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# Money Talks: An Indigent Defendant's Right to an Ex Parte Hearing for Expert Funding

Justin B. Shane\*

## I. Introduction

Jon is an indigent capital murder defendant, and the trial court has appointed two attorneys to defend him. Jon swears that on the night of the murder he was on the other side of the state with someone named Mike. After Jon's attorneys file a motion with the court asking for funds to hire an investigator to search for Jon's alibi, the court holds an open hearing with the prosecution present to determine whether an investigator is necessary for Jon's defense.<sup>1</sup> Subsequently, the investigator's work reveals that Jon had asked Mike to pose as an alibi, and consequently, Jon's attorney decides not to pursue an alibi defense. A few weeks later, the prosecutor becomes suspicious as to why the defense has not notified her of its intent to introduce an alibi at trial.<sup>2</sup> The prosecutor sends her own investigator to find Jon's alleged alibi and the investigator is able to get a statement from Mike admitting that Jon had asked him to pose as an alibi. At trial, months later, the jury convicts Jon based largely on the evidence concerning Jon's attempt to fabricate an alibi. If Jon had money to hire his own investigator, he would not have disclosed his potential alibi defense in the process of requesting funds for an investigator, and the prosecution would have never located the false alibi. Alternatively, the prosecutor would not have discovered Jon's attempt to fabricate an alibi had the court permitted Jon to apply ex parte for investigative funds.

Virginia law does not require trial courts to permit indigent defendants to apply ex parte for expert funding; rather, defendants must argue that an expert or investigator would be necessary for their defense in open court with the

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1. *See Husske v. Commonwealth*, 476 S.E.2d 920, 925–26 (Va. 1996) (explaining the showing defendants must make in order to trigger their constitutional right to a non-mental health expert).

2. *See VA. SUP. CT. R. 3A:11(c)(2)* (requiring the defense to give the prosecution notice if it intends to introduce an alibi defense at trial).

prosecution present.<sup>3</sup> *Black's Law Dictionary* defines *ex parte* as “[d]one or made at the instance and for the benefit of one party only, and without notice to, or argument by, any party adversely interested.”<sup>4</sup> Virginia is one of the few capital jurisdictions in which statutory or case law does not permit defendants to apply *ex parte* for expert funding or in which judges do not routinely allow *ex parte* applications.<sup>5</sup> In the American Bar Association’s recent report on Virginia’s indigent defense system, the authors noted that they had “never encountered such a persistent problem of indigent defendants’ right to seek expert funds being extinguished by a widespread practice of the courts of not allowing the requests to be filed *ex parte*.”<sup>6</sup>

When judges refuse to permit defendants to apply *ex parte* for expert funding, they force indigent defendants to disclose potential defense strategies and provide non-reciprocal accelerated discovery to the prosecution.<sup>7</sup> Defense attorneys must choose between applying for expert funding and safeguarding confidential defense strategy.<sup>8</sup> The choice may cause attorneys not to pursue funds for an expert if they are unsure of the expert’s value and would need to disclose a large amount of potentially damaging information in order to prove that the expert is necessary.<sup>9</sup> Jon’s case illustrates this problem. The next time a defendant tells Jon’s attorneys that he or she has an alibi, the attorneys may not request funds to hire an investigator to locate the alibi unless they are sure that the alibi is legitimate. Otherwise their request may ultimately lead the prosecution to their client’s false alibi. Forcing a defendant to decide whether an expert is necessary at such an early stage in the proceedings burdens his right to present a defense and places him at a major disadvantage when compared to monied defendants.

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3. THE SPANGENBERG GROUP, A COMPREHENSIVE REVIEW OF INDIGENT DEFENSE IN VIRGINIA, 62–63 (2004), available at <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/va-report2004.pdf> [hereinafter VIRGINIA INDIGENT DEFENSE REPORT]. For the purposes of this article, “expert funding” will be used as a shorthand term for “expert and investigative funding.”

4. BLACK’S LAW DICTIONARY 262 (8th ed. 2004).

5. See *infra* Part IV (surveying state practice regarding application for expert funding); see also E-mail from Jonathan Shapiro, Attorney at Law, Alexandria, Va., to author (Jan. 26, 2005, 02:17 PM EST) (on file with author) [hereinafter Shapiro] (explaining that he was unaware of any Virginia state judge who permits *ex parte* application for expert funding).

6. VIRGINIA INDIGENT DEFENSE REPORT, *supra* note 3, at 63. The Spangenberg Group, a research firm that specializes in indigent defense issues, conducted the study on behalf of the American Bar Association. *Id.* at *i*.

7. See Donna H. Lee, *In the Wake of Ake v. Oklahoma: An Indigent Criminal Defendant’s Lack of Ex Parte Access to Expert Services*, 67 N.Y.U. L. REV. 154, 186–91 (1992) (discussing the prejudice to defendants when courts do not permit them to apply *ex parte* for expert funding).

8. Shapiro, *supra* note 5.

9. See Lee, *supra* note 7, at 175 (noting that open hearings for expert funds require the defendant to weigh the costs of revealing strategy and the benefits of obtaining expert assistance).

This article contends that the Constitution entitles indigent defendants to apply *ex parte* for expert funding. Part II examines *Ake v. Oklahoma*,<sup>10</sup> which held that in certain circumstances the state must provide an indigent defendant with expert assistance.<sup>11</sup> Part III analyzes the Supreme Court of Virginia's opinions concerning the right to an *ex parte* hearing for expert assistance. Part IV discusses current state and federal practice regarding applications for expert assistance. Finally, Part V examines possible challenges to open hearings for expert funding under the Fifth Amendment Self-Incrimination Clause, the Sixth Amendment Assistance of Counsel and Compulsion Clauses, and the Fourteenth Amendment Equal Protection and Due Process Clauses.

## II. *Ake*: An Overview

### A. *The Cases Prior to Ake*

In *United States ex rel. Smith v. Baldi*,<sup>12</sup> the United States Supreme Court held that the Constitution requires a court to appoint a psychiatrist only to evaluate a defendant's sanity at the time of the offense and to testify to those findings at trial, rather than to appoint a psychiatrist who will assist the defendant in preparing his insanity defense.<sup>13</sup> In the years following *Baldi*, the United States Supreme Court vastly expanded indigent criminal defendants' rights and held, *inter alia*, that the state must provide at no cost trial transcripts for appellate review and counsel at trial and on first appeal from conviction.<sup>14</sup> However, the Court also clarified that the Fourteenth Amendment does not require states to provide indigent defendants with the same services that a monied defendant could purchase.<sup>15</sup> The Court in *Ross v. Moffitt*<sup>16</sup> limited the Due Process and Equal Protection Clauses in holding that there is no constitutional right to

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10. 470 U.S. 68 (1985).

11. See *Ake v. Oklahoma*, 470 U.S. 68, 83–84 (1985) (holding that when certain conditions are met, due process requires the state to provide a defendant with at least one competent mental health expert).

12. 344 U.S. 561 (1953).

13. *United States ex rel. Smith v. Baldi*, 344 U.S. 561, 568 (1953).

14. See *Griffin v. Illinois*, 351 U.S. 12, 19 (1956) (holding that the state must provide at no cost trial transcripts for appellate review to indigent defendants); *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (holding that the state must provide indigent defendants with counsel at trial); *Douglas v. California*, 372 U.S. 353, 357 (1963) (holding that the state must provide indigent defendants with counsel on their first appeal as a matter of right).

15. See *Douglas*, 372 U.S. at 357 (“Absolute equality is not required; lines can be and are drawn and we often sustain them.”). See generally Lee Richard Goebes, *The Equality Principle Revisited: The Relationship of Daubert v. Merrell Dow Pharmaceuticals to Ake v. Oklahoma*, 15 CAP. DEF. J. 1, 4–10 (2002) (providing an in depth discussion of the Court's holdings in *Griffin* and *Douglas* and the limits of the Court's holdings in those cases).

16. 417 U.S. 600 (1974).

counsel on a discretionary appeal.<sup>17</sup> The Court noted that the Constitution only requires that states “assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State’s appellate process.”<sup>18</sup> Although *Ross* was a step backward for the rights of indigent defendants, the Court’s jurisprudence had changed enough since 1953 to undermine the basis for *Baldi*’s holding.<sup>19</sup>

### B. *The Ake Opinion*

In *Ake*, the trial court denied the capital murder defendant’s request for a court-appointed psychiatrist to evaluate his sanity at the time of the offense and to assist him in preparing his insanity defense.<sup>20</sup> Due to the lack of expert assistance, the jury heard no testimony on Ake’s sanity at the time of the offense and thereafter sentenced him to death.<sup>21</sup> Justice Marshall, writing for the Supreme Court majority, first noted that the consistent theme of the Court’s indigent defense cases had been to ensure that defendants have “[m]eaningful access to justice.”<sup>22</sup> To implement that principle, the Court “focused on identifying the ‘basic tools of an adequate defense or appeal’ and . . . required that such tools be provided to those defendants who cannot afford to pay for them.”<sup>23</sup> The Court applied the test from *Mathews v. Eldridge*<sup>24</sup> to assess whether psychiatric assistance is a “basic tool[] of an adequate defense or appeal” such that the Due Process Clause requires courts to provide defendants with the means to obtain a psychiatrist.<sup>25</sup> To determine if due process requires courts to provide a given procedural protection, the *Mathews* test balances the private and governmental interests involved as well as the risk of error and the value of additional or substitute procedural safeguards.<sup>26</sup>

Applying *Mathews*, the *Ake* Court first determined that defendants have a compelling interest in their lives and liberty.<sup>27</sup> Moreover, the state’s interest was

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17. *Ross v. Moffitt*, 417 U.S. 600, 618–19 (1974).

18. *Id.* at 616.

19. *See Baldi*, 344 U.S. at 568 (noting that the defendant received due process because a court-appointed psychiatrist had examined him as to his sanity at the time of the offense).

20. *Ake*, 470 U.S. at 72.

21. *Id.* at 72–73.

22. *Id.* at 76–77.

23. *Id.* at 77 (quoting *Britt v. North Carolina*, 404 U.S. 226, 227 (1971)).

24. 424 U.S. 319 (1976).

25. *Ake*, 470 U.S. at 77 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)); *see Mathews*, 424 U.S. at 324–25, 334–35 (assessing whether the Social Security Administration violated the plaintiff’s due process rights when it provided the plaintiff only with notice and the opportunity for written comment after terminating the defendant’s social security benefits).

26. *Ake*, 470 U.S. at 77 (citing *Mathews*, 424 U.S. at 335).

27. *Id.* at 78.

limited because of the minor financial burden involved in providing defendants with one competent psychiatrist.<sup>28</sup> Further, the state did not have a compelling interest in prevailing at trial; rather, its only interest was in providing a fair trial.<sup>29</sup> Regarding *Mathews's* third prong, the Court concluded that defendants risk erroneous determinations of their sanity when they receive no psychiatric assistance.<sup>30</sup> Thus, the Court reversed Ake's conviction and sentence and held that under certain circumstances the Due Process Clause of the Fourteenth Amendment requires that the state provide indigent defendants with funds for at least one competent psychiatrist.<sup>31</sup> However, because the risk of erroneous determination is only present when a defendant's sanity is at issue, the due process requirement only comes into existence when a defendant shows that his sanity at the time of the offense is likely to be a material issue at trial.<sup>32</sup> Further, the *Ake* Court held that due process requires the state to provide a capital defendant with a psychiatrist when the State presents expert psychiatric testimony regarding his future dangerousness at the sentencing phase of trial.<sup>33</sup>

Regarding the implementation of the right to psychiatric assistance, Justice Marshall explained that defendants do not have the right to a psychiatrist of their choice and the state must provide only one competent psychiatrist.<sup>34</sup> Further, the Court left the implementation of the right to the states.<sup>35</sup> However, Justice Marshall revealed his understanding of the procedure for implementing the right when he noted that a psychiatrist should be appointed "[w]hen the defendant is able to make an *ex parte* threshold showing to the trial court that his sanity is likely to be a significant factor in his defense."<sup>36</sup> In the same year that the Court decided *Ake*, the Court in *Caldwell v. Mississippi*<sup>37</sup> rejected a defendant's contention that due process entitled him to a court-appointed criminal investigator, ballistics expert, and fingerprint expert on the grounds that he had not shown the trial court that any of the experts would be necessary to his defense.<sup>38</sup> However, Justice Marshall implied that the Court might have favorably

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28. *Id.* at 78–79.

