PETITIONING FOR FUNDS FOR DOMESTIC VIOLENCE EXPERT WITNESSES IN DEFENSE CASES

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About the Author

Quetita Cavero, the author of this paper, is the Staff Attorney at the National Clearinghouse for the Defense of Battered Women. Quetita brings valuable experience to the field of defense – based advocacy – as a former assistant district attorney, a victim advocate in a prosecutor's office, and a staff attorney at a battered women's organization. As the Staff Attorney at the National Clearinghouse for the Defense of Battered Women, she provides direct technical assistance to defense teams, researches and develops legal materials, and conducts training programs.

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Introduction

Through our work at the National Clearinghouse for the Defense of Battered Women, we consult with many defense attorneys who need to hire qualified expert witnesses. Securing funds for expert services in cases with indigent defendants can be very challenging despite state and federal constitutional mandates, but often, attorneys cannot provide effective assistance of counsel without doing so. This piece provides an overview of counsel's constitutional duty to secure expert assistance, the scope of the government's obligation to provide funds to defendants for expert services, and how counsel for indigent defendants may petition the court for funds for a domestic violence (DV) expert.[1] Throughout the paper, the use of DV experts in defense cases will be outlined, including issues to consider before making a request for funds.

> *In many cases, effective representation is impossible without the services of an expert.*

Counsel's Duty in Cases Involving Battered Defendants[2]

As in any criminal case, where there is a Sixth Amendment right to counsel, a defendant is entitled to effective assistance of counsel.[3] Included in effective representation is a duty to investigate all relevant facts and legal options, and any strategic decision not to investigate must be reasonably made.[4] Thus, effective representation of a battered defendant requires, at a minimum,

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[1] This paper addresses situations in which counsel for indigent defendants are obliged to request funding from the court to cover expert assistance. Please note that there may be other procedures to follow when seeking funding; for example, public defender offices may handle the disbursement of expert funding internally. However, a defendant's constitutional rights are the same regardless of local procedure, and counsel should look to the court for adequate funds when necessary.

[2] This section is largely excerpted from a memo, *Ineffective Assistance of Counsel in the Criminal Law in Cases of Battered Defendants*, written by Jill M. Spector, Esq. Jill Spector is an experienced criminal defense attorney and has been working as a legal consultant to the National Clearinghouse since 1994.

[3] The legal standard and principles guiding claims of ineffective assistance of counsel have long been established in Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984) and its progeny. For more information about ineffective assistance of counsel claims in cases involving battered defendants, please contact NCDBW.

[4] "Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular

that the attorney fully understand the applicable law and thoroughly investigate the facts and possible avenues of defense. In many cases, doing so is impossible without the services of an expert; often an attorney may lack the expertise to properly identify and understand how the defendant's experiences of abuse played a part in the incident for which the defendant is charged. Given the pivotal role that evidence concerning prior abuse can play in a case involving a battered defendant, it must be investigated in the same way any other important evidence, such as alibi or eyewitness testimony, would be investigated.

Despite increased recognition by courts and litigants of the relevance of expert testimony on battering and its effects, ineffective assistance of counsel complaints that involve the attorney's failure to investigate by consulting with an expert and/or present expert testimony still persist.[5] In many cases, such omissions are a result of the attorney's lack of familiarity with the dynamics of battering and its effects, and/or lack of understanding as to the possible role of expert testimony for the defense.

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investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Id. at 690-691, 80 L. Ed. 2d 674, 104 S. Ct. 2052.

[5] See Dando v. Yukins, 461 F.3d 791 (6th Cir. 2006), finding ineffective assistance of counsel for failing to adequately investigate and explore with defendant possible defenses, including consulting with necessary experts which, contrary to counsel's advice, would have been available despite defendant's inability to pay, pursuant to Ake v. Oklahoma; See also Smith v. Oklahoma, 2006 Okla. Crim. App. LEXIS 39 (2006), trial counsel was found to be ineffective for failing to have defendant evaluated by an expert on BWS to determine viability of expert testimony and petition for funds for expert, and failing to fully inform client of legal significance of expert and financial options for funding. For an excellent discussion of counsel's duty to investigate corroborative lay evidence as well as expert investigation regarding abuse issues, see Harris v. State, 2004 Ala. Crim. App. LEXIS 203 (2004), reversing a battered woman's death sentence on ineffectiveness grounds for failing to adequately investigate this evidence.

Consultation with an expert, or multiple experts, can be one aspect of a thorough investigation in a case involving a battered defendant.[6] Pre-trial expert assistance may be essential to fully understand the relevance of prior abuse to a criminal case, and to evaluate possible claims and defenses. Expert consultation can also aid the attorney in uncovering and understanding lay evidence concerning abuse, including evidence from the defendant. An expert can also help by facilitating communication with the defendant and, in some instances, with preparing the defendant to testify. Without such expert assistance, a defense attorney may be ill-equipped to give judges and juries the information they need to fairly evaluate the evidence in battered defendants' cases and to render just verdicts.

All indigent defendants, regardless of who is paying for their defense, are constitutionally entitled to state funded expert assistance.

Although expert testimony at trial may be essential to enable the factfinder to fully and fairly evaluate the evidence and the defense, that does not mean expert testimony should necessarily be presented in every case. Rather, this decision, like all legal strategy decisions, can only be made after a full and thorough review of numerous factors. The critical point is to recognize that the "tactical" decisions of whether to consult with an expert and/or present expert testimony must represent informed and reasoned choices made with full knowledge and evaluation of available alternatives. A decision based on assumptions, or on a lack of information or awareness of those alternatives, can never be justified as tactically based.

[6] Although this paper focuses on battering experts, the same content can also be applied when petitioning for funds for ancillary defense services that may be relevant to the case. "Ancillary defense services" are non-counsel services needed to promulgate an effective defense, including, for example, investigators or interpreters, as well as experts. These services can often be equally necessary to an adequate defense as an expert, and should be sought whenever necessary, under the same guidelines for experts as indicated in this memo.

Indigent Defendants' Right to Expert at Public Expense

The U.S. Supreme Court case Ake v. Oklahoma, 470 U.S. 68 (1985), established that defendants have a constitutional right to present a defense, and in some cases government funding for experts is necessary to satisfy that right. More specifically, the Court held that a capital indigent defendant must be provided funds for a psychiatric evaluation and assistance where his sanity "is to be a significant factor at trial," id. at 83. State and federal courts have held that the right provided by Ake extends to non-capital defendants and non-psychiatric contexts, including to battered defendants, who often need experts to prepare and present a good defense.

Notably, when representing an indigent defendant whose case needs an expert and who cannot afford to pay for one, many times an attorney doesn't request the necessary funding despite their obligation to do so. Though there are numerous barriers to obtaining expert funds, some of which are discussed below, a defense attorney who represents an indigent defendant must seek the necessary funds in order to protect their clients' constitutional rights and maximize the opportunity for a just outcome.

Privately retained and pro bono counsel

An attorney who is retained or who represents their client pro bono may think that government funding for expert assistance is only available to defendants represented by public defenders through an organized indigent defense system. However, the right to expert funding also applies to indigent defendants with private, pro bono, and court-appointed counsel,[7] although

[7] Failure to request funds for expert assistance may constitute grounds for a finding of ineffective assistance of counsel, even where defendant is represented by retained counsel, and the right to an expert for defendants represented by retained counsel is not explicit in the state's caselaw or statutes. See Ex parte Briggs, 187 S.W.3d 458, 468-69 (Tex. Crim. App. 2005) (holding, in an appeal based on an ineffective assistance of counsel claim, that retained counsel was ineffective, reasoning in part that counsel could and should have requested a state-funded expert under Ake; citing the right to expert assistance under Ake and the equal application of the right to effective assistance of counsel to retained and appointed counsel alike under Culyer v. Sullivan, 446 U.S. 335, 344 (1980) as sufficient notice to retained counsel of the availability of the right to request funds).

statutory and case law may present significant hurdles for indigent defendants with private counsel to obtain funds.[8]

What standard must you meet in your state to show the need for funds for an expert?

The three most common standards sound similar, but require varying levels of proof. These standards are:

- *Denial of expert assistance will result in a fundamentally unfair trial*
- *An expert is necessary for an adequate defense/reasonably necessary to present a defense*
- *An expert is necessary*

Some states don't have standards that fall neatly into any of these categories, and some states don't have an articulated standard at all.

Local court culture as a deterrent to seeking funds

Defense counsel may often be deterred from seeking funds by local court practices. For example, based on their experiences in a particular jurisdiction and/or with a particular judge, an attorney may be certain they will only get a limited amount to retain an expert, or no funds at all, and will not seek funds beyond this perceived expectation. In Hinton v. Alabama, 571 U.S. 263 (2014), defense counsel mistakenly believed that he was limited in the amount he could receive for the expert he needed. The only expert he found and hired did not have the level of expertise that defense counsel thought he needed to effectively represent his client. In Hinton, the U.S. Supreme Court found trial counsel ineffective because of his "inexcusable mistake of law – the unreasonable failure to understand the resources that state law made available to him – that caused counsel to employ an expert that *he himself* deemed inadequate." Counsel's expectations

[8] Generally speaking, indigent defendants who cannot afford experts have the right to hire experts at government expense, if needed to present their defense. A majority of courts who have considered the issue of providing funds to indigent defendants represented by private or pro bono counsel have held that such defendants are entitled to funds. However, a significant number of state courts have held that indigent defendants must access the state indigent defense system in order to obtain funds for experts and other defense services. Other states have not conclusively settled the issue, or have been silent on the issue in state case law and statutes.

or beliefs of what will be granted or denied should not be the sole determinant of whether to request funds.

