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## Equal Protection—Refusal to Provide Expert Witness for Indigent Defendant Denies Equal Protection

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ventional analysis considers the importance of the statute's objectives, but ignores the relationship between the discriminatory means employed and the achievement of these objectives.<sup>48</sup> Until the Government articulates a credible justification for punishing only the male, courts must continue to invalidate gender-based statutory rape provisions. The discriminatory means simply fail to promote the statutory objectives. As the dissent in *Michael M.* properly noted, there is no justification for punishing only male participants of consensual heterosexual intercourse with minors.<sup>49</sup>

If the legislative trend toward repealing gender-based statutory rape provisions continues,<sup>50</sup> the issue addressed in *Hicks* will become moot. Until that occurs, however, many state courts will continue to reject the *Hicks* analysis.<sup>51</sup> This reaction is unfortunate because *Hicks* should serve as a model for proper analysis under each prong of the equal protection test.<sup>52</sup> By granting certiorari in *Michael M.*,<sup>53</sup> the Supreme Court can adopt the *Hicks* approach and invalidate the California gender-based statutory rape provision.

CONSTITUTIONAL LAW—EQUAL PROTECTION—REFUSAL TO PROVIDE EXPERT WITNESS FOR INDIGENT DEFENDANT DENIES EQUAL PROTECTION. *Williams v. Martin*, 618 F.2d 1021 (4th Cir. 1980). Appellant wounded one Maybank with a gunshot that paralyzed her and allegedly caused her death eight months later. The State of South Carolina charged appellant, an indigent, with murder.<sup>1</sup> Before trial ap-

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48. See note 28 *supra* and accompanying text.

49. See note 35 *supra* and accompanying text.

50. See notes 9 and 10 *supra* and accompanying text.

51. The Supreme Court of Delaware has already rejected the *Hicks* analysis in *Acosta v. State*, 417 A.2d 373, 375 (Del. 1980). The latest state court decision on the question, *State v. Ware*, — R.I. —, —, 418 A.2d 1, 4 (1980), does not refer to *Hicks*, but the court's reasoning implicitly rejects the *Hicks* analysis. By contrast, the single federal court that has considered the question since *Hicks* apparently was influenced significantly by the *Hicks* analysis. *Navedo v. Preisser*, 630 F.2d 636 (8th Cir. 1980).

52. See notes 13-16 *supra* and accompanying text.

53. The Supreme Court granted certiorari in *Michael M.* on June 9, 1980. 100 S. Ct. 2984 (1980).

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1. The state originally charged appellant with assault and battery with intent to kill, but it changed the charge to murder following Maybank's death. *Williams v. Martin*, 618 F.2d 1021, 1023 (4th Cir. 1980).

pellant's court appointed attorney requested that the state provide funds to hire a pathologist to determine the cause of death,<sup>2</sup> which the county medical examiner believed was a pulmonary embolism resulting from the paralysis. Appellant's attorney explained that a pulmonary embolism may result from several causes<sup>3</sup> but that he was unable to assess adequately the evidence and question the medical examiner without expert assistance. The trial judge, despite statutory authorization, denied appellant's motion for expert assistance.<sup>4</sup> A jury convicted appellant of voluntary manslaughter,<sup>5</sup> and the South Carolina Supreme Court upheld the conviction.<sup>6</sup> After unsuccessfully petitioning for a writ of habeas corpus in the state courts and in federal district court,<sup>7</sup> appellant sought review from the United States Court of Ap-

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2. Appellant's attorney estimated that the minimum fee for the pathologist's services would be \$400. *Id.*

3. *Id.* In the brief appellant's attorney submitted to the Fourth Circuit Court of Appeals, he cited a medical textbook that indicated that cirrhosis of the liver, which afflicted the decedent, may cause an embolism. *Id.* at 1026.

4. Although the trial judge indicated his willingness to provide an expert to assist appellant with his defense, he overruled the motion on the ground that no funds were available for doing so. *Id.* at 1024. S.C. CODE § 17-287 (Supp. 1975) (current version § 17-3-80 (1979)), however, provided:

*Appropriation for expenses of appointed private counsel and public defenders.*—In addition to the appropriation in § 17-286, there is hereby appropriated for the fiscal year commencing July 1, 1969 the sum of fifty thousand dollars for the establishment of the defense fund which shall be administered by the State Treasurer. This fund shall be used to reimburse private appointed counsel, public defenders, and assistant public defenders for necessary expenses actually incurred in the representation of persons pursuant to this chapter, provided that the expenses are approved by the trial judge. No reimbursement shall be made for travel expenses except extraordinary travel expenses approved by the trial judge. The total State funds provided by this section shall not exceed fifty thousand dollars.

The South Carolina Supreme Court, on appellant's appeal, held that the statute encompassed compensation for expert witnesses. *State v. Williams*, 263 S.C. 290, 299, 210 S.E.2d 298, 302 (1974).

5. 618 F.2d at 1024.

