The Mechanics of Getting Your Own Expert

****

The Mechanics of Getting Your Own Expert

Caitlin Fenhagen, Deputy Capital Defender
Sarah Rackley, IDS Forensic Resource Counsel

What the expert can do

- Review the discovery relevant to their expertise and any relevant investigation you've already done
- Review the state's response to your discovery request
- Help with additional specific discovery motions
- Prepare you for any Daubert hearing to exclude state's witness
- Help prepare cross examination of state's expert for pre-trial hearing or at trial
- Conduct independent research
- Testify and teach the jury the science
- Experts can assist with guilt/innocence and sentencing hearings/memoranda

What expert do you want?

- Consult with Trial Resource Unit or Capital Defender's Office if the case is potentially capital or capital
- Database of experts – www.ncids.com/forensic
- Consult with Forensic Resource Counsel
- Ask on listserves

Timing

- When to get an expert
  - Is there an emergent mental health issue?
  - Do you have sufficient discovery to identify the issues?
  - Notice by state of intent to use scientific data w/expert testimony
- Effective use of mental health experts

First contact with expert

- Rates – will the expert work within state rates?
- Amount of request – discuss the scope of work, number of hours of work needed, travel, cost of testing
- Availability of expert – is the expert available now and at time of anticipated testimony?

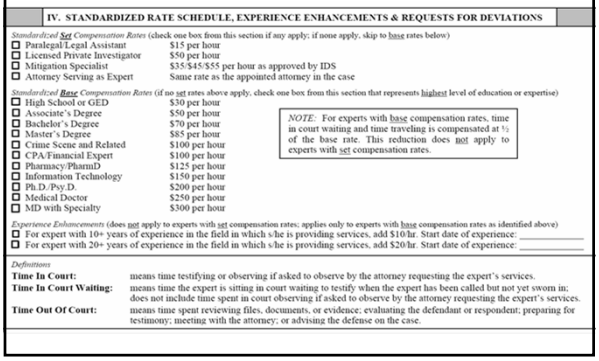
Forms

- Non-capital criminal and non-criminal cases –
  - Prior authorization must be sought through the presiding judge
  - Counsel must complete and submit Form AOC-G-309 along with supporting motion ex parte
  - For non-expert flat fee services, the AOC-G-309 form does not need to be completed (i.e., polygraph exam, medical procedure, sentencing plan) but motion and proposed order does
- Potentially capital criminal cases (i.e., all cases where the Office of the Capital Defender appointed counsel) –
  - Prior authorization must be obtained from the Office of the Capital Defender for all potentially capital cases
  - Form IDS-028

Standardized Rates for Experts

- G.S. 15A-905(c)(2) provides "Standardized fee scales shall be developed by the Administrative Office of the Courts and Indigent Defense Services for all expert witnesses and private investigators who are compensated with State funds."
- The final budget bill, effective July 1, 2011, amended G.S. 7A-498.5(f) to provide: "The rate of compensation set [by the IDS Commission] for expert witnesses may be no greater than the rate set by the Administrative Office for the courts under G.S. 7A-314(d)."

Standardized Rate Schedule



IV. STANDARDIZED RATE SCHEDULE, EXPERIENCE ENHANCEMENTS & REQUESTS FOR DEVIATIONS

*Standardized **Set** Compensation Rates* (check one box from this section if any apply; if none apply, skip to base rates below)

☐ Paralegal/Legal Assistant	$15 per hour
☐ Licensed Private Investigator	$50 per hour
☐ Mitigation Specialist	$35/$45/$55 per hour as approved by IDS
☐ Attorney Serving as Expert	Same rate as the appointed attorney in the case

*Standardized **Base** Compensation Rates* (if no set rates above apply, check one box from this section that represents highest level of education or expertise)

☐ High School or GED	$30 per hour
☐ Associate's Degree	$50 per hour
☐ Bachelor's Degree	$70 per hour
☐ Master's Degree	$85 per hour
☐ Crime Scene and Related	$100 per hour
☐ CPA/Financial Expert	$100 per hour
☐ Pharmacy/PharmD	$125 per hour
☐ Information Technology	$150 per hour
☐ Ph.D./Psy.D.	$200 per hour
☐ Medical Doctor	$250 per hour
☐ MD with Specialty	$300 per hour

NOTE: For experts with base compensation rates, time in court waiting and time traveling is compensated at ½ of the base rate. This reduction does not apply to experts with set compensation rates.

