

2014 NOV -7 AM 8:30

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1 FOR PUBLICATION

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6 **IN THE SUPERIOR COURT**
7 **FOR THE**
8 **COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

9 **COMMONWEALTH OF THE**) **CRIM. CASE NO. 14-0049**
10 **NORTHERN MARIANA ISLANDS,**)
11 **Plaintiff,**) **ORDER GRANTING MOTION TO**
12 **v.**) **RECONSIDER AND GRANTING**
13 **FRANK TUDELA PANGELINAN,**) **REQUEST FOR EXPERT FUNDING**
14 **Defendant.**)

15 **I. INTRODUCTION**

16 **THIS MATTER** came before the Court on November 6, 2014, at 10:00 a.m. in Courtroom
17 217 on Frank Tudela Pangelinan (“Defendant”)’s motion to reconsider. Assistant Public Defender
18 Eden Schwartz appeared for Defendant. Assistant Attorney General Heather Barcinas appeared for
19 the Commonwealth.

20 **II. BACKGROUND**

21 On June 16, 2014, the Court granted Defendant’s previous motion to reconsider and granted
22 his request for a mental condition expert for assistance in a scheduled suppression hearing. The
23 Court had originally denied the motion, balancing Defendant’s rights against the rights of
24 taxpayers. Upon a showing of new evidence, the Court later reconsidered its denial and granted the
25 request, ordering Ms. Schwartz to make the necessary arrangements at her suggested cap of \$1,500.

ENTERED

1 In early August, Ms. Schwartz received an initial invoice by the expert, Dr. Martin Blinder,
2 which reached the cap, but did not exceed it. On August 11, 2014, Ms. Schwartz filed a motion
3 requesting to extend the cap, informing the Court that she had received a bill from Dr. Blinder for
4 services rendered up to that date which exceeded the \$1,500 cap. The services already rendered
5 included a forensic evaluation, a report, and a very limited consultation with Ms. Schwartz. Ms.
6 Schwartz requested the additional funding for travel expenses, consultation time with counsel, Dr.
7 Blinder's time to review his report and documents, and for his time for testifying at the suppression
8 hearing. The suppression hearing was set for August 19, 2014, and was later continued to August
9 29, 2014. Without having received a decision from the Court on whether the request for additional
10 funds would be granted or denied, Ms. Schwartz accepted and allowed services to be rendered by
11 the expert.

12 On August 28, 2014, the parties reached a global non-trial disposition in the matter. On
13 September 15, 2014, Ms. Schwartz filed a follow up request to her August 11 request for additional
14 funds, informing the Court that it owed Dr. Blinder \$1,000 and requested the Court to approve
15 reimbursement. The Court denied this request, finding it procedurally improper for defense counsel
16 to expend funds past the cap without the authorization of the Court, and refusing to approve of an
17 action taken without proper authority.

18 Defendant then filed the instant motion pursuant to NMI Const. Art. I, § 4(a); U.S. Const.
19 amend. VI; *Commonwealth v. Perez*, 2006 MP 24; *Ake v. Oklahoma*, 470 U.S. 68 (1985); 6 CMC §§
20 6604(b), (d); and NMI R. Evid. 706. The Commonwealth had no response to the motion and left the
21 matter to the discretion of the Court.

22 **III. LEGAL STANDARD**

23 A court may reconsider its earlier ruling where there is "an intervening change of controlling
24 law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice."
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1 *Commonwealth v. Eguia*, 2008 MP 17 ¶ 7 (citing *Camacho v. J.C. Tenorio Enterprises*, 2 NMI 407, 414
2 (1992)).

3 **IV. DISCUSSION**

4 Defendant's motion focuses on whether the request was justified based on Defendant's
5 constitutional right to present a defense, the need for expert assistance, and on the standard that
6 experts are entitled to reasonable compensation. The Court has never been in disagreement with
7 any of these matters; it recognized Defendant's needs to present a defense and for expert assistance,
8 granted such assistance at Defendant's own suggested cap, and does not now disagree that the
9 requested amount is unreasonable. The Court does take issue with the propriety of defense counsel
10 expending funds that the Court had not yet authorized. The Court reiterates that the Office of the
11 Public Defender is not the expenditure authority and it may not unilaterally commit Judiciary funds
12 without prior approval by the appropriate authority. Ms. Schwartz was aware approval was needed
13 to expend funds past the cap, yet made the decision to go ahead and accept services when the funds
14 to pay for the services had not been authorized.