6. Although the South Carolina Supreme Court said the trial court erred in its reason for refusing to appoint an expert witness to assist appellant, the error was not prejudicial. The court could not say that the trial judge had abused his discretion. The state's pathologist stated that the autopsy had shown to the "highest possible degree of medical certainty" that the death resulted from the gunshot wound, and the court said that appellant had not demonstrated that another pathologist would have refuted the state's evidence. *State v. Williams*, 263 S.C. 290, 299-300, 210 S.E.2d 298, 302-03 (1974).

7. Appellant alleged in his state habeas corpus petition that he was denied effective representation because his attorney had not informed the trial judge of the statute providing funds for the appointment of experts. In his two federal habeas corpus petitions, appellant alleged that the refusal to appoint a pathologist denied him due process and equal protection, and that his counsel

peals for the Fourth Circuit, which reversed<sup>8</sup> and *held*: When an indigent criminal defendant's trial presents a substantial question that requires expert testimony for its resolution and defendant cannot develop fully a defense without expert assistance, the refusal of a state trial court to provide funds to hire an expert denies the defendant equal protection of the law.<sup>9</sup>

The right of indigent criminal defendants to expert assistance has evolved gradually over the past quarter of a century. In *United States ex rel. Smith v. Baldi*<sup>10</sup> the Supreme Court summarily rejected the contention that the fourteenth amendment due process clause requires the appointment of an expert to assist an indigent defendant with his defense.<sup>11</sup> The Court in *Griffin v. Illinois*<sup>12</sup> began to expand indigents' rights when a majority<sup>13</sup> held that a state's refusal to provide free trial

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"was ineffective because he did not obtain a pathologist to assist with his defense." 618 F.2d at 1025.

8. The court vacated the district court's dismissal of appellant's habeas corpus petitions and remanded the case for further proceedings. *Id.* at 1027.

9. *Id.* "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

10. 344 U.S. 561 (1953).

11. The Court dismissed the due process argument by saying that "[w]e cannot say that the State has that duty by constitutional mandate." *United States ex rel. Smith v. Baldi*, 344 U.S. 561, 568 (1953). The Court adopted the reasoning in *McGarty v. O'Brien*, 188 F.2d 151 (1st Cir.), *cert. denied*, 341 U.S. 928 (1951). The defendant in *McGarty* argued that his sixth amendment right to court appointed counsel lacked substance because he could not adequately prepare a defense without expert assistance. The *McGarty* court rejected the claim that a state court's failure to appoint an expert denied defendant due process of law. The *McGarty* facts, however, provided a narrow basis for the decision. Pursuant to state statute, two impartial psychiatrists examined the defendant, who claimed he was mentally incompetent, and the state made the examination results available to him. The court thus rejected his contention that the state should appoint a third psychiatrist. The court avoided the broad constitutional question, saying that "how far the state . . . is required under the due process clause to minimize this disadvantage [indigence] is a matter which, in other contexts, may deserve serious examination." 188 F.2d at 155 (emphasis added).

*McGarty* was a capital case and thus fell within the Court's ruling in *Powell v. Alabama*, 287 U.S. 45 (1932), that state indigent defendants charged with capital crimes must be provided counsel at the state's expense. The Court for years did not recognize the right of indigents to court appointed counsel in noncapital state cases, saying that appointment of counsel in these instances was constitutionally required only when the lack of counsel in a particular case would lead to unfairness in the criminal prosecution. *Betts v. Brady*, 316 U.S. 455, 471-72 (1942). Finally, in *Gideon v. Wainwright*, 372 U.S. 335 (1963), the Court overruled *Betts* and required counsel in all state criminal prosecutions.

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

13. Chief Justice Warren and Justices Douglas and Clark joined Justice Black's opinion. Justice Frankfurter, writing separately to emphasize that the ruling should apply only prospectively, concurred in the result. *Id.* at 13, 26.

transcripts for indigents in noncapital cases violated the due process and equal protection guarantees of the fourteenth amendment by effectively denying indigents appellate review. "There can be no equal justice," Justice Black wrote, "where the kind of trial a man gets depends on the amount of money he has."<sup>14</sup> Seven years later, *Gideon v. Wainwright*<sup>15</sup> held that a state scheme providing counsel for indigents only in capital cases denied due process of law to noncapital defendants. In addition the Court held in *Douglas v. California*<sup>16</sup> that whenever a state grants criminal defendants a right to one level of appellate review, it must provide counsel for indigents who desire the appeal.<sup>17</sup> Thus, although the Court has never overruled *Baldi*, recent decisions have recognized<sup>18</sup> that the fourteenth amendment due process guarantee

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14. *Id.* at 19. Justice Harlan, dissenting, complained:

[The] holding produces the anomalous result that a constitutional admonition to the States to treat all persons equally means in this instance that Illinois must give to some what it requires others to pay for. . . . [T]he real issue in this case is not whether Illinois has discriminated but whether it has a duty to discriminate.

*Id.* at 34-35 (Harlan, J., dissenting) (emphasis in original).

15. 372 U.S. 335 (1963).

