converse to that in the principal case under the rationale that the relationship of "guest" and "host" does not exist between the operator of an automobile and an occupant, within the meaning of the guest statute, if the guest is being carried for the benefit or in the business of the operator *or for the benefit or in the business of the operator's principal.*[24] Under Iowa law, as well as nearly all other jurisdictions, an agent acting gratuitously owes the same duty as any other agent.[25] Therefore, this agency theory could logically be applied to the principal case, resulting in liability to plaintiff. This theory is another confusing element related to consistent application of the rule requiring a tangible and definite benefit to the owner or operator of the vehicle.

At least one writer has suggested that the tendency to liberalize exemptions under the guest statute should be continued and more fully developed and defined. He further attempts to provide a novel statement of what should be necessary to prove occupancy outside the guest statute:

> It might be concluded that the passenger should be able to avoid the guest statute by establishing that his presence advanced an independent *nonsocial purpose* for which the journey was made. This would include any nonsocial joint undertaking by the passenger and the owner or driver . . . . While the Iowa court has never adopted or expressly recognized this rule, it is generally consistent with the court's decisions and interpretations of the statutory policy.[26]

Whether this "nonsocial purpose" test would be more consistent than the present one is, however, a matter of conjecture. A test phrased in those terms would seem to prevent the court from denying recovery merely because it interpreted a benefit as indirect.

As the court has stated in response to a plaintiff's impassioned plea against the purpose and existence of the guest statute itself, "regardless of the legislative objects, good or bad, the so-called Guest Statute does appear in

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[24] Dobbs v. Sugioka, 117 Colo. 218, 220, 185 P.2d 784, 786 (1947), quoting from Hart v. Hogan, 173 Wash. 598, 601, 24 P.2d 99, 102 (1933). An enlightening statement of the purpose of the guest statute as interpreted by the Colorado Supreme Court is found in *Dobbs*. "Clearly they were enacted to prevent recovery by those who had no moral right to recompense, those carried for their own convenience, for their own business or pleasure, those invited by the operator as a mere generous gesture, 'hitch-hikers' and 'bums' who sought to make profit out of soft-hearted and unfortunate motorists." 117 Colo. at 219, 185 P.2d at 785. Under this statement of purpose it can easily be seen why Colorado would tend to employ a liberal interpretation of what is a benefit sufficient to take the case out of the guest statute.

[25] Merrill v. Sax, 141 Iowa 386, 394, 118 N.W. 434, 437 (1908). The analogy being, of course, that Weston's request and defendant's compliance had in effect created a principal-agent relationship between them.

[26] Note, *Problems of Recovery Under the Iowa Guest Statute*, 47 IOWA L. REV. 1049, 1054 (1962). It is not clear that this test would necessarily be an aid to clarity and predictability of recovery under the statute because the burden of proof to show the nonsocial purpose would probably be on the person seeking to recover, much as under the present interpretation, where the burden is upon the litigant who claims that the guest statute is not applicable to prove his status was other than a guest. *See* Livingston v. Schreckengost, 255 Iowa 1102, 1104, 125 N.W.2d 126, 127 (1963). Also, evidentiary problems which now trouble the court and jury, such as lack of witnesses, would not be made any easier to deal with.

nearly all State Codes today. This is something that can only be corrected by the legislature. The legislature at least is in a position to do something about it. We are not."[27] A bill to abolish the guest statute was in fact introduced and was the topic of significant discussion in the Sixty-first Iowa General Assembly,[28] but at present the statute remains in the code and the Iowa courts are bound thereby. The trend toward liberal interpretation of what is a benefit to the operator sufficient to find the passenger outside the guest statute is in line with a well-recognized and oft-cited statement regarding the guest statute. "In determining who are 'guests' within the meaning of automobile guest statutes, the enactments should not be extended beyond the correction of the evils which induced their enactment."[29]

JON T. GRIFFIN

Criminal Law—IN ACTIONS FOR FORGERY OR UTTERING A FORGED INSTRUMENT AN INDIGENT DEFENDANT HAS THE RIGHT TO STATE FUNDS FOR THE PURPOSE OF OBTAINING AN INDEPENDENT EXPERT HANDWRITING ANALYSIS.—*State v. Hancock* (Iowa 1969).

