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# Subsection (e) of the Criminal Justice Act of 1964

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# NOTE

## SUBSECTION (e) OF THE CRIMINAL JUSTICE ACT OF 1964

### I. INTRODUCTION

The Criminal Justice Act of 1964[1] was enacted "to promote the cause of criminal justice by providing for the representation of defendants who are financially unable to obtain an adequate defense in criminal cases in the courts of the United States."[2] The Act requires each United States district court to place in operation for the benefit of certain indigent defendants a plan[3] designed to provide for the appointment,[4] and payment of counsel,[5] and for certain auxiliary services.[6] The purpose of this note is to examine factors that will influence courts in establishing a criteria for applying subsection (e) which provides for services other than counsel.

In 1963 the President of the United States stated in a letter to the Speaker of the House of Representatives:

> In the typical criminal case the resources of government are pitted against those of the individual. To guarantee a fair trial under such circumstances requires that each accused person have ample opportunity to gather evidence, and prepare and present his cause. Whenever the lack of money prevents a defendant from securing an experienced lawyer, trained investigator or technical expert, an unjust conviction may follow.[7]

An accompanying letter from the Attorney General stated:

> [T]he bill establishes an adequate defense standard under which representation in a criminal case is recognized as involving more than a lawyer alone. It requires making available to counsel those auxiliary investigative, expert, and other services frequently essential to ascertaining the facts and making the judgments upon which to prepare and present the defendant's case.[8]

Subsection (e) is a portion of the finished product of the proposed legislation to which these letters referred.

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1 18 U.S.C. § 3006A (1964).
2 1964 U.S. CODE CONG. & AD. NEWS 631.
3 18 U.S.C. § 3006A(a).
4 18 U.S.C. § 3006A(b).
5 18 U.S.C. § 3006A(d).
6 "Counsel for a defendant who is financially unable to obtain *investigative, expert or other services necessary to an adequate defense* in his case may request them in an ex parte application." 18 U.S.C. § 3006A(e). (Emphasis added.)
7 1964 U.S. CODE CONG. & AD. NEWS 2993.
8 *Id.* at 2995.

### A. *Eligibility*

All but two classes of criminal indigents appear to be eligible for benefits under the Act.[9] First, the Act provides for representation by counsel and other services for those defendants charged with felonies or misdemeanors, *other than petty offenses* as defined in 18 U.S.C. § 1.[10] This, by definition, would exclude defendants charged with petty offenses from the benefits of the Act. Secondly, subsection (e) provides that *counsel* may request necessary services.[11] This use of the word *counsel* raises the question of whether the indigent defendant who has waived his right to counsel and is financially unable to obtain the needed services may move the court in propia persona for auxiliary services or whether such a motion is limited to counsel. This problem will be discussed below.

### B. *Procedure*

The procedure for obtaining the auxiliary services is as follows: counsel for the defendant requests the services in an *ex parte* application.[12] The court must find that the services requested are necessary and that the defendant is financially unable to obtain them. The court then authorizes counsel to obtain such services on behalf of the defendant. The organization or person rendering the services must file a claim for compensation, supported by an affidavit specifying time expended, services rendered, expenses incurred, and compensation received in the same case or for the same services from any other source. The court then determines a reasonable compensation for the services and directs payment.[13]

However, the court may, "in the interests of justice, and upon a finding that timely procurement of necessary services could not await prior authorization, ratify such services after they have been

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[9] For an analysis of financial inability see Carter and Hauser, *The Criminal Justice Act of 1964*, 37 F.R.D. 67 (1964).

[10] A petty offense is any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500 or both. 18 U.S.C. § 1(3).

[11] "Counsel for a defendant who is financially unable . . . ." 18 U.S.C. § 3006A(e).

[12] S. 1057, 88th Cong., 1st Sess. § 3006A(d) (1963) did not originally require an *ex parte* application. However, the bill was amended to include this provision "to protect the accused from premature disclosure of his case" in open hearing. 109 CONG. REC. 14219, 14233 (1963). In contrast, FED. R. CRIM. P. 17(b), providing for the subpoena of witnesses at government expense for the indigent defendant, does not provide for secrecy with respect to defendant's motion. Thomas v. United States, 168 F.2d 707 (5th Cir. 1948). There is a proposed amendment to Rule 17(b) to require an *ex parte* application in such situations. *Second Preliminary Draft of Proposed Amendments to Rules of Criminal Procedure for the United States District Courts*, 34 F.R.D. 411, 426 (1964).

