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Ada Long Croom
University of Dayton

CRIMINAL JUSTICE ACT: THE QUEST FOR THE PROPER STANDARD TO BE APPLIED IN SUBSECTION (e) REVIEW

I. INTRODUCTION

The belief that a defendant in a criminal case has a right to the representation of competent counsel is firmly entrenched in our democratic system of government.[1] In holding that this right applied to the states as well as to the federal government, Justice Black wrote: "The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours."[2] The need to protect this right for all Americans was reiterated by President Kennedy in a state of the union address, when he said that "[t]he right to competent counsel must be assured to every man accused of crime in Federal court, regardless of his means."[3]

To insure that criminal defendants in federal courts receive effective counsel when such defendants are financially unable to pay for legal services, Congress passed the Criminal Justice Act of 1964.[4] Congress realized, however, that one factor which can render even the most skilled attorney ineffective is the inability to conduct a proper investigation or to employ the experts required for the preparation and presentation of an adequate defense.[5] Therefore, Congress went further to assure the effective assistance of counsel and a fair trial by expressly providing for the allocation of funds for investigative, expert, or any other services which defense counsel might need in preparing and presenting a defense; this was accomplished by the enactment of subsection (e) of the Criminal Justice Act.[6]

When a request for services is made pursuant to subsection (e), the statute makes the granting of the request obligatory[7] when two con-

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1. U.S. CONST. amend. VI.
2. Gideon v. Wainwright, 372 U.S. 335, 344 (1963).
3. Annual Message to the Congress on the State of the Union, PUB. PAPERS 11, 14 (Jan. 14, 1963).
4. Pub. L. No. 88-455, 78 Stat. 552 (codified as amended at 18 U.S.C. § 3006A (1982)).
5. *See infra* notes 26–27 and accompanying text.
6. 18 U.S.C. § 3006A(e) (1982). Section 3006A(e)(1) states that:

> 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, or the United States magistrate if the services are required in connection with a matter over which he has jurisdiction, shall authorize counsel to obtain the services.

7. The language of the statute mandates that the request "shall" be authorized when the

ditions are satisfied. The first condition requires a finding that the defendant is financially unable to obtain the requested services.[8] The second condition sets forth a requirement that the services are "necessary for an adequate defense."[9] Some appellate courts, however, have supplanted the "necessary showing"[10] requirement by requiring a "clear and convincing"[11] showing of prejudice[12] before reversing a trial court's refusal to grant subsection (e) requests.

This comment will discuss the purpose of subsection (e), and explore the evolution of the clear and convincing standard as well as the inapplicability and unfairness of its imposition. In addition, guidelines will be proposed to aid the courts in developing a standard of proof which more closely comports with the intent and purpose of the statute.

II. BACKGROUND

A. *Clear and Convincing: Case Law Origins*

Christian v. United States[13] was the first case to come before the federal circuit courts concerning denials of subsection (e) requests. The *Christian* court announced that before it would reverse a trial court's denial of a subsection (e) request, the appellant-defendant[14] must establish prejudice as a result of the denial by "clear and convincing" evidence.[15] During the ten-year period immediately following the *Christian* decision, the overwhelming majority[16] of appellate courts did not follow *Christian*.[17]

Recently, however, more courts have been adopting the *Christian* "clear and convincing" standard. For example, in 1978, the Eighth Circuit Court of Appeals applied the "clear and convincing" standard in refusing to reverse the district court's denial of a subsection (e) re-

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requisite conditions are met. *Id.*

8. *Id.*

9. *Id.*

10. As used in this comment, the terms "necessary showing," "necessary standard," "necessary," and similar terms are meant to be synonymous, and all connote the standard of a showing that the requested services are "necessary for an adequte defense."

11. *See infra* note 38 and accompanying text.

12. *See infra* notes 13–22 and accompanying text.

13. 398 F.2d 517 (10th Cir. 1968).

14. The terms "appellant-defendant," "defendant," and "appellant" are used interchangeably in this comment to refer to a person who was or may be a defendant in a criminal trial proceeding.

