

IN THE DISTRICT COURT OF FRANKLIN COUNTY, KANSAS
FOURTH JUDICIAL DISTRICT

STATE OF KANSAS,)
Plaintiff,)
v.)
KYLE TREVOR FLACK,)
Defendant.)

Case No. 13 CR 104

MOTION TO PRECLUDE IMPROPER IMPEACHMENT OF EXPERT WITNESSES

COMES NOW, Kyle Flack, the defendant, and moves this Court to preclude the state from improperly impeaching any expert witnesses presented by the defense. Such a ruling is essential to protect Mr. Flack's rights under the 6th, 8th, and 14th Amendments to the federal Constitution and the corollary provisions of the Kansas Bill of Rights. Mr. Flack states:

1. It is a far from uncommon practice for prosecutors to attempt to impeach defense expert witnesses through questioning and argument concerning those experts' compensation. This type of attack on expert witnesses is both irrelevant and unduly prejudicial. It also places defendants in an intractable dilemma. Defendants could not hire expert witnesses without compensating them, but that compensation is then used against the defense to suggest bias. To facilitate a fair trial in this matter, Mr. Flack requests that this Court prohibit questions concerning the compensation paid to any defense expert witnesses and any argument concerning that compensation.

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2. Court considering the propriety of such questions have recognized that expert witnesses may not be impeached simply because they have been compensated for their testimony. The Massachusetts Supreme Court noted and condemned this type of misconduct in a case where the prosecutor said of the defense's expert witness, who had been paid by the defendant's family, "are they going to hire somebody and bring him into court if they're not going to testify to that they want them to testify to?" *Commonwealth v. Shelley*, 374 Mass. 466, 373 N.E.2d 951 (1978). The Massachusetts Supreme Court held:

"the prosecutor's remarks as to the experts were based on facts not in evidence. This argument essentially urged the jury to discount the testimony of the defendant's expert witnesses because they were paid large fees by the defendant's family. There was evidence that the witnesses were paid by the family, but there was no evidence that they received anything more than their usual fees. Thus, to urge an inference that the expert testimony was purchased by the defendant was improper and unfair."

373 N.E.2d at 954. *See also State v. Vines*, 105 N.C.App. 147, 412 S.E.2d 156 (N.C. C.A. 1992) (Court condemned state's argument "you can get a doctor to say just about anything these days", holding "We vigorously disapprove of this improper argument and deem it to have been of such gross impropriety as to justify an *ex mero motu* correction"); *Commonwealth v. O'Brien*, 377 Mass. 772, 388 N.E.2d 658, 662 (Mass. 1979) (reference to defense expert as "hired gun" deemed inappropriate argument).

Several other courts have found similar arguments to be reversible error. *See State v. Hughes*, 193 Ariz. 72, 969 P.2d 1184, 1196, 1198 (Ariz. 1998) (court reversed when prosecutor argued that the defense expert "knows what he is looking for, and \$950 later, yes, that's what he's got", holding that "it is improper for counsel to imply unethical conduct on the part of an expert witness without having evidence to support the accusation."); *State v. Sipsus*, 102

Nev. 119, 716 P.2d 231, 234, 235 (Nev. 1986) (prosecutor's comment characterizing defense expert as "hired gun from Hot Tub Country" found reversible even absent objection because "the prosecutorial misconduct was so prejudicial as to require court intervention sua sponte to protect the defendant's right to a fair trial").

3. This motion is not intended to restrict the prosecution from attempting to impeach any defense expert witnesses by constitutionally available means. Questions concerning the expert's qualifications, conclusions, and the evidence upon which they rely are certainly proper. Questions or argument concerning the expert witness' compensation, however, are improper and should be avoided.

THEREFORE, Mr. Flack respectfully requests that this Court preclude the state from asking questions of or presenting argument concerning the compensation awarded to any expert witness.

Respectfully Submitted,

M. Wright

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CERTIFICATE OF SERVICE

I hereby certify that I delivered a true and correct copy of the foregoing motion to: the Clerk of the District Court; the Franklin County Attorney's Office, via FAX at (785) 229-8971; the Office of the Attorney General, via FAX at (785) 291-3875; and the Honorable Eric Godderz, Judge of the District Court, via FAX at (785) 448-3230 on this 14th day of December, 2015.

M. Wright

Maban Wright, #23950