Chapter 5: Experts and Other Assistance

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Chapter 5: Experts and Other Assistance

This chapter focuses on motions for funds for the assistance of an expert (including the assistance of an investigator). Such motions are most appropriate in felony cases. Other forms of state-funded assistance (such as interpreters) are discussed briefly at the end of this chapter.

5.1 Right to Expert

A. Basis of Right

Due Process. An indigent defendant's right to expert assistance rests primarily on the due process guarantee of fundamental fairness. The leading case is *Ake v. Oklahoma,* 470 U.S. 68, 76, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985), in which the Supreme Court held that the failure to provide an expert to an indigent defendant deprived him of a fair opportunity to present his defense and violated due process. North Carolina cases, both before and after *Ake,* recognize that fundamental fairness requires the appointment of an expert at state expense upon a proper showing of need. *See, e.g., State v. Tatum,* 291 N.C. 73, 229 S.E.2d 562 (1976).

Other Constitutional Grounds. Other constitutional rights also may support appointment of an expert for an indigent defendant, including equal protection and the Sixth Amendment right to effective assistance of counsel. *See Ake,* 470 U.S. at 87 n.13 (because its ruling was based on due process, court declined to consider applicability of equal protection clause and Sixth Amendment); *State v. Ballard,* 333 N.C. 515, 428 S.E.2d 178 (1993) (Sixth Amendment right to assistance of counsel entitles defendant to apply *ex parte* for appointment of expert).

State constitutional provisions, such as Art. I, § 19 (law of the land) and Art. I, § 23 (rights of accused), also may support appointment of an expert. *See generally State v. Tolley,* 290 N.C. 349, 364, 226 S.E.2d 353, 365 (1976) (law of land clause requires that administration of justice "be consistent with the fundamental principles of liberty and justice"); *State v. Hill,* 277 N.C. 547, 178 S.E.2d 462 (1971) (under Art. 1, § 23, "accused has the right to have counsel for his defense and to obtain witnesses in his behalf").

Statutory Grounds. G.S. 7A-450(b) provides that an indigent defendant is entitled to the assistance of counsel and other "necessary expenses of representation." Necessary expenses include expert assistance. *See State v. Tatum,* 291 N.C. 73, 229 S.E.2d 562 (1976); G.S. 7A-454 (authorizing trial court to approve fees for expert witness).

B. Breadth of Right

The North Carolina courts have recognized that a defendant's right to expert assistance extends well beyond the specific circumstances presented in *Ake,* a capital case in which the defendant requested the assistance of a psychiatrist for the purpose of raising an insanity defense and contesting aggravating factors at sentencing.

Type of Case. Upon a proper showing of need, an indigent defendant is entitled to expert assistance in both capital and noncapital cases. *See State v. Ballard,* 333 N.C. 515, 428 S.E.2d 178 (1993) (right to expert in noncapital murder case); *State v. Parks,* 331 N.C. 649, 417 S.E.2d 467 (1992) (right to expert in non-murder case).

Type of Expert. An indigent defendant is entitled to any form of expert assistance necessary to his or her defense, not just the assistance of a psychiatrist. *See Ballard,* 333 N.C. 515, 428 S.E.2d 178 (listing some of experts considered by North Carolina courts); *State v. Moore,* 321 N.C. 327, 364 S.E.2d 648 (1988) (defendant entitled to appointment of psychiatrist and fingerprint expert in same case).

Stage of Case. A defendant has the right to the services of an expert on pretrial issues, such as suppression of a confession, as well as on issues that may arise in the guilt-innocence and sentencing phases of a trial or in post-conviction proceedings. *See State v. Taylor,* 327 N.C. 147, 393 S.E.2d 801 (1990) (recognizing right to expert assistance in post-conviction proceedings); *Moore,* 321 N.C. 327, 364 S.E.2d 648 (right to psychiatrist for purpose of assisting in preparation and presentation of motion to suppress confession); *State v. Gambrell,* 318 N.C. 249, 347 S.E.2d 390 (1986) (right to psychiatrist for both guilt and sentencing phases); *United States v. Cropp,* 127 F.3d 354 (4th Cir. 1997) (indigent defendant has right to gather psychiatric evidence relevant to sentencing, and trial judge may authorize psychiatric evaluation for this purpose).