16. 372 U.S. 353 (1963).

17. Other cases further undercut *United States ex rel. Smith v. Baldi*, 344 U.S. 561 (1953), by expanding rights for indigent criminal defendants. *See, e.g.*, *Lane v. Brown*, 372 U.S. 477 (1963) (refusal to review denial of writ of error *coram nobis* solely because of indigence denies equal protection); *Smith v. Bennett*, 365 U.S. 708 (1961) (refusal to docket an appeal or petition for writ of habeas corpus because an indigent prisoner could not pay statutory filing fee denies equal protection); *Burns v. Ohio*, 360 U.S. 252 (1959) (state court's refusal to allow appeal because indigent defendant could not pay filing fee violates fourteenth amendment rights); *Jacobs v. United States*, 350 F.2d 571 (4th Cir. 1965) (refusal to appoint a psychiatrist at government expense to assist indigent prisoner with hearing on petition seeking collateral relief from conviction denies equal protection); *United States v. Products Marketing*, 281 F. Supp. 348 (D. Del. 1968) (refusal to provide funds for expenses necessary for adequate preparation of defense deprives indigent defendants of effective assistance of counsel); *Cohen v. Warden, Montgomery County Detention Center, Rockville, Maryland*, 252 F. Supp. 666 (D. Md. 1966) (denial, because of indigence, of appeal from denial of petition for writ of habeas corpus violates fourteenth amendment rights) (dictum). *Cf.* *United States v. Chavis*, 476 F.2d 1137 (D.C. Cir. 1973) (refusal, notwithstanding statutory authorization, to appoint psychiatrist to assist indigent defendant deprived defendant of effective counsel); *Bradford v. United States*, 413 F.2d 467 (5th Cir. 1969), *rev'd on other grounds sub nom.* *United States v. Malatesta*, 590 F.2d 1379 (5th Cir.), *cert. denied*, 440 U.S. 962 (1979) (indigent defendant had right, under statute, to appointment of expert when case would be prejudiced by absence of expert assistance); *United States v. Largan*, 330 F. Supp. 296 (S.D.N.Y. 1971) (indigent's attorney allowed travel expenses under statute when overseas travel was necessary to take depositions essential to defendant's case); *United States v. Germany*, 32 F.R.D. 421 (N.D. Ala. 1963) (indigent's attorney allowed, under statute, travel expenses necessary to visit scene of alleged crime and to interview material witnesses).

18. Recognition of the need to provide indigents with expert assistance has come not only from the courts, *see* notes 19, 25 *infra* and accompanying text, but also from other authorities as

embodies the right to the appointment of expert assistance for indigents.<sup>19</sup>

well. The American Bar Association, for example, has said that schemes established for the assistance of indigents:

should provide for investigatory, *expert* and other services necessary to an adequate defense. These should include not only those services and facilities needed for an effective defense at trial but also those that are required for effective defense participation in every phase of the process, including determinations on pretrial release, competency to stand trial and disposition following conviction.

ABA PROVIDING DEFENSE SERVICES § 1.5, at 22 (Tent. Draft, 1967) (emphasis added). The reason is that “[t]he quality of representation at trial may be excellent and yet valueless to the defendant if his defense requires the location of a missing witness or the services of a handwriting expert and no such services are available.” *Id.* at 23. One commentator has asserted that “even more serious than the need for witnesses is the problem of securing information from which to construct a defense.” Note, *Right to Aid in Addition to Counsel for Indigent Criminal Defendants*, 47 MINN. L. REV. 1054, 1060 (1963).

