

## CHAPTER 3

### PRE-TRIAL MATTERS UNIQUE TO CAPITAL CASES

**Hon. C. Darnell Jones, II**

#### **[3.1.] Introduction**

Due to the extraordinary importance of early and timely discovery in capital cases, jurisdictions vary in their approach to some or all pre-trial matters. In some jurisdictions where the capital caseload is high, a special judge may hear initial motions so that by the time the case is set for trial, the special judge will have decided many of the critical motions. For example, motions for discovery and motions to quash aggravating circumstances often require a disposition long before the court tries the case. Such jurisdictions should consider creating a “Homicide Calendar Judge,” a “Homicide Motions Judge,” or a “General Motions Judge” to dispose of these motions exclusively or with priority. In jurisdictions where a case is assigned to the same judge from beginning to end, the responsibility can be extremely onerous and often requires a vast amount of preparation and advance rulings addressing critical issues.

In capital cases, many pre-trial motions are similar to those in any other criminal case. The usual motions for severance, discovery, continuance, change of venue, etc., will be present. However, capital cases require attorneys to be even more creative and aggressive, and capital case trial judges must be prepared to handle unique motions. The following will focus on pre-trial matters, which will normally be litigated in capital cases.

#### **[3.2.] Motion to Quash Aggravating Circumstances**

The defendant will most likely move for the disclosure of any evidence the prosecution has, which is probative of any alleged aggravating circumstance(s). Once defense counsel is aware of the alleged aggravating circumstance(s), counsel may decide that the prosecution is incapable of proving their existence.

#### **[3.3.] Authority of the Trial Court to Dismiss Aggravating Circumstances Prior to Trial**

A leading Pennsylvania case on the issue of pre-trial motions to quash aggravating circumstances is *Commonwealth v. Buck*.<sup>317</sup> The *Buck* case raised the issue of a trial court’s authority to make pre-trial determinations as to the propriety of aggravating circumstances alleged by the Commonwealth in a homicide case. Two principal rulings arose from this case: (1) the Pennsylvania Sentencing Code establishes that a jury must weigh the evidence in support of aggravating and mitigating circumstances, whereas a trial court has no authority

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<sup>317</sup> *Commonwealth v. Buck*, 709 A.2d 892 (Pa. 1998).

to do the same; and, (2) a trial court may not interfere with the Commonwealth's pre-trial designation of a murder case as capital.<sup>318</sup> The Pennsylvania Supreme Court further opined that:

A defendant who claims that there is no evidence supporting the notice of aggravating circumstances bears the burden of proving that contention. If the defendant fails to meet this burden and evidence exists to create a factual dispute regarding whether the aggravating factors exist, the defendant's motion should be summarily denied as no abuse of discretion by the prosecutor is apparent. However, if the defendant makes a showing that no evidence exists to support the aggravating circumstance alleged, the trial court may require minimal disclosure by the Commonwealth. If no evidence is presented in support of *any* aggravating circumstance, the trial court may rule that the case shall proceed non-capital. This ruling shall be without prejudice to the Commonwealth to file an amended ["Notice of Aggravating Circumstances"] if it subsequently becomes aware of evidence in support of an aggravating factor.<sup>319</sup>

Therefore, in Pennsylvania, the trial court's inquiry is limited to whether the Commonwealth abused its discretion in designating the case as capital. If evidence exists to support any aggravating factor, the court should not disturb the prosecutor's discretion in proceeding with the case as capital.

### **[3.4.] Is Consideration of such Motions Mandatory?**

The North Carolina Court of Appeals in *State v. Wilds* answered this question.<sup>320</sup> In *Wilds*, a defendant filed a motion for a pre-trial hearing to determine whether there was sufficient evidence to support the submission to the jury of an aggravating circumstance. The issue presented was "whether the trial court abused its discretion when it denied [a] defendant's request for a pre-trial, so-called *Watson* hearing to determine whether the evidence was sufficient for the case to proceed to trial as a capital case."<sup>321</sup> The defendant offered two grounds for alleging error: (1) that the reason for denial given by the trial court was "unsustainable"; and (2) that the refusal to conduct a hearing resulted in a trial of the defendant before a death-qualified jury, in violation of his constitutional right to be tried by a fair and impartial jury.<sup>322</sup>

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<sup>318</sup> *Id.* at 895.

<sup>319</sup> *Id.* at 896-97.

<sup>320</sup> *State v. Wilds*, 515 S.E.2d 466 (N.C. Ct. App. 1999).

<sup>321</sup> *Id.* at 470; *see also* *State v. Watson*, 312 S.E.2d 448 (N.C. 1984).

<sup>322</sup> *Wilds*, 515 S.E.2d at 470-471.

The North Carolina Court of Appeals, in affirming the defendant's conviction and life sentence, held that (1) the so-called "Watson Hearing" is within the broad discretion of the trial court, and (2) North Carolina courts have uniformly rejected the argument that "death qualifying" a jury deprives a defendant of his constitutional right to a fair trial.<sup>323</sup>

In *State v. Coffin*,<sup>324</sup> the New Mexico Supreme Court held that an aggravating circumstance should be dismissed by the trial court if it presents a question of law capable of determination without trial if it doesn't apply as a matter of law. However, if the aggravating circumstance raises a question of fact or fact and law, the trial court should dismiss the aggravating circumstance only if it finds that there is no probable cause to support the aggravating circumstance.<sup>325</sup> Examples of *Watson* hearing petitions are contained in Appendix 3-2.

### [3.5.] Inflammatory Photographs

Photographs of a murder victim are not *per se* inadmissible. It is the manner in which the corpse is displayed that causes photographs to be emotionally charged. The admission of such photographs is a matter "within the sound discretion of the trial judge, and is subject to an abuse of discretion standard of review."<sup>326</sup> The test for determining the admissibility of such evidence requires the court to employ a three-step analysis. First, a court must determine whether the photograph is relevant.<sup>327</sup> Second, a court must determine whether the photograph is inflammatory. If not, the court may admit it if it is relevant and assists the jury's understanding of the facts. If the photograph is inflammatory, the trial court must decide whether the photograph is of such essential evidentiary value that its need clearly outweighs the likelihood of inflaming the minds and passions of the jurors.<sup>328</sup> Third, utilize a traditional Federal Rule of Evidence 403 analysis: assess whether the probative value outweighs the unfair prejudice. However, in making the decision to admit, judges

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<sup>323</sup> *Id.* at 471.