15. *Christian*, 398 F.2d at 519–20.

16. It appears that the Ninth Circuit Court of Appeals was the only court to reject this exception. *See, e.g.*, United States v. Sanders, 459 F.2d 1001 (9th Cir. 1972); United States v. Washbaugh, 442 F.2d 1127 (9th Cir. 1971).

17. *See infra* notes 33–35 and accompanying text.

quest.[18] In the same year, the Ninth Circuit Court of Appeals reaffirmed its earlier adherence[19] to this standard.[20] The Seventh Circuit Court of Appeals followed suit in 1980,[21] and the First Circuit Court of Appeals conformed to the movement in 1981.[22] These decisions intimate a definite trend that raises concerns about the need to develop the proper standard to be applied in subsection (e) review.

B. Clear and Convincing: Not Contemplated by the Legislature

The language of subsection (e) compels the approval of a request for expert, investigative, or other services when a defendant is financially unable to pay for such services and when the services are necessary for an adequate defense.[23] The requirement that services are *necessary* must logically be interpreted as a requirement which falls far short of a *clear and convincing* showing of prejudice resulting from a denial of the request.[24] Such logic is dictated particularly in view of the congressional purpose behind the Criminal Justice Act.

When a statute does not include a statement of its purpose, the best indicator of the purpose of the enactment can be found in the legislative history of the statute. The legislative history of the Criminal Justice Act clearly indicates that it is a remedial statute. The purpose of the statute is to assure the effective legal representation of criminal defendants in federal courts when the defendants themselves are without the financial resources to pay for such services.[25] Further, the legis-

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18. United States v. Eagle, 586 F.2d 1193, 1197 (8th Cir. 1978) (request for appointment of an expert under subsection (e) in connection with motions for change of venue and voir dire examination).

19. *See, e.g., Sanders*, 459 F.2d at 1002; *Washbaugh*, 442 F.2d at 1130.

20. United States v. Spaulding, 588 F.2d 669, 670 (9th Cir. 1978) (defendant charged with criminal use of the mails requested subsection (e) experts to examine fingerprint and typewriting evidence within the government's possession in an attempt to contest the testimony of FBI experts regarding that evidence).

21. United States v. Reddick, 620 F.2d 606, 609 (7th Cir. 1980) (defendant charged with mail fraud sought subsection (e) investigative services to locate and interview potential witnesses from among defendant's former out-of-state customers).

22. United States v. Canessa, 644 F.2d 61, 64 (1st Cir. 1981) (defendant on appeal from various federal fraud convictions requested subsection (e) funds for investigative services to uncover evidence to support his contention that his attorney had perjured himself before the grand jury).

23. *See supra* notes 6–9 and accompanying text.

24. *See infra* notes 28–32 and accompanying text.

25. Letter from President John F. Kennedy to Speaker of the House of Representatives, John W. McCormack (March 8, 1963), H.R. REP. No. 864, 88th Cong., 1st Sess. 4–5, *reprinted in* 1964 U.S. CODE CONG. & AD. NEWS 2990, 2993 [hereinafter cited as President's letter]; Letter from Attorney General Robert F. Kennedy to President John F. Kennedy (March 6, 1963), H.R. REP. No. 864, 88th Cong., 1st Sess. 5–8, *reprinted in* 1964 U.S. CODE CONG. & AD. NEWS 2990, 2994 [hereinafter cited as Attorney General's letter]; CONFERENCE REP. No. 1709, 88th Cong., 2d Sess. 1, *reprinted in* 1964 U.S. CODE CONG. & AD. NEWS 2990, 3000.

lative history of the act reveals that one of the two key objectives contemplated was not only that of providing skilled counsel, but the equally important goal of making investigative and other expert assistance available to defendants as well.[26] It was noted that the act would establish

> an adequate defense standard under which representation in a criminal case is recognized as involving more than a lawyer alone. It requires making available to counsel those auxiliary investigative, expert, and other services frequently essential to ascertaining the facts and making the judgments upon which to prepare and present the defendant's case.[27]