Meeting the Threshold for Expert Funds: Varying Standards to Show Need for an Expert

Although the Court in Ake laid the groundwork for the right to expert testimony, it left "to the States the decision on how to implement this right." 470 U.S. at 82-83. The Court did not firmly establish a "threshold showing" that must be met in order to require provision of state-funded experts. Courts have however, read the Ake holding together with guidance from a footnote in Caldwell v. Mississippi, 472 U.S. 320, 323 n.1 (1985), to create "necessary showing" tests.[9] The Caldwell court indicated that "undeveloped assertions" that expert assistance would be beneficial were insufficient to trigger due process rights. 472 U.S. at 323, n.1. The standards that states have developed to show the need for an expert generally cluster into three categories:

Denial of expert would result in a "fundamentally unfair trial"

Construing the guidance from Ake and Caldwell together, courts in a handful of states have required that a defendant show both that there is a "reasonable probability" that an "expert would be of assistance to the defense," and that a denial of that assistance would "result in a fundamentally unfair trial." Moore v. Kemp, 809 F.2d 702, 712 (11th Cir. 1987).

An expert is necessary for an adequate defense/reasonably necessary to present a defense

A more significant number of states have adopted statutory standards that require only that the defendant show indigence and that the expert is "necessary for an adequate defense." Arnold v. Higa, 600 P.2d 1383, 1385 (Haw. 1979); see e.g. English v. Missildine, 311 N.W.2d 292, 293-94 (Iowa 1981); Widdis v. Second Jud. Dist. Ct. of State of Nev., 968 P.2d 1165, 1167-68 (Nev. 1998).

[9] To note, all states require some showing of indigence as part of accessing funds for an expert. The guidelines and process for meeting this requirement varies from jurisdiction to jurisdiction and is beyond the scope of this paper.

Some states word this standard slightly differently; they require a showing that an expert is reasonably necessary to present a defense.

An expert is necessary

*L*astly, a smaller, but distinct number of courts require only that the defense demonstrate a showing of "necessity" for an expert. By not requiring a defendant to demonstrate that denial of funds for expert assistance will create a "fundamentally unfair trial," these states presumably make expert assistance more accessible to indigent defendants.

Thinking beyond testimony – how can an expert help you prepare your client's defense?

- Help identify defendant's relevant experiences of abuse
- Locate corroborative evidence
- Assist with trauma-informed communication
- Educate attorney
- Help develop defense theory
- Help prepare defendant to testify
- Help attorney prepare to examine adverse expert
- Help develop mitigation evidence

Showing the Need for a Domestic Violence Expert

Courts in all jurisdictions have found that domestic violence is a subject that is beyond the ken of the jury, and is appropriate for expert testimony. Although jurisdictions vary on when expert testimony on battering and its effects is deemed admissible, many jurisdictions have not clearly defined when battering evidence is inadmissible, so it makes sense to request funds in all cases in which expert assistance will benefit the defense.

When seeking funds for an expert on battering and its effects, the defense can meet the threshold showing of necessity in a variety of ways. The defense can argue an expert will help facilitate communication between the defense attorney and defendant about the defendant's experiences of abuse, so those experiences may be assessed and investigated. It may be particularly necessary to have a skilled expert when the defendant has never previously discussed their experiences of domestic violence and trauma. By helping to uncover the defendant's history

of abuse, a domestic violence expert can assist the defense attorney in determining whether the abuse is relevant, and if presenting lay or expert evidence of the abuse will be helpful to the defense. If so, the expert's knowledge can be essential to the defense attorney throughout the preparation of the case. Further, expert testimony could provide essential education to the jury to help them understand domestic violence dynamics relevant to the case that are beyond the understanding of a lay person. In most states, the showing of the need of an expert in the request for funds must emphasize how the expertise is necessary to present a defense; in states with higher standards, defense counsel must show that a fundamentally unfair trial would result from the absence of expert assistance. For a fuller discussion of the use of domestic violence experts, see page 11*, The Use of Experts and Areas to Consider Prior to Petitioning for Funds.*

The Importance of Requesting Funds Ex Parte

Filing a petition for funds ex parte, meaning, without the other party's knowledge of the motion and having the motion heard without the other party present, can be a critical aspect of trial strategy. Although most state courts allow party requests to hear motions for funds ex parte, not all states routinely grant these requests; a few states find there is no right to ex parte hearings. However, even in states where courts are sometimes reluctant to allow ex parte motions for funds, a defense attorney should always consider seeking to file the motion for funds for a domestic violence expert ex parte and under seal, in an attempt to control the revelation of their trial strategy.

A defense attorney in a jurisdiction without the benefit of strong statutory or case law allowing ex parte hearings can base their arguments for the right to an ex parte hearing on constitutional grounds. The Fifth Amendment provides the right against self-incrimination and the 14th Amendment provides the right to equal protection: "[i]ndigent defendants seeking state

funded experts should not be required to disclose to the State the theory of defense when non-indigent defendants are not required to do so." Moore, 889 A.2d at 341-42. Defense counsel can also assert their client's Sixth Amendment right to the effective assistance of counsel, and can argue that an open hearing for a funds request "forces an attorney to choose between revealing the defense strategy or sacrificing the client's constitutional right to expert or investigative services," thereby "interfer[ing] in certain ways with the ability of counsel to make independent decisions about how to conduct the defense." Shane, 17 Cap. Def. J. at 373-74 citing Strickland v. Washington, 466 U.S. 668, 686 (1984).

A defense attorney needs to be prepared to demonstrate to the courts that holding the hearing ex parte is, in fact a "basic tool of an adequate defense for due process purposes,"[10] and be ready to counter any policy arguments that may be raised surrounding the State's interest to be present, for example, because funds implicate government expenditure.

Requesting the funds motion be heard ex parte and filed under seal by defense counsel is important, even if denied, to preserve the issue for appeal. If the ex parte request is denied, defense counsel needs to balance efforts to minimize disclosure of the defense strategy against counsel's ability to make the full 'necessary showing' to receive funds.

Safeguarding Legal Strategy

When the court will not grant an ex parte hearing and the prosecution will be privy to the information submitted with the motion for funds, the defense can make strategic decisions as to whether and/or how to modify their motion before submitting it. In other words, even if the motion reveals the defense use of the expert, the defense may take into consideration whether the strategy has already been revealed to the prosecution, it will be revealed soon, or it is easy to infer.

[10] Justin B. Shane, *Money Talks: An Indigent Defendant's Right to an Ex Parte Hearing for Expert Funding*, 17 CAP. DEF. J. 347 (2005) at 359.

If so, it may be helpful to fully reveal the need of the expert, particularly if that will make the difference between the judge granting or denying the motion. Depending on the case, it may be worth evaluating if the expertise needed can be satisfied with an expert who provides general testimony only. These experts do not evaluate the defendant or provide case specific testimony; rather, they provide the factfinder with general information about domestic violence, domestic violence victims, etc. Requesting funding for this type of expert might be a way to reveal the least amount of information about the defense strategy in the motion for funds.

The Use of Experts and Areas to Consider When Petitioning for Funds

Understanding the Admissibility of Battering Evidence in the Charging Jurisdiction

Although expert testimony on battering and its effects has been admitted in every jurisdiction, defense counsel needs to consider how to address potential barriers to admissibility before petitioning for funds, as the range of admissibility varies greatly in different jurisdictions. This means not only understanding the purpose and relevance of the expertise to the legal case, but also the jurisdiction's unique case law and statutes regarding this kind of testimony. For example, there is wide variation amongst state and federal jurisdictions about the circumstances under which expert testimony on battering and its effects can be used to support the affirmative defense of duress.

Essentially, the motion for funds boils down to demonstrating the relevance of, and need for the expert. While most courts know that there are experts who specialize in "battered woman syndrome," many do not understand what the battering expert actually does in a particular case. In

this regard, many courts need an introductory "nuts and bolts" education about battering and its effects or “battered woman syndrome” expertise generally.[11]

Domestic Violence Expertise in Legal Defense Cases

This paper is not intended to encompass all the nuances of what a battering expert can do, but rather to give the defense attorney a solid set of considerations when deciding what type of expert is needed in their case. For example, when petitioning for funds, the defense may need to decide first if they want an expert who can do a specific evaluation of the defendant, or if they only need the expert to give general testimony without evaluating the defendant. All experts on battering and its effects can give a general education on domestic violence, including common dynamics, tactics of power and control, and common myths and misconceptions about survivors. However, not all experts are qualified to do a defendant-specific evaluation.

A general expert can be a good fit in relatively straightforward cases where an attorney can easily make the connection between general DV concepts and the legal defense. However, a more complex case may need an expert to do a defendant-specific evaluation, as well as to educate the jury on more advanced concepts related to domestic violence as they relate closely to the defendant in order to provide an adequate defense. Some of these concepts may include, but are not limited to, seemingly counterintuitive behaviors, coercive control, strangulation, and effects of battering. In the motion for funds, it may be important, in addition to conveying the "basics" about this field of expertise, to specifically link the expert to the relevant factual and legal issues in the

[11] The term “battering and its effects” describes lay and expert evidence regarding a defendant’s experiences of abuse, including “the nature and dynamics of battering, the effects of violence, battered women’s responses to violence, and the social and psychological context in which the violence occurs.” Sue Osthoff & Holly Maguigan, *Explaining Without Pathologizing: Testimony on Battering and its Effects*, *in* Current Controversies in Domestic Violence, Second Edition 225, 231 (Donileen R. Loseke, Richard J. Gelles & Mary M. Cavanaugh eds., 2005). The term “battering and its effects” is a more accurate and inclusive term for what was initially labeled “battered women’s syndrome,” and is now widely used by courts, legislatures, and in the scholarly literature. However, it must be noted that “battered women’s syndrome” still appears frequently in statutes and case law.

case. Depending on the jurisdiction, this particular decision can have other implications, for example, whether the state has a right to have the defendant examined by their own expert.

A defense attorney may also wish to consider whether there is a specific professional background their expert needs to have in order to be a good fit in the case. For example, if a defendant's psychological diagnoses will be somehow relevant to her defense, it may make sense to ensure that the battering expert is a psychologist.

Another issue that may need to be decided prior to petitioning for funds is the role in which the expert will be used in the defense. The defense may want the expert to be a behind-the-scenes consultant, to help develop the defense or aspects of the legal case. If the motion isn't clear that the expert will be used in only a consulting capacity or for general testimony, there may be an unnecessary trigger of an adverse expert examination by the prosecution. To note, a defense attorney who represents a client in a complicated case that may otherwise benefit greatly from a defendant-specific evaluation may still decide to request an expert to do only general testimony so they do not trigger the state having access to their client for an adverse evaluation.