15 Although the Commonwealth is not required to provide an indigent defendant with
16 unlimited funding, it must ensure the defendant has the services of experts necessary to a
17 meaningful defense:

18 We recognized long ago that mere access to the courthouse door does not by itself
19 assure a proper functioning of the adversary process, and that a criminal trial is
20 fundamentally unfair if the State proceeds against an indigent defendant without
21 making certain that he has access to the raw materials integral to the building of an
22 effective defense. Thus, while the Court has not held that a State must purchase for
the indigent defendant all the assistance that his wealthier counterparts might buy, it
has often reaffirmed that fundamental fairness entitles indigent defendants to an
"adequate opportunity to present their claims fairly within the adversary system."

23 *Ake. v. Oklahoma*, 470 U.S. 68, 460 (1985) (internal quotations omitted).

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1 In discussing the relationship between attorney compensation and a defendant's right to
2 counsel in light of a statutory cap for representation, a Florida court examined the issue of under-
3 compensation and how it might affect a defendant's right to representation:

4 It may be difficult for an attorney to disregard that he or she may not be reasonably
5 compensated . . . As a result, there is a risk that the attorney may spend fewer hours
6 than required representing the defendant or may prematurely accept a negotiated plea
7 that is not in the best interests of the defendant. A spectre is then raised that the
8 defendant received less than the adequate, effective representation to which he or she
9 is entitled, the very justice appointed counsel was intended to remedy.

10 *White v. Board of County Commissioners of Pinellas County*, 537 So. 2d 1376, 1379-80
11 (Fla. 1989).

12 It is Defendant's constitutional right to adequately present a defense which must be the
13 Court's focus. *See Makemson v. Martin County*, 491 So. 2d 1109, 1112 (Fla. 1986) (Noting the
14 defendant's right to effective representation and the attorney's right to fair compensation are
15 "inextricably interlinked"). The Commonwealth does not have a statutory cap¹ on services, but the
16 Court's cap can be analogized similarly. Defendant's right to present a defense is intertwined with
17 an expert's right to fair compensation. There are no mental health experts on island. Defense
18 counsel in this case obtained the services of Dr. Blinder who happened to be working in the area at
19 the time of the request and willing to return to provide services.

20 ¹ Most states place monetary limits on payments for investigator and expert services. Douglas W. Vick,
21 *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFFALO L. REV. 329,
22 392 (1995) ("[I]n many states, the resources available to the defense for investigators or experts is constrained by
23 statute."). In federal cases, with prior authorization, compensation for investigative, expert, and other services is also
24 limited by statute. Payment in excess of the case compensation limit for services authorized prior to the performance
25 thereof may be made when certified by the court or U.S. magistrate judge and approved by the chief judge of the circuit
as being necessary to provide fair compensation for services of an unusual character or duration. 18 U.S.C. §
3006A(e)(3). If counsel anticipates that the compensation will exceed the statutory maximum, she should obtain
approval in advance from the court and the chief judge of the circuit. Guide, Vol 7A, § 310.20.20(b). Counsel may
obtain such services without first getting authorization if it is necessary for adequate representation, subject to later
review. 18 U.S.C. § 3006A(e)(2)(A). "The total cost of the services obtained without prior authorization may not
exceed \$800 and the expenses reasonably incurred." 18 U.S.C. § 3006A(e)(2)(A). However, even if the costs of such
services exceeds \$800, the court may, in the interest of justice and "upon finding that timely procurement of necessary
services could not await prior authorization, approve payment for such services after they have been obtained." 18
U.S.C. § 3006A(e)(2)(B).

1 As a matter of public policy, the Court is gravely concerned with defense counsel expending
2 scarce resources without authority and then expecting the Court to condone such improper actions.
3 The Court, however, takes into consideration Ms. Schwartz's admission that she should have
4 approached the situation differently and taken steps to ensure a decision on her request before
5 accepting services that required funds the Court had not approved. Therefore, taking into account
6 Defendant's right to adequately prepare a defense and defense counsel's affirmation that such
7 tactics will no longer be utilized, the Court finds it appropriate to reimburse Dr. Blinder for his
8 services, and to grant the motion to reconsider on the ground of manifest injustice.

9 **V. CONCLUSION**

10 The Court therefore **GRANTS** Defendant's motion to reconsider and **GRANTS** the request
11 for expert funding.

12 **SO ORDERED** this 6th day of November, 2014.

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16 TERESA K. KIM-TENORIO
17 Associate Judge
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