29. *Id.*

30. *Id.* at 82.

31. *Id.* at 83–84, 86–87.

32. *Ake*, 470 U.S. at 82–83.

33. *Id.* at 83–84.

34. *Id.* at 83.

35. *Id.*

36. *Id.* at 82–83.

37. 472 U.S. 320 (1985).

38. *Caldwell v. Mississippi*, 472 U.S. 320, 323 n.1 (1985).

considered the defendant's argument had the defendant made some showing of necessity at trial.<sup>39</sup>

### III. Virginia's Treatment of Motions for Ex Parte Hearings

#### A. The Effects of Denying a Defendant an Ex Parte Hearing

The Virginia General Assembly partially codified *Ake* when it adopted Virginia Code section 19.2-264.3:1.<sup>40</sup> Section 19.2-264.3:1 requires courts to appoint a mental health expert if a defendant is charged with capital murder and is unable to pay for one.<sup>41</sup> The Supreme Court of Virginia in *Commonwealth v. Husske*<sup>42</sup> expanded *Ake's* holding to non-mental health experts when it concluded that due process requires "the appointment of non-psychiatric experts" if the defendant shows that "the subject which necessitates the assistance of the expert is 'likely to be a significant factor in his defense.'" <sup>43</sup> An indigent defendant satisfies "this burden by demonstrating that the services of an expert would materially assist him in the preparation of his defense and that the denial of such services would result in a fundamentally unfair trial."<sup>44</sup> Further, the defendant "must show a particularized need."<sup>45</sup> Thus, a capital defendant seeking a non-mental health expert, or a non-capital defendant seeking any type of expert, must demonstrate that the particular expert sought would materially assist the defense at trial and that the expert's absence would be prejudicial.<sup>46</sup>

Like Virginia, Texas uses the "likely to be a significant factor in his defense" standard to determine whether a court must grant a defendant's request for expert funding.<sup>47</sup> The Court of Criminal Appeals of Texas in *Williams v. State*<sup>48</sup> noted that the showing requires counsel "to explain his theories

39. See *id.* ("We therefore have no need to determine as a matter of federal constitutional law what if any showing would have entitled a defendant to assistance of the type here sought.")

40. See VA. CODE ANN. § 19.2-264.3:1 (Michie 2004) (providing capital defendants with the right to a mental health expert when they cannot pay for one); Goebes, *supra* note 15, at 23-24 (listing Virginia as one of the many states that codified *Ake*).

41. See VA. CODE ANN. § 19.2-264.3:1 (requiring courts to provide the defense with a qualified mental health expert when a defendant is charged with capital murder and cannot pay for expert assistance); Goebes, *supra* note 15, at 23-24 (noting that Virginia Code section 19.2-264.3:1 only applies to capital defendants seeking mental health experts).

42. 476 S.E.2d 920 (Va. 1996).

43. *Husske*, 476 S.E.2d at 925 (quoting *Ake*, 470 U.S. at 82-83).

44. *Id.*

45. *Id.*

46. *Id.*; see also Steven B. Bright, *Obtaining Fund for Experts and Investigative Assistance*, THE CHAMPION, June 1997, at 32-33 (explaining what defendants must show in order to obtain expert funding).

47. See *Williams v. State*, 958 S.W.2d 186, 192 (Tex. Crim. App. 1997) (quoting *Ake*, 470 U.S. at 82-83) (describing the showing that a defendant must make when applying for expert assistance).

48. 958 S.W.2d 186 (Tex. Crim. App. 1997).

and describe with some specificity how an expert would assist him.”<sup>49</sup> For instance, in requesting a mitigation specialist or social worker, counsel should describe to the court the area of mitigation they plan to investigate, the possible weight of the evidence that may result, and how the expert will go about his or her investigation.<sup>50</sup>

In showing that an expert is necessary, defendants will reveal potential defenses, witness names, and trial strategies and theories earlier than Virginia’s discovery rules require.<sup>51</sup> Further, Virginia’s discovery rules do not require the defense to turn over work-product information, attorney-client communications, or possible defenses or experts that counsel consulted but do not plan to use at trial.<sup>52</sup> In showing necessity under *Husske*, however, attorneys may need to disclose such information and, consequently, provide the prosecution with far more than the discovery rules allow it.<sup>53</sup> Additionally, the prosecution is not required to provide reciprocal information once the defense discloses information at the open hearing for expert funds.<sup>54</sup> Virginia capital defense attorneys frequently find that the benefits of obtaining an expert do not outweigh the risks in disclosing their strategies to the defense.<sup>55</sup> For instance, the attorneys for John Allen Muhammad faced this choice until they were able to hire a mitigation expert with funds from another state’s public defender office that was also involved in the case.<sup>56</sup> Other defendants are not so lucky and must choose between maintaining the confidentiality of the defense effort and expert funding.<sup>57</sup>

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49. *Williams*, 958 S.W.2d at 193.

50. Bright, *supra* note 46, at 32.

51. See VA.SUP. CT. R. 3A:11 (c) (permitting the Commonwealth to obtain any written report of scientific tests which the defense intends to proffer as evidence at trial or sentencing if the defense requests similar information, notice of a defendant’s intention to introduce an alibi defense, and notice of intention to rely on an insanity defense); see also VA. CODE ANN. § 19.2-168 (Michie 2004) (requiring the defense to provide the prosecution with notice of an insanity defense twenty-one days prior to trial); Tamara L. Graham, *Death by Ambush: A Plea for Discovery of Evidence in Aggravation*, 17 CAP. DEF. J. 321 (2005) (exploring Virginia’s criminal discovery rule).

52. See VA.SUP. CT. R. 3A:11(c) (requiring defendants to disclose scientific reports that they plan to “proffer or introduce into evidence at trial or sentencing”).

53. See Lee, *supra* note 7, at 180 (“The disclosure that would occur in an *Ake* proceeding would be of information that the defense was considering, but not necessarily intending to use at trial.”).

54. See *O’Dell v. Commonwealth*, 364 S.E.2d 491, 497 (Va. 1988) (determining that the accused who was forced to disclose the identity of his experts when applying for funds for them was not prejudiced by a lack of knowledge about the Commonwealth’s experts and the substance of their testimony).

55. VIRGINIA INDIGENT DEFENSE REPORT, *supra* note 3, at 63.

56. Shapiro, *supra* note 5.

57. VIRGINIA INDIGENT DEFENSE REPORT, *supra* note 3, at 63.



Further, open-court hearings notify the prosecution that the defense plans to hire a specific expert.<sup>58</sup> Because Virginia's discovery rules require the defense to disclose prior to trial the reports of any expert it intends to use at trial, the prosecution will infer that an expert's studies were not favorable to the defense if the prosecution requests expert reports that the defense plans to introduce at trial and the defense does not turn over any reports from the expert for which it had requested funds.<sup>59</sup> For example, if a hair found on the victim's body is a different color than that of the defendant, the prosecution may initially decide the hair is not worth testing. If the defendant, however, retains an expert to test the hair and the results identify it as the defendant's hair, the defense's failure to disclose those tests to the prosecution prior to trial may induce the prosecution to conduct its own tests and thereby uncover the incriminating evidence. Thus, open hearings permit the prosecution to get a free look at potential theories of the case while the defense experiments with its trial strategy.

When the defense applies for a mitigation expert, it will need to disclose the number of interviews the mitigation expert will conduct, where the mitigation expert will need to travel for the interviews, and potentially the names of the people the mitigation expert will interview or their relation to the defendant.<sup>60</sup> In every case, these revelations will direct prosecutors toward the specific people the defense intends to introduce and allow prosecutors to focus their own "counter-mitigation" investigation.<sup>61</sup> Prosecutors generally believe that the earlier they get to a defendant's family and friends, the more helpful to the State they will be.<sup>62</sup> For example, if the defense retains a mitigation expert to interview the defendant's uncle concerning his past sexual abuse of the defendant, the prosecution may be able to reach the uncle first and implicitly inform him that the defense believes he is a sexual molester. This situation may cause the uncle to become uncooperative with the mitigation expert because he does not want to be labeled a sexual molester. If the defense asks for a mitigation expert to investigate the defendant's social history for indicators of mental retardation, the prosecution may be able reach members of the defendant's family first and disclose the defense's plan to establish that the defendant is mentally retarded. This technique may encourage the defendant's family and friends to give the

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58. See *State v. Apelt*, 861 P.2d 634, 650 (Ariz. 1993) (noting that an ex parte hearing would benefit an indigent defendant when an expert's analysis turns out contrary to what the defendant had expected).

59. See VA. SUP. CT. R. 3A:11(c) (requiring the defense to disclose expert reports that it plans to introduce at trial).

60. Bright, *supra* note 46, at 32.

61. David J. Novak, *Anatomy of a Federal Death Penalty Prosecution: A Primer for Prosecutors*, 50 S.C.L. REV. 645, 671-73 (1999) (noting that the earlier prosecutors are able to get to the defense's potential mitigation witnesses, the better).

62. *Id.* at 651.

prosecution statements that minimize his disabilities so as to avoid the stigma of mental retardation and to say something "positive" about him.

*B. The Current Argument in Virginia Against Providing Defendants with an Ex Parte Hearing*

The Supreme Court of Virginia has rejected defendants' arguments that there is a right to an ex parte hearing for expert funding but, in doing so, has relied on case law that is no longer valid.<sup>63</sup> The Supreme Court of Virginia in *O'Dell v. Commonwealth*<sup>64</sup> upheld the trial court's denial of the defendant's request to apply ex parte for funds to obtain a forensic expert to analyze blood and hair samples found at the crime scene.<sup>65</sup> The court cited two cases holding that indigent defendants were not constitutionally entitled to certain non-psychiatric experts and rejected O'Dell's claim because he "had no constitutional right requiring the Commonwealth to provide funding of this type of expert assistance."<sup>66</sup>

Four years after *O'Dell*, the Supreme Court of Virginia, in *Ramdass v. Commonwealth*,<sup>67</sup> rejected the defendant's claim that the trial court erred when it denied his request for an ex parte hearing on funding for a medical doctor and private investigator.<sup>68</sup> Ramdass argued that an open hearing "violated his Fifth Amendment right against self-incrimination, his Sixth Amendment right to confrontation, and his Fourteenth Amendment right to due process."<sup>69</sup> The court based its decision on *O'Dell*.<sup>70</sup> One year after *Ramdass*, the Supreme Court of Virginia, in *Weeks v. Commonwealth*,<sup>71</sup> cited *Ramdass* and affirmed the trial court's denial of the defendant's request for an ex parte hearing on funding for pathology and ballistics experts because it had "already . . . decided that a

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63. See *O'Dell*, 364 S.E.2d at 499 (affirming the trial court's rejection of the defendant's request for an ex parte hearing on funding for forensic experts); *Ramdass v. Commonwealth*, 437 S.E.2d 566, 571 (Va. 1993) (concluding that there is no constitutional right to an ex parte hearing for funding for a medical doctor and private investigator); *Weeks v. Commonwealth*, 450 S.E.2d 379, 388 (Va. 1994) (stating that a capital defendant is not entitled to an ex parte hearing for funding for a pathology and a ballistics expert).

64. 364 S.E.2d 491 (Va. 1988).

65. *O'Dell*, 364 S.E.2d at 498-99.

66. *Id.* at 499; see *Townes v. Commonwealth*, 362 S.E.2d 650, 664 (Va. 1987) (concluding that the defendant had no constitutional entitlement to an identification expert); *Gray v. Commonwealth*, 356 S.E.2d 157, 166 (Va. 1987) (concluding that defendants have no constitutional entitlement to a publicly paid investigator or public funds to secure certain statistical reports).

67. 437 S.E.2d 566 (Va. 1993).

68. *Ramdass*, 437 S.E.2d at 571.

69. *Id.*

70. *Id.* (citing *O'Dell*, 364 S.E.2d at 499).