The foregoing statement regarding the purpose of the Criminal Justice Act has been interpreted by some courts as a congressional attempt to place indigent[28] defendants, as closely as possible, on equal footing with nonindigents.[29] The purpose of the Criminal Justice Act was not limited, however, to eliminating the existing disparity between indigent and nonindigent defendants in criminal cases, but was aimed also at eliminating the disparity which exists between the resources which are available to the government and those available to defendants.[30] The drafters of the act were aware that in typical criminal cases, the government's unlimited resources are pitted against the virtually nonexistent resources available to the individual defendants.[31] To ensure a fair trial under such circumstances, it is paramount that the accused have access to those resources necessary to gather pertinent evidence to prepare and present his or her case.[32]

In view of these purposes, the application of a lenient standard has been espoused for determining the need for subsection (e) services. For example, the court in *United States v. Largan*[33] applied a lenient standard by determining if the requested services would yield material evidence.[34] Other courts have applied a lenient standard by inquiring

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26. H.R. REP. NO. 864, 88th Cong., 1st Sess. 11, *reprinted in* 1964 U.S. CODE CONG. & AD. NEWS 2990, 2997.

27. Attorney General's letter, *supra* note 25, at 7, *reprinted in* 1964 U.S. CODE CONG. & AD. NEWS at 2995.

28. Although courts frequently use the term "indigent" when referring to the class of defendants to which the Criminal Justice Act applies, Congress consciously refrained from using this term so as not to imply that a person must be destitute before counsel or services can be furnished. *Id.*

29. United States v. Schappel, 445 F.2d 716, 721 n.13 (D.C. Cir. 1971).

30. President's letter, *supra* note 25, at 5, *reprinted in* 1964 U.S. CODE CONG. & AD. NEWS at 2993.

31. *Id.*

32. *See id.*

33. 330 F. Supp. 296 (S.D.N.Y. 1971).

34. *Id.* at 298.

whether the requested services would reasonably be utilized by an attorney working with an independently paying client.[35]

Support for utilizing a lenient standard is also found in the act's post-legislative history. In 1969, the Senate Subcommittee on Constitutional Rights stated that "the bar should be bold in seeking subsection (e) authorizations, and the bench should be tolerant in entertaining and relatively *generous in granting them.*"[36] Although the legislative history is devoid of any precise definition of, or test for determining when subsection (e) services are "necessary for an adequate defense," even a cursory examination of the legislative history of the statute forces the conclusion that the requirement of a "clear and convincing" showing of prejudice was not envisioned by the drafters or the legislators.[37]

C. *"Clear and Convincing" Distinguished from "Necessary"*

Not only does the legislative history evidence that the requirement of a clear and convincing showing was never contemplated as a prerequisite to "necessary" services, but logic alone would appear to dictate that these are two distinct and different standards. The term "clear and convincing" refers to a standard of proof that requires proof by *more* than a preponderance of the evidence, but proof less than that required under the "beyond a reasonable doubt" standard.[38]

The word "necessary," on the other hand, is susceptible to many meanings varying from an import of an absolute need or requirement to that of mere convenience or usefulness; the meaning, therefore, must be derived from the context in which it is used.[39] Where the language of the statute fails to provide a context from which the precise meaning of a term may be derived, the context should be sought from the purpose for which the statute was enacted. From an examination of the purpose of subsection (e),[40] as well as the purposes of the Criminal Justice Act in general,[41] it is evident that the legislature envisioned "necessary" as taking on a connotation which imparts a meaning akin to "helpfulness"

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35. Brinkley v. United States, 498 F.2d 505, 510 (8th Cir. 1974); United States v. Bass, 477 F.2d 723, 725 (9th Cir. 1973).

36. SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS OF THE SENATE COMMITTEE ON THE JUDICIARY, THE CRIMINAL JUSTICE ACT IN THE FEDERAL DISTRICT COURTS, 90th Cong., 2d Sess. 220–21 (1969) (emphasis added) [hereinafter cited as SUBCOMMITTEE REPORT].