Experience Enhancements (does not apply to experts with set compensation rates; applies only to experts with base compensation rates as identified above)

☐ For expert with 10+ years of experience in the field in which s/he is providing services, add $10/hr. Start date of experience: _____

☐ For expert with 20+ years of experience in the field in which s/he is providing services, add $20/hr. Start date of experience: _____

Definitions

Time In Court: means time testifying or observing if asked to observe by the attorney requesting the expert's services.

Time In Court Waiting: means time the expert is sitting in court waiting to testify when the expert has been called but not yet sworn in; does not include time spent in court observing if asked to observe by the attorney requesting the expert's services.

Time Out Of Court: means time spent reviewing files, documents, or evidence; evaluating the defendant or respondent; preparing for testimony; meeting with the attorney; or advising the defense on the case.

Rate Deviation

- If expert will not work within state rates, may apply for a deviation
- For non-capital cases, counsel must submit Form AOC-G-310 to IDS Director
- For potentially capital cases, use page 2 of Form IDS-028

Case Law and Statutes

- Ake v. Oklahoma, 470 U.S. 68 (1985) - 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.
- State v. Ballard, 333 N.C. 515 (1993) - Sixth Amendment right to assistance of counsel entitles defendant to apply *ex parte* for appointment 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.
- State v. Bates, 333 N.C. 523 (1993) - error to deny the motion of an indigent defendant for an ex parte hearing regarding his request for the assistance of a psychiatrist – violated 5th, 6th, and 14th Am.
- N.C. Gen. Stat. § 7A-450(b) - 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 (1976).
- N.C. Gen. Stat. § 7A-454 - authorizes trial court to approve fees for expert witness
- In District or Superior Court
- See Defender Manual, Ch. 5 – Experts and Other Assistance

Ex parte motion for appointment of expert

- Ex parte means DO NOT SERVE MOTION OR ORDER ON THE PROSECUTION
- State v. Ballard, 333 N.C. 515, 428 S.E.2d 178 (1993) – constitutional right to ex parte hearing
- Selecting a judge to hear the motion
- Submit Motion and Form AOC-G-309 to judge or by letter with copies to judge's chambers
- Per Form AOC-G-309, the Order shall be sealed in the court file and only opened upon further order of the Court.
- Keep a copy of the order for your file and one for expert (for proof of allocation of funds so he/she can get paid)
- May make motion in district court if case has not yet been indicted

Necessary Showings

- Area of expertise (psychiatrist, pathologist, fingerprint expert, etc.)
- Name of expert, description of qualifications (CV may be included)
- Amount of funds - include hourly rate, number of hours of work, cost of testing or other procedures, travel expenses, and total amount requested (note rates for waiting and traveling, use Expert Compensation Calculator on Form AOC-G-309)
- Describe work to be performed by expert (i.e., review of records, examination of defendant/evidence, interview of particular witnesses, testifying at trial, etc.)
- Threshold showing of specific necessity in your case: show defendant will be deprived of fair trial without the expert's assistance or expert will materially assist the defendant in the preparation of his/her case
- Leave to apply for additional funding if necessary
- Sample Motions

What if your ex parte motion is denied?

- Get more facts and evidence showing why you need an expert and renew the motion
- State v. Jones, 344 N.C. 722, 477 S.E.2d 147 (1996) – NC Supreme Court ruled trial court erred in denying renewed request for funds for psychiatrist. Defense counsel renewed with affidavit supporting the request
- Get a court reporter and ask the judge to hear and rule on motion again in chambers (Protect the Record)
- Have the court issue an order denying the motion and have motion and order sealed in court file for appellate review (Protect the Record)
- Call Staples Hughes

Funding for an investigator

- Public Defender Office investigators should be used where possible, but if case has extensive needs and in house investigator is unavailable, consider submitting request for an outside investigator
- Use same form as for other experts
- Must be a licensed Private Investigator

Communication with Experts

- Give a copy of the signed order/IDS authorization to the expert
- Consider what parts of discovery to send to expert
- Ensure that expert keeps within approved hours, including travel and waiting time
- Expert may not be paid if time exceeds amount that was pre-approved
- Apply for additional funds for expert, if necessary
- Expert will submit fee app (direct expert to the IDS website for direction on billing)
  - For potentially capital cases, use Form IDS-003 and send to IDS in Durham
  - For non-capital criminal and non-criminal cases: use Form AOC-G-309, p. 2 and send to IDS Financial Services in Raleigh

Questions?