71. 450 S.E.2d 379 (Va. 1994).

defendant charged with capital murder is not entitled to an ex parte hearing on his motion for expert assistance.”<sup>72</sup>

In sum, the Supreme Court of Virginia has relied on *O'Dell* each time it has specifically rejected a defendant's request for an ex parte hearing for expert assistance.<sup>73</sup> *O'Dell* in turn upheld a denial of a motion for an ex parte hearing only because there was no constitutional right to a non-psychiatric expert.<sup>74</sup> Subsequent to *O'Dell*, *Husske* recognized that appointment of non-psychiatric experts is constitutionally compelled when the defendant shows that an expert is “likely to be a significant factor in his defense.”<sup>75</sup> Thus, the restrictive reading of *Ake* on which *O'Dell* rested is no longer valid in light of *Husske*.<sup>76</sup> Consequently, *Ramdass* and *Weeks* are based on invalid case law and trial courts should not deny requests for ex parte hearings based solely on those decisions. This conclusion leads to the question of whether the Constitution does create a right to ex parte hearings.

#### IV. Overview of Current State and Federal Practices

##### A. Statutes and Case Law Providing the Right to Ex Parte Application for Expert Funds

The federal government and the American Bar Association have recognized that courts should permit defendants to apply ex parte for expert funding.<sup>77</sup> The Criminal Justice Act of 1964 permits indigent federal defendants “to obtain investigative, expert, or other services necessary for adequate representation [by] request[ing] them in an ex parte application.”<sup>78</sup> Various state courts have cited this standard in holding that defendants have a right to apply ex parte for expert

72. *Weeks*, 450 S.E.2d at 388.

73. See *Ramdass*, 437 S.E.2d at 571 (deciding that *Ramdass* gave no reason for the court to depart from *O'Dell*); *Weeks*, 450 S.E.2d at 388 (basing its rejection of the defendant's motion for an ex parte hearing on funding for expert assistance on *Ramdass*).

74. *O'Dell*, 364 S.E.2d at 499.

75. *Husske*, 476 S.E.2d at 925 (quoting *Ake*, 470 U.S. at 82–83).

76. Compare *id.* (holding that under certain circumstances defendants have a constitutional entitlement to non-psychiatric expert assistance), with *O'Dell*, 364 S.E.2d at 499 (concluding that the defendant was not entitled to an ex parte hearing because he had no constitutional right to a forensic expert).

77. See 18 U.S.C. § 3006A(e)(1) (2000) (providing defendants with the right to ex parte applications for expert funds); A.B.A. GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES, § 10.4 cmt. (Rev. Ed. 2003) [hereinafter ABA GUIDELINES] (recommending that motions for expert funding be conducted ex parte).

78. 18 U.S.C. § 3006A(e); see *Lee*, *supra* note 7, at 156–59 (discussing Congress's enactment of the Criminal Justice Act of 1964); see also *Weeks v. Angelone*, 4 F. Supp. 2d 497, 526 (E.D. Va. 1998) (concluding that while federal defendants have a right to ex parte applications for expert funds, it is a statutory right and not a constitutional right).

assistance.<sup>79</sup> The drafters of the Criminal Justice Act of 1964 were concerned that open hearings for expert funding would disadvantage indigent defendants because such hearings would force the premature disclosure of material to the prosecution.<sup>80</sup> Similarly, the *A.B.A. Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* recommend ex parte application for expert funding to prevent counsel from disclosing privileged information or defense strategy.<sup>81</sup>

Along with the federal government, fourteen of the thirty-eight death penalty jurisdictions have statutes that provide defendants with at least a partial right to apply ex parte for expert assistance.<sup>82</sup> South Carolina's statute is typical:

Upon a finding in ex parte proceedings that investigative, expert, or other services are reasonably necessary for the representation of the defendant whether in connection with issues relating to guilt or sentence, the court shall authorize the defendant's attorneys to obtain such services on behalf of the defendant . . . . Payment of such fees and expenses may be ordered in cases where the defendant is an indigent represented by either court-appointed, private counsel or the public defender.<sup>83</sup>

Various non-death penalty jurisdictions also permit ex parte application for expert funding.<sup>84</sup> Most of these statutes apply to requests for experts as well as investigators and other defense services.<sup>85</sup> Further, seven death penalty juris-

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79. See, e.g., *Ex Parte Moody*, 684 So. 2d 114, 120 (Ala. 1996) (citing the federal standard in concluding that defendants are entitled to apply ex parte for expert assistance).

80. See generally *Lee*, *supra* note 7, at 156–59 (citing *Criminal Justice Act of 1964: Hearings on S. 63, 1057 Before the Senate Comm. On the Judiciary*, 88th Cong., at 149, 173 (statements of Judge William F. Smith and Senator Hruska) [hereinafter *Hearings on S. 63*]) (discussing Congress's decision to require ex parte application for expert funding).

81. ABA GUIDELINES, *supra* note 77, at § 10.4 cmt.

82. See CAL. PENAL CODE § 987.9(a) (West Supp. 2005) (permitting capital defendants to apply ex parte for funds for expert assistance); DEL. SUPER. CT. CRIM. R. ANN. 44(e)(4) (same); 725 ILL. COMP. STAT. ANN. 124/15(h), (i)(1) (West Supp. 2004) (same); IND. R. CRIM. P. 24(C)(2) (same); KAN. STAT. ANN. § 22-4508 (1995) (same); KEN. REV. STAT. ANN. § 31.185(2) (Michie Supp. 2004) (same); NEV. REV. STAT. § 7.135 (2003) (same); N.Y. JUD. LAW 35-b(8) (McKinney 2002) (same); N.C. INDIGENT DEF. SVCS. R. 2D.4 (same); S.C. CODE ANN. § 16-3-26(C)(1) (Law. Co-op. 2003) (same); TENN. CODE ANN. § 40-14-207(b) (2003) (same); TEX. CODE CRIM. P. art. 26.052(f) (Vernon Supp. 2004-05) (same); WASH. SUPERIOR CT. CRIM. R. 3.1(f)(2) (same); see also ARIZ. R. CRIM. P. 15.9(b) (permitting capital defendants to apply ex parte for expert funding upon a showing of need).

83. S.C. CODE ANN. § 16-3-26(C)(1).

84. See, e.g., D.C. CODE ANN. § 11-2605(a) (1995) (requiring courts to conduct ex parte hearings on motions for expert assistance); MINN. STAT. ANN. § 611.21(a) (West 2003) (same); N.D. R. CRIM. P. 44(b) (same); W. VA. TRIAL CT. R. 35.04 (permitting a court to conduct an ex parte hearing for expert funding upon a showing of good cause).

85. See, e.g., CAL. PENAL CODE § 9879.9(a) (providing the right to apply ex parte for

dictions currently have case law that requires courts to permit some form of ex parte application for expert funding.<sup>86</sup> A few other courts, while not expressly requiring ex parte hearings, have indicated that they are preferred.<sup>87</sup>

### B. *Limited Right to an Ex Parte Hearing*

Other state courts and statutes permit a defendant to apply ex parte for expert funding upon a showing of need.<sup>88</sup> In *State v. Touchet*,<sup>89</sup> the Supreme Court of Louisiana rejected the request that courts be required to permit ex parte application for expert assistance and instead adopted a rule that permitted the defendant to file the motion in camera but also required courts to give the prosecution notice of the hearing and the opportunity to file a brief in opposition.<sup>90</sup> After the judge reviewed the defendant's motion, the judge was to permit the prosecution to be present at the hearing if the defendant did not initially show a need to continue the hearing ex parte.<sup>91</sup> The defendant establishes need by "showing that certain essential and potentially meritorious elements of his defense will be disclosed to the state if there is a contradictory

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"payment of investigators, experts, and others for the preparation or presentation of the defense").

86. See *Ex Parte Moody*, 684 So. 2d at 121 (holding that the capital defendant was entitled to an ex parte hearing for expert funding); *People v. Anderson*, 742 P.2d 1306, 1320–22 (Cal. 1987) (same); *Brooks v. State*, 385 S.E.2d 81, 84 (Ga. 1989) (same); *State v. Ballard*, 428 S.E.2d 178, 179 (N.C. 1993) (same); *Ex parte Lexington County*, 442 S.E.2d 589, 593 (S.C. 1994) (same); *State v. Barnett*, 909 S.W.2d 423, 429–30 (Tenn. 1995) (same); *Williams*, 958 S.W.2d at 194 (same).

87. See *Dunn v. State*, 722 S.W.2d 595, 596 (Ark. 1987) (indicating that the hearing for expert funding was conducted ex parte); *State v. Hamilton*, 448 So. 2d 1007, 1008–09 (Fla. 1984) (finding that the prosecution is not entitled to notice or a hearing for the appointment of a psychiatrist); *Arnold v. Higa*, 600 P.2d 1383, 1385 (Haw. 1979) (remanding a decision for an ex parte hearing on a defendant's need for certain litigation expenses); *People v. Loyer*, 425 N.W.2d 714, 722 (Mich. 1988) (requiring courts to permit ex parte application for expert witness fees); *Manning v. State*, 726 So. 2d 1152, 1191 (Miss. 1998) (noting that the prosecution has no role to play in the court's decision on whether an expert is necessary to the defense); *Fitzgerald v. State*, 972 P.2d 1157, 1165–66 (Okla. Crim. App. 1998) (indicating that public defenders in counties with their own public defender system may apply ex parte to courts for expert funds); *McGregor v. State*, 733 P.2d 416, 416–17 (Okla. Crim. App. 1987) (issuing a writ of mandamus requiring that the trial court conduct an ex parte hearing for expert funding); *State v. Newcomer*, 737 P.2d 1285, 1291 (Wash. Ct. App. 1987) (indicating that expert funding hearings are to be conducted ex parte). *But see McGilberry v. State*, 741 So. 2d 894, 916–17 (Miss. 1999) (holding that it was not an abuse of discretion for the trial court to deny the defendant's request for an ex parte hearing).

88. See *Stevens v. State*, 770 N.E.2d 739, 759 (Ind. 2002) (requiring a showing of good cause for an ex parte hearing); *State v. Touchet*, 642 So. 2d 1213, 1214 (La. 1994) (requiring a defendant to show necessity for an ex parte hearing); *State v. Peebles*, 640 N.E.2d 208, 212 (Ohio Ct. App. 1994) (requiring a showing of necessity).

89. 642 So. 2d 1213 (La. 1994).

90. *Touchet*, 642 So. 2d at 1214.

91. *Id.*

hearing on the request for funds.”<sup>92</sup> In *Stevens v. State*,<sup>93</sup> the Supreme Court of Indiana came to a similar conclusion and permitted defendants to apply ex parte for expert funding upon a showing of good cause.<sup>94</sup>

Arizona is the only state legislature to address the ex parte issue and require capital defendants to show need in order to apply ex parte for expert funding.<sup>95</sup> Federal law also requires capital defendants to show a “need for confidentiality” before they are permitted to apply ex parte for expert funds.<sup>96</sup> In 1996 Congress amended 21 U.S.C. § 848 to require that defendants show a need for confidentiality; the former statute granted ex parte hearings without any showing of need.<sup>97</sup> Thus, federal capital defendants must show need in order to receive an ex parte hearing, while non-capital federal defendants are automatically entitled to an ex parte hearing.<sup>98</sup> In practice, however, federal courts routinely grant ex parte hearings to capital defendants and rarely require a showing of necessity.<sup>99</sup>

### C. No Right to an Ex Parte Hearing

In addition to Virginia, three other state courts have held that trial courts need not permit defendants to apply ex parte for expert funding.<sup>100</sup> In rejecting the defendant’s request for an ex parte hearing, the Supreme Court of Arizona in *State v. Apelt*<sup>101</sup> cited an Arizona judicial canon that prohibited ex parte proceedings and concluded that ex parte applications were not a basic tool of an adequate defense for due process purposes.<sup>102</sup> Responding to the defendant’s concern over premature disclosure of defense strategy, the court noted that Arizona’s discovery rules already require extensive disclosure by the defense and

92. *Id.* at 1220.

93. 770 N.E.2d 739 (Ind. 2002).

94. *Stevens*, 770 N.E.2d at 759.

95. ARIZ. R. CRIM. P. 15.9.

96. 21 U.S.C. § 848(q)(9) (2000).

97. *See* 21 U.S.C. § 848(q)(9) (1992) (requiring federal judges to provide funds for expert or investigative assistance “[u]pon a finding in ex parte proceedings that investigative, expert or other services are reasonably necessary for the representation of the defendant”).

98. *See* 18 U.S.C. § 3006A(e) (2000) (providing indigent defendants with the right to apply ex parte for expert funding).