<sup>324</sup> 991 P.2d 477 (N.M. 1999).

<sup>325</sup> *Id.* at 498 (citations omitted).

<sup>326</sup> *Philmore v. State*, 820 So.2d 919, 931 (Fla. 2002), *cert. denied sub nom. Philmore v. Florida*, 537 U.S. 895 (2002).

<sup>327</sup> *See Custis v. State*, 793 N.E.2d 1220, 1224 (Ind. Ct. App. 2003), (citing *Kiefer v. State*, 153 N.E.2d 899, 903 (Ind. 1958) (stating that the relevance of photographs depicting the body of a victim is determined by whether a witness would be permitted to describe the scene photographed)); *Scott v. State*, 297 S.E.2d 18 (Ga. 1982) (ruling that a photograph accurately depicting the location of the victim's wound is relevant and may be admitted even if the defendant stipulates to the cause of death).

<sup>328</sup> *See Commonwealth v. Spotz*, 756 A.2d 1139 (Pa. 2000), *cert. denied sub nom. Spotz v. Pennsylvania*, 532 U.S. 932 (2001) (stating that prior to admitting photographs of a murder victim (in this case a video of the victim's legs protruding from under a car), the trial court must decide if the photographs are inflammatory and, if so, whether the probative value of the evidence outweighs its potential to impassion jurors).

should heed the warning of the Florida Supreme Court in *Philmore v. State*<sup>329</sup>: “[n]onetheless, this court has ‘caution[ed] trial judges to scrutinize such evidence carefully for prejudicial effect, particularly when less graphic photographs are available to illustrate the same point.’”<sup>330</sup>

In *Philmore v. State*,<sup>331</sup> the Florida Supreme Court addressed the issue of inflammatory photographs in detail and held that the test for admissibility of photographic evidence is relevancy rather than necessity. The Florida Supreme Court opined that where the photographs are relevant, the trial court must determine whether the “gruesomeness of the portrayal is so inflammatory as to create an undue prejudice in the minds of the jury and [distract] them from a fair and unimpassioned consideration of the evidence.”<sup>332</sup>

If an inflammatory photograph is merely cumulative to other evidence, an appellate court will likely not deem it admissible.<sup>333</sup> However, in *State v. Lane*,<sup>334</sup> the Louisiana Supreme Court held that the cumulative nature of photographic evidence does not provide a ground for inadmissibility if it corroborates the testimony on essential matters.<sup>335</sup>

### [3.6.] Crime Scene Photographs

In *State v. M.M.*,<sup>336</sup> the defendant asserted that “the trial court erred when it overruled his objection to the state’s introduction of crime scene color photographs depicting various parts of his father’s and mother’s bodies. [Defendant insisted] that the photographs’ gruesome nature created danger to inflame the jury and, thus, prejudiced him in such ways that it outweighed their probative value.”<sup>337</sup>

The Court of Appeals of Louisiana opined that among the photographs, only one proved particularly gruesome. It showed the gunshot wound to the face of the defendant’s father. However, a sheriff-witness testified that it described the damage which the bullet wound did to his left eye area. The court held that the photograph’s probative value outweighed the danger of unfair prejudice.<sup>338</sup>

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<sup>329</sup> *Id.*

<sup>330</sup> *Philmore*, 820 So.2d at 931 (citations omitted).

<sup>331</sup> *Id.*

<sup>332</sup> *Id.* at 930-931.

<sup>333</sup> See *Commonwealth v. LeGares*, 709 A.2d 922 (Pa. Super. Ct. 1998), *appeal denied*, 729 A.2d 1127 (Pa. 1998).

<sup>334</sup> 414 So.2d 1223 (La. 1982).

<sup>335</sup> *Id.* at 1227.

<sup>336</sup> 802 So.2d 43 (La. Ct. App. 2001), *writ denied sub nom. by State v. Morris*, 826 So.2d 1121 (La. 2002).

<sup>337</sup> *Id.* at 73.

<sup>338</sup> *Id.* at 74; see also *Hayes v. State*, 85 S.W.3d 809, 815 (Tex. Crim. App. 2002) (holding that admissibility of photographs is within the sound discretion of the trial court, and an appellate court will not reverse the trial court’s decision unless it falls outside the zone of reasonable disagreement); *Salazar v. State*, 38 S.W.3d 141, 151 (Tex. Crim. App. 2001) (appellant claimed that any injury caused by his actions to a two year old girl was the result of his pushing the victim down, once, in the bathtub. The pathologist testified

Autopsy photographs are generally admissible unless they depict mutilation caused by the autopsy. Even then, photographs might be admissible if the alteration was necessary to depict fully the extent of the injuries in certain cases when the photographs are highly probative and there is no danger that the jury would attribute the autopsy alteration to the defendant.<sup>339</sup>

In *State v. Maxie*,<sup>340</sup> the Supreme Court of Louisiana considered the interest of the state in presenting the contested evidence and held that the state is entitled to the moral force of its evidence. Thus, “postmortem photographs of murder victims are admissible to prove *corpus delicti*, to corroborate other evidence establishing cause of death, location and placement of wounds, as well as to provide positive identification of the victim.”<sup>341</sup> Similarly, in *People v. Scheid*,<sup>342</sup> the California Supreme Court held that a defendant’s offer to stipulate to the fact or manner of the shootings did not negate the photograph’s relevance. Moreover, “[t]he prosecutor ‘was not obliged to prove these details solely from the testimony of live witnesses or to accept antiseptic stipulations in lieu of photographic evidence. [T]he jury was entitled to see how the physical details of the scene and the bod[ies] supported the prosecution theory . . . .’”<sup>343</sup>