Congress, too, has recognized the need for the government to provide indigents with expert assistance and has responded by enacting 18 U.S.C. § 3006A(e) (Supp. III 1979). Similarly, at least 40 states now provide for these services, in varying degrees, at state expense. Fifteen state statutes specifically mention expert assistance, although three states—California, Illinois, and Pennsylvania—limit express application of expert assistance to capital cases. ARIZ. REV. STAT. ANN. § 13-4013(B) (1978); CAL. PENAL CODE § 987.9 (Deering 1980); ILL. ANN. STAT. ch. 38, § 113-3(d) (Smith-Hurd 1980); IOWA CODE ANN. § 813.2 (1979); KAN. STAT. ANN. § 22-4508 (1974); MINN. STAT. ANN. § 611.21 (West 1979); MO. REV. STAT. § 600.150 (1978); NEV. REV. STAT. § 7.135 (Supp. 1980); N.H. REV. STAT. ANN. § 604-A:6 (1974); N.Y. COUNTY LAW § 722-c (McKinney 1979); N.C. GEN. STAT. § 7A-454 (1969); OR. REV. STAT. § 135.055(4) (1979); PA. STAT. ANN. tit. 19, § 1501 (Purdon 1980); TEX. STAT. ANN. art. 26.05 § 1 (Vernon 1979); W. VA. CODE § 51-11-8 (1980). The remaining state statutes deal generally with reimbursing private court appointed counsel for expenses necessarily incurred in the representation of an indigent criminal defendant. California and Illinois, in addition to the explicit statutes cited above, also have general reimbursement statutes. ALA. CODE §§ 12-19-252, 15-12-21(b) (1977); ALASKA STAT. § 18.85.100 (Supp. 1980); ARK. STAT. ANN. § 43-2419 (1977); CAL. PENAL CODE § 987.2 (Deering 1980); COLO. REV. STAT. §§ 18-1-403, 21-1-105 (1978); DEL. CODE ANN. tit. 29, § 4605 (1979); FLA. STAT. ANN. § 925.035(1) (West 1973); GA. CODE ANN. § 27-3204 (1978); ILL. ANN. STAT. ch. 34, § 5609 (Smith-Hurd 1980); KY. REV. STAT. ANN. §§ 31.110(1)(b), .070(3) (Baldwin 1975); LA. REV. STAT. ANN. § 15:571.11-(A) (West 1980); MD. ANN. CODE art. 27A, § 6(d) (1976); MISS. CODE ANN. § 99-15-17 (1979); MONT. REV. CODES ANN. § 46-8-2-1 (1979); NEB. REV. STAT. § 29-1804.12 (1979); N.M. STAT. ANN. §§ 31-16-3(A), -8 (1978); N.D. CENT. CODE § 29-07-01.1 (1974); OHIO REV. CODE ANN. § 2941.51 (Page 1980); S.C. CODE § 17-3-80 (1979); S.D. COMP. LAWS ANN. § 23A-40-8 (1979); TENN. CODE ANN. § 40-2023 (1975); UTAH CODE ANN. §§ 77-64-1(3), -7 (1978); VT. STAT. ANN. tit. 13, §§ 5205, 5231(2) (1974); VA. CODE § 19.2-163 (1980); WASH. REV. CODE ANN. § 36.26.090 (1980); WYO. STAT. §§ 7-1-110(a)(ii), -115(b) (1977).

19. Dissenting judges recognized the right to expert assistance long before a majority embraced the right. For example, Judge Frank, dissenting in *United States v. Johnson*, 238 F.2d 565, 572 (2d Cir. 1956), argued:

Furnishing [defendant] with a lawyer is not enough: The best lawyer in the world cannot competently defend an accused person if the lawyer cannot obtain existing evidence crucial to the defense, e.g., if the defendant cannot pay the fee of an investigator to find a pivotal missing witness or a necessary document, or that of an expert accountant or mining engineer or chemist. It might, indeed, reasonably be argued that for the government

The Supreme Court has held that the sixth amendment<sup>20</sup> contemplates effective counsel and that a state's denial of effective assistance violates due process.<sup>21</sup> In *Powell v. Alabama*<sup>22</sup> the Court ruled that the duty to provide counsel for indigents "is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case."<sup>23</sup> Thus, some modern federal courts, following cases that recognize expanded rights for indigent criminal defendants,<sup>24</sup> have held that an indigent's due process right to effective counsel encompasses his right to the appointment of an expert to assist in the preparation of the defense.<sup>25</sup>

The court in *Williams v. Martin*,<sup>26</sup> however, rested its decision primarily on equal protection grounds. *Williams* enunciated a two-tailed test, previously established in *Jacobs v. United States*,<sup>27</sup> to determine

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to defray such expenses, which the indigent accused cannot meet, is essential to that assistance by counsel which the Sixth Amendment guarantees. . . . [I]f the government does not supply the funds, justice is denied the poor—and represents but an upper-bracket privilege.

20. "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI. The right to counsel in state criminal prosecutions was limited until the Court held in *Gideon v. Wainwright*, 372 U.S. 335 (1963), that it was a fundamental right under the fourteenth amendment.

21. *Hawk v. Olson*, 362 U.S. 271 (1945). *Cf.* *Reece v. Georgia*, 350 U.S. 85, 90 (1955) (effective assistance in state capital prosecution "is a constitutional requirement of due process which no member of the Union may disregard"). For an overview of the ineffective assistance question, see generally Note, *Effective Assistance of Counsel for the Indigent Defendant*, 78 HARV. L. REV. 1434 (1932).

22. 287 U.S. 45 (1932).

23. *Id.* at 71.

24. See notes 12-17 *supra* and accompanying text.

25. *United States v. Hartfield*, 513 F.2d 254 (9th Cir. 1975); *United States v. Stifel*, 433 F.2d 431 (6th Cir. 1970), *cert. denied*, 401 U.S. 994 (1971) (dictum); *Lee v. Habib*, 424 F.2d 891 (D.C. Cir. 1970) (dictum); *Greer v. Beto*, 379 F.2d 923 (5th Cir. 1967) (dictum); *Hintz v. Beto*, 379 F.2d 937 (5th Cir. 1967); *Robinson v. Pate*, 345 F.2d 691 (7th Cir. 1965), *aff'd in part and remanded on other grounds*, 383 U.S. 375 (1966); *Bush v. McCollum*, 231 F. Supp. 560 (N.D. Tex. 1964), *aff'd*, 344 F.2d 672 (5th Cir. 1965).