99. Interview with David Bruck, Director, Virginia Capital Case Clearinghouse (Mar. 2, 2005).

100. *See Apelt*, 861 P.2d at 649–50 (finding that the defendant had no constitutional right to an ex parte hearing for expert assistance); *State v. Wood*, 967 P.2d 702, 713–14 (Idaho 1998) (same); *State v. Floody*, 481 N.W.2d 242, 254–56 (S.D. 1992) (same); *see also State v. Turner*, 12 P.3d 934, 945–46 (Mont. 2000) (rejecting the defendant’s argument that his counsel was ineffective for failing to request an ex parte hearing for mental health expert funding).

101. 861 P.2d 634 (Ariz. 1993).

102. *Apelt*, 861 P.2d at 650.

found that prejudice only occurs “when the expert’s analysis turns out to support a position contrary to that of the defendant.”<sup>103</sup> The Supreme Court of South Dakota in *State v. Floody*<sup>104</sup> rejected the defendant’s contention that the Constitution required ex parte hearings and implied that the prosecution’s presence was necessary whenever “government expense is involved to ‘prevent abuses often attempted by defendants.’”<sup>105</sup> Additionally, the Supreme Court of Idaho in *State v. Wood*<sup>106</sup> rejected the defendant’s contention that *Ake*’s language concerning ex parte hearings created a constitutional entitlement to ex parte hearings for expert assistance.<sup>107</sup>

*D. Expert Funding Through Alternative Sources and the  
Actual Conduct of State Trial Courts*

In some jurisdictions, the issue of ex parte application for expert funding does not arise because the public defenders and court-appointed attorneys may apply to the state’s public defender agency for expert funds and thus do not need to ask the courts for funds. In states such as Oregon, Colorado, Missouri, Louisiana, New Mexico, Oklahoma, Maryland, New Jersey, Connecticut, as well as most major cities like Philadelphia, the state or city indigent defense system controls the distribution of expert funds for defendants represented by public defenders and court-appointed conflict counsel.<sup>108</sup> Ideally, Virginia’s indigent defense system would control funding for experts because, in addition to removing the need for an open hearing, that system would avoid involving the

103. *Id.*

104. 481 N.W.2d 242 (S.D. 1992).

105. *Floody*, 481 N.W.2d at 256 (quoting *Feguer v. United States*, 302 F.2d 214, 241 (8th Cir. 1962)).

106. 967 P.2d 702 (Idaho 1998).

107. *Wood*, 967 P.2d at 713–14.

108. See, e.g., CONN. GEN. STAT. § 51-292 (West 1985) (providing that the indigent defense commission shall review applicants’ requests for expert funding); MD. ANN. CODE art. 27A, § 5(2) (2003) (requiring the Public Defender to prepare a fee schedule for technical services provided to indigent persons); N.J. STAT. ANN. § 2A:158A-5 (West Supp. 2004) (requiring the Public Defender to provide necessary services to defendants in every case); OKLA. STAT. tit. 22 § 1355.4(D) (West 2003) (noting that attorneys appointed by the Indigent Defense System shall apply to the Indigent Defense System for expert services); OR. REV. STAT. § 135.055(3)(a) (2003) (requiring that motions for expert funding be made directly to the Public Defense Services Commission); THE SPANGENBERG GROUP, RATES OF COMPENSATION FOR COURT-APPOINTED COUNSEL IN CAPITAL CASES AT TRIAL: A STATE BY STATE OVERVIEW, 2003, at 12,14, <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/compensationratescapital2003.pdf> [hereinafter COMPENSATION FOR COURT-APPOINTED COUNSEL] (explaining that Louisiana and New Mexico require court-appointed counsel to request expert funding from the state public defender commission); E-mail from Kathleen Lord, Attorney at Law, Denver, Colo., to author (Feb. 3, 2005, 18:55 EST) (on file with author) [hereinafter Lord] (explaining Colorado’s procedures); E-mail from Bill Odle, Attorney at Law, Kansas City, Mo., to author (Feb. 7, 2005, 11:59 EST) (explaining Missouri’s procedures) (on file with author).

trial judge in evaluating and even potentially controlling the defense's trial strategy. As an alternative approach, California requires that a judge other than the trial judge hear the motion for expert assistance; Utah has a similar provision that is triggered upon the defendant's request.<sup>109</sup> Either system prevents the trial judge who will actually hear the defendant's case from scrutinizing and making important decisions about the conduct of the defense prior to trial.

Regardless of statutory or case law, most trial courts outside of Virginia permit defendants to apply *ex parte* for expert funds. Despite the Supreme Court of Arizona's holding in *Apelt*, Arizona defense attorneys report that many Arizona trial judges routinely permit *ex parte* application for expert funding.<sup>110</sup> The same is true of South Dakota where, despite the court's holding in *Floody*, some trial courts permit *ex parte* applications in that state's limited number of capital cases.<sup>111</sup> In other states with no statutory or case law on the issue, trial judges routinely grant *ex parte* hearings for expert assistance.<sup>112</sup> For instance, in Mississippi, capital cases handled by the publicly-funded Capital Defense Counsel receive expert funds from their own office, while other court-appointed attorneys apply *ex parte* to the court for expert funds.<sup>113</sup> Florida provides funding to circuit public defender organizations to use for their own clients at their discretion.<sup>114</sup> While Florida's court-appointed attorneys normally request expert funds from their circuit's indigent services committee, court-appointed attorneys who apply to courts for funding generally do so *ex parte*.<sup>115</sup> Before

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109. CAL. PENAL CODE § 987.9(a) (West Supp. 2005); UTAH CODE ANN. § 77-32-305.5(3) (2003).

110. E-mail from Conrad Baran, Attorney at Law, Phoenix, Ariz., to author (Jan. 25, 2005, 18:56:51 EST) (on file with author); E-mail from Bret Huggins, Attorney at Law, Florence, Ariz., to author (Jan. 26, 2005, 12:03 EST) (on file with author).

111. E-mail from Leslie Bowman, Attorney at Law, Belle Fourche, S.D., to author (Jan. 25, 2005, 19:25 EST) (on file with author); *see* E-mail from David Hosmer, Attorney at Law, Yankton, S.D., to author (Jan. 20, 2005, 10:55 EST) (on file with author) (explaining that some judges allow informal *ex parte* communication on the need for expert funding, even if the judge conducts the formal hearing with the prosecution present).

112. *See* E-mail from Ray Carter, Attorney at Law, Jackson, Miss., to author (Feb. 4, 2005, 04:24 PM EST) (on file with author) [hereinafter Carter] (explaining Mississippi's procedures); E-mail from Marc Bookman, Attorney at Law, Phila., Pa., to author (Feb. 5, 2005, 23:07 EST) (on file with author) (explaining Pennsylvania's procedures).

113. Carter, *supra* note 112.

114. FLA. STAT. ch. 29.006(3) (West 2003).

115. Interview with Peter Mills, Attorney at Law, Bartow, Fla. (Feb. 28, 2005). Florida's court-appointed attorneys apply to their circuit's indigent services committee for expert funds. *Id.* Some circuit's indigent service committees, however, run more effectively than others and court-appointed attorneys in the less effectively run circuits often apply to courts for expert funds instead of applying to the indigent services committee. *Id.*



Colorado's public defender system received authority to disburse expert funds, trial judges routinely permitted *ex parte* applications.<sup>116</sup>

In a few other states, however, the prevailing practice is less clear and whether a defendant is permitted to apply *ex parte* for funding may depend on the trial judge.<sup>117</sup> Utah is such a jurisdiction.<sup>118</sup> Capital defense attorneys in Utah, however, may incur up to \$7,500 for an investigator and mitigation expert before they must ask the courts for expert funding, and thus the issue of open hearings for funding does not arise as frequently as it does in Virginia.<sup>119</sup> Further, the public defender offices in Utah's three major cities, Salt Lake City, Provo, and Ogden, retain control over funding in capital cases within their offices, and thus, these public defender attorneys need not apply to courts for expert funds.<sup>120</sup> In Nebraska, judges typically deny requests to apply *ex parte* for expert funds.<sup>121</sup> However, the issue also does not arise as frequently in Nebraska because county public defender organizations often retain discretion over expert funds.<sup>122</sup> In sum, in the overwhelming majority of death penalty jurisdictions, most requests for expert funding are made *ex parte*, and Virginia stands almost alone in refusing to permit such *ex parte* hearings.

## V. Constitutional Arguments for Providing an *Ex Parte* Hearing

### A. Due Process

An open hearing for expert funding burdens a defendant's due process right to a fair trial under the Fourteenth Amendment. Various state courts have concluded that the Due Process Clause requires courts to permit defendants to apply *ex parte* for expert funding.<sup>123</sup> Yet the framework that courts should use to analyze due process challenges to rules of criminal procedure is unclear. None of the state supreme court opinions addressing the issue of open hearings for expert assistance or United States Supreme Court opinions addressing due

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116. Lord, *supra* note 108.

117. E-mail from Richard Mauro, Attorney at Law, Salt Lake City, Utah, to author (Feb. 7, 2005, 14:01 EST) (on file with author) [hereinafter Mauro] (explaining Utah's procedures).

118. *Id.*

119. *Id.*

120. *Id.*

121. E-mail from Jeff Pickens, Attorney at Law, Lincoln, Neb., to author (Feb. 7, 2005, 10:53 EST) (on file with author) (explaining Nebraska's procedures).

122. *Id.*

123. See *Moody*, 684 So. 2d at 120 (implying that due process requires *ex parte* application for expert assistance because it is a basic tool of an adequate defense); *Brooks*, 385 S.E.2d at 84 (using the *Mathews* test to determine whether applications for expert funding must be made *ex parte*); *Williams*, 958 S.W.2d at 192 ("While the Supreme Court's suggestion [in *Ake*] that the threshold showing should be made *ex parte* is dicta, it is consistent with the due process principles upon which *Ake* rests.').

process challenges to rules of criminal procedure have applied a consistent due process analysis.<sup>124</sup> Although the Court in *Ake* used the *Mathews* test, subsequent Supreme Court cases have cast doubt on whether *Ake* appropriately injected *Mathews* into the setting of criminal procedure.<sup>125</sup> More recently, in assessing whether a state statute that required the defendant to prove incompetence to stand trial violated the defendant's due process rights, the Court in *Medina v. California*<sup>126</sup> rejected *Ake*'s importation of the *Mathews* test into criminal procedure and, instead, adopted a due process analysis first used in *Patterson v. New York*.<sup>127</sup> Accordingly, this article will analyze whether an open hearing for expert funds violates a defendant's due process rights under *Medina*'s framework.

The Court in *Medina* first noted that a state rule of criminal procedure violates a defendant's due process rights only "if 'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"<sup>128</sup> This standard derives from a long line of due process cases concerning rules of criminal procedure starting with Justice Cardozo's opinions in *Snyder v. Massachusetts*,<sup>129</sup> and *Palko v. Connecticut*,<sup>130</sup> and continuing through *Patterson*.<sup>131</sup> In order to make such a determination, the *Medina* Court examined

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124. Compare *Brooks*, 385 S.E.2d at 84 (using *Mathews* to analyze a due process challenge to open hearings for expert funding), with *Williams*, 958 S.W.2d at 193 (finding that open hearings for expert assistance are contrary to *Ake*'s promise of "meaningful access to justice").

125. *Ake*, 470 U.S. at 77 (citing *Britt v. North Carolina*, 404 U.S. 226, 227 (1971)); see *Mathews*, 424 U.S. at 335 (assessing whether an administrative proceeding met the requirements of the Due Process Clause). The Court has used the *Mathews* test one other time in assessing a due process challenge to a rule of criminal procedure. See *United States v. Raddatz*, 447 U.S. 667, 677 (1980) (citing *Mathews* in rejecting a due process challenge to a federal statute permitting magistrates to make findings on motions to suppress evidence); see also David A. Harris, *Ake Revisited: Expert Psychiatric Witnesses Remain Beyond Reach for the Indigent*, 68 N.C. L. REV. 763, 766 n.27 (1990) (commenting that some scholars have considered the *Mathews* test inappropriate because it is so capable of being manipulated); John M. West, Note, *Expert Services and the Indigent Criminal Defendant: the Constitutional Mandate of Ake v. Oklahoma*, 84 MICH. L. REV. 1326, 1332 n.41 (1986) (noting that prior to *Ake* the United States Supreme Court had rarely used the *Mathews* test in the context of criminal procedure and that the manipulability of the factors makes the test dangerous to apply).