[13] 18 U.S.C. § 3006A(e).

obtained."[14] The plan adopted by the Southern District of California under the Criminal Justice Act has such a provision.[15]

In either event, the Act provides that the compensation to be paid for such service shall not exceed 300 dollars exclusive of reimbursement for expenses reasonably incurred.[16] It is important to note that this 300 dollar limitation applies to each individual service approved, and is not a maximum limitation on all services rendered to an indigent defendant. Thus one of the considerations necessarily involved in the granting of services will be the cost, especially since the defendant will feel that the more services he receives the better his chances of acquittal will be even though they would merely be cumulative in effect.

## II. THE CONSTITUTIONAL QUESTION

The report by the committee appointed to implement the Criminal Justice Act[17] recommended that the "allowances of petitions for investigative services be strictly limited, to the extent possible, to those charges necessary in the strictest sense of the word."[18] The report by the *ad hoc* committee appointed to develop rules, procedures and guidelines for an assigned counsel system[19] indicated that one of the problems with the Act is the lack of a standard or criterion to guide the courts, other than that of necessity for the services. The report suggests:

> To guarantee against possible abuses in the use of investigative and expert services, other than counsel services, a system for evaluating the need for these services, determining that they have been performed competently, and insuring the reasonableness of payments requested, seems desirable and necessary.[20]

To establish a standard for evaluating the need for such ancillary

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14 *Ibid.*

15 "In every instance the attorney should use all reasonable efforts to file an application and secure prior authorization for investigative, expert or other services alleged to be necessary to an adequate defense. The Court will look with disfavor on claims for such services rendered without a prior application and the burden will be upon the counsel for the defendant to show, in the interests of justice, that 'timely procurement of necessary services could not await prior authorization.' " PLAN FOR REPRESENTATION OF DEFENDANTS IN THE SOUTHERN DISTRICT OF CALIFORNIA UNDER THE CRIMINAL JUSTICE ACT OF 1964. § VII(3) (1965); This provision follows the suggestion set down by the Committee to implement the Act, *Report on Criminal Justice Act*, 36 F.R.D. 277, 290 (1965).

16 18 U.S.C. § 3006A(e).

17 *Report on Criminal Justice Act, supra* note 15, at 285.

18 *Id.* at 290.

19 *Id.* at 376.

20 *Id.* at 383.

services, one must first determine if there is a constitutional right to services other than the assistance of counsel. Such a right may be within the due process clause of the fifth amendment[21] as applied to the federal courts, but as yet no case has so held. However, certain decisions under the fourteenth amendment[22] indicate that a defendant may have a constitutional right to the services provided for by subsection (e). In *Griffin v. Illinois*,[23] the Supreme Court stated that the due process and equal protection clauses of the fourteenth amendment were violated by the state's denial of appellate review solely on account of a defendant's inability to pay for a transcript.

The Court stated: "[O]ur own constitutional guaranties of due process and equal protection both called for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons"[24] and, "there can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[25]

The extent to which a state must afford the indigent defendant the same opportunities afforded a non-indigent under the *Griffin* case has not yet been determined. *Douglas v. Green*[26] found a violation of the fourteenth amendment when the highest court of a state does not afford an indigent an adequate remedy for the prosecution of an appeal without payment of docket fees. *Lane v. Brown*[27] stated that the State of Indiana had deprived the petitioner of a right secured by the fourteenth amendment by refusing him appellate review of the denial of *coram nobis* solely because of his poverty. Other cases have reiterated an indigent defendant's right at least to *access* to appellate review.[28]

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21 "No person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

22 "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV § 1.

23 351 U.S. 12 (1956).

24 *Id.* at 17.

25 *Id.* at 19.

26 363 U.S. 192 (1960).

27 372 U.S. 477 (1963).

28 Draper v. Washington, 372 U.S. 487 (1963); Smith v. Bennett, 365 U.S. 708 (1961); Burns v. Ohio, 360 U.S. 252 (1959); Eskridge v. Washington State Bd. of Prison T. & P., 357 U.S. 214 (1958). That the circumstances of the particular case will sometimes require an affirmance of the conviction is shown by Norvell v. Illinois, 373 U.S. 420 (1963), where the court held that without violating due process or equal protection requirements a State may deny post-conviction relief where a transcript was unavailable due to the death of the court reporter, where the indigent defendant had the services of a lawyer at the trial but did not appeal at that time.

In 1963 the Court in *Douglas v. California*[29] stated that the refusal to appoint counsel for an indigent under a California rule of criminal procedure authorizing denial of motions for appointment of counsel on appeal where, after an independent investigation of the record, the appellate court determined that appointment of counsel would be helpful to neither the defendant nor the court, violated the fourteenth amendment: "The indigent, where the record is unclear or the errors hidden, has only the right to a meaningless ritual, while the rich man has a meaningful appeal."[30] The *Douglas* case therefore concerned itself not only with access to the appellate court, but also with the *quality* of review afforded there.