Other federal courts, however, have refused to extend the rationale. See, e.g., *Watson v. Patterson*, 358 F.2d 297 (10th Cir.), *cert. denied*, 341 U.S. 928 (1951); *United States ex rel. Huguley v. Martin*, 325 F. Supp. 489 (N.D. Ga. 1971).

Similarly, state courts are split on the question. Cases are collected in Annot., 34 A.L.R.3d 1256 (1970).

26. 618 F.2d 1021 (4th Cir. 1980).

27. 350 F.2d 571 (4th Cir. 1965). In *Jacobs* an indigent defendant sought collateral relief to set aside a prior conviction on the ground that he was insane at the time of trial. The defendant requested the appointment of a psychiatrist to assist him at his hearing, but the district court refused to appoint a psychiatrist and denied relief. The court of appeals vacated the judgment, but it never mentioned equal protection as the ground for its decision. Instead, it cited a number

whether the state must provide an expert. First, the case must raise a substantial question that requires expert testimony for its explication. Second, the indigent must require expert assistance to develop fully a defense.<sup>28</sup> Because the denial in *Williams* of appellant's motion for expert assistance "was not the result of the informed discretion of the trial judge,"<sup>29</sup> the court independently examined the record<sup>30</sup> to determine whether appellant's situation satisfied the bifurcated test. The court noted that the state pathologist conceded that a pulmonary embolism generally occurs sooner than eight months after an injury, and thus it found a substantial question that required expert testimony for its resolution.<sup>31</sup> The *Williams* court ruled that "just as the State needed an expert to prove the cause of death, [appellant] needed an expert to present his defense."<sup>32</sup> Thus, the court held, appellant had "satisfied the dual test prescribed in *Jacobs* to establish that he was denied equal protection of the law."<sup>33</sup>

*Williams v. Martin*<sup>34</sup> is novel because it states clearly<sup>35</sup> that the equal protection clause requires states to appoint experts on a proper showing<sup>36</sup> to assist indigent defendants with their defense. Yet the court

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of cases based in whole or in part on a state's denial of due process of law to an indigent defendant. *Lane v. Brown*, 372 U.S. 477 (1963); *Douglas v. California*, 372 U.S. 353 (1963); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Coppedge v. United States*, 369 U.S. 438 (1961); *Griffin v. Illinois*, 351 U.S. 12 (1956). Consequently, the *Williams* court's conclusion that *Jacobs* was based on an equal protection analysis is questionable.

28. 618 F.2d at 1026. See also *United States v. Chavis*, 476 F.2d 1137 (D.C. Cir. 1973), in which the court laid down a virtually identical test to determine whether a psychiatrist need be appointed under 18 U.S.C. § 3006A(e) (1976) (federal statute provides funds for such appointments).

29. 618 F.2d at 1026. Indeed, the trial judge indicated his willingness to provide an expert to assist appellant, but he erroneously thought that no such funds were available. *Id.* at 1024, 1026.

30. *Id.* at 1026.

31. *Id.*

32. *Id.*

33. *Id.* at 1027.

34. 618 F.2d 1021 (4th Cir. 1980).

35. The *Williams* court stated that its decision in *Jacobs v. United States*, 350 F.2d 571 (4th Cir. 1965), held that the equal protection clause mandated the appointment of an expert to assist in an indigent's defense to a criminal prosecution. *Williams v. Martin*, 618 F.2d 1021, 1026 (4th Cir. 1980). A close examination of *Jacobs*, however, indicates that the court did not clearly state that the equal protection clause was the basis for its decision. See note 27 *supra*. Similarly, the court's express recognition in *Lee v. Habib*, 424 F.2d 891 (D.C. Cir. 1970), of the equal protection clause as the foundation for the right was only dictum, because *Lee* was a civil case and the discussion of criminal rights was included only as an analogy.

36. Obviously, an indigent defendant must demonstrate that his request for assistance is not frivolous, because "[t]he determination of the defendant's need for expert assistance is committed

need not have reached the equal protection question to render its decision. In addition to finding a denial of equal protection,<sup>37</sup> *Williams* concluded that the trial judge's refusal to provide an expert violated the sixth amendment and the fourteenth amendment due process clause by denying appellant effective assistance of counsel.<sup>38</sup> The court, therefore, could have followed other courts<sup>39</sup> by relying on the established due process ground,<sup>40</sup> but it chose to enunciate an alternative constitutional doctrine.<sup>41</sup>

The *Williams* decision may have been more compelling had it rested solely on the due process ineffective assistance of counsel theory.<sup>42</sup> The

to the sound discretion of the trial judge." *Williams v. Martin*, 618 F.2d 1021, 1026 (4th Cir. 1980). The standard of proof required, however, is apparently not a stringent one, because the indigent is not required to "prove . . . that an independent expert would [provide] helpful testimony at trial. An indigent prisoner who needs expert assistance because the subject matter is beyond the comprehension of laymen should not be required to present proof of what an expert would say when he is denied access to an expert." *Id.* at 1026-27. The *Williams* court thus adopted the standard used to determine whether to appoint experts under 18 U.S.C. § 3006A(e) (1976)—the trial judge "need only be satisfied that they reasonably appear to be necessary to assist counsel in their preparation, not that the defense would be defective without such testimony." *United States v. Pope*, 251 F. Supp. 234, 241 (D. Neb. 1966) (emphasis in original).