126. 505 U.S. 437 (1992).

127. *Medina v. California*, 505 U.S. 437, 443–45 (1992); see *Patterson v. New York*, 432 U.S. 197, 202–05 (1977) (evaluating the historical practice, the operation of the challenged rule, and the Court's own precedent in rejecting a due process challenge to a statute that required defendants to prove extreme emotional disturbance); Carlton Bailey, *Ake v. Oklahoma and an Indigent Defendant's 'Right' to an Expert Witness: A Promise Denied or Imagined?*, 10 WM. & MARY BILL RTS. J. 401, 409 n.84 (2002) (noting that *Ake* has been justified by the *Medina* line of cases, which offer an alternate approach to due process than *Ake* and asserting that the *Medina* due process approach is preferable).

128. *Medina*, 505 U.S. at 445 (quoting *Patterson*, 432 U.S. at 202).

129. 291 U.S. 97 (1934).

130. 302 U.S. 319 (1937).

131. See *Patterson*, 432 U.S. at 201–02 (citing the "traditions and conscience of our people" language in determining whether a statute violated a defendant's due process rights when it required

historical practice, the operation of the challenged rule, and the Court's own precedent.<sup>132</sup> The Court, however, noted that federal courts should remain very deferential to state rules of criminal procedure.<sup>133</sup> The Court then rejected the defendant's due process claim because there was no settled historical or contemporary practice on who shoulders the burden of proving competence to stand trial and the statute adequately protected the defendant's right not to stand trial if incompetent.<sup>134</sup> Four years after *Medina*, the Court in *Cooper v. Oklahoma*<sup>135</sup> sustained a due process challenge to a rule that required defendants to prove incompetence to stand trial by clear and convincing evidence.<sup>136</sup> The Court analyzed the claim under *Medina*'s framework and determined that historical and contemporary practice and the operation of the rule weighed against requiring that defendants prove incompetence to stand trial by clear and convincing evidence.<sup>137</sup>

There is little historical practice regarding application for expert funding because *Ake* granted the constitutional right less than twenty years ago.<sup>138</sup> Although most states provided indigent defendants with some sort of expert funding prior to *Ake*, only five states and the federal government had statutory or case law that required courts to conduct ex parte hearings.<sup>139</sup> The Court in *Medina* and *Cooper* also examined contemporary state and federal practice.<sup>140</sup> *Cooper*'s holding rested in large part on the fact that only four of fifty states used the procedure in question, while the rest of the states used a procedure more favorable to the defendant.<sup>141</sup> Refusal to permit ex parte hearings for expert

the defense to prove extreme emotional disturbance); *Palko v. Connecticut*, 302 U.S. 319, 325, 328 (1937) (citing the "traditions and conscience of our people" language in determining that the Fourteenth Amendment did not incorporate the Fifth Amendment's prohibition against double jeopardy); *Snyder v. Massachusetts*, 291 U.S. 97, 104–05 (1934) (stating that the trial court's denial of the defendant's request to be present when the jury viewed the crime scene did not violate his Fourteenth Amendment due process rights because it did not "offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental").

132. *Medina*, 505 U.S. at 446–53; see *Cooper v. Oklahoma*, 517 U.S. 348, 355–67 (1996) (using the test from *Medina* to assess a due process challenge to a statute that required the defendant to prove incompetence to stand trial by clear and convincing evidence).

133. *Medina*, 505 U.S. at 443–44.

134. *Id.* at 446–51.

135. 517 U.S. 348 (1996).

136. *Cooper*, 517 U.S. at 355–56, 362.

137. *Id.* at 362, 367.

138. See *Ake*, 470 U.S. at 83–84 (providing a constitutional right to a psychiatrist when the defendant's sanity at the time of the offense is at issue).

139. See 18 U.S.C. § 3006A(e) (2000) (permitting defendants to apply ex parte for expert funding); Lee, *supra* note 7, at 155–59 (discussing the historical use of ex parte proceedings for expert funding prior to *Ake*).

140. *Medina*, 505 U.S. at 447–48; *Cooper*, 517 U.S. at 360–62.

141. *Cooper*, 517 U.S. at 360–62.

funding is likewise a rarity among American jurisdictions.<sup>142</sup> Currently, seventeen of the thirty-eight death penalty jurisdictions have statutory or case law that gives defendants at least a partial right to apply *ex parte* for expert funds.<sup>143</sup> Of the states with no statutory or case law on the subject, nine states distribute expert funds through the state public defender organization, and counsel therefore need not apply to courts for expert funds.<sup>144</sup> Further, in five other death penalty jurisdictions, at least half of the trial judges routinely permit *ex parte* application for expert funds.<sup>145</sup> In total, in only three or four states do trial judges routinely deny requests for *ex parte* application.<sup>146</sup> Thus, contemporary practice weighs against open hearings for expert funding.

The Court in *Cooper* and *Medina* also examined Supreme Court precedent in its due process analysis.<sup>147</sup> Although the Court has never directly addressed the issue of open hearings for expert funds, the Court in *Wardius v. Oregon*<sup>148</sup> addressed a similar issue.<sup>149</sup> In *Wardius*, the Court balanced the state and private interests involved to find that an Oregon notice of alibi statute violated a defendant's due process rights because it did not require the prosecution to provide reciprocal discovery once the defendant disclosed his potential alibi witnesses.<sup>150</sup> The Court noted that "[i]t is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the State."<sup>151</sup> The State in *Wardius* had conceded that it had no interest in withholding reciprocal discovery.<sup>152</sup>

Open hearings for expert funds pose a similar dilemma. Unless they forgo requesting an expert, defendants are required to disclose material to the State with no reciprocal benefit, and the prosecution gains a substantial tactical

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142. See *supra* notes 77–122 and accompanying text (surveying state procedures concerning *ex parte* hearings).

143. See *supra* notes 82–107 and accompanying text (surveying statutory and case law concerning *ex parte* hearings).

144. See *supra* note 108 and accompanying text (listing the states that distribute expert funds through a public defender commission).

145. See *supra* notes 110–116 and accompanying text (describing the jurisdictions in which trial judges routinely grant *ex parte* hearings).

146. See *supra* notes 77–122 and accompanying text (surveying state practices regarding *ex parte* hearings).

147. *Medina*, 505 U.S. at 446; *Cooper*, 517 U.S. at 362–68.

148. 412 U.S. 470 (1973).

149. *Wardius v. Oregon*, 412 U.S. 470, 471–72 (1973).

150. *Id.*

151. *Id.* at 476.

152. *Id.*

advantage over the defendant.<sup>153</sup> Although the disclosure by the defendant is not formally compelled as it was in *Wardius*, open hearings still contain an element of compulsion because the defendants risk not receiving necessary assistance if they do not disclose their need for assistance with sufficient particularity.<sup>154</sup>

Additionally, the Court in *Medina* and *Cooper* analyzed the operation of the challenged rule and assessed the risks inherent in the procedures at issue.<sup>155</sup> In rejecting the defendant's due process claim, *Medina* emphasized that the burden of proof would only affect the outcome of a limited number of cases and that the defendant's attorney was in a better position to assess competency because the attorney had closer contact with the defendant.<sup>156</sup> Conversely, the Court in *Cooper* came to the opposite conclusion because requiring proof of incompetence by clear and convincing evidence created a risk of an erroneous determination of competence that could be fatal for the defendant but only minor to the State.<sup>157</sup> Further, the Court in *Cooper* was concerned that an erroneous determination of competence would inhibit the defendant's ability to assert other constitutional rights.<sup>158</sup> The Court in *Cooper* distinguished *Medina* by noting that a larger group of defendants would be affected by the clear and convincing evidence burden.<sup>159</sup>

This facet of the *Medina* analysis weighs heavily in favor of a right to ex parte proceedings.<sup>160</sup> Open hearings pose substantial risks to indigent defendants.<sup>161</sup> As in *Cooper*, open hearings affect almost every capital defendant because of the widespread use of expert assistance in capital cases. The possibility that the defense will not request an expert in order to protect the confidentiality of defense information risks burdening a defendant's rights to compulsory process, to effective assistance of counsel, against self-incrimination, and to expert assistance at trial.<sup>162</sup> When defendants apply for expert funds and disclose their strategy to the prosecution, they give the prosecution a substantial tactical advantage by providing it with information it can use to tailor its pretrial

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153. See *supra* notes 41–62 and accompanying text (explaining the disadvantages to open hearings for expert funds).

154. See *Wardius*, 412 U.S. at 471–72 (noting that Oregon's notice of alibi statute precluded defendants from introducing an alibi witness if they did not disclose it prior to trial).

155. *Medina*, 505 U.S. at 448; *Cooper*, 517 U.S. at 362–67.

156. *Medina*, 505 U.S. at 449, 450.

157. *Cooper*, 517 U.S. at 364–67.

158. *Id.*

159. *Id.* at 364.

160. *Medina*, 505 U.S. at 448 (examining the operation of the challenged rule in its due process analysis).

161. See *supra* notes 41–62 and accompanying text (examining the effects of open hearings for expert funding on the defense).

162. See *infra* notes 185–256 and accompanying text (explaining the Fifth and Sixth Amendment implications of open hearings for expert funds).

investigation, opening and closing statements, presentation of witnesses and evidence, and cross-examination.<sup>163</sup>

Conversely, ex parte applications pose little risk to the State. A recurring argument against ex parte applications for expert funding is that the State should have some input on the expenditure of state resources.<sup>164</sup> In this context, however, trial courts themselves provide adequate safeguards against needless expenditure of state funds.<sup>165</sup> Attorneys routinely note that judges scrutinize requests for funds closely and are concerned with the potential wasting of state funds.<sup>166</sup> Also, administratively, ex parte applications would not add any cost in terms of the attorneys' or state's time and, if anything, would be cheaper because they would eliminate an issue for which the State would need to take time to prepare.<sup>167</sup> Thus, the State's interest in preserving state funds would not be jeopardized by ex parte application for expert funds.

To be sure, there is a state interest in avoiding undue ex parte communication with the court and providing adversarial hearings when possible.<sup>168</sup> Various state courts have cited judicial canons against ex parte hearings in rejecting defendants' contentions that they have a right to ex parte applications.<sup>169</sup> For instance, Virginia's code of judicial conduct prohibits judges from considering ex parte communications unless they would not prejudice any party involved.<sup>170</sup> Yet, other courts with similar judicial canons have held that defendants have at least a limited right to an ex parte hearing.<sup>171</sup> Further, the

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163. See *Touchet*, 642 So. 2d at 1218 (discussing the tactical advantage that open hearings for expert assistance give to the prosecution).

164. See, e.g., *Floody*, 481 N.W.2d at 256 (citing the State's interest in preventing the abuse of state funds).

165. See *Moody*, 684 So. 2d at 121 (noting that an ex parte hearing "can adequately protect taxpayers from unwise expenditures of money while at the same time protecting the constitutional rights of indigent defendants").

166. See VIRGINIA INDIGENT DEFENSE REPORT, *supra* note 3, at 64 (citing a comment by a public defender in Richmond that judges often act like the funds are coming out of their own wallets); Shapiro, *supra* note 5 (discussing capital trials in which the judge has refused to appoint an expert for the defense).

167. See Thomas Bassett, *The Necessity of Ex Parte Proceedings for Indigent Criminal Defendants*, 55 J. MISSOURI B. 32, 33 (1999) (noting that ex parte hearings would add no additional costs).

168. See *Touchet*, 642 So. 2d at 1217 (noting that due process weighs in favor of using adversarial hearings when possible).

169. See, e.g., *Apelt*, 861 P.2d at 650 (noting that ex parte hearings "would violate Canon 3(A)(4) of the Code of Judicial Conduct, which forbids *ex parte* proceedings except where authorized by law").