### [3.7.] “In Life” Photographs

Many states have adopted legislation to bring victims and their rights fully and visibly back into the courtroom, given society’s increasing concern for the rights of crime victims. Thus, in some jurisdictions there is a question of whether it is permissible to allow a jury to become acquainted with the homicide victim through a display of “in life” photographs of the victim. There is a split of authority on the admissibility of a victim’s “in life” photographs. Courts in California, New York, Pennsylvania, Arkansas, Ohio, Mississippi, and Oklahoma, for example, have held the admission of “in life” photographs to be erroneous, without providing an evidentiary basis.<sup>344</sup>

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that the victim’s injuries were not consistent with appellant’s version of the facts, but rather, indicated repeated blows of severe force. At trial, the prosecution introduced photographs of the two-year-old victim’s internal organs removed during an autopsy. The prosecution argued that they would show that the victim was beaten repeatedly with extreme force and not pushed down only once as claimed by the defendant. The trial court found that the probative value was not substantially outweighed by danger of unfair prejudice: while the pictures were graphic, their gruesome nature was lessened by fact that victim’s body did not appear in any of the pictures. All of the organs had been removed and placed on a separate tray for the taking of the photograph).

<sup>339</sup> See *Ripkowski v. State*, 61 S.W.3d 378, 392-393 (Tex. Crim. App. 2001), *cert. denied sub nom.* *Ripkowski v. Texas*, 539 U.S. 916 (2003).

<sup>340</sup> 653 So.2d 526 (La.1995).

<sup>341</sup> *Id.*

<sup>342</sup> 939 P.2d 748 (Cal. 1997).

<sup>343</sup> *Id.* at 756 (quoting *People v. Pride*, 833 P.2d 643, 671 (Cal. 1992)).

<sup>344</sup> *People v. Zapfen*, 846 P.2d 704 (Cal. 1993); *People v. Stevens*, 559 N.E.2d 1278 (N.Y. 1990); *Commonwealth v. Rivers*, 644 A.2d 710 (Pa. 1994); *Walker v. State*, 671

The Pennsylvania Supreme Court's decision in *Commonwealth v. Rivers*<sup>345</sup> focused on the issue of "in life" photographs. *Rivers* held that counsel introduced these types of photographs to engender sympathy and thus are "clearly irrelevant to the central issue at trial, which is the guilt or innocence of the accused."<sup>346</sup> The Pennsylvania Supreme Court went on to state, "Only where the victim's character or physical abilities are called into question will such evidence be relevant."<sup>347</sup> However, subsequent decisions focus on the standard relevancy/probative value analysis.<sup>348</sup>

Other states such as Washington, North Dakota, Georgia, North Carolina, and Oregon have held that "in life" victim photographs are either always admissible or that their admissibility is within the discretion of the trial court.<sup>349</sup> In *State v. Williams*,<sup>350</sup> the Supreme Court of Oregon referenced a statute, which required the trial court to admit a photograph of a homicide victim while alive when offered to show general appearance and condition. The statute declares the photograph relevant and not subject to a balance of prejudice against probative value.<sup>351</sup> Photographs of murder victims while alive were relevant to placing the defendant with victims at scene of murders: witnesses used the photographs to make out-of-court identifications of women seen with the defendant and co-perpetrator on the day of murders.<sup>352</sup>

### **[3.8.] Motion to Secure Mental Evaluation and Other State-Funded Experts**

Indigent defendants will often make motions requesting the court to provide the necessary funds for a mental evaluation. Indigent defendants request mental evaluations for several reasons, such as to assess their sanity or competence to stand trial, to evaluate their capacities to make voluntary confessions, or to assess whether they could grant permission to perform searches. In light of *Atkins v. Virginia*<sup>353</sup> in which the U.S. Supreme Court held that executions of mentally retarded criminals were "cruel and unusual

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So.2d 581 (Miss. 1995); *Parker v. State*, 731 S.W.2d 756 (Ark. 1987); *State v. Roe*, 535 N.E.2d 1351 (Ohio 1989); *Rawlings v. State*, 740 P.2d 153 (Okla. Crim. App. 1987).

<sup>345</sup> 644 A.2d 710 (Pa. 1994).

<sup>346</sup> *Id.* at 716 (citing *Commonwealth v. Mehmeti*, 462 A.2d 657 (Pa. 1983)).

<sup>347</sup> *Id.* (citing *Commonwealth v. Scoggins*, 353 A.2d 392 (Pa. 1976) (victim's obvious physical handicap was relevant to the claim of self-defense)).

<sup>348</sup> *See Commonwealth v. Tharp*, 830 A.2d 519 (Pa. 2003), *cert. denied sub nom. Tharp v. Pennsylvania*, 541 U.S. 1045 (2004) (in prosecution of mother for starvation death of her child, the prosecution's introduction of "in life" photographs and video of child was relevant and admissible).

<sup>349</sup> *State v. Pirtle*, 904 P.2d 245 (Wash. 1995); *Ledford v. State*, 439 S.E.2d 917 (Ga. 1994); *State v. Goode*, 461 S.E.2d 631 (N.C. 1995); *State v. Ash*, 526 N.W.2d 473 (N.D. 1995); *State v. Williams*, 828 P.2d 1006 (Or. 1992).

<sup>350</sup> 828 P.2d 1006 (Or. 1992).

<sup>351</sup> FED. R. EVID. 401, 403; OR. REV. STAT. § 41.415 (1987).

<sup>352</sup> *Williams*, 828 P.2d at 1013.

<sup>353</sup> 536 U.S. 304 (2002).

punishments” prohibited by the Eighth Amendment, defendants will petition the court for experts and relevant records in seeking a pre-trial ruling of the defendant’s ineligibility for the death penalty. At a minimum, the evaluation may reveal mitigating factors such as whether the defendant was under the influence of extreme mental or emotional distress at the time of the alleged homicide.