Defendant, an indigent, was charged with forgery. A Questioned Document Examiner from the Iowa Bureau of Criminal Investigation compared a sample of defendant's handwriting with the handwriting on the instrument in question and concluded that the author of both writings was the same person. Without questioning the reliability of the state's expert, defendant, through her court-appointed attorney, applied to the trial court for authorization of funds to obtain an independent handwriting analysis for comparison purposes. The application was denied. Defendant was ultimately found guilty of uttering a forged instrument. On appeal to the Supreme Court of Iowa, *held,* reversed and remanded. In actions for forgery or uttering a forged instrument, an indigent defendant has the right to state funds for the purpose of obtaining independent expert handwriting analysis.[1] *State v. Hancock,* — Iowa —, 164 N.W.2d 330 (1969).

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[27] Hessler v. Ford, 255 Iowa 1055, 1059, 125 N.W.2d 132, 134 (1963).
[28] H.F. 3, 61st Iowa G.A. (1965).
[29] D. BLASHFIELD, AUTOMOBILE LAW & PRACTICE § 2292 (1948).

[1] Although the opinion dealt with other issues, the court felt that "[t]he trial court committed reversible error in denying defendant's application." State v. Hancock, 164 N.W.2d 330, 333 (Iowa 1969).

The Iowa Supreme Court based its decision on the broad language of section 775.5 of the 1966 Iowa Code, which provides compensation for the court-appointed attorney "including such sum or sums as the court may determine are necessary for investigation in the interests of justice . . . ."[2] The enactment of similar and related[3] statutes was encouraged[4] by the landmark decision in *Gideon v. Wainwright*,[5] which held for the first time that the due process clause of the fourteenth amendment made the sixth amendment's right to counsel provision[6] applicable to the states in both capital and noncapital cases.[7] The indigent accused in Iowa has the statutory right to counsel,[8] and his court-appointed attorney has the statutory right to reasonable compensation.[9] Courts have felt that an attorney should not be expected to defend an accused gratuitously.[10]

While an indigent has the right to counsel, it is less than clear that this right extends to the furnishing of expert assistance. Few cases have considered this issue[11] and none have been entirely on point, for in none was even a state's expert provided. Two cases, expressing the polar views of other jurisdictions on the indigent's right to court provided experts, are cited in the *Hancock*[12] decision. In *State v. Superior Court*,[13] the Arizona Court of Appeals reversed the trial court's order to pay the sum of seventy-five dollars to an expert on chronic alcoholism who the indigent defendant had procured to testify and whose testimony was the essence of the defense. In so doing, it upheld a 1960 Arizona case,[14] which took the position that a state is not mandated by constitutional provision to provide "a full paraphernalia of defense"[15] at public expense. It was this precedent and the legislative silence on the matter which prompted the decision.

On the other hand, in *People v. Watson*,[16] the Illinois court opined that

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2 IOWA CODE § 775.5 (1966).

3 IOWA CODE § 775.4 (1966) provides in part: "If the defendant appears for arraignment without counsel, he must . . . be informed by the court of his right thereto, and be asked if he desires counsel; and if he does, and is unable to employ any, the court [will so appoint] . . . ."

4 *See* A. LEWIS, GIDEONS TRUMPET (1964), for an excellent documentary on *Gideon*. The author points out the states which statutorily provided for counsel on behalf of indigents prior to *Gideon*.

5 372 U.S. 335 (1963).

6 U.S. CONST. amend. VI provides in part: "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense."

7 Iowa has demonstrated its amenability to the effects of *Gideon*. Waldon v. District Court of Lee County, 256 Iowa 1311, 130 N.W.2d 728 (1964).