C. Right to Own Expert

Under *Ake* and North Carolina case law, a defendant has the right to an expert *for the defense,* not merely an independent expert employed by the court. *See Ake,* 470 U.S. at 83 (defendant has right to psychiatrist to "assist in evaluation, preparation, and presentation of the defense"); *Gambrell,* 318 N.C. 249, 347 S.E.2d 390 (recognizing requirements of majority opinion in *Ake*); *Smith v. McCormick,* 914 F.2d 1153, 1157 (9th Cir. 1990) ("right to psychiatric assistance does not mean the right to place the report of a 'neutral' psychiatrist before the court; rather, it means the right to use the services of a psychiatrist in whatever capacity defense counsel deems appropriate"). Thus, the defense determines the work to be performed by the expert (although not, of course, his or her conclusions).

The courts have stopped short of holding that a defendant has a constitutional right to choose the individual who will serve as his or her expert. *See Ake,* 470 U.S. at 83 (defendant does not have constitutional right to choose particular psychiatrist or to receive funds to hire his or her own expert); *State v. Campbell,* 340 N.C. 612, 460 S.E.2d 144 (1995) (on defendant's motion for psychiatric assistance, trial court appointed state

psychiatrist who had performed earlier competency examination); *see also Marshall v. United States,* 423 F.2d 1315 (10th Cir. 1970) (error to appoint FBI as investigator for defendant, as FBI had inescapable conflict of interest). Upon a proper showing, however, most trial judges will allow the defendant funds to hire an expert of his or her choosing.

5.2 Required Showing for Expert

To obtain the services of an expert at state expense, a defendant must be (1) indigent and (2) in need of an expert's assistance.

A. Indigency

To qualify for a state-funded expert, the defendant must be indigent or at least partially indigent. Defendants represented by a public defender or other appointed counsel easily meet this requirement, as the court already has determined their indigency. A defendant able to retain counsel also may be considered indigent for the purpose of obtaining an expert if he or she cannot afford an expert's services. *See State v. Boyd,* 332 N.C. 101, 418 S.E.2d 471 (1992) (trial court erred in refusing to consider providing expert to defendant who was able to retain counsel); *see also State v. Hoffman,* 281 N.C. 727, 738, 190 S.E.2d 842, 850 (1972) (an indigent person is "one who does not have available, at the time they are required, adequate funds to pay a necessary cost of his defense").

B. Preliminary but Particularized Showing of Need

An indigent defendant must make a "threshold showing of specific necessity" to obtain the services of an expert. A defendant meets this standard by showing either that:

- he or she will be deprived of a fair trial without the expert's assistance; or
- there is a reasonable likelihood that the expert will materially assist the defendant in the preparation of his or her case. *See State v. Parks,* 331 N.C. 649, 417 S.E.2d 467 (1992) (finding that formulation satisfies requirements of *Ake*); *State v. Moore,* 321 N.C. 327, 364 S.E.2d 648 (1988) (defendant must show either of above two factors).

The cases emphasize both the preliminary *and* particularized nature of this showing. Thus, a defendant need not make a "prima facie" showing of what he or she intends to prove at trial; nor must the defendant's evidence be uncontradicted. *See, e.g., Parks,* 331 N.C. 649, 417 S.E.2d 467 (defendant need not make prima facie showing of insanity to obtain expert's assistance; defendant need only show that insanity likely will be a significant factor at trial); *State v. Gambrell,* 318 N.C. 249, 256, 347 S.E.2d 390, 394 (1986) (court should not base denial of psychiatric assistance on opinion of one psychiatrist "if there are other facts and circumstances casting doubt on that opinion"); *Moore,* 321 N.C. 327, 345, 364 S.E.2d 648, 657 (defendant need not "discredit the state's expert witness before gaining access to his own").

A defendant must do more, however, than offer "undeveloped assertions that the requested assistance would be helpful." *Caldwell v. Mississippi,* 472 U.S. 320, 323, n.1, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985); *see also State v. Mills,* 332 N.C. 392, 400, 420 S.E.2d 114, 117 (1992) ("mere hope or suspicion that favorable evidence is available" is insufficient to support motion). In short, defense counsel may need to make a fairly detailed, although not conclusive, showing of need.