37. *See* Decker, *Expert Services in the Defense of Criminal Cases: The Constitutional and Statutory Rights of Indigents*, 51 U. CIN. L. REV. 574, 601 (1982).

38. Alexander v. Warren, Arkansas School Dist. No. 1 Board, 464 F.2d 471, 474 (8th Cir. 1972). The clear and convincing standard has also been defined as requiring proof beyond a reasonable doubt. BLACK'S LAW DICTIONARY 227 (5th ed. 1979).

39. BLACK'S LAW DICTIONARY 928 (5th ed. 1979).

40. *See supra* notes 26–32 and accompanying text.

41. *Id.*

or "usefulness" rather than that of an absolute need or requirement.[42] The post-legislative history of the act recommends that subsection (e) services should be interpreted as " 'necessary' within the meaning of the act if they are likely to lead to or involve admissible evidence, or if they appear reasonably necessary to assist counsel in the performance of his defense functions."[43]

III. ANALYSIS

The judicially developed requirement that the defendant-appellant establish by clear and convincing evidence that the trial judge's denial of a subsection (e) request has resulted in prejudicial error effectively emasculates the protection afforded under the statute. Under the clear and convincing standard, the congressional requirement that subsection (e) services need only be necessary is vitiated by a judicial interpretation which equates necessity with unmistakable prejudice.[44] Not only does the imposition of this requirement contravene the legislative purpose[45] underlying inclusion of this provision in the Criminal Justice Act, but it also places an unwarranted and often insurmountable burden upon the defendant.[46] Further, this imposition diminishes the right to an adequate defense[47] and frustrates the integrity of the fairness and truth-seeking functions of the justice system[48] in which our society takes much pride.[49]

A. The Difficulity of Proving Prejudice under the Clear and Convincing Standard

The preparation and presentation of an adequate defense is encumbered with many complexities. Often, defense counsel is faced with having only a few bits and pieces of an immense jigsaw puzzle from which to develop a defense.[50] Many times the defense attorney must rely on investigations and the aid of experts, not only to determine *where* the particular pieces fit into the overall puzzle, but often even more critically, *what* pieces are missing.[51] These problems may be com-

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42. *Id.*

43. SUBCOMMITTEE REPORT, *supra* note 36, at 227.

44. *See infra* text accompanying notes 58–61.

45. *See supra* notes 23–32 and accompanying text.

46. *See infra* notes 50–68 and accompanying text.

47. *See generally* Clinton, *The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials*, 9 IND. L. REV. 713 (1976) (Bill of Rights and recent decisions suggest a "federally protected constitutional right" to present a defense).

48. *See* United States v. Agurs, 427 U.S. 97, 111–12 (1976).

49. Brady v. Maryland, 373 U.S. 83, 87 (1963).

50. SPECIAL COMMITTEE OF THE ASS'N OF THE BAR OF THE CITY OF NEW YORK AND THE NAT'L LEGAL AID AND DEFENDER ASS'N, EQUAL JUSTICE FOR THE ACCUSED 58 (1959).

51. *See generally* Note, *Toward a Constitutional Right to an Adequate Police Investiga-*

pounded due to inadequate police investigations resulting in critical evidence, favorable to the defendant, being lost and at times totally unrecoverable.[52]

The difficulties inherent in attempting to prove that prejudice has resulted from the denial of a subsection (e) request were addressed by the Fourth Circuit Court of Appeals in *Williams v. Martin*.[53] In *Martin*, the court concluded that it is unreasonable to require a defendant who has been denied access to an expert, to present proof of what an expert would reveal because the need for an expert would not arise if the subject matter were within the comprehension of a nonexpert.[54] A similar problem was recognized by the trial judge in *United States v. Agurs*[55] with respect to the inability of the defense to specifically request favorable information in the possession of the government. The problem as articulated by the trial judge was simply: "How can you request that which you don't know exists."[56] The problem posed by a defense attorney's inability to make a respectable showing of the need for subsection (e) services, absent evidence which an expert is needed to produce, was also recognized by the Senate Subcommittee on Constitutional Rights.[57]