8 IOWA CODE § 775.4 (1966).

9 IOWA CODE § 775.5 (1966).

10 Weaver v. Herrick, 258 Iowa 796, 140 N.W.2d 178 (1966). In Dillon v. United States, 230 F. Supp. 487 (D. Ore. 1964), the court indicated that the court appointment of an attorney constitutes a taking of property (legal learning and office facilities) which requires just compensation under the fifth amendment.

11 Neither appellant nor appellee cited any cases on this point in their briefs. The opinion contained only two cites which were relevant.

12 State v. Hancock, 164 N.W.2d 330 (Iowa 1969).

13 2 Ariz. App. 458, 409 P.2d 742 (1966).

14 State v. Crose, 88 Ariz. 389, 357 P.2d 136 (1960).

15 *Id.* at 392, 357 P.2d at 138.

16 36 Ill. 2d 228, 221 N.E.2d 645 (1966).

an indigent charged with forgery had the constitutional right to be alloted reasonable fees by the state for the purpose of hiring an expert handwriting analyst whose testimony may be crucial to the defense.[17] The decision was grounded upon the compulsory process clauses of the Illinois and United States Constitutions,[18] both of which guarantee the accused the right to obtain witnesses in his own favor.[19] The court contended that to compel an expert witness to attend, without providing the funds with which the expert can make the necessary preparation in order to form an opinion, is to afford "the shadow of the right" but to deprive the accused of the "substance" thereof.[20] With respect to the *Watson* decision, it has been said that the accused is entitled to effective compulsory process, as well as effective assistance of counsel.[21]

If a common thread permeates these polar positions it is the recognition of both courts that providing funds for expert assistance is a matter "appropriate" for legislation.[22] If this is a legislative matter, few states have heeded the call. To date, only seven have statutes which specifically provide for expert witness fees[23] and some of these have been narrowly applied. It is conceivable, should future legislation be inadequate in this area, that the courts will increasingly take it upon themselves to broadly apply related, and existing, statutes.[24] Various revisions of the Iowa criminal law have been suggested[25] and the issue of indigent representation should warrant thorough consideration.

Another common thread, although not so prominent, is the reluctance of the courts to discuss the issue of an indigent's right to expert assistance on constitutional grounds. The court in *Hancock*, while aware that the issue had constitutional "overtones," preferred to base its decision on a local statute.[26] There is abundant authority to the effect that a court will not decide a case on consitutional grounds where there are other grounds available.[27]

In spite of the court's reluctance, it might be helpful to speculate briefly as to possible constitutional grounds on which a conclusion, similar to that in *Hancock*, could be based. Such grounds may exist, obviating further need to rely on broad state statutes. On the other hand, it may be found that such

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17 For a thorough comment on the *Watson* case, *see* 32 Mo. L. Rev. 543 (1967).

18 U.S. Const. amend. VI provides in part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . . ." The Iowa Constitution has a similar provision. Iowa Const. art. I, § 10.

19 Washington v. Texas, 388 U.S. 14 (1967).

20 People v. Watson, 36 Ill. 2d 228, 233, 221 N.E.2d 645, 648 (1966).

21 *See* 32 Mo. L. Rev. 543 (1967). *See also* text accompanying notes 35-46 *infra*.

22 State v. Superior Court, 2 Ariz. App. 458, 465, 409 P.2d 742, 749 (1966); People v. Watson, 36 Ill. 2d 228, 234, 221 N.E.2d 645, 649 (1966).

23 Cal. Civ. Pro. Code § 187 (1954); Fla. Stat. Ann. § 932.30 (1944); N.H. Rev. Stat. Ann. § 604-A:6 (Supp. 1965); N.Y. Code Crim. Pro. § 308 (1958); Pa. Stat. Ann. tit. 19, § 784, (1964); R.I. Gen. Laws Ann. § 9-17-19 (1956); S.D. Code § 36.0109 (Supp. 1960). *See also* 18 U.S.C. § 3495 (1964).

