be made ex parte:

> 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 the assistance of a psychiatrist is readily apparent . . . [T]he State must [then], at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.

Id. at 82-83 (emphasis added). See also McGregor v. State, 754 P.2d 1216, 1217 (Okl. Cr. 1988) (intention of Ake that hearings be held ex parte is "manifest"); Lindsey v. State, 254 Ga. 444, 448, 330 S.E.2d 563 (1985) (Ake expert's "findings . . . privileged to the defendant"). U.S. v. Tate, 419 F.2d 131 (6th Cir. 1969). The Sixth Circuit Court of Appeals expressed concern for equality between "indigents and those who possess the means to protect their rights." See also, Ex parte Moody, 684 So. 2d 114, 120 (Ala. 1996) ("An indigent defendant should not have to disclose to the state information that a financially secure defendant would not have to disclose").

4.

Ake applies to experts in fields other than psychiatry and psychology. The Ake decision applies to all services and expenses reasonably necessary for an effective defense. Similar, and perhaps more

obvious, considerations apply when a court considers an application for appointment of counsel. The Supreme Court's decision in Ake was based on its recognition that to deny an indigent accused basic, critical rights and expert assistance, while the State may utilize the services of any attorney and has virtually unfettered access to any expert of its choosing, would render a criminal trial fundamentally unfair. The truth finding function of the adversary process would also be lost if the prosecution were allowed simply to overwhelm the impoverished defendant with the wealth of its resources:

> 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 . . . [This Court] has often reaffirmed that fundamental fairness entitles indigent defendants to "an adequate opportunity to present their claims fairly within the adversary system."

470 U.S. at 77 (quoting Ross v. Moffitt, 417 U.S. 600, 612, 94 S. Ct. 2437, 41 L.Ed.2d 341 (1974). Due process and fundamental fairness thus forbid the State from "assert[ing] an interest in maintenance of a strategic advantage over the defense, if the result of that advantage is to cast a pall on the accuracy of the verdict obtained." Ake, 470 U.S. at 79. See also Rey v. Texas, 897 S.W.2d 333, 338 (Tex. Cr. App. 1995) ("Medicine in any of its sub-specialties eludes mathematic precision, as evidenced by the need for a 'second opinion' with regard to any important medical question. Causation or mechanism of death are examples of important medical questions addressed by pathologists that require more than an objective or rote determination." (footnote omitted)) (en banc).

5.

The Supreme Court's holding in Ake clearly requires more than simply "the right to place the report of a 'neutral' [expert] before the court; rather it means the right to use the services of a[n expert] in whatever capacity defense counsel deems appropriate. . . ." Smith v. McCormick, 914 F.2d 1153, 1157 (9th Cir. 1990) (reversing death sentence because court merely provided defendant with neutral psychiatrist). Clearly, "under Ake, evaluation by a "neutral" court psychiatrist does not satisfy due process." Id. at 1158; Johnson v. State, 529 So.2d 577, 591-92 (Miss. 1988) ("an accused should . . . be afforded at State expense an independent expert" when accused provides name, specific costs, purpose and value of expert (emphasis added)); Lindsey v. State, 254 Ga. 444, 449, 330 S.E.2d 563 (1985) (Ake mandates more than "neutral" psychiatrist; "we conclude that, in addition to examining the defendant, the psychiatrist must assist the defense by aiding defense counsel in the cross-examination and rebuttal of the state's medical experts."); Knott v. Mabry, 671 F.2d 1208, 1212-13 (8th Cir.) ("[w]here there is a substantial contradiction in a given area of expertise, it may be vital in affording effective representation to a defendant in a criminal case for counsel to elicit expert testimony rebutting the state's expert testimony."), cert denied, 459 U.S. 851, 103 S.Ct. 115, 74 L.Ed.2d 101 (1982); Buttrum v. Black, 721 F.Supp. 1268, 1312-13 (N.D. Ga. 1989) ("It is clear that Ake contemplates a psychiatrist who will work closely with the defense . . . Ake requires more than explanations of psychological terms and assistance in preparation for cross-examination"); United States v. Sloan, 776 F.2d 926, 929 (10th Cir. 1985) (state's duty under Ake "cannot be satisfied with the appointment of an expert who ultimately testifies contrary to the defense. . . . "); United States v. Durant, 545 F.2d 823, 827 (2d Cir. 1976) (fingerprint expert necessary to prepare

counsel to cross-examine state's expert, since "'an adequate defense' must include preparation for cross examination of a government expert as well as presentation of an expert defense witness"). As the Court of Appeals for the Seventh Circuit has stated, under Ake, a defendant is entitled to the assistance of an expert who can perform three essential functions:

> First, the expert can aid a defendant in determining whether a [particular] defense . . . is warranted by the defendant's particular circumstances. Second, the expert can coherently present to the jury his or her observations . . . Finally, the expert can "assist in preparing the cross-examination" of . . . experts retained by the government.

United States v. Fazzini, 871 F.2d 635, 637 (7th Cir.) (citations omitted) (quoting Ake, 470 U.S. at 82), cert. denied, 493 U.S. 982, 110 S.Ct. 517, 107 L.Ed.2d 518 (1989).

6.

Ake applies to the sentencing phase of a death penalty case, including mitigation experts. See Ake, 470 U.S. at 87 (Burger, C.J. concurring). See also Smith v. McCormick, 914 F.2d 1153, 1157 (9th Cir. 1990) (reversing death sentence because defendant's constitutional right to expert assistance in presenting mitigation evidence at capital murder sentencing phase was not satisfied by neutral psychiatrist) (quoting Ake, 470 U.S. at 83 ("[w]e have repeatedly recognized the defendant's compelling interest in fair adjudication at the sentencing phase of a capital case."); Harris v. Vasques, 901 F.2d 724, 727 (9th Cir. 1990) (Ake applies to mitigation evidence at capital sentencing hearing); State v. Gambrell, 347 S.E.2d 390, 394 & n.2 (N.C. 1986) ("Ake held that an indigent defendant is entitled to state furnished psychiatric assistance on issues relating to his mental state which may arise at a capital sentencing hearing"); Perri v. State, 441 So. 2d 606 (Fla. 1983) (error to deny defendant assistance of a psychiatrist to develop

mitigation evidence even though defense of insanity not available); State v. Wood, 648 P.2d 71 (Utah 1982) (same); United States v. Sloan, 776 F.2d 926, 929 (9th Cir.1985) (Ake compels appointment of a psychiatrist to assist the defense where the "mental condition" of the defendant is a real issue); United States v. Crews, 781 F.2d 826 (10th Cir. 1986) (same); Holloway v. State, 257 Ga. 620, 621-22, 361 S.E.2d 794 (1987) (defendant's motion for court appointment of independent psychiatrist held improperly denied because he was "entitled to the kind of independent psychiatric assistance contemplated in [Ake] on the questions of competency to stand trial, criminal responsibility, and mitigation of sentence." (Emphasis added)); Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977).

7.

These same interests which require the State to bear the expense of services essential to the defense, also require that applications for those services be considered *ex parte.* <THIS DEFENDANT>'s adversary, the District Attorney, should have no more voice in determining whether <he> has the "raw materials" integral to an effective defense or whose services <he> retains in presenting <his> defense any more than <THIS DEFENDANT> should have a voice in what police officers investigate <his> case or what State experts analyze <his> fingerprints or handwriting.

8.

Nor does fundamental fairness tolerate requiring only the poor defendant to disclose prematurely, on account of <his> poverty, the lines of investigation <he> is undertaking, the names of those <he> is consulting in preparing <his> case, the purpose of those consultations, and other confidential matters. The confidential decisions of client and counsel are among the "basic tools of an adequate defense" which must

not be abridged due to inability to pay. Ake, 470 U.S. at 77 (quoting Britt v. North Carolina, 404 U.S. 226, 227, 92 S. Ct. 431, 30 L.Ed.2d 400 (1971)). Involving the prosecution in the consideration of such sensitive defense matters would merely enhance the "strategic advantage" the Ake ruling was meant to minimize.

9.