5.3 Components of Showing of Need

This section discusses the potential ingredients of a motion for funds for an expert. Some defense attorneys make a detailed showing in the motion itself. Others make a relatively general showing in the motion and present the supporting reasons and evidence (documents, affidavits, counsel's own observations, etc.) when presenting the motion to the judge. In either event, counsel should be prepared to give the judge all of the evidence supporting the motion, both to make the motion as persuasive as possible and to preserve the record for appeal.

Because of the detail that counsel must provide the court, counsel always should ask to be heard *ex parte*. *See infra* § 5.4, p. 8. The exact showing will vary, of course, with the type of expert sought. *See infra* § 5.5, p. 11 for a discussion of specific types of experts. Sample motions for experts appear at the end of this chapter.

A. Area of Expertise

Defense counsel should specify the particular kind of expert needed (e.g., psychiatrist, pathologist, fingerprint expert, etc.). A general description of a vague area of expertise may not be sufficient. *See, e.g., State v. Johnson,* 317 N.C. 193, 344 S.E.2d 775 (1986) (trial court did not err in denying general request for "medical expert" to review medical records, autopsy reports, and scientific data). Although a defendant may obtain more than one type of expert upon a proper showing, a blunderbuss request for several experts is unlikely to succeed. *See, e.g., State v. Mills,* 332 N.C. 392, 420 S.E.2d 114 (1992) (characterizing motion as fanciful "wish list," court denied in entirety motion for experts in psychiatry, forensic serology, DNA identification testing, forensic chemistry, statistics, genetics, metallurgy, pathology, private investigation, and canine tracking).

B. Name of Expert

When possible, counsel should determine the expert he or she wants to use before applying to the court. Counsel should interview the prospective expert, both to determine his or her suitability for the case and to obtain information in support of the motion.

Whether counsel must advise the court of the expert's name in moving for funds depends on local practice. Some judges require counsel to identify the proposed expert and one or two alternatives. Even if not required, identifying the expert and describing his or her qualifications may help substantiate the need for expert assistance and reduce the chance

that the court may appoint an expert not to defense counsel's liking. A curriculum vitae can be included with the motion.

Several sources may be helpful in locating suitable experts. Often the best sources of referrals are other criminal lawyers. In addition to public defender offices and private criminal lawyers, it may be useful to contact the Center for Death Penalty Litigation (in Durham); Prisoners Legal Services (in Raleigh); and organizations of criminal lawyers (such as the National Association of Criminal Defense Lawyers and National Legal Aid & Defender Association, both in Washington, D.C.). Counsel also can look at university faculty directories, membership lists of professional associations, and professional journals for the names of potential experts.

C. Amount of Funds

The actual relief requested in a motion for expert assistance is authorization to expend state funds to retain an expert. Counsel should advise the court of the estimated amount of money needed (based on the expert's hourly rate, number of hours required to do the work, costs of testing or other procedures, travel expenses, etc.) and should be prepared to explain the reasonableness of the amount in light of prevailing rates. Counsel may reapply for additional funds as needed.

D. What Expert Will Do

Counsel should specifically describe the work to be performed by the expert—review of records, examination of defendant, interview of particular witnesses, testifying at trial, etc. Failure to explain what the expert will do may hurt the motion. *Compare, e.g., State v. Parks,* 331 N.C. 649, 417 S.E.2d 467 (1992) (trial court erred in denying motion for psychiatric assistance where defendant intended to raise insanity defense and needed psychiatrist to evaluate his condition, testify at trial, and counter opinion of state's expert) *with State v. Wilson,* 322 N.C. 117, 367 S.E.2d 589 (1988) (motion denied where defendant indicated only that assistance of psychologist might be helpful to him in preparing his defense).

E. Why Expert's Work Is Necessary

This part is the most fluid—and by far the most critical—part of a showing of need. *See generally State v. Jones,* 344 N.C. 722, 726, 477 S.E.2d 147, 149 (1996) ("court should consider all the facts and circumstances known to it at the time the motion" is made). Although there are no rigid rules on what to present, consider doing the following:

- Identify the issues that you intend to pursue and that you need expert assistance to develop. To the extent then available, provide specific facts supporting your position on those issues. For example, if you are considering a mental health defense, describe the evidence supporting the defense. *See, e.g., Parks,* 331 N.C. 649, 417 S.E.2d 467 (court found persuasive the nine circumstances provided in support of request,

including previous diagnosis of defendant and counsel's own observations of and conversations with defendant).