The *Griffin-Douglas* cases do not make it clear whether equal protection, or due process, or both, are the basis for the decisions,[31] leading one writer to suggest that such an ambiguity seems too consistent to be fortuitous.[32] The basis of the decisions becomes important when analogizing these cases to the federal system, for there is no equal protection clause which applies to the federal government.[33]

*Griffin* and *Douglas* can be analyzed on an equal protection basis as follows: The equal protection clause prohibits "discriminating and partial legislation . . . in favor of particular persons as against others in like condition."[34] Even though the law itself is impartial in appearance, if it is applied so as practically to make unjust and illegal discriminations between persons in similar circumstances it is void.[35] A legislative scheme which allows an appeal from a trial court's conviction provided the defendant can pay for a transcript is an invidious discrimination between the indigent and non-indigent and a denial of equal protection of the law. (*Griffin.*) A legislative scheme which allows an appeal as a matter of right but which

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29 372 U.S. 353 (1963).

30 *Id.* at 357-58.

31 Griffin v. Illinois, 351 U.S. at 18 states: "Consequently at all stages of the proceedings the Due Process and Equal Protection Clauses protect persons like petitioners from invidious discriminations." Douglas v. California, 372 U.S. at 356-57 states: "But it is appropriate to observe that a State can, consistently with the Fourteenth Amendment, provide for differences so long as the result does not amount to a denial of due process or an 'invidious discrimination.' . . . But where the merits of *the one and only appeal* an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor."

32 *The Supreme Court, 1962 Term*, 77 HARV. L. REV. 62, 105 (1963).

33 Hirabyashi v. United States, 320 U.S. 81, 100 (1943) states: "The Fifth Amendment contains no equal protection clause and it restrains only such discriminatory legislation by Congress as amounts to a denial of due process."

34 Minneapolis Ry. v. Beckwith, 129 U.S. 26, 28-29 (1889).

35 Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886).

permits the appellate judge to deny the assistance of counsel to indigents which may deny the indigent a meaningful appeal is an invidious discrimination violating the equal protection clause and therefore void. (*Douglas.*)

A due process analysis might proceed as follows: "No State shall . . . deprive any person of life, liberty or property, without due process of law."[36] "The words due process of law 'were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.' "[37] The question is, "Is it a fundamental principle of liberty and justice which inheres in the very idea of free government and is the inalienable right of a citizen of such a government?"[38] A legislative scheme which requires that a defendant have sufficient funds to afford a transcript as a condition of appeal violates those fundamental principles of liberty and justice. (*Griffin.*) Likewise, a legislative scheme which permits the appellate judge to deny the assistance of counsel to an indigent for his appeal violates those same standards. (*Douglas.*)[39]

On either basis these cases are fraught with dicta showing concern for the indigent's rights at all stages of the proceeding,[40] and the reasoning of the cases would apply to any situation where the refusal to grant investigative or expert services resulted in such an "invidious discrimination" that the defendant was deprived of a meaningful defense.

## III. Right to Services as Heretofore Presented in State Courts

In *United States ex rel. Smith v. Baldi,*[41] it was held that the defendant was not denied due process by the Pennsylvania trial court's

36 U.S. Const. amend. XIV § 1.

37 Twining v. New Jersey, 211 U.S. 78, 101 (1908), quoting Bank of Columbia v. Okely, 17 U.S. (4 Wheat.) 122, 126 (1819).

38 Twining v. New Jersey, *supra* note 37, at 106.

39 One difficulty in finding *Douglas* or *Griffin* to be based on due process, despite the reference to the term, is that the Court did not expressly overrule McKane v. Dourston, 153 U.S. 684 (1894), which held that it is not a violation of due process for a state to deny review by an appellate court of a final judgment in a criminal case. Therefore it would seem that any due process argument must rest on the invidious discrimination language of *Griffin.* See Bolling v. Sharpe, 347 U.S. 497 (1954).

40 *E.g.*, "There can be no equal justice where the kind of trial a man gets depends upon the amount of money he has." Griffin v. Illinois, 351 U.S. at 19; "[T]he Fourteenth Amendment weighs the interests of rich and poor criminals in equal scale, and its hand extends as far to each." Smith v. Bennett, 365 U.S. 708, 714 (1961).

41 192 F.2d 540 (3d Cir.), *aff'd*, 344 U.S. 561 (1951).

refusal to appoint a psychiatrist at state expense for the exclusive assistance of the defendant where other psychiatrists were utilized at the trial.

