THE STATE OF TEXAS,	)	**IN CRIMINAL DISTRICT COURT**
	)	**NUMBER 7**
Plaintiff,	)	
	)	**DALLAS COUNTY, TEXAS**
v	)	
	)	
YYYY ANH XXXX,	)	
	)	
Defendant.	)	
	)	

EX PARTE MOTION FOR EXPERT ASSISTANCE

Defendant YYYY XXXX moves this Court for expert approval to retain, at the state's expense: (1) Dr. Michael Gottlieb at a rate of $250 per hour for a period not to exceed six hours to review the Dallas Child Advocacy Center interview and previous testimony of the Complainant in this case and (2) Jeffrey Fletcher, for $1,250 to conduct a psychosexual evaluation of Mr. XXXX. In support of this motion, Mr. XXXX sets for the following facts and argument:

1. Undersigned Counsel was retained in this case by Mr. XXXX's mother, however, Mr. XXXX is indigent. *See* Attachment A. Mr. XXXX works in a nail salon as an independent contractor. *Id*. According to his financial affidavit, he has a *gross* income of $1,500-$2,000 per month[1] and expenses of at least $1,010.

2. In the context of obtaining an appellate record, the Court of Criminal Appeals has made clear that simply because a defendant is represented by counsel retained by a defendant's family does not mean that he cannot qualify as indigent for other purposes. *See Abdnor v. State*, 712 S.W.2d 136, 142 (Tex. Crim. App. 1986) ("'Outside sources *such as relatives* and even employers are not to be considered unless they are legally bound to pay for defendant's appellate expenses.'" (citation

[1]As an independent, contractor Mr. XXXX is responsible for his own FICA payments.

omitted) (emphasis added)).

3. More specifically, the Court of Criminal Appeals has found retained attorneys ineffective when they have failed to seek funding for necessary experts in cases where defendants are indigent but where the attorneys are retained. In *Ex Parte Briggs*, 187 S.W.3d 458, 463 (Tex. Crim. App. 2005), the defendant had paid counsel $10,400 of his $15,000 fee and counsel told the defendant he could not hire experts without additional money. The Court of Criminal Appeals held that Briggs' counsel was ineffective for failing to obtain a medical expert to review medical records despite the fact that it appeared that Briggs could not afford to retain such an expert.

> Here, applicant's claim stems from counsel's decision not to fully investigate Daniel's medical records or consult with experts until he had been paid an additional $2500-$7500 in expert fees. This was not a "strategic" decision, it was an economic one. There is no suggestion that trial counsel declined to fully investigate Daniel's medical records because he made a strategic decision that such an investigation was unnecessary or likely to be fruitless or counterproductive. But counsel has an absolute duty "to conduct a prompt investigation of the circumstances of the case and to explore all avenues likely to lead to facts relevant to the merits of the case." The decision was made because he had not been paid for experts. Counsel is most assuredly not required to pay expert witness fees or the costs of investigation out of his own pocket, but a reasonably competent attorney- regardless of whether he is retained or appointed- must seek to advance his client's best defense in a reasonably competent manner.

Id. at 467 (citations omitted). The Court specifically noted that one option open to Briggs' counsel was to remain as counsel "but request investigatory and expert witness fees from the trial court for a now-indigent client pursuant to *Ake v. Oklahoma*." *Id*. at 468. Indeed, the Court noted that "the trial court undoubtedly would have permitted state-funded appointment of expert assistance under *Ake* had applicant's attorney put on proof of his client's present indigency." *Id*.

4. The Court of Criminal Appeals has, in fact, made clear that a trial court can commit structural error when it fails to provide funds for a necessary expert in the case of an indigent

defendant. For example, in *Rey v. State*, 897 S.W.2d 333 (Tex. Crim. App. 1995), the Court of Criminal Appeals found structural error and reversed a conviction where the trial court refused to provide funds for the defense to retain an expert pathologist.[2] Applying *Briggs*, this same structural error would occur in cases where a defendant was represented by counsel retained by his family.