170. VA. CANONS OF JUD. CONDUCT 3(B)(7).

171. See *Stevens*, 770 N.E.2d at 758-59 (explaining that although Indiana's rules of judicial conduct counsel against ex parte communications, the defendant had a limited right to an ex parte hearing); *Touchet*, 642 So. 2d at 1220 (giving defendants a limited right to an ex parte hearing despite a judicial canon advising otherwise).

interest in adversarial hearings is minimal in this context because the State will likely not know enough about the defense's strategy to be in a position to argue why a given expert is not necessary for an adequate defense.<sup>172</sup>

The risks to the defendant in conducting an open hearing for expert funding substantially outweigh the risks to the State when defendants apply ex parte for funds. As long ago as the Senate Judiciary Committee hearing on the Criminal Justice Act of 1964, Judge William F. Smith of the Third Circuit Court of Appeals and Senator Roman Hruska noted that forcing the defense prematurely to disclose its theories and strategies was too high a price to obtain expert assistance.<sup>173</sup> The Supreme Court's decision in *Wardius* echoes the same concern—that it is fundamentally unfair to force the defense to give the prosecution discovery information without any reciprocal disclosure.<sup>174</sup> Additionally, only a few states do not routinely allow ex parte applications for expert funds.<sup>175</sup> Thus, the current weight of authority and practice among states and the federal government, Supreme Court precedent, and the risks to the defendant all lead to the conclusion that it is fundamentally unfair to permit the prosecution to be present at a hearing for expert funding.

### B. Equal Protection

The United States Supreme Court has made it extremely difficult for indigent criminal defendants to use the Equal Protection Clause to invalidate a state rule of criminal procedure.<sup>176</sup> The Court has made it clear that wealth is not a suspect classification triggering strict scrutiny; rather, wealth-based classifications must only rationally relate to a state interest in order to pass constitutional muster.<sup>177</sup> The Court in *Ross* signaled that the Due Process Clause was the proper framework for analyzing disparities between rich and poor criminal defendants, stating that “[t]he duty of the State . . . is not to duplicate the legal arsenal that may be privately retained by a criminal defendant . . . but only to assure the indigent defendant an adequate opportunity to present his claims fairly.”<sup>178</sup> Yet the Equal Protection Clause still lingers in opinions like

172. *Touchet*, 642 So. 2d at 1220.

173. *Lee*, *supra* note 7, at 157–58 (citing *Hearings on S. 63*, *supra* note 80, at 149, 173 (statements of Judge William F. Smith and Senator Hruska)).

174. *Wardius*, 412 U.S. at 475–76.

175. *See supra* notes 77–122 and accompanying text (surveying state practice concerning ex parte hearings).

176. *See Harris*, *supra* note 125, at 766 n.24 (noting that the Court's holding in *Ross* “limits the reach of equal protection for indigent criminal defendants to no more than due process affords”).

177. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 29 (1973).

178. *Ross*, 417 U.S. at 616; *see also Ake*, 470 U.S. at 76–77 (citing cases such as *Griffin*, which are based on the Equal Protection Clause, but basing its holding on the Due Process Clause); Note, *Indigent Criminal Defendant's Right to a Psychiatrist*, 99 HARV. L. REV. 130, 139 (1985) [hereinafter *Right to a Psychiatrist*] (noting that *Ross* “render[ed] the standard of equal protection virtually indistinguish-

*Ake*, in which Justice Marshall sought to ensure that indigent defendants received “meaningful access to justice” and cited such opinions as *Griffin v. Illinois*<sup>179</sup> and *Douglas v. California*<sup>180</sup> that were based on the Equal Protection Clause.<sup>181</sup>

Many state and federal court opinions also echo equal protection concerns, but then conflate due process with equal protection analysis without specifically finding an Equal Protection Clause violation.<sup>182</sup> Congress was also concerned with the equal protection implications of open hearings when it drafted the Criminal Justice Act of 1964.<sup>183</sup> Thus, although an explicit equal protection argument will be difficult to make, it is worthwhile to address the equal protection concerns by including them within a due process argument.<sup>184</sup>

### C. Fifth Amendment

The Fifth Amendment guarantees that “[n]o person shall . . . be compelled in any criminal case to be a witness against himself.”<sup>185</sup> Several state courts have noted that the prosecution’s presence at a hearing for expert assistance may

able from the standard of due process in cases concerning the rights of indigent criminal defendants”).

179. 351 U.S. 12 (1956).

180. 372 U.S. 353 (1963).

181. See *Ake*, 470 U.S. at 76 (“[J]ustice 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.”); *Douglas*, 372 U.S. at 357–58 (holding that the Due Process and Equal Protection Clauses require the state to provide an indigent defendant with counsel for the defendant’s first appeal); *Griffin*, 351 U.S. at 18–19 (holding that the Due Process and Equal Protection Clauses require the state to provide at no cost trial transcripts to indigent defendants); *Harris*, *supra* note 125, at 780–81 (noting that although *Ake*’s holding was based on due process, it had strong equal protection language); *Right to a Psychiatrist*, *supra* note 178, at 139–40 (noting that *Ake* collapsed equal protection analysis into due process analysis for issues involving services for indigent defendants).

182. See *United States v. Meriwether*, 486 F.2d 498, 506 (5th Cir. 1973) (“When an indigent defendant’s case is subjected to pre-trial scrutiny by the prosecutor, while the monied defendant is able to proceed without such scrutiny, serious equal protection questions are raised.”); *Moody*, 684 So. 2d at 120 (“An indigent defendant should not have to disclose to the state information that a financially secure defendant would not have to disclose.”); *Brooks*, 385 S.E.2d at 83 (noting possible equal protection concerns resulting from open court hearings); *Williams*, 958 S.W.2d at 193 (concluding that failure to provide an ex parte hearing prevents defendants from receiving “meaningful access to justice”).

183. *Lee*, *supra* note 7, at 157 (citing *Hearings on S. 63*, *supra* note 80, at 149).

184. See *Ake*, 470 U.S. at 76–77 (referencing equal protection concepts within a due process analysis); *Bearden v. Georgia*, 461 U.S. 660, 665–67 (1983) (noting the similarity between due process and equal protection analysis when a court must determine whether the state’s treatment of a criminal defendant was fundamentally unfair or arbitrary).

185. U.S. CONST. amend. V; see *Malloy v. Hogan*, 378 U.S. 1, 11 (1964) (applying the Fifth Amendment self-incrimination provision to the states).



infringe on a defendant's privilege against self-incrimination.<sup>186</sup> Communications that violate the defendant's Fifth Amendment privilege must be self-incriminating, testimonial, and compelled.<sup>187</sup> Requiring defendants to seek expert funding at open hearings potentially meets all three of these requirements and thereby violates defendants' privilege against self-incrimination.

The Self-Incrimination Clause of the Fifth Amendment "protects an accused only from . . . provid[ing] the State with evidence of a testimonial or communicative nature."<sup>188</sup> Testimonial communications are communications that "explicitly or implicitly, relate a factual assertion or disclose information."<sup>189</sup> In order to obtain funds for expert assistance in Virginia, defendants must establish that the expert sought would materially assist their defense and that the expert's absence would be prejudicial.<sup>190</sup> For instance, defendants planning to hire a forensics expert must disclose what evidence will be tested, how those tests will be conducted, and how they relate to their theories about the case.<sup>191</sup> Thus, this type of explanation "relate[s] a factual assertion or disclose[s] information," and qualifies as "testimonial" because when defendants explain why an expert is necessary to their case they must disclose facts to support their argument.<sup>192</sup>

Further, to qualify for Fifth Amendment protection, a communication must be self-incriminating.<sup>193</sup> Communications during ex parte hearings that disclose

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186. See *Moody*, 684 So. 2d at 120 (determining that open hearings for expert funding encroach on a defendant's privilege against self-incrimination); *Brooks*, 385 S.E.2d at 83-84 (noting that failure to provide an ex parte hearing forces the defendant to reveal potential defenses and possibly raises self-incrimination concerns); *Touchet*, 642 So. 2d at 1218 (noting that open hearings raise concerns under the "Fifth Amendment-based principle that the defendant has a right to compel the State to investigate its own case, find its own witnesses, prove its own facts, and convince the jury through its own resources"); *Barnett*, 909 S.W.2d at 429 (explaining that only in a non-adversarial atmosphere can the defendant be freed from any self-incrimination concerns in applying for expert assistance).

187. See *Williams v. Florida*, 399 U.S. 78, 84 (1970) (concluding that Florida's notice of alibi rule did not violate the defendant's privilege against self-incrimination because although the communications were testimonial and self-incriminating, they were not compelled); Robert P. Mosteller, *Discovery Against the Defense: Tilting the Adversarial Balance*, 74 CAL. L. REV. 1569, 1586 (1986) (noting that a Fifth Amendment violation occurs when a defendant's communications are testimonial, self-incriminating, and physically or morally compelled).

188. *Schmerber v. California*, 384 U.S. 757, 761 (1966).

189. *Doe v. United States*, 487 U.S. 201, 210 (1988). The Fifth Amendment does not protect "against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture." *Schmerber*, 384 U.S. at 764.

190. *Husske*, 476 S.E.2d at 925 (citing *Ake*, 470 U.S. at 82-83).

191. *Bright*, *supra* note 46, at 32.

192. *Doe*, 487 U.S. at 210; see *Lee*, *supra* note 7, at 176 (arguing that explanations of why funding is necessary qualify as a testimonial communication).

193. See *Pennsylvania v. Muniz*, 496 U.S. 582, 589 (1990) (noting that a statement must be self-incriminating in order to qualify for Fifth Amendment protection).

potential justification defenses, such as self-defense or insanity, are self-incriminating because they concede that the defendant performed the act.<sup>194</sup> Further, statements that “furnish a link in the chain of evidence needed to prosecute the claimant” also qualify as self-incriminating.<sup>195</sup> The court in *Ex Parte Moody*<sup>196</sup> determined that open hearings implicate the Fifth Amendment privilege against self-incrimination by requiring a defendant to disclose information, which could “furnish a link in the chain of evidence that could lead to prosecution, as well as evidence that an individual reasonably believes could be used against him in a criminal prosecution.”<sup>197</sup> When the prosecution is present at a hearing for expert funding, it may learn of potential defense strategies and theories about the case.<sup>198</sup> These disclosures are links “in the chain of evidence needed to prosecute the claimant” because they could alert the prosecution to evidence of which it was previously unaware or allow it to focus its investigation toward rebutting specific theories that the defense discloses at the hearing.<sup>199</sup>

Finally, a defendant’s testimony must be compelled in order to qualify for the self-incrimination privilege.<sup>200</sup> The prototypical case of compulsion occurs when defendants must choose between talking or serving time in prison.<sup>201</sup> An open hearing is not such a situation. However, certain forms of indirect

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194. *Lee*, *supra* note 7, at 177; *see Bassett*, *supra* note 167, at 34 (noting that the disclosure of a justification defense is self-incriminating).

195. *Hoffman v. United States*, 341 U.S. 479, 486 (1951); *see Mosteller*, *supra* note 187, at 1588 (noting that pretrial discovery disclosed by the defendant may be incriminating because it provides the prosecution with information before it completes investigation). Professor Mosteller suggests that pretrial disclosure may be impermissible for various reasons: (1) the information disclosed may be used to obtain further information against the defendant; (2) the information may provide collaterally damaging information; (3) the State may use the information to ascertain impeachment evidence that it otherwise would have pursued; (4) the information could be used to impeach the defendant’s testimony; and (5) the prosecution could use the information to focus their case. *Id.* at 1588–89.

196. 684 So. 2d 114 (Ala. 1996).

197. *Moody*, 684 So. 2d at 120 (quoting *Maness v. Meyers*, 419 U.S. 449, 461 (1975)).

198. *See Karla C. McGrath, Sommers v. Commonwealth: An Indigent Criminal Defendant’s Right to Publicly Funded Expert Assistance Other than the Assistance of Counsel*, 84 KY. L.J. 387, 402 (1995) (noting that the Kentucky Department of Public Advocacy’s primary complaint about open hearings for expert assistance is that they force defendants to reveal defense theory and strategy before a monied defendant would need to do so).

199. *See Bassett*, *supra* note 167, at 34 (noting that testimony in a hearing for expert funding is self-incriminating because it may alert the prosecution to incriminating or inculpatory evidence about the defendant).

200. *See Williams*, 399 U.S. at 83–84 (requiring that testimony be compelled in addition to self-incriminating and testimonial to qualify for Fifth Amendment protection).