Understanding the Potential Relevance of Domestic Violence Expert in a Defense Case

Prior to petitioning for funds for a domestic violence expert, defense strategy decisions may need to be made. For example, will the expertise be supporting a non-psychiatric legal theory (i.e. self-defense, duress, etc.)? If the request does not clearly frame the legal relevance of the expertise sought, courts may misunderstand the use of an expert on battering and its effects and assume that the purpose of the testimony is exclusively to support a psychiatric defense like diminished capacity or insanity. However, in the majority of victim defendants' cases, the legal theory is quite the opposite: the expert testimony is used to support the theory that the battered defendant's state of mind is reasonable in its perception of danger they are in, and therefore, psychiatric expertise is not

needed or relevant. In other words, a defense attorney must be clear about whether their defense theory implicates the defendant's mental capacity or mental health status.

Framing the relevance of the expert, and how the expertise will be used in the legal case is critical. When not outlined clearly, the court may misunderstand the relevance of the expert and deny the funds.

A Glance at Potential Uses of Battering Evidence in a Defense Case

This sub-section is intended only to give defense counsel the broadest of brush strokes as to some potential uses of battering evidence to support legal defenses. Ultimately, when developing the defense, the specific facts of the case – both good and bad – will be the building blocks, and the education about battering will be the mortar with which defense counsel will connect everything.

In a self-defense case, an expert might discuss the effects of physical abuse and trauma, and educate the jury on the dynamics of power and control and how they played out in the relationship between the defendant and the complainant/decedent. That information can help the trier of fact understand the reasonableness of the defendant's fear of death or serious bodily injury and the defendant's state of mind regarding the immediacy of the harm at the time of the incident.

Another example of how expert testimony on battering might be relevant to a legal defense may be to negate a specific element of the charge; in some cases, battering evidence can support alternative explanations of why the defendant acted the way they did. For example, evidence of battering may be presented to negate the prosecution's proof of specific intent. If the intent level is "with malice," and the prosecution offers that the defendant's specific action was done with ill intention towards the complainant, the defendant's experiences of battering with the complainant could be offered to negate that intent, and show that the action was done to protect themself from harm. For example, if the prosecution argues that the defendant's habit of secretly hiding weapons

around the house is evidence of malice, the defense might present expert testimony to explain protective strategies that survivors may use, and testify about fear-based reasons why the defendant felt she needed constant access to weapons to feel safe.

Expert testimony may also be admissible to explain various other aspects of the legal case. For example, it may help to explain inconsistent statements and/or false confessions. DV experts can also help educate jurors about common behaviors of survivors of domestic violence that might be counterintuitive, such as why a victim may stay in a battering relationship, separation assault, and the real dangers of leaving an abusive relationship. Battering experts can also provide education on myths and misconceptions about domestic violence and domestic violence victims that are directly relevant to the defendant and legal case that need to be explained; this is particularly helpful in cases where the prosecution may attempt to exploit this misinformation. For example, the demeanor of a survivor such as a blank stare or a seemingly "emotionless" presentation might be described by the prosecution as "cold" or "cruel" whereas DV experts can help juries understand that kind of demeanor is often related to the need for survivors to hide their emotions from their abusers, or a trauma response such as dissociation.

To be able to fully investigate, identify and understand all the potential uses of battering in a specific legal case, it's critical for the defense attorney to hire a battering expert to help them understand their client's experiences and how they impacted their behaviors and state of mind at the time of the incident. Explaining the use of the expert for the defense in the petition for funds may not only be helpful with developing the legal defense, but will likely be necessary to justify the need for an expert. As a quick reminder, if the petition will not be heard ex parte, defense counsel should consider scaling back the information in the petition and not revealing all aspects of the defense legal strategy.

When Funds Are Denied

Procedure for an Interlocutory Appeal or Immediate Review Varies by Jurisdiction

It is important for defense counsel to research the interlocutory appeals process in their state to find out whether such an appeal is possible when a request for funds is denied. If it is allowed, the next steps vary depending on the jurisdiction. For example, in some jurisdictions the trial court first needs to certify the order for an interlocutory appeal; in others, defense counsel can file a writ of certiorari directly to the court of appeals to apply for the discretionary interlocutory appeal. With additional procedural steps and tight deadlines, it may be useful to prepare for an interlocutory appeal in advance, particularly if the notice of appeal must be filed within days of a denial.[12]

Educating the Appellate Court When Funds are Denied

Although the standard for granting the request for funds for an expert are the same in cases involving battered defendants as in other criminal cases, appellate courts, like trial courts, may not be familiar with the need for a domestic violence expert, and therefore may need more information to understand the relevance of and need for an expert. It is particularly important when appealing a denial of expert funds, to be clear and specific as to the type of assistance needed and the legal relevance of the expert assistance or testimony to the issues in the case. Most of these arguments will have already been made to the trial court, and if the court's findings and rationale for denying funds are explicit on the record, it can be very helpful when framing the appeal. For example, did the court assess that the defendant did not qualify for the funds? Or, did the court find that the expert testimony was not necessary or relevant to the defense? Was there some other rationale?

[12] See e.g. Committee for Public Counsel Services; Assigned Counsel Manual; Policies and Procedures, *IV. Court Costs of Indigent Persons Fund; MA G.L. c. 261, §§ 27A-G*, July 1, 2006 (outlining "general guidelines for obtaining funds for defense costs" in Massachusetts, and directing that "Counsel should research the law and prepare an argument for hearing before the judge on this motion; if the motion is denied, the attorney should appeal the motion to either the Appellate Division of the District Court, the Superior Court, or the Appeals Court, depending on which court has jurisdiction... This notice of appeal must be filed within seven days").

Preserving the Record

If an interlocutory appeal is not permitted, or, if it was denied, it is still critical for defense counsel to renew their request to the trial court for expert funds in order to preserve the issue for appeal. Appellate courts might consider the issue waived if it is only presented pre-trial, and not raised again during the trial itself.

Suggested Reading

Paul C. Giannelli, *Ake v. Oklahoma: The Right to Expert Assistance in a Post-Daubert, Post-DNA World*, 89 CORNELL L. REV. 1305 (2004).
Available at: https://scholarship.law.cornell.edu/clr/vol89/iss6/1/

Emily J. Groendyke, *Ake v. Oklahoma: Proposals for Making the Right a Reality*, 10 N.Y.U. J. Legis. & Pub. Pol'y 367 (2007).
Available at: http://www.nyujlpp.org/wpcontent/uploads/2012/11/GROENDYKEAKE-V.-OKLAHOMA-PROPOSALS-FORMAKING-THE-RIGHT-A-REALITY.pdf

Jim Kolosowsky, *Funding Expert Witnesses for Indigent Defendants: A Model for Unequal Protection,* Michigan Bar Journal (2016).
Available at: http://www.michbar.org/file/barjournal/article/documents/pdf4article2855.pdf

Stephen A. Saltzburg, *The Duty to Investigate and the Availability of Expert Witnesses,* 86 Fordham L. Rev. 1709 (2018).
Available at: https://ir.lawnet.fordham.edu/flr/vol86/iss4/11

Justin B. Shane, *Money Talks: An Indigent Defendant's Right to an Ex Parte Hearing for Expert Funding*, 17 Cap. DEF.J. 347 (2005).
Available at:
https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1631&context=wlucdj

Appendix A – Sample motion for funds from the Kentucky Department of Public Advocacy[13]

Chapter 19: Sample Motion for Funds for Mental Health Experts in Capital Case and For *Ex Parte* Hearing and Order

[Click here to download motion and order.]

COMMONWEALTH OF KENTUCKY
CIRCUIT COURT
INDICTMENT NO. ____-CR-0

COMMONWEALTH OF KENTUCKY **PLAINTIFF**

VS.

***EX PARTE*, SEALED MOTION FOR FUNDS FOR EXPERT ASSISTANCE**

_____ **DEFENDANT**

*** * * * * ***

Comes the indigent defendant, through counsel, and hereby moves this Court to enter a finding that there is a "reasonable necessity" for expert assistance in support of a defense to these charges, and in support of his right to present evidence and defend against the penalty of death sought by the Commonwealth. The defendant further moves for funding to retain the assistance of the necessary experts in order to prepare for a trial of guilt/innocence and punishment. This funding assistance would otherwise be an expense of the Fiscal Court, so the accused moves the Court to enter an order directing that funds be provided from the newly created indigent funding pool administered by the Finance and Administration Cabinet pursuant to **KRS 31.185** and **KRS 31.200**.

The accused's mental status at the time of the offense will be a significant factor in the guilt and penalty defense to these charges and expert assistance will be necessary to prepare and present the defense. Counsel are unable to retain a psychiatrist or psychologist due to Mr. _____'s indigence and the unavailability of state facilities or personnel to act in the capacity of confidential consulting defense expert.

Counsel cannot provide effective assistance of counsel or ensure protection of Mr. _____'s constitutional and statutory rights in this death penalty prosecution in the absence of expert mental health assistance. See *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087 (1985). Without the necessary tools for effective assistance of counsel, defendant could never announce "ready" for trial.

The Kentucky Supreme Court recently addressed the issues at stake when a capital murder defendant seeks access to mental health expert assistance:

[13] This sample motion is from the Kentucky Department of Public Advocacy's *Expert Funds Manual* found at https://dpa.ky.gov/Public_Defender_Resources/Pages/ppmanual.aspx. As of the writing of this paper, this manual is unavailable online as it is currently being updated.

> **This is a capital case. The fact that its resolution may eventually lead to [ ] execution renders the need for a complete, accurate evaluation of his mental health thoroughly compelling. There are multiple purposes that such an evaluation could potentially serve: an indication of competency at the time of trial (in light of the possibility of new information); the possibility of available guilt phase defenses; knowledge of factors that could have been offered in mitigation of punishment by death; whether appellant could be deemed to be ineligible for the death penalty with respect to his I.Q.; and insight into whether the appellant is, in fact, mentally ill, a suspicion which seems to have been confirmed since trial. *Hunter v. Commonwealth*, Ky., 869 S.W.2d 719, 725 (1994) (footnotes omitted).**

The *Hunter* opinion stresses the due process considerations implicated by the failure to provide access to expert mental health assistance. "By making a defendant's mental condition relevant not only to criminal culpability, but also to the degree and kind of punishment conviction will bring to bear, the State itself has instituted a framework in which psychiatric assistance may turn out to be an essential ingredient of justice." *Id.* at 723. Psychiatric assistance is an essential ingredient of justice in this capital murder case.