- Emphasize the significance of the issues: the more central the issue, the more persuasive the assertion of need may be. *See, e.g., State v. Jones,* 344 N.C. 722, 477 S.E.2d 147 (1996) (defendant entitled to psychiatric expert because only possible defense to charges was mental health defense); *State v. Moore,* 321 N.C. 327, 364 S.E.2d 648 (1988) (defendant entitled to fingerprint expert where contested palm print was only physical evidence connecting defendant to crime scene).
- Deal with contrary findings by the state's experts. For example, if the state already has conducted an analysis of blood or other physical evidence, explain what a defense expert may be able to add. Although the cases state that the defendant need not show that the state's expert is wrong (*see Moore,* 321 N.C. 327, 364 S.E.2d 648), you can strengthen your motion by pointing out areas of weakness in the state's analysis or at least areas where reasonable people might differ. If the expert is a state employee and not a neutral expert, advise the court of that as well. *See id.* (one of circumstances supporting motion). Before making the motion, try to interview the state's expert and obtain any reports, test results, or other information that may support the motion. If the state's expert is uncooperative, that fact may bolster your showing.
- Explain why you cannot perform the tasks with existing resources and why you require special expertise or assistance. In some instances, the point is self-evident. *See, e.g., Moore,* 321 N.C. 327, 364 S.E.2d 648 (defense could not challenge fingerprint evidence without fingerprint expert). In other instances, you may need to convince the court that the expert would bring unique abilities to the case. *See, e.g., State v. Kilpatrick,* 343 N.C. 466, 471 S.E.2d 624 (1996) (defense failed to present any specific evidence or argument on why counsel needed assistance of jury selection expert in conducting voir dire).

F. Documentation

Counsel should provide documentary support for the motion—affidavits of counsel and prospective experts, information obtained through discovery, scientific articles, etc. How to present this evidence to minimize the risk of disclosure to the prosecution is discussed further in the next section.

5.4 Obtaining an Expert *Ex Parte*

A. Importance of *Ex Parte* Hearing

Grounds to Obtain. Regardless of the type of expert sought, defense counsel should always ask that the motion be heard *ex parte*—that is, without notice to the prosecutor and without the prosecutor present.

Support for this procedure can be found in *State v. Ballard,* 333 N.C. 515, 428 S.E.2d 178 (1993), and *State v. Bates,* 333 N.C. 523, 428 S.E.2d 693 (1993), which held that an indigent defendant is entitled as a matter of right to an *ex parte* hearing when moving for the assistance of a mental health expert. The court found that a hearing open to the prosecution would jeopardize a defendant's right to effective assistance of counsel under the Sixth Amendment because it would expose defense strategy to the prosecution and inhibit defense counsel from putting forward his or her best evidence. An open hearing also could expose privileged communications between lawyer and client (an essential part of the Sixth Amendment right to counsel, according to the court) and force the defendant to reveal incriminating information (in violation of the Fifth Amendment privilege against self-incrimination). *See also State v. Greene,* 335 N.C. 548, 438 S.E.2d 743 (1994) (error to deny *ex parte* hearing on motion for mental health expert).

Although *Ballard* and *Bates* involved mental health experts, the reasoning of those cases supports *ex parte* hearings for all types of experts. On request, many judges will proceed *ex parte* as a matter of course. If counsel must argue the point, he or she should emphasize the factors identified in *Ballard* and *Bates*—namely, that an open hearing could expose defense strategy and confidential attorney-client communications and impinge on the privilege against self-incrimination. *See State v. Phipps,* 331 N.C. 427, 418 S.E.2d 178 (1992) (stating that there are "strong reasons" to hold all hearings for expert assistance *ex parte*); *see also State v. White,* 340 N.C. 264, 457 S.E.2d 841 (1995) (to obtain *ex parte* hearing, defendant is not required to make showing of need for expert; however, on facts presented, trial court did not abuse discretion in refusing to hear motion for investigator *ex parte*); *United States v. Sutton,* 464 F.2d 552 (5th Cir. 1972) (trial court erred by failing to hold hearing *ex parte* on motion for investigator); *Marshall v. United States,* 423 F.2d 1315 (10th Cir. 1970) (use of adversarial rather than *ex parte* hearing to explore defendant's need for investigator was error).

