

**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D.C. 20548**

**FILE:** B-204189

**DATE:** July 6, 1982

**MATTER OF:** District of Columbia Criminal Justice Act—Payment for expert and other services at sentencing

**DIGEST:** The District of Columbia (DC) Criminal Justice Act, D.C. Code Ann. § 11-2605 (1981), provides funding for expert and other services necessary for "an adequate defense" for eligible defendants. The purpose of the Act is to assure adequate representation of indigent defendants in the local courts at all stages of the proceedings. We construe the statutory phrase "an adequate defense" to include sentencing. Moreover, the Act plan, which has been implemented as required under D.C. Code Ann. § 11-2601, as well as the DC Superior Court Criminal Rules contemplate defense of the contents of the presentence report and presentation of mitigating factors, at the time of sentencing. Therefore, we would not object if the Superior Court authorizes or approves expert and other services necessary for an adequate defense at the time of sentencing.

The Chief Judge of the Superior Court of the District of Columbia (DC) asked for our opinion on whether an outside organization which performs services requested by defense counsel in connection with a defendant to be sentenced by the judge may be paid for such as an expert witness at the time of sentencing. District of Columbia Criminal Justice Act, D.C. Code Ann. §§ 11-2601 et seq. (1981).

The Chief Judge suggests that sentencing is not a part of defense and as such would not fall under expert and other services "necessary for an adequate defense" under D.C. Code § 11-2601. He states that the question in issue appears to be a novel one in the District of Columbia. He further states that he can find no case law either in the District of Columbia or the Federal courts which directly addresses the use of expert witnesses at sentencing.

For the reasons discussed below, it is our position that if desirable, the Superior Court may pay for services necessary to assure the defendant "an adequate defense" at sentencing.

The Superior Court has discretionary authority under the following provisions of the D.C. Code Annotated, to authorize or approve expert and other services necessary for an adequate defense of indigent defendants in criminal cases:

"§ 11-2601. Plan for furnishing representation of indigents in criminal cases.

"The Joint Committee on Judicial Administration shall place in operation, within ninety days after the effective date of this chapter, in the District of Columbia a plan for furnishing representation to any person in the District of Columbia who is financially unable to obtain adequate representation--

\* \* \* \* \*

"Representation under the plan shall include counsel and investigative, expert, and other services necessary for an adequate defense, \* \* \*

"§ 11-2603. Duration and substitution of appointments.

"A person for whom counsel is appointed shall be represented at every stage of the proceedings from his initial appearance before the court through appeals \* \* \*.

"§ 11-2605. Services other than counsel.

"(a) Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for an adequate defense may request them in an ex parte application. Upon finding, after appropriate inquiry in an ex parte proceeding, that the services are necessary and that the person is financially unable to obtain them, the court shall authorize counsel to obtain the services.

"(b) Counsel appointed under this section may obtain, subject to later review, investigative, expert, or other services \* \* \* without prior authorization if necessary for an adequate defense. The total cost of services obtained without prior authorization may not exceed \* \* \* the rate provided by section 3006A(e)(2) of title 18, United States Code \* \* \*."

In United States v. Durant, 545 F.2d 823, 827 (2d Cir. 1976) (a case construing 18 U.S.C. § 3006A(e), which is for all practical purposes identical to D.C. Code Ann. § 11-2605), the court discussed the phrase "necessary to an adequate defense" 1/ as follows:

---

1/ This phrase now reads "necessary for an adequate defense" in 18 U.S.C. § 3006A(e) as well as D.C. Code Ann. § 11-2605.

"\* \* \* We recognize, as did the Fifth and Eighth Circuits, that it is difficult to spell out a rigid rule in great detail. Yet, the purpose of the Act, confirmed by its legislative history, \* \* \* is clearly to redress the imbalance in the criminal process when the resources of the United States Government are pitted against an indigent defendant. Therefore, the phrase 'necessary to an adequate defense' must be construed with this commendable purpose in mind. 'Necessary' should at least mean 'reasonably necessary,' and 'an adequate defense' must include preparation for cross-examination of a government expert as well as presentation of an expert defense witness. This does not mean that applications for expert assistance should be granted automatically, or that frivolous applications should be granted at all. But it does mean that the Act must not be emasculated by niggardly or inappropriate construction."

Sentencing is not technically a part of defense of the charges. However, even at sentencing, a defendant has rights to be protected. See Mempa v. Rhay, 389 U.S. 128, 88 S. Ct. 254 (1967); Townsend v. Burke, 334 U.S. 736, 68 S. Ct. 1252 (1948). A defendant for whom counsel is appointed has a right to be represented "at every stage of the proceedings from his initial appearance before the court through appeals." D.C. Code Ann. § 11-2603. Representation includes expert and other services. See 50 Comp. Gen. 128, (1970); D.C. Code Ann. § 11-2601.

Further, the DC Criminal Justice Act Plan, which has been implemented as required under D.C. Code Ann. § 11-2601, establishes the following defense practice standards for attorneys in the Superior Court to consider in preparing for sentencing:

"10.8 After Conviction

"(a) Sentencing

"Counsel has the duty to consider the following in preparing for sentencing:

\* \* \* \* \*

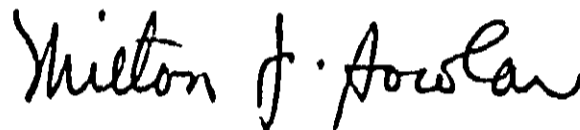
"(ii) The presentence report prepared for the court, with a view to verifying, supplementing, or challenging its contents as appropriate.

"(iii) Preparation of a sentencing memorandum in the event there are unique, favorable, mitigating factors known to counsel regarding the defendant

that would not otherwise be brought to the court's attention." 2/

Under the DC criminal representation plan, attorneys in the Superior Court are required to review the contents of the presentence report and to inform the sentencing court of any mitigating factors. Similarly, Rule 32 (dated November 11, 1976), Superior Court Criminal Rules, requires the court, before imposing sentence, to afford the defendant or his counsel an opportunity to comment on the presentence report and, at the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in such report. Hence, the DC criminal representation plan and criminal rules contemplate defense of the contents of the presentence report and presentation of mitigating factors at sentencing.

In view of the foregoing, we construe the statutory phrase "an adequate defense" to include sentencing. Accordingly, we would not object if the Superior Court authorizes or approves payment for any necessary expert or other services required by the defense at sentencing. Review of the necessity for any given service is, of course, part of the trial judge's responsibility under the statute.



Acting Comptroller General  
of the United States

---

2/ The Joint Committee on Judicial Administration adopted this plan on April 21, 1981.