The effect of the clear and convincing showing of prejudice in subsection (e) cases is to require proof through the same evidence for which expert or investigative services were needed in the first place, but were denied. Further, under this standard, prejudice is required to be established by a standard which demands proof by more than even a preponderance of the evidence.[58] In essence, the defendant-appellant must show that had the requested services been granted, the jury's verdict *would* have been different, rather than that it is more likely than not that the verdict *might* have been different.[59] Moreover, in the area of requests for expert services, a need often arises not only with respect to examining evidence to obtain facts which are favorable to the defendant, but also to aid counsel's understanding of the evidence in order to

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tion: A Step beyond Brady, 53 N.Y.U. L. REV. 835 (1978).

52. It is argued that an inadequate police investigation impairs the ability of a defendant to gather all the material evidence favorable to the defense because by the time he or she learns of the pending charges much of this evidence will have been removed or will have naturally deteriorated. *Id.* at 835.

53. 618 F.2d 1021 (4th Cir. 1980).

54. *Id.* at 1026–27.

55. 427 U.S. 97 (1976).

56. *Id.* at 101 n.4.

57. SUBCOMMITTEE REPORT, *supra* note 36, at 221.

58. The position taken in this comment is that even a preponderance standard may, in particular cases, be too demanding upon a defendant. *See infra* notes 80–93 and accompanying text.

59. *See infra* notes 66–73 and accompanying text.

make effective use of cross-examination[60]—a right guaranteed by the Constitution.[61] It has been postulated that this guarantee encompasses the right to discover and introduce evidence that would tend to impeach the witness.[62]

The requirement of a clear and convincing showing of prejudice places an impoverished defendant in a catch-22 situation. For example, an investigation is often most crucial when the evidence which could be uncovered during the investigation is somewhat uncertain.[63] However, the clear and convincing standard requires a defendant to establish with a high degree of proof what the evidence *would* have revealed without the benefit of these services. This same analysis applies with respect to the need for an expert. When counsel can establish by clear and convincing evidence that an expert would have changed the outcome of the trial, then such evidence would suffice to eliminate the need for the expert.[64] This type of situation is especially problematic when one recalls that the reason for utilizing an expert is to clarify a particular area of knowledge which is beyond the comprehension of a layperson.[65] Invariably, many defendants will be unable to establish prejudice because of this catch-22 requirement. This result attains not because no actual prejudice has been suffered, but because, without the requested services, the evidence required to make a clear and convincing showing of prejudice is unavailable.

An example of the difficulty in establishing the required degree of prejudice under the clear and convincing standard is clearly manifest in the case of *United States v. Spaulding*.[66] In *Spaulding*, the appellate court remanded the case to the district court with an order to appoint the requested experts. The court of appeals further ordered the district court to hold a hearing to determine the significance of the evidence produced by the expert.[67] After examining the subsequent findings of the trial judge, the appellate court concluded that the experts would possibly have benefited the defense in an advisory capacity, as

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60. United States v. Durant, 545 F.2d 823, 827 (2d Cir. 1976).

61. "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. CONST. amend. VI.

62. Note, *supra* note 51, at 846 (citations omitted).

63. *See supra* text accompanying notes 50–51, 56.

64. For example, in *Durant*, 545 F.2d at 828, the court observed that, based on the evidence before it, the only conclusion which could be reached was that had the defendant properly been authorized expert services, counsel *might* have been able to challenge the government's charges.

65. *See supra* text accompanying note 54.

66. 588 F.2d 669 (9th Cir. 1978).