If Request Denied. If counsel cannot obtain an *ex parte* hearing, he or she must decide whether to make the motion for expert assistance in open court (and expose potentially damaging information to the prosecution) or forego the motion altogether (and give up the chance of obtaining funds for an expert). Some of the implications for appeal are as follows:

- If the defendant makes the motion in open court and the trial judge refuses to fund an expert, the defendant has not waived the right to challenge the judge's refusal to hold an *ex parte* hearing. The theory on appeal would be that the defendant could have made a stronger showing if allowed to do so *ex parte. See Bates,* 333 N.C. 523, 428 S.E.2d 693 (court finds it impossible to determine what evidence defendant might have offered had he been allowed to do so out of prosecutor's presence).
- If the defendant decides not to pursue the motion in open court, *Ballard* indicates that the defendant need not make an offer of proof to preserve for appellate review the trial judge's refusal to hold an *ex parte* hearing; however, if counsel has strong evidence of the need for expert assistance, he or she may want to ask the trial court for leave to submit the evidence under seal.

Regardless of which way you proceed, make a record of the trial court's decision not to hear the motion *ex parte*.

B. Who Hears the Motion

After Transfer of Case to Superior Court. An *ex parte* motion for expert assistance ordinarily may be heard by any superior court judge of the judicial district in which the case is pending. *But cf.* N.C. GEN. R. PRAC. SUPER. & DIST. CT. 25 (for capital motions for appropriate relief, rule states that requests for experts, *ex parte* matters, and similar matters arising prior to filing of MAR "should" be ruled on by senior resident judge or designee). Thus, any superior court judge assigned to hold court in the district ordinarily has authority to hear the motion, whether or not actually holding court at the time. *See* G.S. 7A-47 (in-chambers jurisdiction extends until adjournment or expiration of session to which judge is assigned). Any resident superior court judge also has authority to hear the motion, whether or not currently assigned to hold court in the district. *See* G.S. 7A-47.1 (resident superior court judge has concurrent jurisdiction with judges holding court in district to hear and pass upon matters not requiring jury).

Before Transfer of Case to Superior Court. In some felony cases, a defendant may need an expert before the case is transferred to superior court. For example, in a case involving a mental health defense such as diminished capacity or insanity, which turns on the defendant's state of mind at the time of the offense, counsel often will want to retain a mental health expert as soon after the offense as possible. Counsel may be able to obtain authorization from a district court judge to retain an expert.

C. Filing, Hearing, and Disposition of Motion

In moving *ex parte* for funds for an expert, counsel should keep in mind maintaining the confidentiality of the proceedings and preserving the record for appeal.

The motion papers and any other materials should be presented directly to the judge who will hear the matter (not to the clerk of court). Ordinarily, a separate written motion requesting to be heard *ex parte* (in addition to the motion for funds for an expert) is unnecessary. In the event one is needed, a sample motion to be heard *ex parte* appears at the end of this chapter. (The motion was written before *Ballard* and *Bates,* discussed *supra* § 5.4A, p. 8; if used, it should be updated to include those decisions.)

If the judge hears the motion *ex parte* but denies funds for an expert, counsel may (and often should) renew the motion upon obtaining additional supporting evidence. *See generally State v. Jones,* 344 N.C. 722, 477 S.E.2d 147 (1996) (after court initially denied motion for psychiatrist, counsel renewed motion and attached own affidavit that related his conversations with defendant and included medical notes of defendant's previous doctor; court erred in denying motion). If the motion ultimately is denied, obtain a court reporter and ask the judge to hear and rule on the motion on the record (but still in chambers). For purposes of appeal, it is imperative to present on the record all of the

evidence and arguments supporting the motion. You should ask the judge to order that the motion and supporting materials be sealed and that the court reporter not transcribe or disclose the proceedings except on the defendant's request.

If the motion is granted, counsel likewise should ask that the order and motion papers be sealed and preserved for appellate review. Some defense attorneys prefer instead to retain the order and motion papers and file them upon conclusion of the case at the trial level. To avoid any question about the propriety of this practice, counsel should consider including in the order for an expert a provision authorizing counsel to retain the materials until the case concludes at the trial level. Regardless of which way you proceed, make sure that the order and motion papers are provided to the court to ensure a complete record in the event of appeal.

D. Other Procedural Issues

There is no time limit on a motion for expert assistance. *But cf. State v. Jones,* 342 N.C. 523, 467 S.E.2d 12 (1996) (defendant requested expert day before trial; belated nature of request and other factors demonstrated lack of need).