*Bush v. Texas*[42] involved a claim of a constitutional right to services in addition to the assistance of counsel, under the due process clause of the fourteenth amendment. Petitioner claimed a denial of due process based on (1) the trial court's refusal, prior to trial, either to send him to a state mental institution for observation and diagnosis before requiring him to stand trial or to appoint and pay for a competent psychiatrist for that purpose; and (2) the alleged denial by the trial court of adequate time for proper examination and diagnosis by a psychologist who appeared at the trial upon request of petitioner's counsel. The Supreme Court, in declining to anticipate a question of constitutional law in advance of the necessity of deciding it, remanded the case to the Texas Court of Criminal Appeals for consideration in light of subsequent developments. The Court's action indicated a reluctance to apply the due process clause alone to secure equal rights of indigent defendants, possibly because the due process clause has been considered a rather unwieldy weapon:

> [The due process clause] tends to secure equality of law in the sense that it makes a required minimum of protection for everyone's right of life, liberty and property, which the Congress or the legislature may not withhold.[43]

> The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law,' and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.[44]

Also, even when held applicable to a particular situation, due process has been stated to be difficult to apply to subsequent situations: "[H]ypothetical situations can be conjured up, shading imperceptibly from the circumstances of this case and by gradations producing practical differences despite seemingly logical extensions."[45] Furthermore, one of the biggest problems involved in applying due process is that it affects every jurisdiction in the United States. Where every state has its own system of criminal procedure, a decision that a particular mode of handling a criminal trial violates due process could

[42] 372 U.S. 586 (1964).
[43] Truax v. Corrigan, 257 U.S. 312, 332 (1921).
[44] Bolling v. Sharpe, 347 U.S. 497, 499 (1954).
[45] Rochin v. California, 342 U.S. 165, 174 (1952).

have disastrous effects on the administration of criminal justice throughout the United States. Therefore, it seems likely that if and when the *Griffin-Douglas* rationale is applied to expert and investigatory services the Court, if it can, will rest its decision on equal protection rather than due process.

## IV. Equal Protection in the Federal System

The Court has dealt with situations where decisions based on the equal protection clause of the fourteenth amendment were questioned in a federal jurisdiction. The Court on certiorari in *Shelley v. Kraemer*[46] refused to enforce a restrictive covenant in a deed which prohibited sale of real property to Negroes, based on the equal protection clause. *Hurd v. Hodge*,[47] considered at the same time, involved a similar problem in Washington D.C., where the equal protection clause does not apply. Here the Court found an 1866 civil rights law applicable but stated:

> It is not consistent with the public policy of the United States to permit federal courts in the Nation's capital to exercise general equitable powers to compel action denied the state courts where such state action has been held to be violative of the guaranty of the equal protection of the laws. We cannot presume that the public policy of the United States manifests a lesser concern for the protection of such basic rights against discriminatory action of federal courts than against such action taken by the courts of the States.[48]

The Court could use the Criminal Justice Act itself to enforce the same standard upon the federal courts as the equal protection clause enforces upon the states, or it could resort to the public policy argument used in *Hurd*. Other cases have shown a trend to construe federal statutes to bring about more equal treatment of criminal defendants. In *Coppedge v. United States*[49] the Court held that a federal statute[50] authorizing any court of the United States to allow indigent persons to prosecute, defend or appeal suits without prepayment of costs means that the court must grant indigents a cost-free appeal unless the appellate court would also have dismissed a non-indigent's appeal. The court of appeals in *Leach v. United States*[51] found an abuse of the trial court's discretion in declining to

[46] 334 U.S. 1 (1948).
[47] 334 U.S. 24 (1948).
[48] *Id.* at 35-36.
[49] 369 U.S. 438 (1962).
[50] 28 U.S.C. § 1915 (1948).
[51] 334 F.2d 945 (D.C. Cir. 1964).

refer defendant for a psychiatric examination as provided by the District of Columbia Code where the defendant was an indigent unable to present psychiatric information directed to the separate issue of sentencing.

Rule 17(b) of the Federal Rules of Criminal Procedure[52] provides that the court may order the issuance of a subpoena upon motion or request of an indigent defendant and that the cost incurred by the service of process and the fees of the witness so subpoenaed shall be paid in the same manner in which similar costs and fees are paid in case of a witness subpoenaed in behalf of the government. The courts of appeal have shown a divergence of opinion regarding the standard to be applied to the granting or denial of these services, as indicated by the following paragraphs.