37. See notes 26-33 *supra* and accompanying text.

38. 618 F.2d at 1027.

39. See note 25 *supra* and accompanying text.

40. Thus, the court could have reversed appellant's conviction on the ground that the trial court's refusal to provide an expert rendered appellant's attorney ineffective. See notes 20-23 *supra* and accompanying text. Indeed, the court recognized the viability of the ineffective assistance theory. It quoted with approval a report to the attorney general, which stated that "[u]ntil such [expert] services are made available, the [system] can not fairly be characterized as [one] of adequate representation. One of the assumptions of the adversary system is that counsel for the defense will have at his disposal the tools essential to the conduct of a proper defense." 618 F.2d at 1025.

Judge Hall, dissenting, accepted the ineffective assistance theory, but on a narrower basis. He argued that appellant's counsel was negligent in failing to inform the trial judge of the statute, see note 4 *supra*, providing funds for expert assistance. Thus, he wrote, he "would reverse for ineffective assistance of counsel. That is where the true fault lies." 618 F.2d at 1028 (Hall, J., dissenting). Similarly, the court might have reversed on the ground that appellant was denied due process because the trial judge errantly prevented appellant from taking advantage of the statutory provision itself. Given the court's holding, however, the existence of the statute is immaterial because, in appropriate cases, the equal protection clause mandates that the state provide expert assistance for indigents regardless of whether it has formally appropriated funds for their assistance.

41. The equal protection doctrine that the court announced may be nothing more than a semantic alternative to the ineffective assistance theory. Whether it differs from due process is unclear, because the court made no effort to distinguish between the two. See note 46 *infra* and accompanying text.

42. Justice Harlan argued consistently that decisions finding rights for indigent criminal defendants must rest on the fourteenth amendment's due process, rather than equal protection, clause. In *Griffin v. Illinois*, 351 U.S. 12, 35-36 (1956) (Harlan, J., dissenting), he asserted:

notion that appellant was the victim of an impermissible wealth classification based on his ability to pay for the services of an expert is inherent in the court's equal protection analysis.<sup>43</sup> The court, however, discussed neither the classification nor the level of scrutiny required on

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The issue here is not the typical equal protection question of the reasonableness of a "classification" on the basis of which the State has imposed legal disabilities, but rather the reasonableness of the State's failure to remove natural disabilities. . . . I submit that the basis for [the Court's] holding is simply an unarticulated conclusion that it violates "fundamental fairness" for a State which provides for appellate review . . . not to see to it that such appeals are in fact available to those it would imprison for serious crimes. That of course is the traditional language of due process . . . .

In *Douglas v. California*, 372 U.S. 353, 361 (1963), Justice Harlan argued that application of the equal protection clause "can lead only to mischievous results." He wrote:

[N]o one would dispute the constitutional power of the State to levy a uniform sales tax, to charge tuition at a state university, . . . to impose a standard fine for criminal violations, or to establish minimum bail for various categories of offenses. Nor could it be contended that the State may not classify as crimes acts which the poor are more likely to commit than are the rich.

[T]he Equal Protection Clause does not impose on the States "an affirmative duty to lift the handicaps flowing from differences in economic circumstances." To so construe it would be to read into the Constitution a philosophy of leveling that would be foreign to many of our basic concepts of the proper relations between government and society. The State may have a moral obligation to eliminate the evils of poverty, but it is not required by the Equal Protection Clause to give to some whatever others can afford.

[N]o matter how far the state rule might go in providing counsel for indigents, it could never be expected to satisfy an affirmative duty—if one existed—to place the poor on the same level as those who can afford the best legal talent available.

*Id.* at 361-63 (Harlan, J., dissenting). See also note 46 *infra* and accompanying text.

43. The gravamen of the equal protection claim is that an indigent without governmental assistance cannot afford to hire the needed expert whom a nonindigent could engage. Thus he may be prejudiced and as a result may be convicted and imprisoned, although the nonindigent may not be. The argument is not without merit:

On the reasoning of *Griffin* and its progeny, for the states to disallow necessary expert and investigative services to the indigent *as such* is a prohibited discrimination between "rich" and "poor" in the application of their laws. There is a blatant disparity in the consequences of state action for rich and poor when an indigent defendant, who would have been found innocent had he had the necessary funds to procure expert witnesses or investigative assistance, is found guilty.