The defendant ordinarily does not need to be present at the hearing on the motion. *See State v. Seaberry,* 97 N.C. App. 203, 388 S.E.2d 184 (1990) (finding on facts that motion hearing was not critical stage of proceedings and that defendant did not have right to be present; court finds in alternative that noncapital defendants may waive right to be present and that this defendant waived right by not requesting to be present).

5.5 Specific Types of Experts

The legal standard for obtaining an expert is the same in all cases—that is, the defendant must make a preliminary showing of specific need—but the courts' application of the standard may vary with the type of expert sought. For example, in some cases the courts have found that the defendant did not make a sufficient showing of need for a jury consultant; however, these cases may have little bearing on the required showing for other types of assistance.

A. Mental Health Experts

Case Law. North Carolina case law is relatively favorable on motions for mental health experts, perhaps because defense counsel is in a better position to obtain supporting information. On several occasions, the supreme court has reversed convictions for failure to grant the defense a mental health expert. *See State v. Jones,* 344 N.C. 722, 477 S.E.2d 147 (1996); *State v. Parks,* 331 N.C. 649, 417 S.E.2d 467 (1992); *State v. Moore,* 321 N.C. 327, 364 S.E.2d 648 (1988); *State v. Gambrell,* 318 N.C. 249, 347 S.E.2d 390 (1986). These cases illustrate the kinds of information that counsel can and should marshal (e.g., counsel's observations of and conversations with the client; treatment, social services, school, and other records bearing on client's mental health; etc.). *See also*

Michael J. Yaworsky, Annotation, *Right of Indigent Defendant in State Criminal Case to Assistance of Psychiatrist or Psychologist,* 85 A.L.R.4th 19 (1991).

Impact of Competency Examination. Cases involving mental health issues also may involve issues about the client's competency to stand trial. In such cases, counsel should consider moving for a mental health expert before deciding whether to question competency. The motion would seek funds for an expert on all applicable mental health issues (defenses, mitigating factors, etc.), including competency. *See supra* § 2.4, p. 9 (discussing reasons for obtaining evaluation by own expert before questioning competency). Once the expert has evaluated the client, counsel will be in a better position to determine whether there are grounds for questioning competency.

Once counsel questions a client's competency, the court may order a competency examination at a state facility (Dorothea Dix hospital) or at a local mental health facility. *See supra* § 2.5, p 10 (competency examination by state or local examiner). The impact of such an examination on a motion for a mental health expert may be difficult to predict.

- A state-conducted competency examination may have no impact on a later motion for expert assistance. The courts have held that a competency examination does not satisfy the state's obligation to provide the defendant with a mental health expert to assist with preparation of a defense. *See Moore,* 321 N.C. 327, 364 S.E.2d 648 (examination to determine competency not substitute for mental health expert's assistance in preparing for trial); *see also Ake v. Oklahoma,* 470 U.S. 68, 76, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985) (psychiatry is "not an exact science, and psychiatrists disagree widely and frequently").
- A competency examination may lend support to a motion for a mental health expert, as it could show that the defendant, even if competent to proceed, suffers from some mental health problems.
- A competency examination may undermine a later motion for a mental health expert as well as presentation of the defense in general. *See State v. Pierce,* 346 N.C. 471, 488 S.E.2d 576 (1997) (in finding that defendant had not made sufficient showing of need, court relied in part on findings from earlier competency examination); *State v. Campbell,* 340 N.C. 612, 460 S.E.2d 144 (1995) (on motion for assistance of mental health expert, trial court appointed same psychiatrist who had earlier found defendant competent to stand trial); *see also supra* § 2.9, p. 22 (evidence from competency examination may be admissible to rebut mental health defense).

B. Experts on Physical Evidence

Some favorable case law exists on obtaining experts on physical evidence. *See, e.g., State v. Bridges,* 325 N.C. 529, 385 S.E.2d 337 (1989); *State v. Moore,* 321 N.C. 327, 364 S.E.2d 648 (1988). In both cases, the only direct evidence connecting the defendant to the crime scene was physical evidence (fingerprints), and the only expert testimony was from witnesses for the state, not independent experts. In those circumstances, the defendants were entitled to their own fingerprint expert without any further showing of need.