Mr. _____ needs the assistance of at least three experts in order to prepare a defense to these capital murder charges:

1. A psychologist to evaluate _____'s mental status at the time of the offense, to assist counsel in understanding the nature of the charged crime and evaluate possible defenses, including insanity, extreme emotional disturbance, and duress, and to evaluate all these factors to determine whether penalty phase statutory and non-statutory mitigation exists if the presence of mental illness, emotional disturbance, or duress does not rise to the level of a defense in the guilt phase, and to testify if appropriate. The psychologist will also conduct a battery of neurological testing to make an initial determination regarding the possibility of brain damage resulting from a history of childhood and adolescent head trauma and polio with which the defendant was stricken before age 2. Prison records indicate that _____ suffers hallucinations which may be the product of organic or psychiatric dysfunction. The psychologist will also advise as to the necessity for psychiatric and neurological examinations.
2. A psychologist with expertise in mental retardation to evaluate _____'s current and past intellectual and adaptive functioning, to assist counsel in preparing for a pretrial hearing pursuant to KRS 532.135**[1]** and 532.140, to determine whether the defendant is mentally retarded to the extent of exempting the death penalty as a sentencing option, and to assist in preparing and presenting a defense involving mental retardation or subaverage intellectual functioning. One intelligence test dating from school age indicates that _____'s IQ is 71. Other tests done by prison personnel or contractors resulted in scores in the 70's, indicating either mental retardation or borderline intellectual capacity. In fact, prison mental health experts diagnosed him as borderline mentally retarded.
3. A social worker with expertise in assessing family dynamics to evaluate the effect upon ____ of his troubled childhood, including poverty, abuse, social ostracism, racial confusion, polio victimization, early hospitalization and trauma, and the family structure. _____ comes from a large black family in which one of his brothers was obviously white and later grew up to be a successful professional football player while _____ ended up on death row. His relationship with this brother and with other family members appears to be significant to his character, behavior, and the crime itself.
4. If needed, a neurologist or neuropsychologist to perform testing to determine the extent of brain damage and to explain the impact of these injuries and malfunctioning upon ____'s behavior to a jury in the guilt and/or penalty phase of trial.

The statutory and constitutional basis for this relief can be found in the following:

> **a. U.S. Constitution, 14th Amendment Due Process**
> **Due process fairness**
> **Due process right to present a defense**
> **Due process right to disclosure of favorable evidence**

Due process right to fair administration of state created right: *Evitts v. Lucey*, 469 U.S. 387 (1985)
Due process right to rebut aggravation evidence;

b. Kentucky Constitution, Section 2, Due Process:
***Kaelin v. City of Louisville*, Ky., 643 S.W.2d 590 (1982) (absolute and arbitrary power over the lives, liberty, and property of freemen exists nowhere in a republic, not even in the largest majority. Ky. Const. §2)**;

c. U.S. Constitution, 14th Amendment Equal Protection;

d. U.S. Constitution 6th and 14th Amendment right to effective assistance of counsel;

e. Kentucky Constitution, Section 11, right to effective assistance of counsel;

f. U.S. Constitution 6th and 14th Amendment right to confrontation;

g. Kentucky Constitution, Section 11, right to confrontation;

h. U.S. Constitution, 6th and 14th Amendment right to compulsory process;

i. Kentucky Constitution, Section 11 right to compulsory process;

j. Kentucky Constitution, Sections 2 and 3, right to equal protection;

k. U.S. Constitution, 8th and 14th Amendment rights to reliable sentencing, the production of mitigation evidence, and rebuttal of evidence in aggravation;

l. The Due Process right to obtain and present evidence of an exculpatory nature which will show defendant's culpability might be less than that which the Commonwealth alleges, if any;

m. Sections 1, 2, 3, 7, 11, 17, and 26 of the Kentucky Constitution;

n. KRS Chapter 31, and specifically KRS 31.200, KRS 31.110, and KRS 31.185;

o. KRS 532.135, KRS 532.140;

p. Defendant also asserts his right to a full and fair hearing under both state and federal constitutions.

GENERAL INTRODUCTORY STATEMENT

_____ is charged with an offense for which the prosecutor is apparently seeking the penalty of death**[2]** and thus is confronted with defending himself, for the second time, in two separate trials -- a guilt/innocence trial and a penalty phase where his life or death will be decided. He is an indigent African-American prison inmate charged with the murder of a white female prison employee of which he was originally convicted and sentenced to death in 1985. No experts testified on his behalf either in the guilt or

penalty phases of 's first trial. Mental health expert assistance will be required in order for _____ to receive a fair retrial.

In the first phase of his trial, the guilt/innocence phase, _____ must defend against the charge of murder. The circumstances surrounding the impulsive, confessed but unexplained homicide of _____'s friend _____ and the circumstances of _____'s background and mental status indicate that an affirmative mental health defense of insanity, extreme emotional disturbance,**[3]** and/or duress is present and that expert assistance will be necessary in presenting this defense. The indigent defendant has a right to present a defense and to expert assistance in exercising that right. *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087 (1985); *Sommers v. Commonwealth*, Ky., 843 S.W.2d 879 (1992) (copy attached).

In the penalty phase, _____ will be forced to defend against death by electrocution by presenting evidence which mitigates against the penalty of death. Federal constitutional law recognizes the fundamental right to present mitigation evidence which is defined as "aspects of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604-605 (1978). Relevant mitigation evidence encompasses the "compassionate or mitigating factors stemming from the diverse frailties of humankind." *McCleskey v. Kemp*, 481 U.S. 279, 304 (1987), quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). The defendant must have expert assistance to identify, evaluate, and present this mitigating evidence in a form which can be understood by the jury, and which would provide a basis for penalty phase instructions on the statutory mitigating factors of extreme emotional disturbance, insanity, duress, as well as nonstatutory mitigation.

Kentucky caselaw also recognizes the right of a defendant to present mitigating evidence and the right to have the sentencing jury instructed to consider and give effect to such evidence mitigating against imposing the death penalty. *Smith v. Commonwealth*, Ky., 845 S.W.2d 534, 538 (1993); see, also, KRS 532.025(2), cited in *Smith.* The Kentucky Supreme Court in *Smith* analyzes federal caselaw regarding mitigating circumstances and states

> a state cannot, consistent with the Eighth and Fourteenth Amendments, prevent the sentencer from considering and giving effect to evidence relevant to the defendant's background or character or to circumstances of the offense that mitigates against imposing the death penalty. The principle underlying [*Lockett* and *Eddings*] is that punishment should be directly related to the personal culpability of the criminal defendant. "[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *California v. Brown*, 479 U.S. 538, 545, 107 S.Ct. 837, 841, 93 L.Ed.2d 934 (1987) (concurring opinion). *Smith* at 538.

Unlike evidence normally seen in criminal trials, capital murder penalty phase evidence often combines diverse disciplines such as psychology, sociology, neurology, among others, that are beyond the ken of the average attorney or juror and requires the assistance of an expert to present. The evidence which will be presented in this case is complex due to _____'s mental status, background, and physical disability.

Juvenile and prison records indicate that psychological evaluations of _____ conducted many years ago during juvenile commitments and adult incarceration revealed that ____ has suffered from mental illness in the past. He engaged in group counseling at Frenchburg Boys Center and Kentucky Village, but was not treated medically. Two MMPIs were administered by prison personnel (one in 1975 and one in 1980) which reflect extremely high scoring on scales that indicate psychosis, suggesting a *severe* mental disturbance. Probation reports indicate that the community of Tompkinsville did not want him returned to the community because they believed him to be mentally ill. The evaluation in 1980 was done because the parole board had serious concerns about his mental stability. Although the testing indicated that _____ was mentally ill, the evaluators concluded that he was not actively psychotic at the time.

Prison records indicate that _____ suffers from hallucinations and that he has been treated at Kentucky State Penitentiary with antidepressants and anti-anxiety medication, but no extensive psychiatric treatment has been provided. Undersigned counsel have also observed indications of significant mental disturbance (irrational thoughts and behavior, emotional ability, obsessive and overly suspicious thoughts, disinhibition, tangential speech, other communication problems, etc.) which clearly demonstrate that the assistance of mental health experts will be necessary in evaluating the circumstances of the charged crime, including possible mental health defenses, as well as _____'s character, background, and intellectual capacity.

In addition _____ suffered a very troubled childhood which have obviously impacted upon his character and behavior but which counsel cannot begin to understand or present to a jury without expert assistance. _____ grew up as a mentally deficient polio victim in a large, poor black family. He did poorly in school; records reflect an IQ score of 71. He operated on a very low, simplistic level and apparently was only socially promoted. _____ did not progress far as his behavioral problems began in the early teens and thus, he was introduced into the juvenile justice system at an early age.

His mother, _____, worked as a domestic for wealthy white families. There were nine children in the family, of various parentage. _____'s brother _____, who grew up to be a successful professional football player, appears to be white. Racial issues, including his relationship with _____, have deeply affected in ways which relate to the crime and to his character but which counsel do not currently understand.

There is a possibility of neurological damage caused by polio and/or head trauma as _____ has suffered several severe blows to the head, including falling from a barn, being hit with a lead pipe, and various beatings and fights as a child. Reported hallucinations may be the result of an organic brain dysfunction. _____ was stricken with polio which has resulted in a withered leg, numerous invasive surgeries in Louisville far from home at an early age, social ridicule, a devastated self-esteem, and possible neurological damage.

Records of IQ tests and an adaptive behavior test (Vineland examination done by Penitentiary employee or contractor Wayne Fuller) indicate that _____ is either mentally retarded or so close as to render his functioning significantly below the level of most of the adult population. In addition, counsel have observed deficits in adaptive behavior and a low intellectual functioning with behavior improving in a structured, familiar environment with low conflict. This is significant as a factor in a guilt phase defense and to the appropriate penalty for this crime. Counsel need the assistance of experts to prepare a guilt/innocence and penalty defense and to present this information to a jury coherently.