*Taylor v. United States*[53] involved the denial of defendant's request that the trial court subpoena three psychiatrists, where defendant's sole defense was insanity. The court of appeals held that the defendant's right to subpoena witnesses rested not only on Rule 17(b) but also on the sixth amendment, which provides that in all criminal prosecutions the accused shall enjoy the right to have compulsory process for obtaining witnesses in his favor. It also held that this right is not absolute, but rather that a wide discretion with regard to subpoenaing witnesses at government expense is vested in the district court to prevent abuse and an appellate court will not disturb the exercise of that discretion unless exceptional circumstances compel it. The court found that such exceptional circumstances existed and reversed the decision.[54]

*Greenwell v. United States*[55] suggests another test:

> [I]f the accused avers facts which, if true, would be relevant to any issue in the case, the requests for subpoenas must be granted, unless the averments are inherently incredible on their face, or unless the Government shows, either by introducing evidence or from matters already of record, that the averments are untrue or that the request is otherwise frivolous.[56]

In *Brown v. United States*,[57] the court reversed a conviction on the

[52] 18 U.S.C. Rule 17(b) (1945).
[53] 329 F.2d 384 (3d Cir. 1964).
[54] For a contrary result under the same holding, see Reistroffer v. United States, 258 F.2d 379 (8th Cir. 1958).
[55] 317 F.2d 108 (D.C. Cir. 1963).
[56] *Id.* at 110.
[57] 331 F.2d 822 (D.C. Cir. 1964).

ground that the refusal to issue a subpoena under Rule 17(b) where the averments in the motions were not "inherently incredible on their face," nor was there evidence "that the averments were untrue or that the request is otherwise frivolous,"[58] was reversible error.

## V. CONCLUSION

That the *Greenwell* test of frivolity is not practical to apply to subsection (e) is suggested by the fact that the necessity for services is not determined in an adversary proceeding. The *Greenwell* test requires that the averments be inherently incredible on their face or shown by the government to be frivolous. Where there is no opportunity for the government to make such a showing, as in an *ex parte* proceeding, the court must of necessity make the inquiry. This would indicate that the trial judge must be given the wide discretion advocated in the *Taylor* case.

Though the trial judge may have this broad discretion, the appellate courts will be able to examine whether a refusal to grant services resulted in an "invidious discrimination" rendering the trial a meaningless ritual. Certain considerations would lessen the likelihood of such an occurrence:

1. The court should inquire whether the defendant may obtain the desired information by stipulation, as provided for in the Plan for the Southern District of California.[59]

2. Where investigative services are desired to locate witnesses likely to testify for the prosecution, for the purpose of impeaching or developing inconsistencies in their testimony, much expense can be saved if the United States Attorney is willing to provide a list of witnesses he intends to call.

3. Investigative services directed toward establishing an essential element of the defense, such as a particular witness who can corroborate the defendant's alibi, should be favored over "fishing expeditions" hoping to unearth something favorable to the defendant.

4. Rule 28 of the Federal Rules of Criminal Procedure[60] provides that the court may appoint expert witnesses agreed upon by the parties, and may appoint witnesses of its own selection, both of whom are subject to cross-examination by each party. Requests for

[58] *Id.* at 823.
[59] *Op. cit. supra* note 15, at § VII (7).
[60] 18 U.S.C. Rule 28 (1945).

services of an expert should be viewed in the light that an impartial expert might be appointed under Rule 28 which would avoid pitting the Government's experts against the defendant's experts.

Probably one of the first problems the federal courts will have to face will be where (1) an indigent defendant waives appointment of counsel, (2) and then demands an investigative or expert service which is necessary to an adequate defense, (3) and the trial court refuses on the grounds that subsection (e) contemplates administration of the services only through counsel, since the Act by its terms precludes payment for services unless the defendant is represented by counsel.[61] To apply a due process requirement to the services would impress a duty to provide services in every jurisdiction in the United States. The result would be a rather clear lack of equal protection in the federal courts, there being an unreasonable discrimination between those indigent defendants who are represented by counsel and those who have waived the appointment of counsel. The court would be faced with construing the Act as meaning "Counsel, or if counsel has been waived, defendant, may request . . . ." or that the public policy of the United States requires that no such "invidious discrimination" between indigent defendants shall be made.

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[61] That the specification of counsel is not a mere legislative oversight is indicated by the fact that the forms recommended by the Judicial Council, CJA forms 8 (Application), 9 (Voucher), and 10 (Ratification), 36 F.R.D. 310-12, require that the attorney for the defendant execute the documents; the Plan for the Southern District of California note 15 *supra*, at VII provides that the attorney handle the requests for services.