24 Iowa has no statute specifically providing for the payment of funds to procure expert witnesses for indigent defendants.

25 *See* 51 Iowa L. Rev. 883 (1966).

26 State v. Hancock, 164 N.W.2d 330, 333 (Iowa 1969).

27 Duvall v. Moore, 276 F. Supp. 674 (N.D. Iowa 1967); Town of Mechanicsville v. State Appeal Bd., 253 Iowa 517, 111 N.W.2d 317 (1961).

reliance is imperative and that the court's reluctance to decide these cases on constitutional grounds is motivated by necessity.

While several cases have dealt with the issue of the indigent's right to expert witnesses on a due process theory,[28] only one has reached a result consistent with either the *Hancock* or *Watson* decisions.[29] In order to ascertain whether due process is achieved, courts might ask whether the failure of the state to provide independent expert analysis results in "invidious discriminations,"[30] or a violation of a "fundamental principle of justice"[31] or reduces the indigent's trial to "meaningless ritual"?[32] Most courts have responded that the failure to provide such independent assistance is not a deprivation of due process.[33] On one occasion the United States Supreme Court decided that the constitutional requirements of due process had been met where the state's impartial psychiatrist was permitted to testify on the issue of insanity even though the indigent was not provided with an independent expert.[34] This decision would seem to be applicable to the *Hancock* case.

The constitutional right to "assistance of counsel"[35] might also bear on the indigents right to experts. Numerous cases have interpreted "assistance" to mean *effective* assistance of counsel.[36] While effective counsel is imperative to give substance to the constitutional right to a fair trial, the courts have not found a universal definition for the phrase. Most courts agree, however, that effective counsel is not synonymous with successful counsel, but does imply "conscientious, meaningful, representation . . . [and] not merely a perfunctory appearance by counsel."[37] To the Supreme Court of Iowa,[38] effective counsel means "honest, learned and able legal counsel given reasonable opportunity to perform the task assigned . . . ."[39] Thus, in *Hancock*, the court might well have asked whether the trial court's refusal to pay for an independent expert analysis on behalf of the indigent defendant rendered counsel's appearance perfunctory or failed to give counsel a reasonable opportunity to perform his task.

The answer would probably be in the negative, for while the definition of effective may vary slightly from case to case, the courts agree that the effectiveness of counsel or reasonableness of opportunity are within the discretion of the court.[40] The defendant has the burden of overcoming the presump-

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28 *See* 32 Mo. L. Rev. 543 (1967).
29 Bush v. McCollum, 231 F. Supp. 560 (N.D. Tex. 1964), *aff'd*, 344 F.2d 672 (5th Cir. 1965).
30 Williamson v. Lee Optical, 348 U.S. 483, 489 (1954); Cole v. Arkansas, 333 U.S. 196 (1947).
31 Palko v. Connecticut, 302 U.S. 319, 328 (1947).
32 Douglas v. California, 372 U.S. 353, 359 (1963).
33 State v. Superior Court, 2 Ariz. App. 458, 409 P.2d 742 (1966) and cases cited therein.
34 Smith v. Baldi, 344 U.S. 561 (1953).
35 U.S. Const. amend. VI; Iowa Const. art. I, § 10.
36 State v. Wesson, 149 N.W.2d 190 (Iowa 1967); State v. Lowder, 256 Iowa 853, 129 N.W.2d 11 (1964). *See also* Annot. 148 A.L.R. 183 (1944).
37 Birk v. Bennett, 258 Iowa 1016, 1019, 141 N.W.2d 576, 578 (1966).
38 State v. Myers, 248 Iowa 44, 79 N.W.2d 382 (1956).
39 *Id.* at 48, 79 N.W.2d at 385.
40 State v. Myers, 248 Iowa 44, 79 N.W.2d 382 (1956).

tion[41] that his counsel's inability to act deprived him of a fair trial.[42] Although in an isolated case the defendant may meet his burden,[43] most defendants fail.[44] Apparently only one court has found that failure to provide an expert witness resulted in a denial of effective assistance of counsel.[45]