All presentations to the Court for funds must be made *ex parte*. In order to protect <THIS DEFENDANT>'s Sixth Amendment rights and/or <his> lawyer-client privilege, information submitted to the Court must not be disclosed to the prosecution and must be made privately. See McGregor v. State, 754 P.2d. 1216, 1217 (Okla. Ct. Crim. App. 1988) (intention of Ake majority that hearings be *ex parte* is "manifest"); Lindsey v. State, 254 Ga. 444, 449, 330 S.E.2d 563 (1985) (findings of Ake expert privileged to defendant); Brooks v. State, 259 Ga. 562, 385 S.E.2d 81 (1989) (indigent defendant has right to present applications for expert funds *ex parte* out of presence of district attorney).

10.

Applications for defense assistance must be made on an *ex parte* basis because of the showing required to vindicate the right to such assistance. Ake provides that an indigent defendant is entitled to defense services at state expense only upon a threshold showing that such assistance is required to deal with a significant factor in the defense of the case. Ake, 470 U.S. at 86-87. See also Caldwell v. Mississippi, 472 U.S. 320, 323 n.1, 105 S. Ct. 2633, 86 L.Ed.2d 231 (1985) (defendant must support request for investigator and fingerprint and ballistics experts with something more than general statement of need). Thus, in order to demonstrate <his> entitlement to an expert or to investigative assistance, <THIS

DEFENDANT> must reveal to the court the theory of the defense, the results of any investigation and witness consultation that has already taken place, and other work product, in addition to the information that is anticipated from the services sought. Of necessity, this showing must require disclosure of information obtained in attorney-client interviews.

11.

To require poor defendants to reveal this information before the prosecution in order to obtain the basic tools of their defense would compromise their right to present a defense. See Blazo v. Superior Ct., 315 N.E.2d 857, 860 n.8 (Mass. 1974) ("The reason *ex parte* application is allowed is that, just as a defendant able to foot the costs need not explain to anyone his reasons for summoning a given witness, so an impecunious defendant should be able to summon his witnesses without explanation that will reach the adversary.") There should be equality between "indigents and those who possess the means to protect their rights." See U.S. v. Tate, 419 F.2d 131 (6th Cir. 1969). In U.S. v. Meriwether, 486 F.2d 498, 606 (5th Cir. 1973), the Court stated:

> The names of witnesses to be called by the defendant could easily aid the government in determining the strategy the defendant plans to use at trial. The government should not be able to obtain a list of adverse witnesses in the case of a defendant unable to pay their fees when it is not able to do so in the cases of defendants able to pay witness fees. 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.

12.

In federal prosecutions, a defendant is protected by express statutory provisions in the Criminal

Justice Act which require that an indigent's request for expert assistance be considered *ex parte*. 18 U.S.C. 3006A(e); Fed. R. Crim. P. 17(b). See also H.R. Rep. No. 864, 88th Cong., 2d Sess. (1963) reprinted in 2 U.S. Code Cong. & Ad. News 2990 (1964) (Criminal Justice Act's *ex parte* procedure "prevents the possibility that an open hearing may cause a defendant to reveal his defense."); S. Rep. No. 346, 88th Cong., 1st Sess. 3 (1963) (*ex parte* requirement included in Criminal Justice Act "in order to protect the accused from premature disclosure of his case.") Judicial interpretations of the *ex parte* requirement have made clear that its function is to protect the accused from having to make premature disclosure of confidential information to the State.

For example, in United States v. Sutton, 464 F.2d 552 (5th Cir. 1972), the defendant's conviction was reversed due to the trial court's failure to hold an *ex parte* hearing on his motion for an investigator. The reviewing court agreed that the defendant should not have had to reveal the names of his potential witnesses or the type of information sought by the investigation and thereby unveil his case to the prosecution. Id. at 553. The Court in Marshall v. United States, 423 F.2d 1315, 1318 (10th Cir. 1970) similarly overturned a conviction where the accused was subject to an adversarial rather than *ex parte* hearing on his need for investigative aid, observing that "the 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."

13.

