

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

STATE OF NEBRASKA,

Plaintiff,

vs.

ANTHONY J. GARCIA

Defendant.

CR 13-2322

SEALED EX PARTE MOTION
FOR FUNDS FOR EXPERT
ASSISTANCE

COMES NOW the Defendant Anthony Garcia, by and through Counsel Jeremy C. Jorgenson, and moves this Court, under seal, pursuant to the 5th, 6th, 8th and 14th Amendments to the United States Constitution, to find that the Defendant is indigent and to provide funding for expert assistance for the defense of the Defendant, with regard to expert assistance, including reports regarding DNA testing, private investigative services, including but not limited to, service of process, witness tracking, expert investigation and background, amongst other costs.

IN SUPPORT of this motion the Defendant states and alleges as follows:

Defendant's Indigency:

1. Anthony Garcia is indigent as he has been unemployed and incarcerated since his arrest on July 13, 2016.
2. All of the Defendant's resources were exhausted to retain counsel, and additional fees since that time have been paid by a collateral source, namely his immediate family members.
3. The resources from the prior release of funds is exhausted, an itemized accounting of all expenses is being gathered; however, outstanding expert fees are due at this time.

Defense counsel shall provide all required documentation upon receipt from each vendor.

Given the quantity of vendors utilized, travel, hotels, transportation, etc., the acquisition of these documents is time consuming but ongoing.

4. That Dr. Garcia receives an annual gross income of \$0 since the time of his arrest which is 125% or less of the current federally established poverty level.
5. That Dr. Garcia is in custody in jail and has no available funds.

Grounds for Sealed Ex Parte Hearing:

6. In *Ake v. Oklahoma*, 470 U.S. 68, 84 L.Ed.2d 53 (1985) the United States Supreme Court determined that a Defendant was entitled to make his showing for the necessity of money for an expert's assistance ex parte 470 U.S. at 82, 84 L.Ed. 2d at 66.
7. "The manifest purpose of requiring that the inquiry be ex parte is to insure that the defendant will not have to make a premature disclosure of his case." *Marshall v. United States*, 423 F.2d 1315, 1318 (10th Cir. 1970); *accord United States v. Chavis*, 476 F.2d 1137, 1141-42 (D.C. Cir. 1973); *United States v. Sutton*, 464 F.2d 552, 553 (5th Cir. 1972); *United States v. Hamlet* 456 F.2d 1284, 1284-85 (5th Cir. 1972); *see also United States v. Baily*, 112 F.3d 758, 768 (4th Cir. 1997) (holding that it was not error to unseal ex parte motions for experts where defendant had not properly complied with discovery requests).
8. In effect, the provision of *Ake* allowing request of expert witness fees ex parte permits the expert to be a partisan witness. The conclusions of the expert or experts need not be reported in advance of trial to the court or to the prosecution. *United States v. Bass*, 477 F.2d 723, 726 (9th Cir. 1973); *accord United States v. Theriault*, 440 F.2d 713, 715 (5th Cir. 1971). Courts have held that a defendant's failure to object to the presence of a

prosecutor or the lack of an ex parte hearing is subject to plain error analysis. *See United States v. Pofahl*, 990 F.2d 1456, 1472 (5th Cir. 1993) (lack of hearing); *United States v. Greschner*, 802 F.2d 373, 380 (10th Cir. 1986) (prosecutors present).

9. The *Ake* decision does not explicitly address this issue, although at one point the Court spoke in passing of an “ex parte threshold showing.” *See supra* citations accompanying paragraph 8.
10. After that reference, in *Ake*, several lower courts have directly ruled that an accused has the right to an ex parte hearing. *See, Ex parte Moody*, 684 So. 2d at 114, 120 (Ala. 1996) (“[A]n indigent criminal defendant is entitled to an ex parte hearing on whether expert assistance is necessary, based on the Fifth, Sixth, and Fourteenth Amendments...”); *Brooks v. State*, 385 S.E.2d 81, 84 (Ga. 1989) (“[I]n making the requisite showing defendant could be placed in a position of revealing his theory of the case. He therefore has a legitimate interest in making the showing ex parte.”); *McGrerror v. State*, 733 P.2d 416, 416-17 (Okla. Crim. App. 1987) (ordering an evidentiary hearing on whether defendant falls within *Ake* to be conducted ex parte because the presence or participation of the state would “thwart the Supreme Court’s attempt to place indigent defendants ... on a level of equality with nonindigent defendants”); *State v. Barnett*, 909 S.W.2d 186, 192-93 (Tex. Crim. App. 1997) (Explaining that, “[w]hile the Supreme Court’s suggestion that the threshold showing should be made ex parte is dicta, it is consistent with [*Ake*’s] due process principles” because otherwise, the defendant would either have to reveal his theories for his defense and other items of his work product or forfeit the appointment of an expert).

11. That there is not legitimate role for the prosecutor in the context of this motion.

Undersigned counsel cannot contemplate a basis upon which the State could oppose appointment. The instant motion is not adversarial and the prosecutor's responsibility does not extend to protecting the public coffers.

Necessity of Expert Assistance to Present an Adequate Defense:

12. All experts utilized, as should be apparent in the trial, were necessary and required to put forth a comprehensive, analytical and exceedingly adequate defense for the defendant.

WHEREFORE, Defendant requests the Court find the Defendant indigent and provide additional funding for expert assistance, in the amount of \$30,000. And for such other further relief the Court deems proper.

DATED 26 day of October, 2016.

Dr. Anthony Garcia, Defendant

Jeremy Jorgenson /s/

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NOTICE OF HEARING

You are hereby notified that the above and foregoing will be heard before the Honorable Gary B. Randall on the ____ day of _____, 2016 at _____ .m. in the Douglas County Courthouse, 1701 Farnam Street, Omaha, Nebraska. Please govern yourselves accordingly.

Dated: 2016

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing was served via electronic filing, on October 26, 2016, to the following party:

Donald Kleine
Douglas County Attorney
1701 Farnam Street, #100
Omaha, NE 68183

Itzel Mendez /s/

Certificate of Service

I hereby certify that on Wednesday, October 26, 2016 I provided a true and correct copy of the Motion Filed to the following:

State of Nebraska represented by Sean Lynch (Bar Number: 25275) service method:
Electronic Service to sean.lynch@douglascounty-ne.gov

State of Nebraska represented by Brenda D. Beadle (Bar Number: 20033) service method:
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State of Nebraska represented by James Masteller (Bar Number: 21749) service method:
Electronic Service to james.masteller@douglascounty-ne.gov

Garcia,Anthony,J represented by Jeremy C. Jorgenson (Bar Number: 23815) service
method: Electronic Service to mylawfirm@nebraskaslawfirm.com

Motta,Alison, service method: No Service

State of Nebraska represented by Donald W. Kleine (Bar Number: 15429) service method:
Electronic Service to donald.kleine@douglascounty-ne.gov

Signature: /s/ Reed, David James (Bar Number: 24345)