

SUPREME COURT OF LOUISIANA

No. 2018-KP-0686

STATE OF LOUISIANA

versus

WARREN HARRIS

**ON SUPERVISORY WRITS TO THE CRIMINAL
DISTRICT COURT, PARISH OF ORLEANS**

PER CURIAM:

Writ granted; stay denied. Respondent filed a motion for state funding of expert witness services and further requested that the district court make that funding determination after conducting a hearing ex parte. Respondent, citing *State v. Touchet*, 93-2839 (La. 9/6/94), 642 So.2d 1213, contends his request for funds must be shielded from the State to ensure he has a fair opportunity to show that his crime did not reflect irreparable corruption in accordance with *Montgomery v. Louisiana*, 577 U.S. —, —, 136 S.Ct. 718, 736, 193 L.Ed.2d 599 (2016).

As this court noted in *State v. Touchet*, ex parte hearings are generally disfavored with a few exceptions, and that “in order to deviate from the general rule of open and contradictory hearings, there must be a showing of good cause.” *Id.*, 93–2839, p. 11, 642 So.2d at 1220. Nonetheless, in *Touchet*, this court found that “an indigent defendant may file a motion for expert funding ex parte.” *Id.*, 93-2839, p. 14, 642 So.2d at 1221. The court based that determination on the Fourteenth Amendment right to due process, citing *Ake v. Oklahoma*, 470 U.S. 68, 76, 105 S.Ct. 1087, 1092, 84 L.Ed.2d 53 (1985) (“This Court has long recognized that when a State brings its judicial power to bear on an indigent defendant in a

criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense. This elementary principle, grounded in significant part on the Fourteenth Amendment's due process guarantee of fundamental fairness, derives from the belief that justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake.”). The court also noted the potential unfairness in requiring an indigent defendant to prematurely disclose its defense to the State when a moneyed defendant would not be compelled to do the same. *See, e.g., Touchet*, 93-2839, p. 10, 642 So.2d at 1219.

The court, however, declined to hold in *Touchet* “that revelations of the reasons for needing experts are per se prejudicial.” *Id.*, 93-2839, pp. 11–12, 642 So.2d at 1220. Instead, recognizing that not all disclosures pertaining to the defense will result in unfairness, the court found that the district court should exercise its discretion to determine whether opening the hearing to the State would prejudice defendant in a substantial manner. *Id.*, 93-2839, p. 12, 642 So.2d at 1220 (citing *State v. Phillips*, 343 So.2d 1047 (La.1977)). *See generally Williams v. Florida*, 399 U.S. 78, 81, 90 S.Ct. 1893, 1896, 26 L.Ed.2d 446 (1970) (upholding a Florida notice-of-alibi rule and stating “[w]e need not linger over the suggestion that the discovery permitted the State against petitioner in this case deprived him of ‘due process’ or a ‘fair trial.’”).

The district court here abused its discretion in conducting the proceedings ex parte. Respondent failed to show that the hearing to determine whether he should be eligible for parole pursuant to *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), will be unfair or that he will be prejudiced in a substantial manner if his request for state funding for expert services is litigated

contradictorily in open court. Therefore, we vacate the district court's ruling authorizing funds, and we remand for an open and contradictory hearing on respondent's request for state funding of expert witness services.

VACATED AND REMANDED