As stated by the United States Court of Appeals for the Fifth Circuit, proceedings must be held *ex parte* because "[d]issemination of information critical to the defense permits the government to enjoy unauthorized discovery which is forbidden under our concept of criminal procedure. . . . " United States

v. Edwards, 488 F.2d 1154, 1162 (5th Cir. 1974). See also United States v. Greschner, 802 F.2d 373, 379-80 (10th Cir. 1986) (although waived by defense, court notes on its own motion that it was error for trial court to allow government attorneys to attend hearing on application for penologist, pathologist, blood tests, and subpoenas at which defendants were required to disclose their theory of self-defense in support of their applications), cert. denied, 480 U.S. 908, 107 S.Ct. 1353, 94 L.Ed.2d 523 (1987); United States v. Meriwether, 486 F.2d 498, 506 (5th Cir. 1973) (intent of *ex parte* provision is to shield theory of defense from prosecutor's scrutiny); Williams v. United States, 310 A.2d 244 (D.C. App. 1973) (purpose of *ex parte* hearing is to ensure that defendant need not make premature disclosure of case in order to obtain access to expert services); Gaither v. United States, 391 A.2d 1364, 1367 n.4 (D.C. App. 1978) (eligibility and need for defense service must be determined in *ex parte* proceeding to afford accused opportunity to present request without prematurely disclosing merits of defense to prosecution).

14.

The same considerations apply with equal force to this capital prosecution. To require <THIS DEFENDANT> to disclose the nature of <his> defense, the names of persons with whom <he> seeks to consult, and the purposes for which <he> seeks such assistance would compromise <his> right to present a defense and to prepare <his> case in confidence with counsel in violation of the principles of law cited in the opening paragraph of this memorandum. An indigent defendant who petitions the court for investigative or other needed assistance is not necessarily seeking "neutral" input as might be imagined in an inquisitional, as opposed to adversary, system of justice. Instead, the poor person accused of a crime seeks the same type of assistance which the District Attorney, John DeLorean, John Hinckley or any other

person of means would employ -- someone in whom <he> has trust and with whom <he> can work in confidence in analyzing the prosecution's case against <him> and planning a defense to it. As the Supreme Court observed in Ake, the appointment of an expert may be necessary to help the accused gather facts, advise counsel on how to question opposing witnesses and interpret their answers, and generally "marshal" <his> defense. 470 U.S. at 80.

15.

Such assistance is essential for proper functioning of the adversary system, in which it is rarely justifiable that one party have exclusive access to the means of understanding, presenting, and explaining relevant facts:

> [The defense] expert fills a different role. He supplies expert services "necessary to an adequate defense," which embraces pretrial and trial assistance to the defense as well as availability to testify. His conclusions need not be reported to either the court or the prosecution.

United States v. Theriault, 440 F.2d 713, 715 (5th. Cir. 1971), cert. denied, 411 U.S. 984, 93 S.Ct. 2278, 36 L.Ed.2d 960 (1973); United States v. Bass, 477 F.2d 723, 725-26 (9th Cir. 1973) (expert may be a partisan witness whose services include pretrial and trial assistance to the defense). The expert appointed pursuant to Ake is expected to "assist the defense by aiding defense counsel in the cross-examination and rebuttal of the state's . . . experts," and thereby protect <his> Sixth Amendment right to confront the evidence against <him>. Lindsey v. State, 254 Ga. 444, 449, 330 S.E.2d 563 (Ga. 1985); see also United States v. Fessel, 781 F.2d 826, 834 (10th Cir. 1986) (services of expert appointed in *ex parte* proceeding include those necessary for cross-examination of government witnesses as well as

presentation of defense expertise).

16.

Thus, "[j]ust as an indigent defendant has a right to appointed counsel to serve him as a loyal advocate he has a similar right under properly proven circumstances to investigative aid that will serve him unfettered by an inescapable conflict of interest." United States v. Marshall, 423 F.2d 1315, 1319 (10th Cir. 1970) (holding it was error to deny *ex parte* hearing on the need for investigative assistance, and appointment of FBI agent cannot suffice to satisfy request).

17.