67. *Id.* at 670. Experts were requested to examine certain fingerprint and typewriting evidence in the possession of the government in a case involving charges of mail extortion and bomb threats made through the mail. *Id.*

well as provided at least *some* helpful evidence during trial.[68] Notwithstanding this acknowledgment, the court held that this showing was insufficient to establish prejudice to the defendant by clear and convincing evidence and therefore affirmed the defendant's convictions.[69] The court purportedly relied on the "harmless error" standard promulgated in *Chapman v. California*[70] in reaching its holding.[71] However, it appears that the court misapplied the *Chapman* standard—which calls for the prosecution to prove harmless error "beyond a reasonable doubt"[72]—by placing the burden upon the defendant to prove by "clear and convincing" evidence that prejudicial error had resulted.[73]

B. Clear and Convincing: Effect on Right to Jury Trial

The clear and convincing standard of review for subsection (e) denials serves, at least to some extent, as an imprimatur of the trial judge's denial of a defendant's constitutional right to a jury trial[74] in criminal cases. This right encompasses the guarantee that it is the jury, not the judge,[75] who determines a defendant's guilt or innocence. A guilty verdict may only be rendered upon a finding by the jury that the evidence in the case established the defendant's guilt "beyond a reasonable doubt."[76] Such a verdict must be based upon a consideration by the jury of *all* the evidence presented. It follows, therefore, that when admissible evidence has been omitted which *might* have influenced the jury's verdict, prejudicial error has been committed.[77]

While it is true that the jury may place more weight on some evidence, it is the jury's duty to evaluate *all* of the material evidence in the case and render a verdict. Further, any proffered evidence which is relevant and material *must* be admitted, unless its probative value is substantially outweighed by the danger of unfair prejudice to the defendant that the evidence might be misunderstood and subsequently misapplied by the jury.[78] It is certainly inherent in the constitutional

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68. *Id.* The court expressed the belief that the amount of helpful evidence produced would have been minimal. *Id.*

69. *Id.*

70. 386 U.S. 18, 24 (1967).

71. *Spaulding*, 588 F.2d at 670 (citing *Chapman*, 386 U.S. 18).

72. *Chapman*, 386 U.S. at 24.

73. *Spaulding*, 588 F.2d at 670.

74. *U.S. Const.* art. III § 2, cl. 3; *id.* amend. VI.

75. The term judges refers to both trial and appellate judges.

76. *Agurs*, 427 U.S. at 112; *In re* Winship, 397 U.S. 358, 361 (1970).

77. *See Agurs*, 427 U.S. at 112.

78. FED R. EVID. 403 provides that: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

right to a jury trial that it is impossible to ascertain exactly what single bit of evidence, when combined with the remaining evidence in the case, will sufficiently create a "reasonable doubt" in the minds of the jury. But it has been advocated that implicit in this right is the defendant's right to actually *present* a defense to the jury.[79] The suggestion made here is that to deprive a defendant of subsection (e) services which would be beneficial in presenting a defense deprives the defendant of the constitutional right to trial by jury.

IV. GUIDELINES FOR DEVELOPING AN APPROPRIATE STANDARD

In setting the proper standard of review, the courts should at all times bear in mind the immense value which our society places on the fairness of a criminal trial. Our nation prides itself on the belief that our criminal trial process is not a sham contrived to convict the accused, but a process developed for ascertaining the truth so that the innocent who are accused are not convicted.[80] This value is often reflected by reference to the inscription on the walls of the Department of Justice which reads: "The United States wins its point whenever justice is done its citizens in the courts."[81] Thus, courts should always be concerned with maintaining the propriety of the truth-seeking function of the trial process.[82] This means that essential to the trial process must be the guarantee that a forum is provided in which the material facts which bear upon the innocence, as well as the guilt, of the accused may be put before the jury for its consideration.[83]

Another factor which should be considered when setting an appropriate standard for subsection (e) review is that the error which is alleged as a result of the denial of access to requested services is not based primarily upon a constitutional violation, but rather upon a statutory violation. The significance of this distinction is that the defendant bears a lesser burden in proving prejudicial error when a statute has allegedly been violated than when the alleged error arises out of a constitutional claim.[84]

Finally, and perhaps most importantly, the courts should always take cognizance of the *purpose* for which the statute was enacted[85] when setting the proper standard of review. Any standard which does

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79. *See generally* Clinton, *supra* note 47.

80. Brady v. Maryland, 373 U.S. 83, 87 (1963).

81. *Id. See also* Attorney General's letter, *supra* note 25, at 8, *reprinted in* 1964 U.S. CODE CONG. & AD. NEWS at 2996.