In *Ake v. Oklahoma*,<sup>354</sup> the U.S. Supreme Court held that the U.S. Constitution requires an indigent defendant to have a state-funded psychiatric evaluation once the defendant has shown that his or her mental state is at issue in the trial. In this case, Ake was charged with two counts of capital murder. Prior to the trial, Ake’s counsel had indicated that his client wanted to raise an insanity defense and requested that the court appoint a psychiatrist or provide funds for one, since Ake was indigent.<sup>355</sup> The trial court denied the request and convicted Ake of capital murder. The Oklahoma Court of Criminal Appeals affirmed. Upon appeal, the U.S. Supreme Court held that the Due Process Clause of the Fourteenth Amendment mandates that the state provide a psychiatrist’s assistance to an indigent defendant who “has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial.”<sup>356</sup> Ake, diagnosed as a paranoid schizophrenic, had been found incompetent to stand trial and returned to competence because of being prescribed an antipsychotic drug. Therefore, the U.S. Supreme Court found that Ake had made such a preliminary showing. This *Ake* requirement will also be the anchor for any motions filed in the area of mental retardation to satisfy the *Atkins* requirements.

Indigent defendants often request other state-funded professional services, such as expert substance analysts, ballistics experts, or private investigators. While courts generally hold that no absolute constitutional right to such state-funded services exists, many jurisdictions recognize a limited or conditional right to such experts.<sup>357</sup> This limited right is sometimes based on concerns of due process and equal protection under the Fourteenth Amendment, but most jurisdictions have granted the request based upon the defendant’s right to a fair trial.<sup>358</sup> Regardless of which constitutional right the court relies upon to support its decision, the vast majority of states have held that the decision whether to provide the defendant with such services rests within the sound discretion of the trial court.<sup>359</sup> The decision of the trial court usually turns on whether the defendant has demonstrated a need for the service such that a denial

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<sup>354</sup> 470 U.S. 68 (1985).

<sup>355</sup> *Id.*

<sup>356</sup> *Id.* at 74.

<sup>357</sup> *Ake v. Oklahoma*, 470 U.S. 68 (1985); *Ex parte Dobyne*, 672 So.2d 1354 (Ala. 1995); *Gretzler v. Stewart*, 112 F.3d 992 (9th Cir. 1997); *Walker v. State*, 327 S.E.2d 475 (Ga. 1985); *Hough v. State*, 560 N.E.2d 511 (Ind. 1990); *Williams v. State*, 791 N.E.2d 193 (Ind. 2003); *State v. Hamilton*, 441 So.2d 1192 (La. 1983); *Lanier v. State*, 533 So.2d 473 (Miss. 1988); *Bannister v State*, 726 S.W.2d 821 (Mo. Ct. App. 1987); *Pertgen v State*, 774 P.2d 429 (Nev. 1989); *State v. Gambrell*, 347 S.E.2d 390 (N.C. 1986); *Liles v State*, 702 P.2d 1025 (Okla. Crim. App. 1985); *Commonwealth v. Appel*, 689 A.2d 891 (Pa. 1997); *Tuggle v Commonwealth*, 334 S.E.2d 838 (Va. 1985).

<sup>358</sup> *Id.*

<sup>359</sup> *Id.*

of the request would deprive the defendant of a fair trial.<sup>360</sup>

Within the context of state-funded investigators, courts have generally held steadfast relative to the requisite “demonstration of need” element. The case of *Franklin v. Anderson* contains a thoughtful and thorough analysis of the issue of state-funded investigators.<sup>361</sup> The petitioner contended that his conviction and death sentence were void because the trial court refused to appoint an investigator in violation of the Due Process Clause of the Fourteenth Amendment. In that case, Franklin submitted a pre-trial motion stating that he is indigent and requesting that the court appoint “investigative services, experts and any other services as are reasonably necessary to assist . . . .”<sup>362</sup>

The U.S. District Court for the Southern District of Ohio reviewed the rule in *Ake*, and then reviewed *Mason v. Mitchell*.<sup>363</sup> In *Mason v. Mitchell*, the U.S. Circuit Court of Appeals, Sixth Circuit noted that *Ake* was one of a number of cases that stands for the proposition that “indigent prisoners are constitutionally entitled to the basic tools of an adequate defense or appeal, when those tools are available for a price to other prisoners.”<sup>364</sup>

The U.S. District Court for the Southern District of Ohio also reviewed *Caldwell v. Mississippi*,<sup>365</sup> where the U.S. Supreme Court, four months after *Ake*, revisited the issue of when due process requires the state to pay for expert assistance for an indigent defendant. Mississippi provided expert psychiatric assistance to Caldwell at state expense. However, the trial court denied his requests for the provision of a criminal investigator, a fingerprint expert, and a ballistics expert. The petitioner challenged the conviction, arguing that there was constitutional infirmity in the trial court’s refusal to appoint various experts and investigators to assist him. The U.S. Supreme Court held that the motion did not contain any showing as to the reasonableness for the request and just offered a general statement of need.<sup>366</sup>

The trial judge overruled defendant’s initial motion, but the petitioner renewed his request during a subsequent pre-trial proceeding. Counsel’s argument is illustrative as to the general tension for counsel who are appointed with limited funds to provide counsel to a defendant charged with capital murder. His argument was as follows:

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<sup>360</sup> See *Davidson v. State*, 558 N.E.2d 1077 (Ind. 1990) (The court denied the defendant’s pre-trial and presentence motions for funds to hire experts to assist that defendant in preparing for her defense and to present evidence in mitigation in her capital murder case. The appellate court found no abuse of discretion because the defendant did not show how her case would have benefited from the use of the requested experts. Defendants are not constitutionally entitled at public expense to any and all types of experts they desire to support their cases. The trial court has the discretion to determine whether the experts are needed, and an appellate court will not overturn the decision unless defense counsel can show an abuse of discretion).

<sup>361</sup> *Franklin v. Anderson*, 267 F. Supp.2d 768 (S.D. Ohio 2003).

<sup>362</sup> *Id.* at 782.

<sup>363</sup> 320 F.3d 604 (6th Cir. 2003).

<sup>364</sup> *Id.* at 615.

<sup>365</sup> 472 U.S. 320 (1985).

<sup>366</sup> *Id.* at 323-24.