Presentation of different opinions on contested matters is equally indispensable to the proper functioning of the adversary process in enabling the fact finder to resolve contested issues. See, e.g., Ford v. Wainwright, 477 U.S. 399, 414, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986) ("[T]he fact finder must resolve differences in opinion . . . 'on the basis of the evidence offered by each party' . . . [W]ithout any adversarial assistance from the [defendant's] representative . . . the fact finder loses the substantial benefit of potentially probative information"); Sisson v. State, 181 Ga. App. 784, 788, 353 S.E.2d 836 (1987) (where examination administered by State expert is not subject to adversarial process, then opinion of State expert who routinely conducts tests for State would be untouchable; appointment of defense polygraph expert necessary in light of Ake).

18.

These objectives would be compromised if the State were allowed to oppose certain defense services or influence which investigators or experts were retained by the defense. See, e.g., United States

v. Chavis, 476 F.2d 1137, 1141-45 (D.C. Cir.), aff'd on rehearing, 486 F.2d 1290 (D.C. Cir. 1973) (federal statute contemplates assistance of expert in presenting defense; attendance and participation of prosecutor in hearing constitutes error); Gaither v. United States, 391 A.2d 1364, 1367-68 (D.C. App. 1978) (presence of government counsel during proceeding on request for funds error; very purpose of appointment is to provide expert services necessary to adequate defense). See also United States v. Hamlet, 456 F.2d 1285 (5th Cir. 1972) (denial of *ex parte* inquiry into need for defense psychiatrist error, where only examination was conducted by government expert, not expert whose responsibility is to assist defense). Thus, it would be error for this Court to give the State a voice in deciding whether <THIS DEFENDANT> was entitled to certain investigators or expert witnesses or in determining who should provide that assistance.

19.

The United States Supreme Court has long since recognized that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has." Griffin v. Illinois, 351 U.S. 12, 19, 76 S. Ct. 585, 100 L.Ed. 891 (1956). To the contrary, "all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court.'" 351 U.S. at 17.

20.

In recognition of the right to Equal Protection, the Supreme Court has repeatedly upheld the right of indigents to receive basic defense tools at state expense. Id. (right to trial transcript); Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) (right to trial counsel); Douglas v.

California, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963) (right to counsel on appeal); Roberts v. Lavallee, 389 U.S. 40, 88 S.Ct. 194, 19 L.Ed.2d 41 (1967) (right to transcript of preliminary hearing); Argersinger v. Hamlin, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972) (right to counsel for misdemeanor). The Ake decision is only one in a long line of cases defining the Equal Protection and Due Process rights of the indigent accused.

21.

In analyzing whether the prosecution may attend <THIS DEFENDANT>'s applications for funds, it must be borne in mind that were <THIS DEFENDANT> financially independent <he> would obtain investigative and other services without informing the prosecution of whose assistance <he> was seeking or why <he> was seeking it. The very purpose of providing funds for such assistance is to place the indigent defendant as nearly as possible on a level of equality with the non-indigent. United States v. Tate, 419 F.2d 131, 132 (6th Cir. 1969); United States v. Theriault, 440 F.2d 713, 716 (5th Cir. 1973); (Wisdom, Jr., concurring). Penalizing the impoverished defendants by requiring them to announce privileged information and their trial strategy as a prerequisite to investigating and presenting a defense would obviously constitute invidious discrimination. See State v. Hamilton, 448 So. 2d 1007, 1008-09 (Fla. 1984).

22.

Since "the Due Process Clause of the Fourteenth Amendment forbids enforcement of . . . rules unless reciprocal . . . rights are given to criminal defendants," Wardius v. Oregon, 412 U.S. 470, 472, 93 S.Ct. 2208, 37 L.Ed.2d 82 (1973), the prosecution may not have a free opportunity at discovery with no

reciprocal obligation. The arrangement is even more invidious where the prosecution receives this discovery only from indigent defendants:

> 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.