Note, *The Indigent's Right to an Adequate Defense: Expert and Investigational Assistance in Criminal Proceedings*, 55 CORNELL L. REV. 632, 640 (1970) (emphasis in original). Similarly, it has been stated:

Little could be more repugnant to our ideal of equal justice for rich and poor than the spectre of innocent men convicted because of financial inability to show their innocence. Even if *Gideon v. Wainwright* established an unqualified right to representation by counsel at trial, unavailability of funds to pay for costs of investigation and for the services of expert witnesses still frequently frustrates the efforts of assigned counsel, of public defenders, and of judges to achieve justice.

Note, *Equal Protection and the Indigent Defendant: Griffin and Its Progeny*, 16 STAN. L. REV. 394, 413 (1964) (citations omitted). The author, however, did not view the right as absolute. Rather, he advocated balancing the harm caused an indigent by the refusal to provide expert assistance against the societal economic benefit derived from the refusal. The state, he argued, is required to do only what is "reasonable under all the circumstances." *Id.* at 414.

review.<sup>44</sup> Moreover, although the court said the refusal to provide an expert breached both appellant's equal protection and due process rights,<sup>45</sup> it made no effort to distinguish between the two rights.<sup>46</sup>

The remedy that the *Williams* court provided further illustrates the difficulty. Although the court found a violation of appellant's constitutional rights,<sup>47</sup> it indicated that the breach might not be reversible error.<sup>48</sup> The court instructed the district court to appoint an independent pathologist to investigate the cause of death and to issue the writ of habeas corpus only if appellant could show that pretrial pathological assistance was necessary and "might reasonably have affected adjudication of the cause of death."<sup>49</sup>

Although the *Williams* court apparently ignored its own constitutional mandate,<sup>50</sup> analysis supports its findings. The equal protection

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44. The Supreme Court has refused to label wealth a suspect classification and thereby bring it within the ambit of strict scrutiny. See *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973). The Court has hinted, however, that, with regard to wealth in criminal proceedings, states cannot justify disparate treatment between indigents and nonindigents even under the laxer test that the means chosen to effectuate a state purpose must be rationally related to the end the state seeks to achieve. "Plainly the ability to pay . . . bears no rational relationship to a defendant's guilt or innocence and could not be used as an excuse to deprive a defendant of a fair trial." *Griffin v. Illinois*, 351 U.S. 12, 17-18 (1956). One noted constitutional scholar, however, has suggested that there are "other legitimate state objectives" to which fee requirements, for example, "do bear a rational relationship," and that "[s]ince wealth has not been accepted as a suspect classification, something more than the mere existence of economic barriers must be involved to explain the Court interventions." G. GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 939 (10th ed. 1980).

45. See notes 37-38 *supra* and accompanying text.

46. Although it may be possible in theory to distinguish between the due process and equal protection rights that the court espouses, it may, in fact, be impossible in practice. Theoretically, the equal protection clause would require the trial judge to provide an expert before trial on an indigent defendant's satisfaction of the two-tailed test, although the due process clause would not because the trial judge cannot know before trial whether, without an expert, an indigent defendant will be denied effective assistance of counsel. In practice, however, a pretrial showing that an indigent defendant can satisfy the two-tailed test probably will convince the trial judge that without expert assistance the defendant would be deprived of effective assistance, prompting him to provide the expert before trial anyway.

47. See notes 37-38 *supra* and accompanying text.

48. 618 F.2d at 1027.

49. *Id.*

50. Judge Hall, in dissent, accused the majority of contradicting itself. The court had said that:

[I]t is not incumbent upon [appellant] to prove under the *Jacobs* test that an independent expert would have provided helpful testimony at trial. An indigent prisoner who needs expert assistance because the subject matter is beyond the comprehension of laymen should not be required to present proof of what an expert would say when he is denied access to an expert.

issue disappears on appointment of the expert because appellant is placed in a position equal to that of a nonindigent. The due process requirement remains, however, that appellant show prejudice before a new trial may be granted.<sup>51</sup> Because the equal protection and the established due process tests merge at the remedial stage, the need for the *Williams* equal protection analysis is limited.<sup>52</sup>

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*Id.* at 1026-27. Pointing to the court's remedy, *see* note 49 *supra* and accompanying text, Judge Hall complained that "the pathologist's *testimony* [is] conclusive on the constitutional issue," which he said was "inconsistent with the majority's position that the *assistance* of an expert was necessary for an adequate defense, regardless of whether the expert would have provided helpful testimony at trial." *Id.* at 1028 (Hall, J., dissenting) (emphasis in original). He concluded by saying:

The majority declares: "We reverse because we believe that the appointment of an expert was constitutionally required for [appellant's] adequate defense against a charge for murder." These are strong words. Appointment of an independent expert to give an opinion is weak action.

.....

I cannot see how the majority can say so much and do so little.

*Id.* at 1028-29 (Hall, J., dissenting).