The final motion I want to bring to the court's attention that's been previously overruled is the motion for investigative services. Quite frankly, this county doesn't have the investigative services that the Public Defender's Office probably should have. It's our position we have done the best we can do with the limited resources available to Mr. Schmidt [Petitioner's co-counsel] and myself to conduct an investigation and contact witnesses and check things out, if you will, but I think in a capital case that there's no question when you have a defendant who's indigent, who has appointed counsel, that investigative services can be extremely beneficial in tracking down people we can't find who could be very essential witnesses to the defense.

In comparison, we have the State of Ohio represented by the prosecution, and I don't remember exactly how many law enforcement officials there are in this county anymore, somewhere around a thousand Cincinnati police officers who can or could be available to the state through the auspices of whatever officer they want to ask. That puts the defense, obviously, at a distinct disadvantage. So we're asking the court to reconsider the granting of the motion for investigative services so we can, even at this date, get proper assistance to help us prepare the case.

Transcript of November 17, 1988, Proceeding at 12-13.<sup>367</sup>

The U.S. District Court for the Southern District of Ohio found that Franklin's oral and written statements were, as in *Caldwell*, "little more than undeveloped assertions that the requested assistance would be beneficial"<sup>368</sup> and did not constitute the preliminary showing required by *Ake*. It also noted that in any criminal prosecution, defense counsel might state that an investigator could be helpful and if such a statement constituted the preliminary showing required in *Ake*, then the Due Process Clause would require the appointment of an investigator to assist every indigent defendant charged with a crime.<sup>369</sup> Since the petitioner failed to make a preliminary showing that he needed the assistance of an investigator, the U.S. District Court for the Southern District of Ohio declined to grant a certificate of appealability on the claim.<sup>370</sup>

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<sup>367</sup> *Franklin*, 267 F. Supp. at 782-783.

<sup>368</sup> *Id.* at 783.

<sup>369</sup> *Id.*

<sup>370</sup> *Id.*

In *Moore v. Kemp*,<sup>371</sup> the U.S. Court of Appeals, Eleventh Circuit summarized the case law as follows:

*Ake* and *Caldwell*, taken together, hold that a defendant must demonstrate something more than a mere possibility of assistance from a requested expert; due process does not require the government automatically to provide indigent defendants with expert assistance upon demand. Rather, a fair reading of these precedents is that a defendant must show the trial court that there exists a reasonable probability both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial.<sup>372</sup>

In *Jackson v. State*,<sup>373</sup> the Indiana Court of Appeals held that an indigent defendant's request for funds to hire a DNA expert for purpose of educating counsel was not specific enough to justify disbursement of public funds. Counsel must provide some indication that counsel's education could not be reasonably accomplished by other means. Further, the Indiana Court of Appeals held that the defendant's request for funds, five days prior to trial, was untimely in light of the defendant's substantial opportunity to make an earlier request. The Indiana Court of Appeals found substantial and cumulative evidence of the defendant's guilt from other evidence. Further, the nature of the DNA evidence was not particularly favorable to the state or damaging to the defendant.<sup>374</sup>

However, in *State v. Frank*,<sup>375</sup> the Louisiana Supreme Court determined that the trial court abused its discretion in not declaring a capital murder defendant indigent prior to trial. The failure to hold a hearing to determine the need for state-funded psychiatric or psychological expert assistance in order to present mitigating evidence during the penalty phase prejudiced the defendant and required a remand for an evidentiary hearing. Specifically, the court held that "[b]y not allowing a hearing on the matter, the trial court did not provide [the appellate court] with adequate information upon which to review the question of whether the defendant was entitled to the expert assistance she requested for the penalty phase of her trial and what prejudice she may have suffered as a result of not obtaining state-funded assistance."<sup>376</sup> On remand, the trial court ordered a mental examination by an expert of the state's choosing. This ruling was subsequently vacated as "unwarranted" in light of the independent panel appointed by the trial court to examine the defendant.<sup>377</sup>

<sup>371</sup> 809 F.2d 702 (11th Cir.1987) (en banc), *cert. denied*, 481 U.S. 1054 (1987).

<sup>372</sup> *Id.* at 712.

<sup>373</sup> 758 N.E.2d 1030 (Ind. Ct. App. 2001) (*Jackson* was not a capital case).

<sup>374</sup> *Id.* at 1033-34; *see also* *Ex parte Grayson*, 479 So.2d 76 (Ala. 1985) (there existed an alternative means to determine the composition of the substance sought to be analyzed); *Ruffin v. State*, 447 So.2d 113 (Miss. 1984) (the state's analyst did not give testimony harmful to the defendant).

<sup>375</sup> 803 So.2d 1 (La. 2001).

<sup>376</sup> *Id.* at 11.

<sup>377</sup> *State v. Frank*, 812 So.2d 620 (La. 2002), *rehearing denied*, 813 So.2d 415 (La. 2002).

**[3.9.] Change of Venue**

The Sixth Amendment guarantees the accused the right to a trial by an impartial jury, and the Fourteenth Amendment secures that right to all criminal defendants in state courts. The First Amendment protects the media's role as the people's monitor of the government. Press-enhanced participation in the criminal trial process has resulted in an increased number of appeals based on claims of unfair trials due to media-created juror bias.

**[3.10.] Sample Rule of Procedure Regarding Motion for Change of Venue**

In Pennsylvania, the rule of criminal procedure regarding motions for change of venue reads in pertinent part:

All motions for change of venue or for change of venire shall be made to the court in which the case is currently pending. Venue or venire may be changed by that court when it is determined after hearing that a fair and impartial trial cannot otherwise be had in the county where the case is currently pending.<sup>378</sup>

**[3.11.] General Standard**

The grant or refusal of a motion for a change of venue is within the sound discretion of the trial judge.<sup>379</sup> To achieve the change of venue, the moving party must demonstrate that the pre-trial publicity was inflammatory and sensational rather than factual and objective and that such publicity has been so extensive, sustained, and pervasive without sufficient time between publication and trial for the prejudice to dissipate. Where the movant satisfies the court of these factors and the court resolves that there exists a substantial likelihood that in the absence of a change of venue a fair trial cannot be held or that an impartial panel cannot be selected, the trial court should grant the motion.