5. On point is the Court of Criminal Appeals' decision in *Ex Parte Ard*, 2009 WL 618982 (Tex. Crim. App. March 11, 2009). In *Ard*, an indigent defendant was charged with aggravated sexual assault of a child. At trial the defense was that the child's accusations "were a result of suggestion and coaching...." *Id*. at *2. In post-conviction proceedings, the defendant argued that, although defense counsel called Dr. Michael Gottlieb as an expert at trial on memory implantation, defense counsel "failed to adequately elicit testimony from the doctor that the theory is the subject of many treatises and is widely accepted by the scientific community, to explain how and why it can occur, and to enumerate those facts which, in his opinion, made the testimony of the alleged victim in the case suspect and unreliable." *Id*. Based on this failure, the Court of Criminal Appeals granted a Writ of Habeas Corpus. *Id*. at *6.

6. In this case, Undersigned Counsel, in his professional opinion, believes it is necessary to retain Dr. Gottlieb to review the Dallas Advocacy Center interview of the Complainant as well as the Complainant's testimony from the previous trial. The Complainant testified at the first trial that she had been abused by the Defendant more than a decade earlier. Mr. XXXX's defense will require that he challenge the Complainant's credibility and memory. As noted in *Ard*, Dr. Gottlieb can testify: "1) memory is generally fairly accurate, but it is not nearly as accurate as people believe; 2)

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[2] *Id*. at 346 ("Accordingly, we hold that the denial of the appointment of an expert, consistent with *Ake*, amounts to structural error which cannot be evaluated for harm.).

memory degrades over time; 3) children's memory is not as developed as that of adults and is subject to certain challenges; and 4) memory is constructive, that is, it can change over time based upon subsequent experiences." *Id*. at *3.

7. Significantly, at the original trial in this case, the State called *three* expert witnesses from the Dallas Child Advocacy Center to support the Complainant's credibility. Mr. XXXX submits that it would offend due process and constitute structural error to deny funding for *one* defense expert to challenge the Complainant's memory of decade old events.

8. Dr. Gottlieb informed Undersigned Counsel that his rate to review the Advocacy Center video and previous testimony of the Complainant would be $250 per hour and he estimates it would take 6 hours to complete his review and report to counsel.

9. Similarly, Undersigned Counsel, in his professional opinion, believes it imperative to have a psychosexual evaluation of Mr. XXXX conducted to be used at punishment in the event Mr. XXXX is convicted. Undersigned Counsel is aware that competent attorneys routinely have such exams conducted in cases involving sexual assault of children and is aware of several instances in which district judges have approved funding for such exams even where counsel has been retained but the defendant is indigent. In this case, Mr. XXXX was previously sentenced to two thirty years sentences to be served consecutively. Even if Mr. XXXX were to be convicted at a retrial, Undersigned Counsel believes that a psychosexual evaluation that indicates that Mr. XXXX is no longer a danger to society would severely mitigate his sentence.

10. Mr. Fletcher informed counsel that his rate to conduct a psychosexual interview of defendants who can come to his office and to prepare a report is $1,250.

WHEREFORE, YYYY XXXX respectfully requests this Court grant approval to retain, at the state's expense: (1) Dr. Michael Gottlieb at a rate of $250 per hour for a period not to exceed six hours to review the Dallas Child Advocacy Center interview and previous testimony of the Complainant in this case and (2) Jeffrey Fletcher, for $ 1,250 to conduct a psychosexual evaluation of Mr. XXXX.

Respectfully submitted,

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F07-41443
F07-41444

THE STATE OF TEXAS,	)	**IN CRIMINAL DISTRICT COURT**
	)	**NUMBER 7**
Plaintiff,	)	
	)	**DALLAS COUNTY, TEXAS**
v	)	
	)	**[FILED UNDER SEAL]**
YYYY XXXX,	)	
	)	
Defendant.	)	
	)	

EX PARTE MOTION FOR EXPERT ASSISTANCE

Defendant's Ex Parte Motion for Expert Assistance, is this _____ day of November, 2012

GRANTED.

ORDERED, Counsel for the Defendant is hereby authorized to retain the following witnesses at state expense:

(1) Dr. Michael Gottlieb at a rate of $250 per hour for a period not to exceed six hours; and

(2) Jeffrey Fletcher, for $ 1,250.

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MICHAEL R. SNIPES
District Judge