201. *See Doe*, 487 U.S. at 206 (determining that a court order to produce foreign bank records qualifies as compelled testimony).

compulsion may also satisfy the compulsion requirement.<sup>202</sup> One form of indirect compulsion occurs when the defendant must give up one constitutional right in order to enforce another.<sup>203</sup> In *Simmons v. United States*,<sup>204</sup> the United States Supreme Court concluded that the state may not force defendants to give up their self-incrimination privilege in order to assert their Fourth Amendment privilege to exclude evidence illegally seized because the practice would compromise defendants' Fourth Amendment rights.<sup>205</sup> The Court in *Simmons* held that the State may not use testimony against the defendant that he made to establish standing to assert his Fourth Amendment right to exclude evidence obtained by an unreasonable search and seizure.<sup>206</sup> Similarly, open hearings for expert assistance force defendants to choose between their Fifth Amendment privilege against self-incrimination and their constitutional right to expert assistance under *Ake* and *Huske*.<sup>207</sup> Just as the Court in *Simmons* was concerned about the potential chill that the rule at issue would place on defendants' willingness to assert their Fourth Amendment rights, there is a danger that open hearings for expert funding may inhibit defendants' willingness to ask courts for expert assistance.<sup>208</sup>

Alternatively, to assess whether testimony is indirectly compelled, courts have balanced the defendant's Fifth Amendment interests against the value of the challenged practice.<sup>209</sup> The United States Supreme Court used this test in *Brooks v. Tennessee*<sup>210</sup> to determine that a statute requiring a defendant to testify prior to any other defense witness violated the defendant's Fifth Amendment

202. See *Lee*, *supra* note 7, at 178–79 (explaining that courts have found indirect compulsion when the defendant must give up one constitutional right to assert another or when the defendant's Fifth Amendment interests outweigh the necessity of the state practice).

203. See *Simmons v. United States*, 390 U.S. 377, 394 (1968) (stating that it is “intolerable that one constitutional right should have to be surrendered in order to assert another”).

204. 390 U.S. 377 (1968).

205. *Simmons*, 390 U.S. at 394; see also *United States v. Branker*, 418 F.2d 378, 380 (2d Cir. 1969) (determining that a defendant's Fifth Amendment rights were compromised when the State introduced incriminating testimony that the defendant made during a hearing to proceed in forma pauperis).

206. *Simmons*, 390 U.S. at 389–90.

207. See *Ake*, 470 U.S. at 83–84 (holding that under certain circumstances due process requires the court to provide the defendant with funds for expert psychiatric assistance); *Huske*, 476 S.E.2d at 925 (holding that under certain circumstances indigent defendants are entitled to funding for a non-psychiatric expert); *Lee*, *supra* note 7, at 177–78 (arguing that permitting the prosecution to introduce defendants' statements at a hearing for expert funding may constitute compulsion for Fifth Amendment purposes).

208. See *Simmons*, 390 U.S. at 394 (noting that the State's use of defendants' testimony from suppression hearings would chill defendants' willingness to assert their Fourth Amendment rights).

209. *Lee*, *supra* note 7, at 178; see *Mosteller*, *supra* note 187, at 1599 (explaining that courts have found compulsion by assessing the substance of the state's interest and the degree of Fifth Amendment values that are implicated).

210. 406 U.S. 605 (1972).

self-incrimination privilege.<sup>211</sup> The *Brooks* Court arrived at this conclusion because the defendant's constitutional interests outweighed the State's interest in preventing the defendant from coloring his testimony after hearing other witnesses.<sup>212</sup> An open hearing forces the defendant to give the prosecution pre-discovery access to defense theories and strategies that may "furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime."<sup>213</sup> Conversely, the prosecution has no grounds upon which to argue that a particular expert would be unnecessary to the defense because the State will know very little about the defense's strategy at that stage of the proceedings.<sup>214</sup> The State's only possible contribution to the hearing would be to urge the court not to abuse state funds; however, trial judges routinely consider the state's fiscal interests in their decisions.<sup>215</sup> Thus, in the context of hearings for expert funding, the defendant's Fifth Amendment interest in remaining silent outweighs the State's interest in being present at the hearing. Consequently, an open hearing for expert funding compels a defendant to disclose self-incriminating testimony and violates the defendant's Fifth Amendment privilege against self-incrimination.

#### D. Sixth Amendment

##### 1. Ineffective Assistance of Counsel

An open hearing for expert funding also burdens a defendant's Sixth Amendment right to effective assistance of counsel and "to be confronted with the witnesses against him."<sup>216</sup> A defendant's right to effective assistance of counsel is not only violated when the attorney is ineffective but also when the government "interferes in certain ways with the ability of counsel to make

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211. *Brooks v. Tennessee*, 406 U.S. 605, 612 (1972).

212. *Id.* at 610–12; *see also* *Jenkins v. Anderson*, 447 U.S. 231, 236–38 (1980) (balancing the defendant's Fifth Amendment interests against the value of the existing procedures to assess whether the State could use the defendant's prearrest silence to impeach him).

213. *Hoffman*, 341 U.S. at 486; *see* *Mosteller*, *supra* note 187, at 1588 (proposing that pretrial disclosures by defendants may violate their Fifth Amendment privilege against self-incrimination because they allow the prosecution to focus their investigation on the defendant's strategies).

214. *See* Paul C. Giannelli, *Ake v. Oklahoma: The Right to Expert Assistance in a Post-Daubert, Post-DNA World*, 89 CORNELL L. REV. 1305, 1403–04 (2004) (arguing that a hearing for expert funding is not an adversarial hearing and that the State has little to contribute at such a hearing).

215. *See* *Moody*, 684 So. 2d at 121 (noting that the trial court can protect state coffers sufficiently in the prosecution's absence); Giannelli, *supra* note 214, at 1403–04 (arguing that the prosecution's duty is not to protect state coffers).

216. *See* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . and to have the Assistance of Counsel for his defence.").

independent decisions about how to conduct the defense.”<sup>217</sup> For example, the Court in *United States v. Cronin*<sup>218</sup> examined whether the trial court violated the defendant’s right to effective assistance of counsel when it appointed an inexperienced real estate attorney to defend a complex mail fraud case and only gave the attorney twenty-five days to prepare for trial.<sup>219</sup> The issue was not the attorney’s own poor performance but whether the government placed the attorney in such a situation that “the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial.”<sup>220</sup> The Court’s focus was whether the trial court’s actions caused a breakdown in the adversarial process.<sup>221</sup>

The statute in *Brooks*, which forced the defendant to testify before any other defense witness or not at all, may have qualified as a situation in which the trial court’s actions led to a complete breakdown in the adversarial process.<sup>222</sup> Although *Brooks* predated *Cronin* and did not specifically use the Sixth Amendment to strike down the statute, the Court’s due process discussion was based on the statute’s interference with counsel’s decisions.<sup>223</sup> Similarly, an open hearing for expert funding forces an attorney to choose between revealing the defense strategy or sacrificing the client’s constitutional right to expert or investigative assistance.<sup>224</sup> Additionally, each time the defense hires an expert who uncovers evidence that is adverse to the defendant’s case, the failure to notify the prosecution that it intends to introduce the expert at trial will alert the prosecution that the expert may have uncovered evidence favorable to its own case.<sup>225</sup> Thus, open hearings force the defense to be more conservative in

217. *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

218. 466 U.S. 648 (1984).

219. *United States v. Cronin*, 466 U.S. 648, 663–66 (1984); *see also* *Avery v. Alabama*, 308 U.S. 444, 447–53 (1940) (rejecting the defendant’s claim that appointing counsel three days prior to a capital trial was not *per se* ineffective assistance of counsel).

220. *Cronin*, 466 U.S. at 659–60. Note that *Cronin*’s standard only determines whether government interference in the defense counsel’s performance resulted in *per se* ineffectiveness such that the court need not inquire into the attorney’s performance. *Id.* at 659 n.26. Otherwise, the court will look to counsel’s specific performance to determine whether, under *Strickland*, the defendant received ineffective assistance of counsel. *Id.*

221. *Id.* at 659.

222. *Brooks*, 406 U.S. at 612–13.

223. *See id.* (“By requiring the accused and his lawyer to make that choice without an opportunity to evaluate the actual worth of their evidence, the statute restricts the defense—particularly counsel—in the planning of its case.”).

224. *See United States v. Abreu*, 202 F.3d 386, 388 (1st Cir. 2000) (“Because the government was present [at a hearing to provide the defendant funding for an evaluation by a licensed psychologist], defense counsel declined to place on the record certain confidential matters that formed part of the basis for the application.”).

225. *See supra* notes 41–62 and accompanying text (elaborating on the strategic advantages to

investigation and strategy and may cause defense attorneys to pursue a particular line of defense only when they are confident that it will prove favorable to their client.<sup>226</sup> Just as the statute in *Brooks* forced attorneys to decide whether to present the testimony “without an opportunity to evaluate the actual worth of their evidence,” an open hearing for expert funding forces defense attorneys to decide whether or not to introduce expert testimony before they can assess its worth.<sup>227</sup>

Open hearings for mitigation expert funds may force defense attorneys to forgo a particular line of mitigation investigation because they do not want to alert the prosecution to the existence of evidence that may ultimately prove unfavorable.<sup>228</sup> The United States Supreme Court’s opinions in *Williams v. Taylor*<sup>229</sup> and *Wiggins v. Smith*<sup>230</sup> establish that counsel has an “ ‘obligation to conduct a thorough investigation of the defendant’s background.’ ”<sup>231</sup> In order for counsel’s decision to forgo a particular line of mitigation to be deemed reasonable under *Strickland*’s performance prong, counsel must first have conducted a thorough mitigation investigation.<sup>232</sup> Open hearings for mitigation expert funds may force defendants to sacrifice certain mitigation strategies without investigating their viability and thereby prevent attorneys from thoroughly investigating their clients’ backgrounds. Given that *Wiggins* and *Williams* require a reasonable mitigation investigation in order for capital counsel’s performance to be effective, a practice that routinely dissuades counsel from investigating their clients’ backgrounds may constitute a state-imposed impediment to effective assistance of the sort that would be presumed prejudicial under *Cronic*.<sup>233</sup>

Further, an open hearing for expert funding intrudes into the attorney-client relationship. The Court in *Weatherford v. Bursey*<sup>234</sup> rejected the plaintiff’s claim

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the prosecution of open hearings for expert funding).

226. *Id.*

227. *Brooks*, 406 U.S. at 612; see Giannelli, *supra* note 214, at 1409 (urging that attorneys must be unfettered in deciding whether to obtain an expert to assist the defense).

228. See *supra* notes 60–62 and accompanying text (explaining that open hearings for investigative funds may result in more conservative defense strategy).

229. 529 U.S. 362 (2000).

230. 539 U.S. 510 (2003).

231. *Wiggins v. Smith*, 539 U.S. 510, 522 (2003) (quoting *Williams v. Taylor*, 529 U.S. 362, 396 (2000)).

232. *Wiggins*, 539 U.S. at 522–23; see *Strickland*, 466 U.S. at 687 (holding that an attorney’s performance violates a defendant’s right to effective assistance of counsel when the performance was deficient and the deficient performance prejudiced the defendant).

233. See *Cronic*, 466 U.S. at 659–60 (concluding that prejudice is presumed if a government practice burdens counsel’s performance to the extent that it causes a breakdown in the adversarial process).

234. 429 U.S. 545 (1977).

that a government informer's presence during private conversations with his criminal defense attorney violated his right to effective assistance of counsel because in that instance the informer had not conveyed any of the confidential information to the prosecution.<sup>235</sup> The Court, however, implied that intentional state intrusion into attorney-client communications may violate the defendant's right to effective assistance of counsel in some cases.<sup>236</sup> The Court was concerned that the fear of government intrusion would affect counsel's ability to communicate effectively with the client.<sup>237</sup> The prosecution's presence at a hearing for expert funding, while not an illicit intrusion, still allows the prosecution to discover preliminary defense strategies that are the product of attorney-client communications and to which the prosecution could not otherwise gain access.<sup>238</sup> The defense is prejudiced by the disclosures in the way that the defendant in *Bursey* was not, namely that the prosecution receives a wealth of attorney-client information directly for use at trial.<sup>239</sup> Further, an open hearing may chill attorney-client communications because the decision not to retain an expert may inhibit the defense from obtaining certain information about the defendant that only an expert would be able to solicit.<sup>240</sup>

Although the *Cronic* standard for ineffective assistance of counsel is difficult to meet, an open hearing for expert funding may qualify in light of the various ways in which it prevents an attorney from performing effectively.<sup>241</sup> Further, various state courts have noted that an open hearing for expert funding implicates a defendant's right to effective assistance of counsel.<sup>242</sup> The

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235. *Weatherford v. Bursey*, 429 U.S. 545, 552–53 (1977); *see also Georgia v. McCollum*, 505 U.S. 42, 58 (1992) (determining that there is no per se ineffective assistance of counsel when the court requires attorneys to give a race-neutral reason for their peremptory strikes).