**[3.12.] General Procedures**

Preliminarily, it is important to note that a motion for change of venue is *premature* prior to *voir dire* of prospective jurors. After *voir dire* is conducted, the defense may make a motion for change in venue or venire, and the trial court

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<sup>378</sup> PA. R. CRIM. P. 584 (A).

<sup>379</sup> *State v. Vaccaro*, 411 So.2d 415 (La. 1982); *Commonwealth v. Paoello*, 665 A.2d 439 (Pa. 1995); *State v. Wallace*, 528 S.E.2d 326 (N.C. 2000); *Gregg v. State*, 844 P.2d 867 (Okla. Crim. App. 1992); *State v. Clements*, 334 S.E.2d 600 (W. Va. 1985); *State v. Galloway*, 211 S.E.2d 885 (S.C. 1975).

should grant it only if the moving party can show *actual prejudice* in impaneling the jury.<sup>380</sup>

The test for determining a change of venue is whether the general state of mind of the inhabitants of a community is so tainted by knowledge of the crime and accompanying prejudice, bias, and preconceived opinions that jurors could not possibly put these matters out of their minds and try the case solely on the evidence presented in the courtroom. Once a defendant raises the partiality of the venire, the trial court must analyze (1) the extent and nature of any pre-trial publicity; and (2) the difficulty encountered in actually selecting a jury.<sup>381</sup> More specifically, the trial court must assess how much time has elapsed from the release of publicity, the severity of the offense charged, and the size of area from which the venire is drawn. The Wisconsin Supreme Court articulated the following factors for trial courts to consider:

The inflammatory nature of the publicity; the degree to which the adverse publicity permeated the area from which the jury panel would be drawn; the timing and specificity of the publicity; the degree of care exercised; the amount of difficulty encountered in selecting the jury; the extent to which the jurors were familiar with the publicity; and the defendant's utilization of the challenges, both peremptory and for cause, available to him on *voir dire*. In addition, the courts have also considered the participation of the state in the adverse publicity as relevant, as well as the severity of the offense charged and the nature of the verdict returned.<sup>382</sup>

It is the defendant's burden to demonstrate that the pre-trial publicity has created such a feeling of prejudice against him or her in the community that he or she would most likely be unable to receive a fair trial.<sup>383</sup> The mere fact that there has been routine pre-trial publicity does not necessarily satisfy this requirement.<sup>384</sup> Courts generally hold that granting or denying a motion for change of venue rests within the sound discretion of the trial court, and an appellate court will only reverse the decision on appeal when an abuse of discretion is clear.

### **[3.13.] Factors Considered in Determining Extent of Pre-trial Publicity**

In assessing a motion for change of venue, an appellate court will generally consider the following factors in determining whether the trial court

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<sup>380</sup> See *Commonwealth v. Rolison*, 374 A.2d 509 (Pa. 1977), *cert. denied sub nom. Rolison v. Pennsylvania*, 434 U.S. 871 (1977).

<sup>381</sup> See *Foster v. State*, 778 So.2d 906 (Fla. 2000).

<sup>382</sup> *Hoppe v. State*, 246 N.W.2d 122, 125 (Wis. 1976).

<sup>383</sup> See *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

<sup>384</sup> See *State v. Hightower*, 661 A.2d 948 (R.I. 1995).

has abused its discretion in granting or denying a motion for change of venue based upon pre-trial publicity:

1. Nature and extent of publicity;
2. Degree to which information is attributable to police or prosecution sources;
3. Community atmosphere;
4. Efforts to insulate the jury against and/or diminish impact of publicity;
5. Probable efficacy of a change of venue; and,
6. Length of time between publicity and trial.<sup>385</sup>

However, even if one of the elements exists, a change of venue will not be required where there has been sufficient time between the publication and the trial for the prejudice to dissipate.<sup>386</sup> A change of venue becomes necessary when a fair and impartial jury cannot be selected. This standard is equally applicable where the trial court is to impanel the jury solely for the penalty phase of a capital case.<sup>387</sup>

### **[3.14.] High Profile Cases**

Once a defendant raises the partiality of the venire, the trial court must analyze (1) the extent and nature of any pre-trial publicity; and (2) the difficulty encountered in actually selecting a jury.

In a New Jersey case, which ultimately led to the creation of “Megan’s Law,” defendant moved for a change of venue because of the extensive publicity surrounding his case.<sup>388</sup> In his motion, he cited 437 separate articles from the *Trentonian* and the *Trenton Times*, Mercer County, New Jersey’s two leading newspapers.<sup>389</sup> He claimed those articles prevented him from receiving a fair trial in Mercer County. The court characterized the situation as follows:

The pre-trial publicity in this case was constant, prolonged, and horrendous. The *Trentonian*, a Mercer County newspaper, referred to defendant as “scum,” a “predator,” a “piece of trash,” an “animal,” a “pervert,” a “dirtball,” a “sicko,” a “monster,” and a “bottom-feeder.” The articles often assumed defendant’s guilt and disclosed defendant’s prior sex offense convictions,

<sup>385</sup> See *Commonwealth v. Bradfield*, 508 A.2d 568 (Pa. Super. Ct. 1986), *appeal denied*, 520 A.2d 1384 (Pa. 1987); see also *State v. Yager*, 85 P.3d 656 (Idaho 2004); *Eads v. State*, 577 N.E.2d 584 (Ind. 1991); *Commonwealth v. Keeler*, 448 A.2d 1064 (Pa. Super. Ct. 1982).

<sup>386</sup> See *Commonwealth v. Casper*, 392 A.2d 287 (Pa. 1978).

<sup>387</sup> See *People v. Alfaro*, 163 P.3d 118 (Cal. 2007).

<sup>388</sup> *State v. Timmendequas*, 737 A.2d 55 (N.J. 1999), *subsequent appeal*, 773 A.2d 18 (N.J. 2001), *cert. denied sub nom.* *Timmendequas v. New Jersey*, 534 U.S. 858 (2001).