It would seem that the effective assistance of counsel argument would be too narrow. The issue of expert assistance deals not with the personal qualifications and diligence of the lawyer but with the effectiveness of the defense. Consequently, the measure of effectiveness, or ineffectiveness, as laid down by the Iowa Supreme Court would appear to be inapplicable as dealing merely with the conduct of the counsel.[46]

Another constitutional consideration is the equal protection clause of the fourteenth amendment. Few would dispute Justice Black's contention that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[47] While courts have used the equal protection clause to afford indigents free transcripts[48] and assistance of counsel on first appeal,[49] they have ignored it in cases such as *Hancock*. It goes without saying that attempts are being made to assure that all persons stand "on an equality before the bar of justice in every American court."[50] As desirable as that goal is, some courts have contended that absolute equality is neither attainable nor required.[51] This contention has produced two opposite reactions: accelerated attempts to bridge the gap between the type of justice which an indigent receives and that which only money can buy[52] and decelerated attempts under the rationalization that absolute equality is unattainable and further frivolous attempts could—if they haven't already—result in reverse inequalities, such as discrimination against the rich or the middle class.[53] The courts seem to favor the former reaction and it is not inconceivable that the equal protection clause will be looked to more and more in the defense of indigent cases.

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41 State v. Wesson, 149 N.W.2d 190 (Iowa 1967); Scalf v. Bennett, 147 N.W.2d 860 (Iowa 1967).

42 State v. Myers, 248 Iowa 44, 79 N.W.2d 382 (1956).

43 Birk v. Bennett, 258 Iowa 1016, 141 N.W.2d 576 (1966).

44 State v. Benson, 247 Iowa 406, 72 N.W.2d 438 (1955); State v. Smith, 199 Iowa 568, 202 N.W. 112 (1925).

45 Bush v. McCollum, 231 F. Supp. 560 (N.D. Tex. 1964), *aff'd*, 344 F.2d 672 (5th Cir. 1965).

46 Scalf v. Bennett, 147 N.W.2d 860, 864 (Iowa 1967). "Only if it can be said that what was done or was not done by the defendant's attorney for his client made the proceedings a farce and a mockery of justice, shocking to the conscience of the Court, can a charge of inadequate legal representation prevail."

47 Griffin v. Illinois, 351 U.S. 12, 19 (1956).

48 *Id.*

49 Douglas v. California, 372 U.S. 353 (1963).

50 Chambers v. Florida, 309 U.S. 227, 241 (1940).

51 Goesaert v. Cleary, 335 U.S. 464 (1948); Tigner v. Texas, 310 U.S. 141 (1939); State v. Superior Court, 2 Ariz. App. 458, 409 P.2d 742 (1966).

52 Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956).

53 State v. Superior Court, 2 Ariz. App. 458, 409 P.2d 742 (1966). It is interesting to note the language: "The rich, by definition, have few peers. That the rich themselves may be discriminated against to some degree under our jury system is a matter of reasonable conjecture." *Id.* at 747.

In light of the foregoing, and having admitted that the initiative in this area should come from the legislative branch, the Iowa Supreme Court has reached the desired result through statutory interpretation.[54] There is authority for holding that an expert witness must be provided by the state where expert testimony is of the essence to assure a fair trial.[55] In *Hancock*, the Iowa Supreme Court went further and, in effect, said that even though an expert witness—albeit a state employee—is qualified and prepared to testify, the state must provide the indigent defendant with funds to procure an independent expert.[56] This raises an important practical consideration. It is equally possible to read the *Hancock* opinion as saying that the indigent is entitled to an independent expert *because* the state has an expert witness.[57]

Few in the legal profession would deny that expert witnesses are valuable assets when on your side but liabilities when testifying for the opposition.[58] The impression that an expert witness makes upon a jury is deep. The fact that a party's first thought is not to procure the best scientist, but the best witness—the more, the better—is an unfortunate fact recognized by eminent writers.[59] It would naturally follow that where the issue is susceptible to varied opinions, the state is afforded an unfair advantage, certainly not in the interests of justice, when the indigent is denied the opportunity to consult with, and produce, an independent expert witness.