When physical evidence is not as vital to the state's case, counsel may need to make an additional showing of need for an expert. *See, e.g., State v. Seaberry,* 97 N.C. App. 203, 388 S.E.2d 184 (1990) (ballistics evidence was important to state's case but was not only evidence connecting defendant to crime; defendant made insufficient showing for own ballistics expert). *See also* Michael J. Yaworski, *Right of Indigent Defendant in State Criminal Case to Assistance of Chemist, Toxicologist, Technician, Narcotics Expert, or Similar Nonmedical Specialist in Substance Analysis,* 74 A.L.R.4th 388 (1990); Michael J. Yaworski, *Right of Indigent Defendant in State Criminal Case to Assistance of Fingerprint Expert,* 72 A.L.R.4th 874 (1990); Michael J. Yaworski, *Right of Indigent Defendant in State Criminal Case to Assistance of Ballistics Expert,* 71 A.L.R.4th 638 (1990).

C. Investigators

Case Law. The courts have adhered to the general legal standard for appointment of an expert when ruling on a motion for an investigator—that is, the defendant must make a preliminary showing of specific need. But, defendants sometimes have had difficulty meeting the standard because, until they get an investigator, they may not know what evidence is available or helpful. *See, e.g., State v. McCullers,* 341 N.C. 19, 460 S.E.2d 163 (1995) (motion for investigator denied where defense presented no specific evidence indicating how witnesses may have been necessary to his defense or in what manner their testimony could assist defendant); *State v. Tatum,* 291 N.C. 73, 229 S.E.2d 562 (1976) (court states that defendants almost always would benefit from services of investigator; court therefore concludes that defendant must make clear showing that specific evidence is reasonably available and necessary for a proper defense). *See also State v. Potts,* 334 N.C. 575, 433 S.E.2d 736 (1993) (defendant entitled to funds for investigator on proper showing); Michael J. Yaworski, *Right of Indigent Defendant in State Criminal Case to Assistance of Investigator,* 81 A.L.R.4th 259 (1991).

Points of Emphasis. To the extent possible, counsel should forecast for the court the information that an investigator may be able to obtain. Thus, counsel should identify the witnesses to be interviewed, the information that the witnesses may have, and why the information is important to the defense. If the witness's name or location is unknown and the witness must be tracked down, indicate that problem. Identify any other tasks that an investigator would perform (obtaining documents, photographing locations, etc.).

Counsel also should indicate why he or she cannot do the investigative work. General assertions that counsel is too busy or lacks the necessary skills may not suffice. *See, e.g., State v. Phipps,* 331 N.C. 427, 418 S.E.2d 178 (1992). Identify the obligations (case load, trial schedule, etc.) that prevent you from doing the investigative work. If the investigation requires special skills (such as the ability to speak Spanish), indicate that as well. *See generally State v. Zuniga,* 320 N.C. 233, 357 S.E.2d 898 (1987) (defendant did not demonstrate language barrier requiring appointment of investigator). Remind the court that counsel ordinarily should not testify at trial to impeach a witness who has changed his or her story. *See* N.C. REVISED RULES OF PROFESSIONAL CONDUCT Rule 3.7 (disapproving of lawyer acting as witness except in certain circumstances). Private

counsel appointed to represent an indigent defendant also can point out that an investigator would cost the state less than if appointed counsel did the investigative work.

D. Other Experts

Selected appellate opinions on other types of expert assistance are cited below, but these opinions may not reflect the actual practice of trial courts, which may be more favorable to the defense. In addition to those listed below, trial courts have authorized funds for mitigation specialists, social workers, eyewitness identification experts, polygraph experts, DNA experts, handwriting experts, legal experts, and others.

Medical Experts. *See, e.g., State v. Rose,* 339 N.C. 172, 451 S.E.2d 211 (1994) (funds for neuropsychologist denied where defendant already had been examined by two psychiatrists); *State v. Penley,* 318 N.C. 30, 347 S.E.2d 783 (1986) (defendant "arguably made threshold showing" for medical expert, but for other reasons court finds no error in denial of funds).

Pathologists. *See, e.g., Penley,* 318 N.C. 30, 347 S.E.2d 783 (defendant "arguably made threshold showing" for pathologist); *Williams v. Martin,* 618 F.2d 1021 (4th Cir. 1980) (error to deny pathologist).