<sup>389</sup> *Id.* at 73.

including the fact that he had refused psychological treatment while serving a previous sentence. The Trentonian frequently stressed that defendant had confessed to the crime, and many articles called for his execution. The case also received nationwide publicity as a result of the activity associated with Megan's Law.<sup>390</sup>

The Supreme Court of New Jersey ruled that the trial court ruled correctly by granting a change of venue due to the media coverage created in this case. The trial court analyzed the motion for change of venue based on five factors contained in *State v. Koedatich*.<sup>391</sup> The five factors from that case applied to this case are:

1. The extent of the coverage was significant;
2. The nature and gravity of the offense cannot be more serious than in a death penalty case;
3. The size of the Mercer County community and its potential exposure to media coverage regarding the case were serious concerns;
4. The respective standing of the deceased and the accused (Megan Kanka had become a national figure after her death);
5. Although there had not yet been crowds or major protests in the courtroom, that did not mean that the community . . . and surrounding municipalities did not feel and harbor a silent rage against the defendant.<sup>392</sup>

### **[3.15.] Defendant's Constitutional Right to Self-Representation**

In 1975, the U.S. Supreme Court recognized a criminal defendant's constitutional right to defend him- or herself.<sup>393</sup> In *Faretta v. California*,<sup>394</sup> the U.S. Supreme Court held that the Sixth Amendment protects the criminal defendant's right to conduct his or her own defense unaided by counsel.<sup>395</sup> The prosecution charged Faretta with grand theft. Several weeks before his trial, he asked the court for permission to proceed *pro se*. Although he had once before represented himself in a criminal trial, he had no formal legal training. After questioning him about such technical matters as the hearsay rule and the procedures governing jury selection, the trial court denied his request and ordered counsel appointed to represent him. The court later convicted Faretta. The U.S. Supreme Court, however, reversed, holding that the Sixth Amendment guarantee

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<sup>390</sup> *Id.*

<sup>391</sup> 548 A.2d 939 (N.J. 1988), *cert. denied*, 488 U.S. 1017 (1989).

<sup>392</sup> *Timmendequas*, 737 A.2d at 73-74.

<sup>393</sup> *See Faretta v. California*, 422 U.S. 806 (1975).

<sup>394</sup> *Id.*

<sup>395</sup> *Id.* at 819.

of the right to assistance of counsel also protected the accused's right to proceed without counsel.<sup>396</sup> However, a defendant must voluntarily and intelligently make the decision to represent him- or herself, and the defendant must clearly and unequivocally state the demand.<sup>397</sup> Most jurisdictions agree, however, that the trial court is under no duty to advise a criminal defendant of his or her constitutional right to self-representation.<sup>398</sup>

In making this determination, the judge must insure that the defendant is “made aware of the dangers and disadvantages of self-representation” so that the record will establish that “he knows what he is doing and his choice is made with eyes open.”<sup>399</sup> Although it is not required, the better practice is to warn the self-represented defendant of the privilege against self-incrimination.<sup>400</sup>

Because execution is the ultimate penalty, a self-represented capital defendant creates the ultimate challenge for the trial judge. The evolution of capital case jurisprudence demonstrates that the law takes extra precautions to ensure that trial courts impose the death penalty only on those defendants guilty of the most heinous forms of the crime of murder. Unschooled in the legal principles that could bolster his or her defense, however, the self-represented capital defendant seems to face a greater risk of conviction. Thus, courts have found themselves faced with the difficult task of determining when, if ever, the state's interest in promoting reliability in capital cases outweighs the defendant's interest in conducting his or her own defense.

The U.S. Supreme Court, however, imposed several limitations on the right to self-representation. A defendant must knowingly and intelligently relinquish the benefits associated with the right to counsel. The purpose of this waiver is not to disallow self-representation based on the defendant's lack of skill as a lawyer, but merely to ensure that the defendant is aware of the dangers and disadvantages of self-representation.

While a defendant has no right to hybrid representation (a procedure in which a self-represented defendant conducts part of the trial and standby counsel conducts another part of the trial), the trial court always should appoint standby counsel where permitted. Some state courts have taken the position that standby counsel is preferred in every case where a defendant represents him- or herself. If a defendant requests standby counsel to assist him or her, it does not cause the request to waive counsel to be equivocal. Standby counsel attends all proceedings and is available to the defendant for consultation and advice.

The majority view, held by seven circuits, maintains that although a colloquy on the record is always preferable, the trial judge may determine the “sufficiency of the waiver from the record as a whole rather than from a

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<sup>396</sup> *Id.* at 836.

<sup>397</sup> *Id.* at 835.

<sup>398</sup> *Hopkins v. Hopper*, 215 S.E.2d 241(Ga. 1975); *Williams v. State*, 252 S.W.3d 353 (Tex. Crim. App. 2008).

<sup>399</sup> *Faretta*, 422 U.S. at 806.

<sup>400</sup> *State v. Poindexter*, 318 S.E.2d 329 (N.C. Ct. App. 1984); *State v. Hutchins*, 279 S.E.2d 788 (N.C. 1981).

formalistic, deliberate, and searching inquiry.”<sup>401</sup> By giving the trial judge broad discretion to determine waiver, these circuits allow for a more fact-specific, case-by-case analysis of a defendant’s decision to proceed without counsel. A court may, however, fail to inquire deeply enough into the defendant’s decision to represent him- or herself.

The Third, Tenth, and D.C. Circuits require the trial judge to record a “searching inquiry sufficient to satisfy him that the defendant’s waiver was understanding and voluntary.”<sup>402</sup> Similarly, the Second Circuit advocates a “recorded colloquy” between the court and the defendant in which “the accused is informed of his right to an attorney, his right to self-representation, and the decided advantages of competent legal representation.”<sup>403</sup> These standards create a record of the trial judge’s inquiry into the defendant’s waiver of counsel, which can simplify appeals of waiver.

In *Commonwealth v. Davis*,<sup>404</sup> the Pennsylvania Supreme Court reiterated that the right to self-representation must be afforded to all defendants, *even in capital cases*.