The Iowa statutes and cases dealing with legal assistance for the indigent have experienced a liberal evolution. The Iowa Code, since 1851, has provided for funds to represent the pauper[60] and as late as 1962, has specified the fees for such assistance.[61] Early decisions were reluctant to vary from the amounts set out in the statutes.[62] In 1965, the code section providing these fees was re-

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54 State v. Hancock, 164 N.W.2d 330 (Iowa 1969).

55 *See* 32 Mo. L. Rev. 543 (1967).

56 In Illinois, where *Watson* was decided, cases have held that one expert is sufficient. People v. Nash, 222 N.E.2d 473 (Ill. 1966) (ballistics expert); People v. Myers, 35 Ill. 2d 311, 220 N.E.2d 297 (1966) (psychiatrist); People v. Carpenter, 13 Ill. 2d 470, 150 N.E.2d 100 (1958) (psychiatrist).

57 "Initially we note it would be extremely difficult, if not impossible . . . , for a party . . . to effectively challenge the reliability of an expert without the aid of his own expert." State v. Hancock, 164 N.W.2d 330, 333 (Iowa 1969).

58 From an expert's point of view, *see* Hammond, *The Lawyer & the Expert*, 54 A.B.A.J. 583 (1968).

59 *See* C. McCormick, Evidence § 17 (1954), quoting from Thorn v. Worthington Skating Rink Co., L.R. 6 Ch. D. 415, 416 (1876):

> A man may go, and does sometimes, to half-a-dozen experts . . . . He takes their honest opinions, he finds three in his favor and three against him; he says to the three in his favor, 'will you be kind enough to give evidence?' and he pays the three against him their fees and leaves them alone; the other side does the same.

60 Iowa Code § 2561 (1851).

61 Ch. 376 [1959] Iowa Acts at 494 provides in part: "An attorney appointed by the court to defend a person indicted for homicide, or any offense the punishment of which may be life imprisonment shall receive fifty dollars per day . . . . If the prosecution be for any other felony, he shall receive . . . twenty-five dollars . . . and if the prosecution be for an indictable misdemeanor, he shall receive . . . fifteen dollars." One attorney would receive additional compensation if he followed the case into another county or into the Supreme Court.

62 State v. Froah, 220 Iowa 840, 263 N.W. 525 (1935).

vised.[63] No longer are the amounts specified; rather, the compensation is to be decided in each case by the court.[64] While still allowing sums "necessary for investigation in the interests of justice," the legislature went on to specifically provide funds to obtain the transcript and the printing of briefs and trial record on appeal.[65] The statute is significant in that it would seem to be a manifestation of the legislature's desire to provide the indigent with the means of obtaining a more adequate defense. A recent Iowa case[66] has indicated that the bar and bench are cognizant of the desirability of effective defense of indigents.

The Iowa Supreme Court has traditionally been reluctant to overrule the trial court on a matter within the discretion of the latter, whether it be a ruling on the admissibility of evidence[67] or the effectiveness of indigent's counsel.[68] In *Hancock*, the court, conceding only that the trial court had "limited discretionary power,"[69] proceeded to substitute its opinion for that of the trial judge without expressly charging that the limited discretion had been abused.[70] The procedural significance of the decision is in the willingness of the court to overrule a matter within the discretion of the trial court. While it is unclear as to what discretion remains in the trial judge, there is no doubt in the court's mind that the statute contemplates payment for the purpose of obtaining independent experts for indigents and in denying the funds the court had abused its limited discretion.[71]

Additionally, the court-appointed counsel deserves to know when he might be entitled to state funds to procure an expert or possibly further assistance, the cost of which could be substantial when one considers the lack of independent experts within the state in such fields as ballistics. While the opinion offers no real guidelines, it appears that at least three factors must be present in order that state funds will be provided for the procurement of independent experts: defendant must be deprived of such expert assistance because of his indigency,[72] the issue must be such as might produce differing

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63 CH. 449 [1965] IOWA ACTS at 847.