Jury Consultants. *See, e.g., State v. Zuniga,* 320 N.C. 233, 357 S.E.2d 898 (1987) (jury selection expert denied; requested expert lacked skills for stated purpose); *State v. Watson,* 310 N.C. 384, 312 S.E.2d 448 (1984) (denial of expert to evaluate effect of pretrial publicity for purposes of moving to change venue and selecting jury; insufficient showing of need). *See also* Michael J. Yaworski, *Right of Indigent Defendant in State Criminal Case to Assistance of Expert in Social Attitudes,* 74 A.L.R.4th 330 (1990).

Statisticians. *See, e.g., State v. Moore,* 100 N.C. App. 217, 395 S.E.2d 434 (1990) (initial motion for statistical expert to analyze race discrimination in grand and petit juries granted; motion for funds for additional study denied), *rev'd on other grounds,* 329 N.C. 245, 404 S.E.2d 845 (1991).

5.6 Confidentiality of Expert's Work

If the court grants a motion for expert assistance, counsel will need to meet with the expert, explain the defense theory, and provide the expert with information on those aspects of the case with which the expert will be involved. In short, counsel will need to incorporate the expert into the defense team.

What protections exist for these communications and the expert's resulting work?

- If the defense does not call the expert as a witness, the prosecution generally does not have a right to discover the expert's work. *See supra* § 4.9C, p. 46 (discussing

restrictions on discovery of expert's work and circumstances when work may be discoverable).

- If the defense intends to call the expert as a witness, the prosecution may be entitled to pretrial discovery. *See supra* § 4.9C, p. 46. In granting motions for expert assistance, some judges have required experts to prepare a written report and provide it to the prosecution. Such an order is permissible only to the extent it complies with the discovery statutes. *See id.*
- Once on the stand, an expert may be required to disclose the basis of his or her opinion, including materials he or she reviewed, examinations of and communications with the defendant, etc. *See generally* N.C. R. EVID. 705 (disclosure of basis of opinion); 1 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE 669-76 (Michie Co., 4th ed. 1993) (discussing application of rule).

To reaffirm the confidential nature of the relationship, counsel may want to have the expert enter into a nondisclosure agreement. A sample appears at the end of this chapter. *See also* N.C. REVISED RULES OF PROFESSIONAL CONDUCT Rule 3.4(f) (lawyer may request person other than client to refrain from voluntarily giving relevant information to another party if person is agent of client); *Crist v. Moffatt,* 326 N.C. 326, 389 S.E.2d 41 (1990) (court holds in civil case that lawyer for defendant could not interview plaintiff's physician without plaintiff's consent; defendant's lawyer could obtain information from physician only through statutorily recognized methods of discovery).

5.7 Right to Other Assistance

A. Interpreters

For Deaf Clients. Under G.S. Ch. 8B, a deaf person is entitled to a qualified interpreter for any interrogation, arraignment, bail hearing, preliminary proceeding, or trial. *See also* G.S. 8B-2(d) (no statement by a deaf person without a qualified interpreter present is admissible for any purpose); G.S. 8B-5 (if a communication made by a deaf person through an interpreter is privileged, the privilege extends to the interpreter).

Obtaining an interpreter is a routine matter, not subject to the requirements on appointment of experts discussed above. An AOC form for appointment of an interpreter (AOC-G-107) appears at the end of this chapter. The superior court clerk should have a list of qualified interpreters. *See* G.S. 8B-6.

For Non-English Speaking Clients. The courts also have the authority to appoint a language interpreter for a person who does not speak English. *See State v. Torres,* 322 N.C. 440, 368 S.E.2d 609 (1988) (court has inherent authority to appoint language interpreter); G.S. 7A-314(f) (authorizing payment in criminal case for language interpreter for indigent defendant, witness for indigent defendant, or witness for state). Obtaining a language interpreter is likewise a routine matter, covered by the form request for an interpreter at the end of this chapter.

For Others. An interpreter may be appointed whenever the defendant's normal communication is unintelligible. *See State v. McLellan,* 56 N.C. App. 101, 286 S.E.2d 873 (1982) (defendant had speech impediment).

B. Other Expenses

Under G.S. 7A-450(b), the state has the responsibility to provide an indigent defendant with counsel and "other necessary expenses of representation." This general authorization may provide the basis for payment of various expenses incident to representation, such as suitable clothing for the defendant.