United States v. Meriwether, 486 F.2d 498 (5th Cir. 1973), cert. denied, 417 U.S. 948, 94 S.Ct. 3074, 41 L.Ed.2d 668 (1974). As stated by the Court of Appeals for the First Circuit:

> We are not impressed by the government's contention that it could properly attend the "*ex parte*" presentation so long as it did not take an active part. Rather, we would regard the purpose of the . . . rule as apparent on its face to be in recognition of the principle that defendants are not to be avoidably discriminated against because of their indigency. Discovery, though only partial, would clearly be a discrimination.

United States v. Holden, 393 F.2d 276 (1st Cir. 1968) (citations omitted).

23.

Therefore, denial of the right to proceed ex parte would deprive <THIS DEFENDANT> of equal protection of the laws and due process of law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States and Article I, § I, ¶¶ I and II of the Constitution of the State of Georgia.

24.

The application for defense expense must be *ex parte* in order to protect <THIS DEFENDANT>'s right to counsel.

> it is by this time well-established that the Sixth Amendment guarantees criminal defendants not only the right to assistance of counsel, but requires that assistance to be legally 'effective.'

Waldrop v. State, 506 So. 2d 273, 275 (Miss. 1987) (citation omitted); accord Read v. State, 430 So. 2d 832, 840 (Miss. 1983); Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The involvement of the prosecution in court-appointed counsel's efforts to provide assistance to an indigent client tends inevitably to curtail this most fundamental right.

25.

It would take a rash person to deny that "[i]n our pecuniary culture the calibre of personal services rendered usually has a corresponding relationship to the compensation provided." Makemson v. Martin County, 491 So. 2d 1109, 1114-15 (Fla. 1986) (quoting MacKenzie v. Hillsborough County, 288 So. 2d 200, 202 (Fla. 1973) (dissenting opinion)), cert. denied, 479 U.S. 1043, 107 S.Ct. 908, 93 L.Ed.2d 857 (1987). Indeed, a quarter century ago the Supreme Court stated the obvious:

> [T]here are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare their defense.

Gideon v. Wainwright, 372 U.S. 335, 344, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963).

26.

The best legal assistance comes at a certain price, as does mediocre representation. The Federal Government established reasonable compensation for lawyers and reasonable fees for experts in the Criminal Justice Act of 1964 "[i]n response to evidence that unpaid appointed counsel were sometimes less diligent or less thorough than retained counsel . . ." Ferri v. Ackerman, 444 U.S. 193, 199, 100 S.Ct. 402, 62 L.Ed. 2d 355 (1979) (footnote omitted).

27.

Since "[t]he link between compensation and the quality of representation remains too clear," Makemson, 491 So. 2d at 1114, and operates to discourage effective representation, the issue of appointment of counsel and the funds to be allowed for the defense becomes of great significance to the right to the effective assistance of counsel.

28.

To provide effective assistance an attorney must adequately investigate and prepare his or her client's case. Goodwin v. Balkcom, 684 F.2d 794, 805 (11th Cir. 1982) (at heart of effective representation is independent duty to investigate and prepare); see also McQueen v. Swenson, 498 F.2d 207, 217 (8th Cir. 1974) (attorney who does not seek out all facts relevant to client's case will not be prepared at trial). Where investigative and other services are necessary to the preparation and presentation of an adequate defense, the denial of access to those services may also deprive a defendant of the minimally effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments. Blake v. Kemp, 758 F.2d 523, 531 (11th Cir. 1985); Pedrero v. Wainwright, 590 F.2d 1383, 1396 (5th Cir. 1979); United States v. Fessel, 531 F.2d 1275 (5th Cir. 1976). See also Mason v. Arizona, 504 F.2d 1345, 1352 (9th Cir. 1974) (failure to provide investigative assistance when necessary to defense constitutes ineffective performance), cert. denied, 420 U.S. 936, 95 S.Ct. 1145, 43 L.Ed.2d 412 (1975).

29.

<THIS DEFENDANT>'s counsel will not be prepared to rebut the State's evidence without meaningful consultation with experts for the defense. Nor can counsel appropriately investigate aspects

of their client's case without the type of assistance that any attorney would obtain for a financially able defendant. See, e.g., United States v. Theriault, 440 F.2d 713, 176-17 (5th Cir. 1971) (Wisdom, J., concurring), cert. denied, 411 U.S. 984, 93 S.Ct. 2278, 36 L.Ed.2d 960 (1973).