64 IOWA CODE, § 775.5 (1966).

65 *Id.* Weaver v. Herrick, 258 Iowa 796, 140 N.W.2d 178 (1966). Some question might be raised as to why the legislature did not as well specifically provide for funds for independent experts. Of course, the costs of transcripts, records and briefs are appellate costs distinct from the rights associated with the indigent's defense on the trial level. Thus, the inclusion of some specific appellate rights should not necessarily warrant an assumption that certain unexpressed rights during the trial are to be excluded.

66 Weaver v. Herrick, 258 Iowa 796, 140 N.W.2d 178 (1966). *See also* Carlson, *Appointed Counsel in Criminal Prosecution: A Study of Indigent Defense*, 50 IOWA L. REV. 1073 (1965).

67 Davis v. Walter, 259 Iowa 837, 146 N.W.2d 247 (1966); Perry v. Eblen, 250 Iowa 1338, 98 N.W.2d 832 (1959).

68 State v. Myers, 248 Iowa 44, 79 N.W.2d 382 (1956).

69 Presumably the court's discretion is limited by the "interests of justice." IOWA CODE § 785.5 (1966).

70 "Additionally we are convinced the refusal to provide funds for an independent analysis of defendant's handwriting was not in the best interests of justice . . . ." State v. Hancock, 164 N.W.2d 330, 333 (Iowa 1969).

71 *Id.*

72 *Id.*

opinions among experts,[73] and the issue sought to be proved by the expert must be crucial to the defense.[74]

Thus, should the facts satisfy the preceeding requirements, the indigent should be entitled to independent expert analysis. Furthermore, should the analysis reveal a variance from the state's findings, the indigent should be entitled to expert witness fees enabling him to put his expert on the stand.[75] The request for expert witness fees must be timely. A pre-trial and pre-analysis request for such fees is, according to *Hancock*, "premature and properly denied."[76]

The defense of indigents has been enhanced by the Iowa Supreme Court's decision in *Hancock*. Provided with the proper factual prerequisities and upon timely request, the court-appointed attorney, in Iowa, is in an excellent position to receive independent expert assistance—both at the pre-trial and trial stage—at the expense of the state.

JEFF H. JEFFRIES

Criminal Procedure—IOWA SUPREME COURT REFUSES TO APPLY RETROACTIVELY A UNITED STATES SUPREME COURT DECISION HOLDING A CLERK'S TRANSCRIPT APPEAL UNCONSTITUTIONAL.—*Kenney v. Haugh* (Iowa 1968).

Thomas Kenney was convicted of burglary in 1964. He requested an appeal; however, without his knowledge or consent, an appointed attorney prosecuted an appeal by clerk's transcript. The conviction was affirmed *per curiam* by the Supreme Court of Iowa in January of 1965. In September of 1966, Kenney filed a petition for a writ of habeas corpus in the Iowa District Court for Jones County claiming violation of due process in the manner in which the appeal was submitted. The petition was denied. Subsequently, *Entsminger v. Iowa*[1] was decided by the United States Supreme Court holding the clerk's transcript method of appeal unconstitutional. On the basis of *Entsminger*, defendant appealed from the denial of the petition for a writ of habeas

[73] *Id.* "An independent analysis of defendant's handwriting conducted by an expert of her own choosing could well have resulted in a conclusion diametrically opposed to that . . ." of the state's expert.

[74] Id. "At the time defendant's application was filed she stood accused of forgery and the issue of authorship was crucial."

[75] State v. Hancock, 164 N.W.2d 330 (Iowa 1969).

[76] *Id.* at 333.