A psychologist will be needed to evaluate _____'s mental status at the time of the offense, assist counsel in understanding the nature of the charged crime and evaluating possible defenses, and to testify if appropriate. The psychologist is needed also to conduct initial testing to determine whether brain damage has been sustained and whether further neurological or neuropsychological testing is recommended.

A social worker, specifically a clinically experienced expert, will be needed to evaluate the effect upon _____ of his troubled childhood, including poverty, abuse, social ostracism, racial problems, polio victimization, early hospitalization for extended periods of time involving invasive surgery, and other issues. This expert will be needed to assist defense counsel in explaining the impact of these factors to a jury and to assist counsel in understanding the meaning of these various mitigating factors in relation to penalty for this crime.

An expert in mental retardation is needed to evaluate _____'s current and past intellectual and adaptive ability, to assist counsel in preparing for a pretrial hearing pursuant to KRS 532.135 and 532.140, and to assist in preparing and presenting a defense involving mental retardation.

There are no state agencies which can provide the assistance sought by defendant. The Cabinet For Human Resources cannot provide these services through its facility at the Kentucky Correctional

Psychiatric Center [KCPC].[4] It is the Department of Public Advocacy which must provide this service through the funding of independent experts.[5]

Access of the accused to expert assistance involves fundamental constitutional rights. The leading case authority on this issue is *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087 (1985).

In *Ake* the specific issue was the petitioner's entitlement to an independent expert on mental health issues to assist the defense counsel in the preparation and presentation of a defense. The trial court had forced the defendant into using the "state employed psychiatrist". As a result the defendant was rendered unable to present a defense in which mental health was to have played a "substantial part."

It was determined that without the needed expertise, *Ake* was denied the ability to "meaningfully participate" in his judicial proceeding. The Court said:

> **This Court has long recognized that when a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense. This elementary principle, grounded in significant part of the Fourteenth Amendment's due process guarantee of fundamental fairness, derives from the belief that justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake. *Ake, supra*, at 1093.**

The Court considered the various ways in which a defense expert assists counsel. It listed the following:

> **1. to conduct a professional exam on issues relevant to the defense;**
>
> **2. to help determine whether the anticipated defense is viable;**
>
> **3. to testify;**
>
> **4. to assist the defense in the preparation of cross examination of the state's expert;**
>
> **5. to aid in the preparation of a penalty phase;**
>
> **6. to rebut aggravating evidence in capital penalty phases; and,**
>
> **7. to present mitigating evidence.**

Counsel intend to use the requested experts to perform all of these functions and will be unable to provide _____ with constitutionally guaranteed effective assistance of counsel without this assistance.

HAS BOTH THE STATUTORY AND CONSTITUITONAL RIGHT TO PRESENT MITIGAITON EVIDENCE ON HIS BEHALF TO DEFEND HIMSELF AGAINST THE DEATH PENALTY

_____ has a constitutional and statutory right to introduce mitigating evidence in the penalty phase. **532.025**; *Smith v. Commonwealth*, Ky., 845 S.W.2d 534 (1993). The Eighth Amendment provides that _____'s jury may not be precluded from "considering, as a mitigating factor," or from "giving independent mitigating weight to," any "aspects of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett,* 438 U.S. at 604-05; *Smith v. Commonwealth*, Ky., 845 S.W.2d 534, 539 (1993); see, e.g., *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.E.2d 256, 277 (1989);, *Mills v. Maryland* 486 U.S. 367, 374-84 (1988); *McCleskey v. Kemp* , 481 U.S. 279, 304 (1987); *Kubat v. Thieret* , 867 F.2d 351, 372-74 (7th Cir. 1989).

Federal Constitutional Law

A capital defendant's right to present relevant mitigating evidence, and the sentencer's obligation to consider it, are not "free-floating" constitutional requirements, nor sympathetic concessions to a convict facing the ultimate punishment. Instead, both are grounded in, and mandated by, the core Eighth Amendment principle that "death is a punishment different from all other sanctions in kind rather than degree." *Woodson v. North Carolina*, 428 U.S. 302, 303-304 (1976). As the Supreme Court has explained,

> [T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.
>
> *Id.* at 305.

The Constitution's insistence on "heightened reliability" thus requires "consideration of the character and record of the individual offender and the circumstances of the particular offense as a *constitutionally indispensable* part of the process of inflicting the penalty of death." *Id*. at 304 (emphasis added).

The Supreme Court has repeatedly emphasized the "indispensable" character of this requirement that a capital sentencer consider all relevant mitigating evidence before imposing sentence, and has not hesitated to reverse death sentences obtained in violation of this principle. For example, two years after *Woodson,* the Court struck down an Ohio statute limiting the relevant "mitigating circumstances" which a capital sentencer might take into account. *Lockett v. Ohio*, 438 U.S. 586 (1978). Observing again that "the imposition of death by public authority [is] profoundly different from all other penalties," the Court accordingly held that

> **The Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case,[6] not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.** *Id.* at 605-606 (emphasis in original).

In 1982, the Court reiterated this holding in reversing a death sentence imposed by a trial court which failed fully to consider the teenage defendant's turbulent home environment, emotional disturbance, and history of abuse in determining whether he should live or die. *Eddings v. Oklahoma*, 455 U.S. 104 (1982). The Court noted that the Oklahoma appellate and trial courts had only considered whether *Eddings*' mitigating evidence established a complete defense to criminal liability -- that is, whether it proved that he did not know the "difference between right and wrong at the time he pulled the trigger." *Id.* at 109 (quoting *Eddings v. State*, 616 P.2d 1159, 1170 (Okla.Crim.App. 1980)). Although the trial court held that *Eddings*' impairment did not rise to the level of an affirmative defense, the trial court's failure to consider it as a mitigating circumstance in passing sentence was constitutionally impermissible.

The Supreme Court rejected the Oklahoma courts' narrow view, finding that "the limitations placed by these courts upon the mitigating evidence they would consider violated the rule in *Lockett*." *Eddings*, 455 U.S. at 113. Significantly, the Court in *Eddings* reversed despite the fact that some of Eddings' mitigating evidence had considered by the trial court in imposing sentence. *Eddings*, 455 U.S. at 109-110, 115-116. Thus, *Eddings* establishes that full consideration of all relevant mitigating evidence is a constitutional prerequisite to the imposition of death, and lends strong support to the conclusion that a capital sentencing proceeding in which available and relevant mitigating evidence is neither presented nor considered -- through no fault of the defendant's -- cannot satisfy the strict requirements of the Eighth Amendment.

The Court's more recent decision in *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934 (1989) compels the same conclusion. In *Penry*, a capital sentencing jury was permitted only to answer whether Penry, a mentally retarded man who had suffered serious abuse as a child, had acted "deliberately" in killing, had acted "unreasonably" in response to any provocation by the deceased, and would probably be dangerous in the future. 109 S.Ct. at 2948-2949. The Court conceded that the jury could weigh Penry's mental retardation and background of abuse in determining whether he had acted "deliberately," and in gauging the "reasonableness" of his response to provocation, but nevertheless concluded that additional jury instructions were necessary to ensure the *full* consideration of this evidence in support of a sentence less than death. *Id*. at 2950-2952.

The centrality of this requirement of individualized sentencing to the Supreme Court's contemporary death penalty jurisprudence is also evident from the variety of contexts in which the Court has invoked the *Lockett* principle to invalidate other practices. For example, the Court has determined that jury instructions which require unanimity as to the existence of particular mitigating factors violate the Eighth Amendment under *Lockett. Mills v. Maryland*, 486 U.S. 367 (1988); *McKoy v. North Carolina*, 494 U.S. 433 (1990). In addition, the Court has held that *Lockett* mandates that prospective jurors during voir dire who would be unwilling to consider mitigating evidence in determining punishment be excluded for cause. *Morgan v. Illinois*, 122 S.Ct. 2222 (1992).

In sum, the Supreme Court's cases since *Woodson* speak with a single voice: the "heightened reliability" required in capital sentencing forbids the imposition of death when available and relevant mitigating evidence, through no fault of the defendant's, is neither presented to nor considered by the sentencer. The complete absence of such vitally important information so undermines the reliability of the proceeding that death is constitutionally unavailable as a sentencing option. See *Gardner v. Florida*, 430 U.S. 349 (1977) (where defendant has no opportunity to explain or rebut evidence in aggravation, due process forbids the imposition of death). Individualized sentencing, affected through the presentation and consideration of mitigating evidence, is "constitutionally indispensable" in a capital case (*Woodson*, *supra*), and in its absence death may not be imposed consistent with the Eighth Amendment.

Just as Mr. _____ has an Eighth Amendment and Section 17 right to an individualized determination of his sentence, he has a Sixth Amendment and Section 11 right to the effective assistance of counsel at both phases of trial. Failure of counsel to seek out and present through experts mitigating evidence would result in a denial of this right. See, *e.g., Cooper v. Tennessee*, 847 S.W.2d 521 (Tenn. Cr. App. 1992) (failure to interview expert witnesses and present evidence of mental disturbance through these experts at the penalty phase of capital case was ineffective assistance of counsel regardless of lack of guilt phase mental health defense).