30.

The failure to allow *ex parte* applications for assistance would therefore inevitably deprive <THIS DEFENDANT> of the benefit of effective counsel such as a non-indigent defendant might expect to receive. Counsel will be forced to either forgo an application for assistance in order to keep attorney-client communications, work-product, and trial strategy confidential or make the needed request, breach his duty of confidentiality and prematurely reveal matters no competent attorney would disclose prior to trial. An *ex parte* procedure obviates the need for such an untenable choice.

31.

Denial of the right to *ex parte* proceedings not only presents a Hobson's choice regarding effective advocacy but also undermines the independence of counsel required by Georgia law. The Georgia Indigent Defense Act specifically provides that defense services be made available for the indigent accused and that the independence of the indigent's counsel be ensured. O.C.G.A. §§ 17-12-31 and 17-12-44. See also Rule 29.11 of the Uniform Superior Court Rules ("indigent defense program shall . . . be structured to preserve independence"). Requiring an attorney to reveal aspects of a case to the prosecution would unnecessarily impinge on the attorney-client relationship and undermine the independence guaranteed by statute. See State v. Hamilton, 448 So. 2d 1007, 1008-09 (Fla. 1984) (basis for request for expert founded on communications between lawyer and client; inquiry into basis would violate attorney-client

privilege).

32.

Ex parte proceedings on the need for defense assistance are necessary to protect <THIS DEFENDANT>'s right against self-incrimination as guaranteed by Fifth Amendment to the United States Constitution, by Article I, § I, ¶ XVI of the Georgia Constitution, and by O.C.G.A. § 24-9-20. The privilege against self-incrimination is secured only when a criminal defendant has the right "'to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence.'" Estelle v. Smith, 451 U.S. 454, 468, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981) (ellipsis in original) (quoting Malloy v. Hogan, 378 U.S. 1, 8, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964). If <THIS DEFENDANT> or <his> attorney is compelled to disclose confidential facts in order to obtain financial assistance, <THIS DEFENDANT> surely cannot be said to have exercised <his> own will. Nor can the failure to justify the request for aid be deemed anything but a penalty for silence.

This was made abundantly clear in Marshall v. United States, 423 F.2d 1315 (10th Cir. 1970). The defendant in that case was compelled to justify his need for investigative assistance before the prosecuting attorney. As a result, the State was able to locate a witness of whom it had previously been unaware who then testified against the defendant. In reversing the conviction, the court emphasized:

> Certainly the movant cannot be said to "waive" disclosure of his case and his concomitant rights against self-incrimination and to due process by [requesting services] . . . [That request cannot] be used . . . as a means of frustrating the fifth amendment right prohibiting self-incrimination.

Id. at 1318-19.

33.

<THIS DEFENDANT> cannot be called on to sacrifice one set of constitutional rights in order to receive the benefit of another. Bordenkircher v. Hayes, 434 U.S. 357, 363, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978); see also State v. Armstead, 152 Ga. App. 56, 262 S.E.2d 233 (1979). <His> motions for the "raw materials integral" to <his> defense must be considered *ex parte.*

34.

The authority of the judiciary cannot be curtailed, just as "the whole of the legislative power has been vested in the legislature . . . [and] the whole of the executive power has been vested in a separate and distinct [executive] department of our government . . ." Alexander v. State by and through Allain, 441 So. 2d 1329, 1339 (Miss. 1983); accord Dye v. State ex rel. Hale, 507 So. 2d 332, 342-43 (Miss. 1987).

35.