[1] 386 U.S. 748 (1967).

corpus. *Held,* affirmed. The 1967 United States Supreme Court decision of *Entsminger* did not apply retroactively to the 1965 submission of appeal on clerk's transcript. *Kenney v. Haugh,* — Iowa —, 163 N.W.2d 428 (1968).

The question of retroactivity[2] of United States Supreme Court decisions in the area of criminal procedure involves the issue of whether a decision which changes some facet of criminal procedure should be applied only to future cases in which the same issue is raised or whether convictions, or other determinations, final before the date of the decision in question will be affected as well as future cases. The question of retroactivity became important in 1965 when the United States Supreme Court held the rule set out in *Mapp v. Ohio*[3] excluding evidence obtained by an illegal search and seizure from use in state courts did not apply retroactively.[4] Previously there had been only one major decision concerning retroactivity.[5] Since 1965, four United States Supreme Court decisions have applied seven United States Supreme Court cases prospectively only[6] while in two decisions three cases received retroactive application.[7]

Throughout the cases dealing with the issue of retroactivity, the United States Supreme Court has suggested three basic standards for determining whether a rule of criminal procedure should be applied retroactively. The results of the application of these standards are then balanced to determine whether the rule should be held retroactive.[8]

The first standard involves the value and purpose of the rule. After determining the value of the rule, the Court looks to how important that value is. If the rule is one which goes "to the fairness of the trial—the very integrity

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2 A decision retroactively applied applies to "convictions which had become final before rendition of our opinion." This is to be distinguished from a purely prospective application. "A ruling which is purely prospective does not apply even to the parties before the court." Another possibility falls in between and occurs when the rule is applied to the parties before the court and cases still pending on direct review as well as all future cases. Linkletter v. Walker, 381 U.S. 618, 621-22 (1965).

3 367 U.S. 643 (1961).

4 Linkletter v. Walker, 381 U.S. 618 (1965).

5 Griffin v. Illinois, 351 U.S. 12 (1956), holding that an indigent could not be denied a fair and adequate appeal because he did not have the money to purchase a transcript, was held retroactive by Eskridge v. Washington State Bd. of Prisons, 357 U.S. 214 (1958).

6 Griffin v. California, 380 U.S. 609 (1965), which forbade state prosecutors from commenting on the failure of defendants to testify, was given prospective application by Tehan v. United States *ex rel.* Shott, 382 U.S. 406 (1966). Escobedo v. Illinois, 378 U.S. 478 (1964), and Miranda v. Arizona, 384 U.S. 436 (1966), both of which concerned defendants' rights to counsel, were held prospective only by Johnson v. New Jersey, 384 U.S. 719 (1966). United States v. Wade, 388 U.S. 218 (1967), involving defendants' right to counsel at police lineups, and Gilbert v. California, 388 U.S. 263 (1967), involving defendants' right to an attorney at the confrontation of witnesses, were applied prospectively only by Stovall v. Denno, 388 U.S. 293 (1967). DeStephano v. Woods, 392 U.S. 631 (1968), held Duncan v. Louisiana, 391 U.S. 145 (1968), guaranteeing a jury trial in a state court wherever the sixth amendment guarantees a jury trial in a federal court, and Bloom v. Illinois, 391 U.S. 194 (1968), guaranteeing a jury trial where serious contempt charges are in issue, did not apply retroactively.

7 Johnson v. New Jersey, 384 U.S. 719 (1966), held retroactive Gideon v. Wainwright, 372 U.S. 335 (1963), requiring a court appointed counsel for the impoverished in felony cases, and Jackson v. Denno, 378 U.S. 368 (1964), establishing procedures for determining the voluntariness of confessions. More recently, Roberts v. Russell, 392 U.S. 293 (1968), held Bruton v. United States, 391 U.S. 123 (1968), which held that admission of a codefendant's confession at a joint trial violated defendant's sixth amendment right of cross-examination, retroactive.

8 "[T]he question . . . is necessarily a matter of degree" and a "question of probabilities . . . ." Johnson v. New Jersey, 384 U.S. 719, 728-29 (1966).