Law Within the Commonwealth on Defendant's Right to Present Mitigation Evidence During Penalty Phase of Death Penalty Case

Kentucky's recognition of _____'s rights relating to mitigation evidence parallels the federal. "Mitigation evidence" is "... all evidence that would tend to excuse or alleviate appellant's responsibility ..." *Smith v. Commonwealth*, Ky., 599 S.W.2d 900 (1980); *White v. Commonwealth*, Ky., 671 S.W.2d 241 (1984); *Skaggs v. Commonwealth,* Ky., 694 S.W.2d 672 (1985) (jury may be instructed that it may consider defendant's age, character, and record, and any other circumstances it considered mitigating). "Mitigating circumstances" are defined as factors put forth to show the appropriate sentence is a sentence less than death. *Smith v. Commonwealth*, Ky., 725 S.W.2d 597 (1987) (evidence admissible on mitigating factors of intoxication, drug abuse, a prior mining accident, affection for family, etc.); **Foster v. Commonwealth**, Ky., 827 S.W.2d 670 (1992) (evidence of long term effects of child abuse in mitigation). Circumstances to be considered as mitigating are not limited to the "statutory mitigators." *Gall v. Commonwealth*, Ky., 607 S.W.2d 97 (1980). *White v. Commonwealth, supra,* (instructions permitted which allowed consideration of mitigation circumstances in addition to "listed mitigating factors").**[7]**

See, also, *Moore v. Commonwealth*, Ky., 634 S.W.2d 426 (1982), in which the Supreme Court found reversible error in the trial court's disallowing testimony about defendant's youth, his abandonment by a

parent, his repeated placement in foster homes as a child, and his difficulties in maturing both spiritually and psychologically. Citing KRS 532.025(2), the Supreme Court included such evidence as falling within the provision "...any mitigating circumstances otherwise authorized by law [as well as the] statutory mitigating circumstances ...." *Id.* at 434. The fact that the trial court viewed it as cumulative should not have kept it from the jury. *Id.* at 434.

In the most recent case in which the Kentucky Supreme Court addressed defendants' rights to present mitigation evidence, *Smith v. Commonwealth*, Ky., 845 S.W.2d 534, 538 (1993), the Court observed

> ... [it is] clear that a state cannot, consistent with the Eighth and Fourteenth Amendments, prevent the sentencer from considering and giving effect to evidence relevant to the defendant's background or character or to circumstances of the offense that mitigates against imposing the death penalty [citations omitted] ... Evidence about the defendant's background and character is relevant because of the belief, long held, by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse. *California v. Brown*, 479 U.S. 538 (1987)(concurring opinion, J. O'Connor).

There could be no reasonable interpretation of the foregoing statutes and cases which could lead any diligent attorney to deny _____'s right to secure and present in a meaningful, coherent fashion mitigating evidence on his behalf. There could be any number of ways in which a defendant might be precluded from presenting mitigation evidence; the failure to have the resources to investigate and present them would be one. The failure of the courts to provide the necessary funding assistance to present this evidence would be another. It is readily apparent from the cases, both state and federal, that courts of all levels would find any interference with a defendant's rights to seek out, prepare, and present a defense to the death penalty to be repugnant to state and federal constitutions.

This Motion is not an attempt by counsel to embark upon a "fishing expedition." See *Hicks v. Commonwealth*, Ky., 670 S.W.2d 837 (1984); *Kordenbrock v. Commonwealth*, Ky., 700 S.W.2d 384 (1985). More specific information regarding the need for expert assistance, the experts' credentials or fees, or any other relevant issue will be gladly provided to this Court, should such a need be determined by this Court. Counsel request an *ex parte* hearing should the Court decline this funding request in whole or in part.

The Supreme Court of Kentucky addressed the right of indigents to expert assistance in *Sommers v. Commonwealth,* Ky., 843 S.W.2d 879 (1992). In a lengthy opinion summarizing prior cases addressing a defendant's rights to expert or investigative assistance, the Court stated "due process requires that indigence may not deprive a criminal defendant of the right to present a defense, KRS 31.110(1) ...." In *Sommers* it was held to be prejudicial error for the McCracken Circuit Court to have denied the assistance requested by defense counsel in that case.

It Would Be Impractical and Impossible to Attempt the Utilization of Any State Agencies or Facilities to Service As Experts on Behalf of Def

It is often pointed out by courts and prosecutors that KCPC is available for the evaluation of indigents. This may be true if a defendant was entitled to nothing more than an evaluation on "insanity" at the time of the crime and/or competency at the time of trial which will be shared with the prosecution and the Court even before defense counsel has sufficient information to notice the prosecution of any intentions to proffer evidence of a mental disease or defect. See KRS Chapter 504 and RCr 7.24(B).**[8]**

The Cabinet For Human Resources [KCPC*] will not* provide expert assistance to the defense in this or any case. It will not provide the assistance to defendant and his attorney envisioned by *Ake v. Oklahoma* when a mental health issue will play a substantial role in the proceedings. See the following exhibits relating to this problem:

1. ***Letter to Attorney John Halstead, June 6, 1989*** - rejection of a specific request to serve as defense expert and/or consultant on behalf of Mr. Halstead's indigent client;

2. ***Letter to Attorney John Halstead dated June 15, 1989*** - same as above, but with a request under KRS 441.047, refused as the services sought herein are not "necessary medical care" ...

3. ***Letter to Attorney Neal Walker dated 3 March 88 -*** refusing to *"assist the defense or the prosecution in an investigation of matters or the development of mitigating circumstances ..."*

4. ***Letter to Attorney Edward C. Monahan dated 19 May 80 -*** refusal on part of KCPC to act in role as defense consultant because to do so would *"... compromise the integrity of our [CHR/ KCPC] program to provide effective evaluations to the courts of Kentucky ... To reiterate, this Department cannot allow itself to be used as the tool for either side in criminal matters ..."*.

5. ***Letter to Attorney Edward C. Monahan dated 27 March 86 -***same as above. CHR/KCPC refusing to act in the capacity of the expert envisioned by *Ake*.

6. ***Letter to Attorney George Sornberger, dated 11 October 89 -*** CHR/KCPC declines to act to assist defense counsel Sornberger by allowing one of its doctors to be utilized as an *"... expert witness and to help develop mitigating circumstances for [Mr. Sornberger's client's] defense."* Based upon a "policy" established by that agency, these "additional services" were denied.

7. ***Affidavit of George Hancock dated 19 July 90*** - same as above. Setting out in Affidavit format CHR/KCPC's position on assuming the role envisioned by *Ake* for the assistance to defense counsel in the presentation and preparation of a defense, including mitigation help.

8. ***Letter to Attorney Mike Williams, dated 8 April 92, from Hon. Masten Childers, General Counsel for Ky Department of Human Resources -*** explanation of policy relating to CHR/KCPC's use as defense experts and/or investigators on defendant's behalf in the case of *Commonwealth v. Donald Herb Johnson*, pending before Perry Circuit Court.

The practical impossibilities of assigning a state agency [against its will and probably against the law] to assist the defense counsel herein were highlighted in *Marshall v. United States*, 423 F.2d 1315 (10th Cir. 1970). The appointment of the FBI to serve as defense counsel's investigator presented obviously conflicting duties and loyalties. This error of constitutional proportions cost a retrial. The Court held that

> Just 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.
> *Id.* at 1319.

See also the case of *United States v. Chavis*, 486 F.2d 1290 (D.C. App. 1973), in which the prosecutor made the same arguments repeated to the undersigned so often around the state. He argued that "state services and personnel were adequate" to serve the needs of the defendant and his attorney. Then, during the trial, the same prosecutor's office argued the "incompetency of the expert and his qualifications" as well as the "insufficient opportunity" the expert had to evaluate the defendant.**[9]** After conviction, the same prosecutor argued on appeal that the state expert was of the "highest qualifications who had an adequate opportunity to evaluate defendant and assist him at trial." Commending the trial judge for his concern over the "public purse," the Court nevertheless found the defendant had the right to an expert with whom there was an adequate opportunity for consultation and evaluation, and to prepare a defense.

CHR/KCPC makes it clear it could not afford defendant and defense counsel with any sort of confidentiality or privileged communications. Every attorney representing a client of financial means has this opportunity. Counsel for Mr. _____ must consult with an expert and discuss how best to prepare

for hearings and the trial. This means the expert will be informed of defense counsel's strategies, his thinking, the fruits of any investigations, and the like. In civil cases this material would never be subject to disclosure. See *Hickman v. Taylor*, 329 U.S. 495 (1947); CR 26.03(3)(4)(b); *Transit Authority v. Vinson*, Ky. App., 703 S.W.2d 482 (1985); and *Newsome v. Lowe*, Ky. App., 699 S.W.2d 748 (1985).

It is recognized that the 5th Amendment protects a "private inner sanctum of individual feelings and thoughts" of a defense attorney. *United States v. Nobles*, 422 U.S. 225 (1975). Defendant and his attorney will be unfairly and unconstitutionally constrained in their preparation for trial if forced to share confidential information with persons or agencies who will be unable to afford them confidentiality. *Couch v. U.S.*, 409 U.S. 322; *Ake v. Oklahoma*, *supra; United States v. Edwards*, 488 F.2d 1154 (5th Cir. 1974); *United States v. Sloan*, 776 F.2d 926 (10th Cir. 1985); *Blake v. Kemp*, 758 F.2d 523 (10th Cir. 1985); and, *Lindsey v. State*, 330 S.E.2d 563 (Ga. 1985) (the defense expert must be more than a "neutral expert"); *DeFreece v. Texas*, 848 S.W.2d 150 (Tex.Cr.App. 1993) (right to a defense consulting expert, not just a "neutral" expert). A client of financial means would never have to tolerate this. *U.S. v. Sanders*, 459 F.2d 1007 (9th Cir. 1972). See also *United States v. Bass*, 477 F.2d 723, 725 (9th Cir. 1973) (services for indigent defendant comparable to those which a reasonable attorney would seek for a client of independent financial means). See also *Gathier v. United States*, 291 A.2d 1364 (D.C. App. 1978).

The Kentucky Supreme Court recognized the need for *independent* expert assistance in *Sommers*, not just access to state experts.**[10]** See, also, *Binion v. Commonwealth*, Ky., 891 S.W.2d 383 (1995). KCPC cannot act in that capacity in this case. Counsel request an evidentiary hearing should the Court have questions regarding the need for independent defense experts and the inability of KCPC to provide this assistance.

Has the Right to the Equal Protection of the Law and He May not Be Denied the Reasonably Necessary Tools for the Presentation and Preparation of a Defense to the Charges in the Indictment or To The Imposition of the Death Penalty

Without the requested assistance, Mr. _____ will not be able to present an effective defense in either the guilt or penalty phases. This is for no other reason than his indigence; therefore, _____ would be deprived of the equal protection of the laws as guaranteed by the 14th Amendment to the United States Constitution. See *Griffin v. Illinois*, 351 U.S. 12 (1956); *Draper v. Washington*, 372 U.S. 487 (1963). See also, Kentucky Constitution, Sections 1, 2, 3, 11 and 17.