In *Jones v. State*,<sup>405</sup> it was argued on appeal that the trial court erred by allowing the defendant to represent himself without satisfactorily advising him of the dangers of self-representation. The Indiana Supreme Court identified accepted guidelines for a trial court to advise a defendant who chooses to represent himself. The guidelines include:

- (1) The defendant should know the nature of the charges against him, the possibility that there may be lesser included offenses, and the possibility of the defenses and mitigating circumstances;
- (2) the defendant should be aware that self representation is almost always unwise, that he may conduct a defense which is to his own detriment, that he will receive no special treatment from the court and will have to abide by the same standards as an attorney, and that the state will be represented by experienced legal counsel;
- (3) the defendant should be instructed that an attorney has skills and expertise in preparing for and presenting a proper defense; and
- (4) the trial court should inquire into the

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<sup>401</sup> U.S. v. Gallop, 838 F.2d 105, 110 (4th Cir. 1988), *cert. denied*, 487 U.S. 1211 (1988); *see also* Gilbert v. Lockhart, 930 F.2d 1356, 1358-59 (8th Cir. 1991); Strozier v. Newsome, 926 F.2d 1100, 1104-05 (11th Cir. 1991), *cert. denied*, 502 U.S. 930 (1991); U.S. v. Bell, 901 F.2d 574, 576-77 (7th Cir. 1990); Wiggins v. Proconier, 753 F.2d 1318, 1320-21 (5th Cir. 1985); U.S. v. Hafen, 726 F.2d 21, 24-26 (1st Cir. 1984), *cert. denied*, 466 U.S. 962 (1984); U.S. v. Kimmel, 672 F.2d 720, 721-22 (9th Cir. 1982).

<sup>402</sup> U.S. v. Welty, 674 F.2d 185, 189 (3d Cir. 1982); *see also* U.S. v. Padilla, 819 F.2d 952, 956-57 (10th Cir. 1987); U.S. v. Bailey, 675 F.2d 1292, 1300-02 (D.C. Cir. 1982).

<sup>403</sup> U.S. v. Tompkins, 623 F.2d 824, 828 (2d Cir. 1980).

<sup>404</sup> *Commonwealth v. Davis*, 388 A.2d 324 (Pa. 1978).

<sup>405</sup> 783 N.E.2d 1132 (Ind. 2003).

defendant's educational background, familiarity with legal procedures and rules of evidence, and mental capacity.<sup>406</sup>

The Indiana Supreme Court also noted that even though it endorsed the guidelines, they did not constitute a rigid mandate.<sup>407</sup>

In *State v. Vrabel*,<sup>408</sup> the trial court disallowed the defendant's request to represent himself. The Ohio Supreme Court stated:

We have held that if a trial court denies the right of self-representation when properly invoked, the denial is per se reversible error. In our view, however, the right of self-representation here was not properly invoked.

In the recent case of *State v. Cassano*, we reasoned that the defendant's request to represent himself was untimely since it was made only three days before the trial was to begin. Other courts, as noted in *Cassano*, have also found that invocation of the right of self-representation can be disallowed where such a request is untimely.

Similarly, the Sixth Circuit upheld the Kentucky Supreme Court's denial of a defendant's motion for self-representation as untimely where the motion was made on the day of trial after the clerk had called the roll of jurors. More recently, the Minnesota Supreme Court held that a trial begins at the commencement of *voir dire* and that the trial court has discretion about whether to grant a motion for self-representation at that point in the trial. Under these circumstances, appellant's request to represent himself on the day the state would present evidence was untimely.<sup>409</sup>

In *Sherwood v. State*,<sup>410</sup> the Indiana Supreme Court held that generally a defendant has no right to hybrid representation. However, when a defendant requests to change from self-representation to representation by standby counsel, the trial court should consider: (1) the defendant's prior history in the substitution of counsel and in the desire to change from self-representation to counsel-representation; (2) the reasons set forth in the defendant's request; (3) the length and stage of the trial proceedings; (4) any disruption or delay in the trial proceedings that might be expected to ensue if the request is granted; and, (5) the likelihood the defendant could effectively defend against the charges if

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<sup>406</sup> *Id.* at 1138 (citing *Dowell v. State*, 557 N.E.2d 1063, 1066-67 (Ind. Ct. App. 1990), *cert. denied sub nom.* *Indiana v. Dowell*, 502 U.S. 861 (1991)).

<sup>407</sup> *Jones*, 783 N.E.2d at 1138.

<sup>408</sup> 790 N.E.2d 303 (Ohio 2003) (citations omitted).

<sup>409</sup> *Id.* at 314 (citations omitted).

<sup>410</sup> 717 N.E.2d 131 (Ind. 1999).

required to continue to act as his own attorney.<sup>411</sup>

In *People v. Simpson*,<sup>412</sup> defendant argued that his waiver of counsel was not valid because the trial court failed to adequately assess his ability to understand his waiver of counsel and that the trial court was obligated to formally probe defendant's level of education, his prior legal experience, and his mental and emotional capacity to represent himself. It was held that:

[D]irect questioning regarding defendant's schooling is only one of many possible means to assess a defendant's ability to understand the nature of the right he was waiving. A defendant's background, experience, and conduct are all factors to consider when determining if a valid waiver of counsel has been made. Viewing the record in its entirety, it is evident that the trial judge had ample opportunity in the pre-trial proceedings to observe defendant and assess his ability to understand the proceedings. The record indicates the defendant was literate, responsive and understanding. Defendant, age 39, had an extensive criminal history. He had demonstrated a familiarity with the judicial process and, according to the trial judge, had waived counsel and represented himself on a prior occasion. Further, defendant filed numerous motions and actively presented his defense. He demonstrated, in the words of the trial judge, that "[defendant] knew what he was doing" when he waived his right to counsel and chose to represent himself.<sup>413</sup>

### **[3.16.] Conclusion**

This chapter identifies some of the particular issues with regard to pre-trial and the capital case. It is meant to guide you through areas that require special attention. As always, be sure to consult your local statutes, case law and rules to ensure that you are properly handling these issues in your jurisdiction.

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<sup>411</sup> *Id.* at 135.

<sup>412</sup> 665 N.E.2d 1228 (Ill. 1996).

<sup>413</sup> *Id.* at 1237 (citations omitted).