One facet of the doctrine of Separation of Powers is that there may be no confusion of power and authority between the branches of the government. A judge may not mix and match authority by acting as a deputy sheriff -- a member of the Executive branch. Vaughn v. State, 160 Ga. App. 283, 284, 287 S.E.2d 277 (1981). A judge may not discuss "strategy" with a prosecutor -- another member of the Executive branch. State v. Guhl, 140 Ga. App. 23, 230 S.E.2d 22 (1976); see also Thomason v. State, 148 Ga. App. 513, 251 S.E.2d 598 (1978); McAllister v. State, 157 Ga. App. 158, 276 S.E.2d 669, 671 (1981). Indeed, the authority of the judiciary may not be usurped even in part by another branch of government even where there is "a laudable purpose" for doing so. Glenn v. Herring, 415 So. 2d 695, 696 (Miss. 1982) (legislature cannot order trial judges to render an opinion within six months).

36.

As Ake makes clear, it is one of the court's functions to determine whether funds will be allowed for expert assistance in a capital case. It is not as if the prosecutor has ever intimated that <THIS DEFENDANT> should have reciprocal rights viz-a-viz the State's selection of witnesses. In contrast, the granting of funds is an obvious attribute of judicial authority, for it "is the duty of this Court to assure such financing so its agencies can discharge the 'jurisdiction and lawful powers as are necessary to conduct a proper and speedy disposition of any complaint ' . . . " In the Matter of the Mississippi State Bar, 361 So. 2d 503, 506 (Miss. 1978). As succinctly stated by the Mississippi Supreme Court in Hosford v. State, 525 So. 2d 789 (Miss. 1988), if the Judiciary is to exist, it must have the authority to order adequate funding:

> The same Constitutional requirement for our courts to exist obviously carries with it the duty on the part of the Legislative branch to provide sufficient funds and facilities for them to operate independently and effectively. Any holding otherwise would emasculate the constitutional mandate for three separate and coequal branches of government by reducing the courts to supplicants only of the Legislature.

Id. at 797. See also Ake, 470 U.S. at 83 (where rights of the defendant are weighed against financial imposition on the State, "the State's interest in its fisc must yield").

37.

In order to protect these rights, the Georgia Supreme Court held in Brooks that an indigent defendant is entitled to preset applications for funds *ex parte*. *Ex parte* means outside the presence of the other party. Brooks v. State, 259 Ga. 562, 564, 385 S.E.2d 81 (1989). The Georgia Supreme Court

held that such proceedings "shall be reported and transcribed as part of the record but shall be sealed in the same manner as are those items examined *in camera*." 259 Ga. at 566. In order to protect the confidentiality of these communications to the court, the motions for assistance should be file stamped by the clerk and then placed in sealed envelopes clearly marked "sealed pleading -- access by court order only"; any hearings on the applications should be conducted *in camera*, excluding the District Attorney, the news media and the public; and the transcripts and orders resulting from the proceedings should be placed under seal until such time as the Court orders that they be made available.

The Court also recognized in Brooks the interest of the State in determining whether the defendant is actually indigent -- that is whether <he> is without funds to pay the costs of <his> defense -- and held that "[t]he State may always be represented when the defendant is examined as to his indigency." Id. However, in this case, the indigence of <THIS DEFENDANT> is not in dispute.

CONCLUSION

For the reasons stated herein, <THIS DEFENDANT> is entitled to proceed *ex parte* with a sealed record, in <his> applications for the funds necessary for <his> defense. *Ex parte* proceedings are essential to protect the right of an indigent defendant to a fair opportunity to present <his> defense on the same footing as a person of means. To allow the prosecution to have a voice in the consideration of <THIS DEFENDANT>'s *ex parte* requests would amount to impermissible discrimination against <THIS DEFENDANT> solely on the basis of <his> financial status. The State cannot assert any interest in being involved in such proceedings that could outweigh <THIS DEFENDANT>'s rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Article I, § I, ¶¶ I, II, XII, XIV, XV

and XVII of the Georgia Constitution, and O.C.G.A. §§ 17-12-31, 17-12-44, 24-9-20, and 24-9-21.

WHEREFORE, <THE DEFENDANT IN THIS CASE> moves that this Court enter an order:

(1) granting <his> right to proceed *ex parte*, *in camera*, and on a sealed record with regard to applications for funds;
(2) establishing procedures which protect <him> against disclosure of any information revealed in making such applications; and
(3) requiring the transcripts and exhibits related to these motion to be filed and to remain under seal.

<Signature Lines>