

2009-065

STATE OF ALABAMA
OFFICE OF THE ATTORNEY GENERAL

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April 29, 2009

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Rules of Criminal Procedure – Costs
and Fees – Discovery – Overhead
Expenses – Indigents – District
Attorneys – Talladega County

The state may charge both retained
and appointed counsel a reasonable
fee for copying discovery materials.

Dear Mr. Giddens:

This opinion of the Attorney General is issued in response to your
request.

QUESTION

May the district attorney charge appointed
counsel for an indigent defendant a reasonable
fee for copying discovery materials?

FACTS AND ANALYSIS

You refer to our opinion to Honorable Ronald L. Myers, District
Attorney, Thirty-seventh Judicial Circuit of Alabama, dated
September 15, 1992, A.G. No. 92-00412. That opinion considered an
identical issue under the rule governing discovery in criminal cases, Rule
16 of the Alabama Rules of Criminal Procedure. A. R. CRIM. P. 16. Rule
16(a) and (b) provide for statements. A. R. CRIM. P. 16(a) & (b). Rule
16(c) provides for other documents and tangible objects. A. R. CRIM. P.
16(c). The *Myers* opinion began its analysis by explaining generally,
without regard to indigency status, that the plain language of the rule

“require[s] that the prosecution allow the defendant to inspect and copy documents specified in the rule. . . . ***[T]he rule does not require that the prosecution provide the copies.*** . . . There is nothing in the rule that prevents the state from making a reasonable charge for that service. . . .” *Myers*, at 2-3 (emphasis added).

This reading is supported by a recent decision of the Alabama Supreme Court. *State v. Isbell*, 985 So. 2d 446 (Ala. 2007). In *Isbell*, the Court rejected the claim of a driving-under-the-influence defendant that the prosecutor was required to provide records in the possession of the Alabama Department of Forensic Sciences about the machine used to test breath for alcohol content. The Court held that the defendant was entitled to no more than what was required under the Open Records Law, emphasizing as follows:

Rule 16.1(c) provides only that “the prosecutor shall . . . permit the defendant to analyze, inspect, and copy or photograph books, papers, documents, photographs, tangible objects, controlled substances, buildings or places, or portions of any of these things, which are within the possession, custody, or control of the state/municipality. . . .” ***It is the defendant who is to do the “analyz[ing], inspect[ing], and copy[ing] or photograph[ing].”*** Thus Rule 16.1(c) requires the prosecutor to allow Isbell the opportunity to “analyze, inspect, and copy or photograph” the records.

Id. at 451 (emphasis added).

Rule 16 makes no exception for indigent defendants. In fact, in *Isbell*, the Court further relied on *Seagroves v. State*, 726 So.2d 738 (Ala. Crim. App. 1998), a case in which the defendant was represented by appointed counsel. The Alabama Court of Criminal Appeals similarly held as follows in *Seagroves*:

The appellant alleges that the state failed to ***provide him with a photocopy*** of the state’s photograph of his truck. ***This is not a duty imposed on the state by Rule 16.1.*** The state was required to allow the defendant to inspect and copy the photograph if he desired. The state

provided him that opportunity, and he did not take advantage of it, and nothing more is required of the state under the discovery rule.

Id. at 744 (emphasis added).

Despite its analysis, the *Myers* opinion ultimately concluded that the state may charge a reasonable fee for the cost of copying documents requested by a *nonindigent* defendant. The opinion reasoned that “if there is any problem in the case of an indigent defendant, it may behoove the prosecution to provide any required copies at its expense . . . rather than risk a reversal.” *Myers*, at 3. Although that may be a valid consideration given the circumstances of the individual case, that would be a strategy decision to be made by the particular district attorney. The *Myers* opinion is overruled to the extent that it conflicts with this opinion.

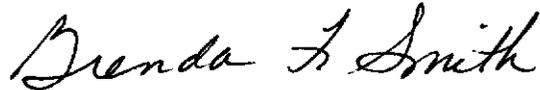
CONCLUSION

The state may charge both retained and appointed counsel a reasonable fee for copying discovery materials.

I hope this opinion answers your question. If this Office can be of further assistance, please contact Ward Beeson of my staff.

Sincerely,

TROY KING
Attorney General
By:



BRENDA F. SMITH
Chief, Opinions Division

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