236. *Bursey*, 429 U.S. at 552, 556.

237. *Id.* at 554 n.4; *see Note, Government Intrusions into the Defense Camp: Undermining the Right to Counsel*, 97 HARV. L. REV. 1143, 1143 (1984) [hereinafter *Government Intrusions*] (arguing that an essential element of the right to counsel is the right to private communications with the attorney).

238. *See* VA.SUP. CT. R. 3A:11(c) (requiring defendants to disclose materials to the prosecution that they intend to introduce or proffer at trial); *Bursey*, 429 U.S. at 554–55 (noting that the attorney-client privilege only extends to disclosures from communications that would not otherwise have been brought forth at trial); *Government Intrusions*, *supra* note 237, at 1144–45 (arguing that the Government must prove its case without the aid of information that the defendant provides against his will).

239. *See Bursey*, 425 U.S. at 555 (noting that the information obtained by the informer was not used by the prosecution at trial).

240. *Government Intrusions*, *supra* note 237, at 1145 (noting that the chill in the attorney-client relationship that concerned the Court in *Bursey* occurs when the attorney does not receive as much information from the client as he would without the challenged discovery procedure).

241. *See Cronic*, 466 U.S. at 659 (concluding that per se ineffective assistance of counsel results when the situation is such that no lawyer could provide effective assistance of counsel).

242. *See Moody*, 684 So. 2d at 120 (noting that an open hearing for expert funding would result in the “[d]isclosure of the defense’s trial strategy [and] would impair the indigent defendant’s right to effective assistance of counsel”); *Stevens*, 770 N.E.2d at 759 (citing interference with counsel’s

combination of the outside government influence on counsel's decisions, forcing counsel to make choices without the opportunity to fully assess the client's needs, inhibiting counsel's ability to conduct a mitigation investigation, and the chilling effect on the attorney-client relationship all seriously burden counsel's effectiveness.<sup>243</sup>

## 2. Right to Compulsory Process

A defendant's Sixth Amendment right to compulsory process requires " 'that criminal defendants have the right to the government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt.' "<sup>244</sup> The defendant in *Taylor v. Illinois*<sup>245</sup> asserted that a statute that permitted courts to prohibit the defense from calling witnesses if it did not disclose them prior to trial violated his right to compulsory process.<sup>246</sup> The Court in *Taylor* balanced the defendant's interest in introducing witnesses with the Government's interests in preventing eleventh-hour defenses and excluding unreliable evidence from trial.<sup>247</sup> The Court determined that "[t]he State's interest in the orderly conduct

preparation as a reason for permitting defendants to receive an ex parte hearing upon a showing of good cause); *Ballard*, 428 S.E.2d at 180 ("A hearing open to the State necessarily impinges upon the defendant's right to the assistance of counsel and his privilege against self-incrimination."); *Williams*, 958 S.E.2d at 193 (noting that pretrial discovery resulting from an open hearing implicates assistance of counsel concerns by interfering with the defense attorney's work product).

243. See *Cronic*, 466 U.S. at 658–62 (noting that a Sixth Amendment violation may occur when government action results in a complete breakdown of the adversarial process); *Bursey*, 425 U.S. at 556–57 (determining that the intentional invasion by the state into the attorney-client relationship may violate a defendant's right to effective assistance of counsel); *Brooks*, 406 U.S. at 612–13 (noting concerns with the Tennessee statute's effect on counsel's ability to assist the defendant).

244. *Taylor v. Illinois*, 484 U.S. 400, 408 (1988) (quoting *Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987)); see also *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) ("Few rights are more fundamental than that of an accused to present witnesses in his own defense.").

245. 484 U.S. 400 (1988).

246. *Taylor*, 484 U.S. at 410–16.

247. *Id.* The United States Court of Appeals for the Ninth Circuit in *Fendler v. Goldsmith* analyzed a compulsory process argument by assessing "the effectiveness of less severe sanctions, the impact of witness preclusion on the evidence at trial and the outcome of the case, the extent to which the prosecution will be surprised or prejudiced by the witness's testimony, and whether the violation of discovery rules was willful or in bad faith." *Fendler v. Goldsmith*, 728 F.2d 1181, 1187 (9th Cir. 1983); see also John Stocker, *Sixth Amendment—Preclusion of Defense Witnesses and the Sixth Amendment's Compulsory Process Clause Right to Present a Defense*, 79 J. CRIM. L. & CRIMINOLOGY 835, 861–64 (1988) (arguing that *Fendler* provides a better analytical framework than *Taylor* for assessing compulsory process claims against rules precluding the introduction of witnesses for failure to disclose them prior to trial).



of a criminal trial” justifies the imposition of rules that exclude certain types of evidence and thus rejected the defendant’s contention.<sup>248</sup>

In applying *Taylor’s* test to open hearings for expert funding, courts should balance the defendant’s interest in obtaining and presenting expert witnesses at trial with the State’s interest in the orderly conduct of criminal trials.<sup>249</sup> An open hearing for expert funding may deter a defendant from retaining an expert witness or investigator and thereby prevent the defense from developing all the relevant facts of the case.<sup>250</sup> Mitigation specialists are the only defense team members with the training necessary to elicit all relevant mitigating evidence from a defendant’s background.<sup>251</sup> The same is true for investigators, whose training specific to investigating crimes makes them essential members of the defense team.<sup>252</sup> Further, a defendant’s interest in introducing expert witnesses is particularly high because expert witnesses often testify to crucial facts and theories, testimony that a lay witness would have difficulty duplicating.<sup>253</sup>

Providing defendants with the right to an ex parte hearing would not foster eleventh-hour defenses or be inefficient.<sup>254</sup> The hearing could be relatively informal in a judge’s chambers, costing the state no more, and most likely less, than a full-blown adversarial hearing in court.<sup>255</sup> Further, an ex parte hearing only temporarily prevents the prosecution from receiving appropriate discovery information because Virginia’s discovery rules compel the defense to disclose its defenses and expert witness information prior to trial.<sup>256</sup> Accordingly, an open hearing for expert funding violates the defendant’s Sixth Amendment right to

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248. *Taylor*, 484 U.S. at 411.

249. *See id.* at 410–11 (balancing state and private interests to assess whether a particular government practice infringes on the defendant’s right to compulsory process).

250. *See Lee*, *supra* note 7, at 184–85 (explaining that an open hearing burdens a defendant’s right to present a defense).

251. *See Daniel L. Payne, Building the Case for Life: A Mitigation Specialist as a Necessity and a Matter of Right*, 16 CAP. DEF. J. 43, 48–52 (2003) (explaining that a mitigation expert performs services that no other member of the defense team can duplicate).

252. *See ABA GUIDELINES*, *supra* note 77, at § 4.1 cmt. (explaining that an investigator’s specialized training makes him or her an indispensable member of the defense team).

253. *See Jeffrey Robinette, Note, Montana v. Egelhoff: Abandoning a Defendant’s Fundamental Right to Present a Defense*, 46 CATH. U. L. REV. 1349, 1367 (1997) (noting that a defendant’s interest in a witness’s presence increases with the importance of the witness’s testimony).

254. *See Taylor*, 484 U.S. at 411–12 (providing that the State has a strong interest in promoting an efficient trial and preventing the introduction of eleventh-hour defenses).

255. *See supra* notes 164–67 and accompanying text (arguing that ex parte hearings will not waste state funds); Giannelli, *supra* note 214, at 1403–04 (rejecting the proposition that any economic concerns would result from an ex parte hearing for expert funding).

256. *See VA. SUP. CT. R. 3A:11(c)* (providing that the Commonwealth may obtain expert reports that the defense intends to introduce at trial if the defense asks the Commonwealth to provide their scientific reports or other evidence material to the defense).

compulsory process because the defendant's interest in presenting a defense outweighs the State's interest in being present at the hearings.

#### VI. Summary and Conclusion

Through either judicial decision or statute, Virginia should require courts to permit defendants to apply ex parte for expert funds. Ideally, Virginia would create a central public defender system that has discretion over the distribution of expert funds for both public defenders and court-appointed attorneys. This system would protect the disclosure of the defense's strategy from the prosecution and relieve the trial judge of entanglement in the defense's strategy. Absent such a system, the Virginia legislature should adopt a statute similar to South Carolina's and permit defendants to apply ex parte for all experts and investigators.<sup>257</sup> A possible addition would permit the defendant to request that a judge other than the trial judge hear the defendant's request for funds.

The case law in Virginia that holds that defendants are not entitled to an ex parte hearing is based on *O'Dell*.<sup>258</sup> The court in *O'Dell* concluded that defendants have no right to apply ex parte for expert assistance because defendants have no right to a state-paid non-mental health expert at trial.<sup>259</sup> However *Husske* rejected *O'Dell*'s reasoning when it held that defendants do have the right to a non-mental health expert upon a showing of need.<sup>260</sup> Thus, the court's subsequent holdings in *Ramdass* and *Weeks* are based on an invalid premise, and consequently, the question of whether Virginia courts should permit ex parte applications for expert funds may still be viewed as an open one.

Further, open hearings for expert funds pose numerous constitutional problems. Courts may violate a defendant's privilege against self-incrimination when they force the defendant to choose between disclosing information that could "furnish a link in the chain of evidence needed to prosecute the claimant" and retaining an expert necessary for the defense.<sup>261</sup> An open hearing implicates a defendant's Sixth Amendment right to assistance of counsel because it forces the defense to choose between revealing strategy to the prosecution and retaining an expert. This choice obstructs an attorney's ability to make independent decisions about the defense and causes a breakdown in the adversarial process. Also, the choice between revealing defense strategy and

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257. S.C. CODE ANN. § 16-3-26 (Law. Co-op. 2003).

258. See *Ramdass*, 437 S.E.2d at 571 (citing *O'Dell* and concluding that defendants have no right to apply ex parte for expert funds).

259. *O'Dell*, 364 S.E.2d at 499.

260. See *Husske*, 476 S.E.2d at 925 (holding that due process requires the court to appoint an expert for an indigent defendant an expert upon a showing of need and prejudice).

261. *Hoffman*, 341 U.S. at 486.

retaining an expert witness unduly burdens the defendant's right to obtain witnesses under the Sixth Amendment.

Evaluation of contemporary practice as well as of the private and state interests at stake reveal that open hearings for expert assistance violate defendants' due process rights. Finally, the burden an open hearing places on indigent defendants, when monied defendants face no such burden, raises equal protection concerns. Although there is no clear consensus among state courts as to which constitutional argument is the most compelling, almost every court has discussed the right in terms of due process. Further, the balancing test the United States Supreme Court uses for compulsory process claims is more flexible than the tests for effective assistance of counsel or self-incrimination, and therefore, may be more persuasive to state courts.

Finally, the clear trend among states is to permit *ex parte* application for expert funds. The majority of death penalty jurisdictions provide defendants with at least a partial right to apply *ex parte* for expert assistance through case law or statute. Although some jurisdictions have case law specifically rejecting the right to an *ex parte* hearing, many judges in those states nevertheless routinely permit *ex parte* application as a matter of discretion. Moreover, many state public defender systems are structured such that defendants do not apply to courts for expert funding, and thus the issue does not arise in those states.

In its report on Virginia's indigent defense system, the American Bar Association was struck by "the complete inadequacy of access by public defenders and court-appointed counsel to court-approved experts and a similar inadequacy of access of court appointed counsel to court-approved investigators."<sup>262</sup> By routinely conducting open hearings for expert funds, courts add another layer to defendants' difficulties in retaining expert assistance. Although this procedural flaw should be cured by the legislature, the courts also have the power to remedy it. Attorneys must urge courts to change their procedures concerning open hearings. Without such a provision, indigent defendants will continue to be robbed of the ability "to participate meaningfully in a judicial proceeding in which [their] liberty is at stake."<sup>263</sup>

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262. VIRGINIA INDIGENT DEFENSE REPORT, *supra* note 3, at 59.

263. *Ake*, 470 U.S. at 76.