The Commonwealth, with all of its resources, will employ any and all necessary persons to convict and kill Mr. _____. If investigation needs to be done, the Commonwealth has an entire agency to conduct investigations, the Kentucky State Police, as well as personnel at the Kentucky State Penitentiary. At the first trial a pathologist, neurosurgeon, and serologist all testified. In addition, lead investigator Detective _____ gave what amounted to expert mental health testimony regarding the defendant's motivation for killing. Defense counsel need the assistance of mental health experts to cross examine prosecution witnesses regarding such conclusions. If the Commonwealth needs experts, the Commonwealth will have the funds to hire them. Defense counsel do not have these resources.

_____ is on trial for his life. If he were a person of financial means, he would retain assistance; however, he is indigent. Without expert assistance, he cannot defend against these charges. A significant imbalance of wealth exists between the defendant and the Commonwealth. It is up to this Court to offset this imbalance. *United States v. Durant,* 545 F.2d 823 (2nd Cir. 1976) (citing Criminal Justice Act); *United States v. Hartfield*, 513 F.2d 254 (9th Cir. 1975).

If _____ is denied the expert assistance he seeks because of his poverty, then the "justice" administered in this case is inherently unequal. See *Gideon v. Wainwright*, 373 U.S. 335 (1963); *Powell v. Alabama*, 287 U.S. 45 (1932); see also *Evitts v. Lucey*, 469 U.S. 387 (1985). For this reason, counsel urges this Court to place defendant on the same footing as a defendant of financial means, and grant him the expert funding requested.

Wherefore, the defendant moves for a finding that funding in the amount of $2500 for Dr. X to evaluate _____ and perform preliminary neuropsychological testing, $5000 for psychologist/mental retardation expert Dr. Y , and $3000 for social worker Z is reasonably necessary to assist counsel in preparation and presentation of the defense. Further, defendant moves for an order that the Kentucky Finance and Administration Cabinet, administrator of the special fund for indigent defendants pursuant to KRS 31.185 and KRS 31.200, shall set aside the amount of $10,500 to be payable to the experts upon proof of rendering of services and further order(s) of this Court. Estimates for fees of the requested experts and their vita are attached to this Motion. Counsel request an evidentiary hearing should this request be denied in whole or in part.

Respectfully submitted,

_____

N O T I C E

Please take notice the foregoing document was mailed to the Hon. _____, Judge, and the Circuit Clerk on this day of January, 1994, to be sealed and filed in the record.

_____

DR. X	DR. Y	Z
5 hours evaluation def	5 hours interviews/testing def	6 hours interview def
10 hours travel	10 hours interviews of various witnesses	5 hours interview family members
2 hours review records/ write report	15 hours travel	6 hours travel
	5 hours review records/previous interviews	2 hours review records/write report
2 hours testimony		
	3 hours testimony	4 hours testimony
19 hrs at $125/hr = $2,375	38 hours at $125/hr = $4,750	23 hours at $125/hr = $2,875
Estimated expenses = $ 125	Estimated expenses = $ 250	Estimated expenses = $ 125
$2,500	$5,000	$3,000

Appendix B – Redacted motion for funds (used with permission)

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

PEOPLE OF THE VIRGIN ISLANDS, Plaintiff, v. K.B., L.R., Defendants.	Case No. *[REDACTED]* Case No. *[REDACTED]* ***FILED UNDER SEAL***

DEFENDANT L.R.'S RENEWED MOTION TO RETAIN EXPERT WITNESS

Defendant L.R., through undersigned counsel, hereby renews her motion for funds to retain an expert witness in this case. This motion is filed under seal as authorized by this Court's Order dated July 23, 2010. Due to the sensitive and confidential nature of the contents of this motion and the materials submitted in support of it, Defendant asks that it remain sealed, secured, and controlled such that it is not accessible to the public or the government. In support of this motion[14], Defendant states as follows:

I. Introduction

Ms. L.R. is a battered woman unfortunately charged in connection with the death of her infant child, who was strangled to death by her abusive partner, K.B. The government has charged Ms. L.R. with a variety of crimes that are each premised on Defendant's alleged "fail[ures]" to act "***after seeing*** K.B. choke [her infant child] with a cord around her neck." Information at 2-4

[14] Defendant L.R. has filed renewed motions for the appointment of a private investigator and for an order authorizing preparation of certain transcripts in this and a related domestic violence case. Both motions remain pending. Defendant L.R. reserves her right to further support or renew this motion as may be necessary after she is able to conduct further investigation.

(emphasis added). In particular, Ms. L.R. is charged with counts of Involuntary Manslaughter (premised on her alleged "fail[ure] to obtain medical treatment for her daughter, K.B."), Aggravated Child Abuse and Neglect (premised on her alleged "fail[ure] to get medical treatment for K.B."), Misprision of a Felony (premised on her alleged failure to report K.B.'s crime to the police investigators), and Accessory After the Fact (premised on her alleged failure to provide a full statement to the police investigators immediately after the incident).

K.B. has systematically and brutally abused Ms. L.R. over a period of many years. See confidential letter dated August 15, 2010 from Dr. Dianne Brinker to Kyle Waldner, attached hereto as ***Exhibit 1***; see Permanent Restraining Order dated 4/23/2010 in Domestic Violence Action No. ST-10-DV-68, attached hereto as ***Exhibit 2***. Indeed, after Ms. L.R. witnessed the murder of her child by K.B. with an extension cord, K.B. savagely brutalized Ms. L.R. *with the same extension cord*.[15] See photographs of Ms. L.R. taken on April 18, 2010, the day of her infant child's murder, received as part of government's production of documents in this matter, collectively attached hereto as ***Exhibit 3***.

As a result, expert testimony regarding the psychological effects and dynamics of domestic violence and post-traumatic stress disorder will be a necessary and material tool to challenge the prosecution's proof of *mens rea*, explain Ms. L.R.'s acts (or failures to act) from which the prosecution will ask the jury to draw negative inferences, and to explain and give context to the existing evidence of duress to support such a defense. Expert assistance is also necessary to assist counsel in his investigation and in preparing the case for trial, and at other stages of the case, such as sentencing.

[15] This vicious act remains uncharged by the government.

On or about June 28, 2010, Defendant moved this Court for authorization to retain an expert witness relating to these dynamics[16]. By Order dated July 23, 2010, Defendant's motion was denied without prejudice on the basis that "the pleadings thus far by Defendant and the plea at arraignment do not support a 'battered woman's' defense."

In accordance with the authorities set out below and the materials submitted in support of this motion, this Court should authorize Ms. L.R. to retain an expert witness or witnesses competent to testify, for example, as to: (i) the psychological effects and dynamics of domestic violence as those effects pertain to the charges against Defendant in this case; (ii) posttraumatic stress disorder, as that disorder pertains to the charges against Defendant in this case; and (iii) the common myths and misconceptions about domestic violence that might prevent the jury from making an accurate assessment of the facts of this case. Such expert testimony is critical to Defendant so she can have a constitutionally adequate defense in this case.

Ms. L.R. lacks the funds to obtain/employ expert witnesses in this case. The Superior Court has permitted Ms. L.R. to proceed *in forma pauperis* as one who is otherwise financially unable to obtain an adequate defense, and Ms. L.R. is not in a position to obtain the services of an expert through personal financing. The undersigned asks this Court to take judicial notice of Ms. L.R.'s financial status for purposes of this motion.

II. Standard for Appointment of Expert Witnesses for Indigent Defendants

[16] The government filed an "Opposition Motion" to this motion. In the government's "Opposition Motion," the government misconceived the nature of defendant's motion as one moving for the "admission" of expert testimony. This places the cart before the horse. Before Defendant can even make a proper proffer of expert evidence such that the Court can determine its admissibility, Defendant, as an indigent defendant, requires the authorization of this Court to retain such an expert in the first place. Regardless, even assuming, *arguendo*, that the expert's opinion is not admissible, Defendant is *still* entitled to an expert. An expert would be "necessary and material," for example, in the pretrial preparation and investigation stages of Ms. L.R.'s defense since this case involves such complex issues that are not easily understood by persons without such expertise.

Defendant L.R. seeks to obtain expert services necessary for an adequate defense in this case. The Virgin Islands has implicitly recognized the right of indigent defendants to expert services by providing for payment of the "reasonable expenses" of appointed counsel through 5 V.I.C. 3503(b). Criminal defendants are entitled to the effective assistance of counsel and to a fair trial that satisfies constitutional due process. *Britt* v. *North Carolina,* 404 U.S. 226, 227 (1971). Implicit in those rights is the right of indigent defendants to have access at the public's expense to "the basic tools of an adequate defense or appeal." *Ake* v. *Oklahoma,* 470 U.S. 68, 76- 77 (1985).

An indigent defendant seeking expert services must make a threshold showing that an expert is both necessary and material to his or her defense and may not rest on bare "undeveloped assertions that the requested assistance would be beneficial." *Caldwell* v. *Mississippi,* 472 U.S. 320,323 (1985); *Lewis* v. *Government,* 77 42 V.1. 175 (D.V.I. 1999) (movant must "explain precisely why such assistance is necessary").

> Upon a determination that the defendant has made such a showing, the trial court may then exercise its discretion to permit use of an expert, at the public's expense, and the compensation to be permitted also lies within the discretion of the court, based upon a determination of reasonableness. The trial court does not abuse its discretion in that regard in the absence of a clear showing as to the necessity and materiality of the expert testimony.

Edwards v. *Government,* 47 V.I. 605, 616 (D.V.I. 2005).

III. Discussion

One of the basic tools needed to rebut the prosecution's case is expert witness testimony regarding: (a) the psychological effects and dynamics of domestic violence (e.g., Battered Woman's Syndrome) as those effects pertain to the charges against Defendant herein; and (b) post-traumatic stress disorder, as that disorder pertains to the charges against Defendant herein. As noted above, such testimony is necessary and material to the defense, for example, as follows:

(i) to challenge the prosecution's proof of *mens rea* (and not to offer an excuse such as insanity or diminished capacity);

(ii) to explain Ms. L.R.'s acts (or failures to act) from which the prosecution will ask the jury to draw negative inferences;

(iii) to explain, support, and give context to the existing evidence of duress, and to support such a defense; and

(iv) to dispel common myths and misconceptions about domestic violence that might prevent the jury from making an accurate assessment of the facts of this case.