51. A convicted defendant seeking a new trial must demonstrate that the error complained of is not harmless, a standard which has its foundation in the proof requirement that a jury may not convict a defendant unless it believes that he is guilty beyond a reasonable doubt. The Supreme Court approved the harmless error rule in *Chapman v. California*, 386 U.S. 18 (1967), in which it approved the language in *Fahy v. Connecticut*, 375 U.S. 84, 86-87 (1963), that "[t]he question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." Under *Chapman* the standard is that "before a federal constitutional error can be considered harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." 386 U.S. at 24. Thus, in *Hoback v. Alabama*, 607 F.2d 680 (5th Cir. 1979), the refusal to appoint a fingerprint expert to assist an indigent defendant did not violate the principles of due process and fundamental fairness when the evidence against the defendant was so overwhelming that even favorable testimony from the expert would not have raised a sufficiently reasonable doubt in the minds of enough jurors to avoid a conviction. Similarly, in *Pedrero v. Wainwright*, 590 F.2d 1383 (5th Cir.), *cert. denied*, 444 U.S. 943 (1979), the refusal to appoint a psychiatrist to assist an indigent with his defense was not error when the question of the defendant's sanity was not seriously in issue. *Cf.* *United States v. Sanders*, 459 F.2d 1001 (9th Cir. 1972) (failure to appoint an expert under federal statute providing funding for such appointments requires reversal only on showing that defendant was prejudiced by the trial court's actions).

Various courts allocate the burden of proof of prejudice differently. Under the most liberal view, a mere showing of ineffectiveness is necessary; defendant need not show prejudice. At the other end of the spectrum the defendant must show both that his counsel was ineffective and that he was prejudiced thereby. The hybrid view is that the burden is on the defendant to establish ineffectiveness, with the burden thereafter shifting to the government to show that it did not prejudice the defendant. Note, *Ineffective Representation as a Basis for Relief from Conviction: Principles for Appellate Review*, 13 COLUM. J.L. & SOC. PROB. 1, 72-73 (1977). For an overview of the standards applied to appellate review of ineffectiveness claims, and some suggestions for alternative approaches, see generally Gard, *Ineffective Assistance of Counsel—Standards and Remedies*, 41 MO. L. REV. 483, 493-503 (1976).

52. Although the court's remedy in *Williams v. Martin* was virtually identical to the one

*Williams v. Martin* will exert only a slight impact on the appointment of experts to assist indigent defendants. Certainly the decision sends a clear signal to state trial judges that, on a proper showing,<sup>53</sup> they must provide expert assistance at an indigent defendant's request. Thus *Williams* should persuade judges to provide experts in cases in which the due process argument is not sufficiently persuasive.<sup>54</sup> The *Williams* rule also will promote the interests of judicial economy and greater efficiency in the criminal process because it will eliminate the need for new trials for indigent defendants denied effective assistance of counsel by a trial court's refusal to provide an expert. Yet the overlap between the equal protection and due process claims at the remedial stage may, in practice, make the *Williams* equal protection analysis superfluous.<sup>55</sup>

TORTS—INTERSPOUSAL IMMUNITY—MAINE ALLOWS SUIT FOR PERSONAL INJURY BETWEEN HUSBAND AND WIFE. *MacDonald v. MacDonald*, 412 A.2d 71 (Me. 1980). In *MacDonald v. MacDonald*<sup>1</sup> a wife sought damages from her former husband alleging that his negligence

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provided an indigent defendant denied effective assistance of counsel, *see* notes 47-51 *supra* and accompanying text, at least one court has indicated that the *Williams* test might produce a broader remedy. In *Pedrero v. Wainwright*, 590 F.2d 1383 (5th Cir.), *cert. denied*, 444 U.S. 943 (1979), the court said that the "decisions in the circuit . . . strongly suggest that prejudice will be presumed if the petitioner shows that the matter on which he needed the assistance of experts was seriously in issue." *Id.* at 1391 n.9. The "seriously in issue" formulation resembles the first tail of the test used in *Williams*: The indigent must show that there is a substantial question which requires expert testimony for its resolution. *See* notes 28, 36 *supra* and accompanying text. If prejudice is presumed once the defendant satisfies the test, the defendant need not demonstrate prejudice independently on appeal absent evidence by the state which rebuts the presumption.

53. *See* notes 27-28 *supra* and accompanying text.

54. *See* notes 18-25 *supra* and accompanying text.

55. While the Fifth Circuit Court of Appeals has intimated that the standard might produce new results, *see* note 52 *supra*, it has not yet so held, and the Fourth Circuit Court of Appeals in *Williams v. Martin*, 618 F.2d 1021 (4th Cir. 1980), refused to extend the doctrine.

In addition, the proliferation of state statutes providing for expert assistance for indigent criminal defendants may diminish the present need to announce another constitutional right. Presently, at least 40 states—including all those within the Fourth Circuit—have provided for state funding of expert assistance for indigents. *See* note 18 *supra*. Because courts should not decide questions of constitutional law if there are other grounds on which a case may be decided, *see* *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring), there should be no need for the announcement of another constitutional right absent state standards for invoking the statute that are more stringent than those required by the Constitution.

1. 412 A.2d 71 (Me. 1980). *Prusinski v. Prusinski*, 412 A.2d 71 (Me. 1980), was decided at the same time on similar facts.