82. Note, *supra* note 51, at 851.

83. United States v. Agurs, 427 U.S. 97, 116 (Marshall, J., dissenting).

84. *Id.* at 108–09, 112.

85. *See supra* notes 23–32 and accompanying text.

not consider the remedial nature of the statute and the injustice and unfairness sought to be remedied by its enactment, will quite likely fall victim to the same trap as the court set in *Christian*.[86] The end result in such situations is that the very protection to defendants which the statute was enacted to afford will be denied.

With these provisos in mind, it is suggested here that the courts utilize a two-step process in deciding if the trial court's denial of subsection (e) services resulted in error which warrants the reversal of the defendant's conviction. The reviewing court should first determine if error was committed as a result of the refusal to authorize subsection (e) services. In making this determination, the court should engage in the same inquiry which the trial judge had the duty to undertake. This means that a determination must be made whether the requested services were "necessary" within the meaning of the statute. In deciding this issue, several factors should be considered. The court should consider whether the requested services involved evidence which was admissible or was likely to lead to admissible evidence,[87] or whether the services would reasonably appear to have aided counsel in preparing or presenting a defense.[88] When this determination cannot accurately be made without the benefit of the requested services,[89] other factors, such as whether a reasonable attorney with an independently paying client would likely have utilized such services,[90] should be considered. Another factor which should be considered in determining if the requested services were "necessary" within the meaning of the statute is whether the government had access to the same type of services which were requested by defendant. This is of particular significance because one of the primary purposes of subsection (e) was to eliminate the advantage which the government attains in criminal cases because of the wealth of resources available to it.[91]

If the reviewing court, after considering the foregoing factors, finds that the services were necessary within the meaning of the statute, but were denied, then error has been committed. The reviewing court should then determine if this error was prejudicial. Considering the legislative purpose of the statute,[92] and the difficulty confronting counsel in attempting to prove prejudice,[93] the fact that error was committed

86. *See supra* note 13 and accompanying text.
87. SUBCOMMITTEE REPORT, *supra* note 36, at 227.
88. *Id. See also supra* text accompanying notes 58–60.
89. *See supra* text accompanying notes 50–57.
90. This test has been utilized by some courts in the past. *See supra* note 35.
91. *See supra* note 30 and accompanying text.
92. *See supra* notes 25–32 and accompanying text.
93. *See supra* text accompanying notes 50–57.

should establish a presumption, albeit rebuttable, of prejudice. This presumption should only be overcome if the court, upon considering the entire record and the benefit which the defendant *might* reasonably have gained from the denied services, is convinced *beyond a reasonable doubt* that the services would not have affected the outcome of the trial had they been granted.

IV. CONCLUSION

The judicial imposition of the clear and convincing standard of review for denials of subsection (e) services creates the exact inequality that Congress sought to remedy when it incorporated this provision into the Criminal Justice Act. This standard devitalizes Congress' efforts to assure that no defendant in a criminal case is deprived of the opportunity to prepare and present an adequate defense because of his or her inability to pay for the necessary services.

The clear and convincing standard abrogates the "necessary" requirement set forth in the statute by placing impecunious defendants in the position of trying to establish prejudice without the benefit of the services which are often required to make this very showing. Under this standard, it is not enough that the defendant show that had the requested services been granted the jury's verdict *might* have been different. Instead, the defendant must show that such services *would* have changed the jury's verdict. Therefore, not only does the clear and convincing standard contravene the legislative intent behind the statute, but it also increases the risk of erroneous convictions by vitiating the requirement that an accused be convicted upon a finding of guilt beyond a reasonable doubt.

It is time for the courts to reevaluate the propriety of the clear and convincing standard for reviewing subsection (e) denials. In reexamining and hopefully modifying this standard, several factors should be considered. First, the proper standard should as closely as possible reflect the intent of the statute. Second, the court's objective should be to seek the truth during the trial process, not to seek a conviction. Developing a standard pursuant to these considerations will not only serve the ends intended by Congress when it enacted subsection (e), but will also better serve the ends of justice, which ultimately benefits all of society.

Ada Long Croom