A criminal defendant is entitled to present evidence and expert testimony regarding battering and its effects in order to secure her right to a fair trial. Testimony about battering and its effects is a form of social framework testimony that is now admissible in every jurisdiction in the United States. *See* National Institute of Justice, *The Validity and Use of Evidence Concerning Battering and its Effects in Criminal Trials* at 3 [17]; Janet Parrish, *Trend Analysis: Expert Testimony on Battering and Its Effects in Criminal Cases*, 11 Wis. L. Rev. 75 (1996). *See also Commonwealth v. Stonehouse*, 555 A.2d 772, 785 (Penn. 1989)(Such testimony is necessary and material to help the jury understand the honesty and reasonableness of a defendant's belief of danger, and to dispel jurors' myths and misconceptions about battered women.) While expert testimony on battering and its effects evolved in the context of self-defense cases, it has been admitted as evidentiary support other types of cases and situations, including duress.[18]

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[17] This publication is a U.S. Department of Justice publication and can be accessed at the following website: http://www.ncjrs.gov/pdffiles/batter.pdf. A copy of the Overview section is included with this brief for the Court's convenience and review.

[18] *See* National Institute of Justice, *The Validity and Use of Evidence* at 2-4; *State v. B.H.*, 2003 N.J. Super. LEXIS 352 (expert testimony admitted to support battered woman's duress claim as defense to charge of sexual assault; trial court erred by instructing jury to consider expert testimony on battering only with respect to her

Virgin Islands courts have opined favorably on the relevance of expert testimony regarding battering and its effects to help explain the actions of the battered woman. *United States v. Williams*, 2000 U.S. Dist. LEXIS 22677 (D.V.I. 2000)(relying on an expert witness on battered women syndrome to explain a battered woman's actions, including why she might have recanted her allegations of abuse); *People v. Donastorg*, 2010 V.I. LEXIS 53, *33 (Super. Ct. 2010)(finding that opinion testimony regarding "the dynamics of domestic violence in the present case and in understanding the victim's reaction as characteristic of victims of domestic violence" is relevant and citing approvingly to caselaw from other jurisdictions finding that expert or opinion testimony on the topic of the behavior of victims of domestic violence is more probative than prejudicial).

In fact, the People of the Virgin Islands (through the same prosecutor in this case, Claude E. Walker, Esq.) made the case ***only months ago*** that testimony regarding the behavior of victims of domestic violence and/or battered woman syndrome should be presented to the jury to help explain the actions of the battered woman. In finding such information may be of assistance to the jury, the *Donastorg* court found as follows:

> The People argue this information will be helpful to the jury because a domestic violence victim's behavior is often difficult for laypeople to

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recklessness in staying with the batterer, as the testimony was also relevant to her honest and reasonable belief of danger and whether person of reasonable firmness in her situation would have resisted the threats); *United States v. Marenghi*, 893 F. Supp. 85, 96 (D. Me. 1995) (in drug prosecution, expert testimony on battering relevant to battered woman's duress defense to help jury understand reasonableness of her actions, and "to [explain] how a reasonable person can nonetheless be, trapped and controlled by another at all times even if there is no overt threat of violence at any given moment;" court specifically notes that there is no reason to preclude expert testimony in duress cases if it is admissible in self-defense cases); *United States v. Brown*, 891 F. Supp. 1501 (D. Kan. 1995) (expert testimony on battering admissible to support duress defense to drug charges); *United States v. Rouse*, 168 F.3d 1371 (D.C. Cir. 1999) (newly discovered evidence that defendant suffered abuse from her codefendant/batterer, including expert testimony, was relevant to her defense to fraud charge but not grounds for relief here since trial court made credibility determination). For cases admitting expert testimony on battering and its effects on issues of intent similar to duress theories, *see, e.g.*, *Dunn v. Roberts*, 963 F.2d 308 (10th Cir. 1992) (denial of funds for expert on battering violated due process since battering was relevant to negate the specific intent element of the aiding and abetting statute where defendant charged as conspirator with batterer in killing third person); *Mott v. Stewart,* 2002 U.S. Dist. LEXIS 23165 (2002) (battered woman's petition for habeas corpus granted where trial court erred in precluding expert on battering offered to negate intent element of child abuse offense).

> understand. In the view of the People, Ms. Digirolamo's testimony will prevent the laypeople that will make up the jury from relying on myths or substituting their own uninformed judgments regarding victims of domestic violence. **The Court concurs with the several courts which have addressed this issue and concluded the nature and dynamics of domestic violence and the reactions and responses of victims "…may be puzzling or appear counterintuitive to lay observers."** *State v. Searles*, 141 N.H. 224, 680 A.2d 612, 614 (N.H. 1996) (citations omitted). **These courts have concluded "the pattern of behavioral and emotional characteristics common to the victims of battering lies beyond the ken of the ordinary juror and may properly be the subject of expert testimony."** *Goetzendanner*, 679 N.E.2d at 244. *Accord*, *Townsend*, 897 A.2d at 327 ("We have no doubt that the ramifications of a battering relationship are beyond the ken of the average juror.").

Donastorg, 2010 V.I. LEXIS at *33 (emphasis added). The *Donastorg* court additionally found that it is appropriate to allow expert testimony about the behavior of victims of domestic violence even though the expert witness has not, or cannot, diagnose the subject with battered wife syndrome. *Id.*, citing *State v. Townsend*, 186 N.J. 473, 897 A.2d 316, 329-331 (N.J. 2006) (citing cases from fourteen different jurisdictions reiterating the same proposition).

Here, the necessity of expert testimony relating to domestic violence and post-traumatic stress disorder is beyond question; indeed, even the People believe that "a domestic violence victim's behavior is often difficult for laypeople to understand" and that expert testimony on the effects of domestic violence "will prevent the laypeople that will make up the jury from relying on myths or substituting their own uninformed judgments regarding victims of domestic violence." *Donastorg*, 2010 V.I. LEXIS at *33. This difficulty is particularly present in duress cases, where there may seem to be multiple opportunities for the defendant to escape the threatened harm. Further, misconceptions about the domestic violence might cause the defendant to be considered at fault for putting herself in the situation in the first place, especially where, as here, it appears that a battered woman "returned" to the abusive relationship after removing herself from it temporarily. Clearly, expert testimony will be crucial and necessary to explain these complicated

dynamics, and, as correctly argued by the People in *Donastorg*, prevent reliance by the jury on "myths" concerning domestic violence. For a more detailed explanation of the need for expert witness participation in battered women's criminal cases that is relevant to the facts of this case, counsel refers the Court to *The Value of Expert Testimony in Battered Women's Criminal Cases* by Mindy B. Mechanic, Ph.D., submitted herewith as ***Exhibit 4***.

Moreover, expert assistance is necessary in the pretrial preparation and investigation stages of Ms. L.R.'s defense. An expert's participation can assist an attorney in working more effectively with battered women clients, who often minimize, distort, or otherwise fail to provide sufficient information about their abuse to effectively develop and marshal a viable defense on their behalf. Additionally, information uncovered in an expert evaluation can be relied upon by a defense attorney to develop more effective legal defense strategies incorporating information about the abuse. The expert's evaluation of a defendant might also result in a negotiated plea to a lesser charge and/or the dropping of some or all charges. An expert might also assist a defense attorney in the process of jury selection. Finally, expert assistance is necessary at the sentencing stage to provide the judge with evidence to support a mitigated sentence.

The requested expert testimony is also material. Defendant is challenging what the prosecution must prove—namely the *mens rea* elements of the charge. Specific intent is a necessary element of the crimes with which defendant is charged (e.g., child abuse/neglect, misprision, accessory after the fact), and these mental states must be proven by the government beyond a reasonable doubt. The defense of duress, moreover, is an affirmative defense to a culpable mental state. Such expert testimony is also material to providing explanations for Defendant's behavior (e.g. not calling for help) that will be offered by the government. More broadly, the expert testimony would help to explain Defendant's state of mind to the jury.

Other jurisdictions have found that expert testimony regarding battering and its effects is relevant and material in "failure to protect" situations, as is presented here. For example, in *Mott v. Stewart*, 2002 WL 31017646 (D. Ariz. Aug. 30, 2002), an Arizona federal court determined that a trial court violated a murder defendant's constitutional right to present a defense when it prevented her from presenting expert testimony about battered woman syndrome to negate the element of *mens rea* and to rebut the state's evidence. The *Mott* case concerned a woman who was accused of child abuse and first degree murder after she left her children in the care of her boyfriend, despite knowing he was abusive. The charges involved specific intent crimes of omission based on Mott's failure to protect her children from her boyfriend. In her defense, she sought to present evidence of BWS to negate the *mens rea* element of the charged offenses, and to rebut the state witnesses' testimony that she had always confronted her boyfriend. In affirming the exclusion of the expert testimony, the state supreme court had relied on *United States v. Fisher*, 328 U.S. 463 (1946). The federal court found *Fisher* distinguishable. There, the question was whether a jurisdiction was required to offer a diminished responsibility defense, which the federal court found to be distinct from presenting testimony to explain the defendant's behavior, and to negate the prosecution's evidence that she had knowingly or intentionally neglected her children. The district court noted that "[s]pecific intent crimes of omission are both more difficult to prove and more difficult to disprove. As a result of the nature of the charges against [Mott], the possibility of a Due Process violation was heightened because of the defense's limited opportunities to challenge the state's evidence." *Id*. In summary, expert testimony is desperately necessary for a fair assessment of Ms. L.R.'s claims. Ms. L.R. thus requests the use of court-appointed funds in order to retain an expert witness or witnesses competent to testify as to the above matters.

Wherefore, the Defendant respectfully prays that the Court grant her motion and issue an order allowing the undersigned to engage an expert witness or witnesses as described herein, and for other and further relief as may be warranted under the circumstances.

Dated: September 9, 2010

Respectfully submitted:

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