Contact information:

Caitlin Fenhagen, Deputy Capital Defender
919-354-7167

Sarah Rackley, IDS Forensic Resource Counsel
919-354-7217

THE MECHANICS OF GETTING YOUR OWN EXPERT

Materials Prepared for 2012 Spring Public Defender Conference May 9 - 11, 2012 Raleigh, N.C.

Sarah Rackley, IDS Forensic Resource Counsel
Sarah.H.Rackley@nccourts.org

Caitlin Fenhagen, Deputy Capital Defender
Caitlin.Fenhagen@nccourts.org

Index of Materials

Statutes and Rules

1. North Carolina General Statute § 7A-450 – Indigency; Definition; Entitlement; Determination; Change of Status.
2. North Carolina General Statute § 7A-454 – Supporting Services.
3. North Carolina General Statute § 7A-314 – Uniform Fees for Witnesses; Experts; Limit on Number.
4. North Carolina General Statute § 15A-905 – Disclosure of Evidence by the Defendant.
5. North Carolina Indigent Defense Services Rule 1.10 – Supporting Services in Non-Capital Criminal and Non-Criminal Cases at the Trial Level.
6. North Carolina Indigent Defense Services Rules 2D.1, 2D.2, 2D.3 and 2D.4 – Appointment and Compensation of Experts in Potentially Capital Cases.

AOC and IDS Forms and Policies Regarding Expert Services for Non-Capital Criminal and Non-Criminal Cases and Potentially Capital Cases at the Trial Level

1. Form AOC-G-309 – Application and Order for Defense Expert Witness Funding in Non-Capital Criminal and Non-Criminal Cases at the Trial Level.
2. Form AOC-G-310 – Defense Petition for Expert Hourly Rate Deviation in Non-Capital Criminal and Non-Criminal Cases at the Trial Level.
3. Form IDS-028 – Ex Parte Request for Expert Funding Potentially Capital Cases at the Trial Level.

4. IDS Memorandum on Expert Fee and Expense Applications in Non-Capital Criminal and Non-Criminal Cases at the Trial Level.
5. IDS Memorandum on Expert Fee and Expense Applications in Potentially Capital Cases at the Trial Level.
6. IDS Attorney Fee Application Policies in Non-Capital Criminal and Non-Criminal Cases at the Trial Level – Expert and Support Services. See pp. 10-11.
7. IDS Attorney Fee Application Policies in Potentially Capital Cases at the Trial Level – Expert and Support Services. See pp. 16-19.
8. IDS Policy on Expert Requests and Spending.
9. IDS Policy on Effective Use of Mental Health Experts in Potentially Capital Cases.
10. North Carolina Commission on Indigent Defense Services Performance Guidelines for Indigent Defense Representation in Non-Capital Criminal Cases at the Trial Level – Assistance from Experts, Investigators, and Interpreters. See p. 8.

Sample Motions

1. Ex Parte Motion for Appointment of Expert (Arson)
2. Ex Parte Motion for Appointment of Expert (Forensic Neuropsychologist)
3. Ex Parte Motion for Appointment of Private Investigator

Relevant Case Law

1. Ake v. Oklahoma, 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985)
2. State v. Ballard, 333 N.C. 515, 428 S.E.2d 178 (1993)
3. State v. Bates, 333 N.C. 523, 428 S.E.2d 693 (1993)

4. State v. Tatum, 291 N.C. 73, 229 S.E.2d 562 (1976)
5. State v. Jones, 344 N.C. 722, 477 S.E.2d 147 (1996)

Additional Resource

Defender Manual, Chapter 5 – Experts and Other Assistance

SUBCHAPTER IX. REPRESENTATION OF INDIGENT PERSONS.

Article 36.

Entitlement of Indigent Persons Generally.

§ 7A-450. Indigency; definition; entitlement; determination; change of status.

(a) An indigent person is a person who is financially unable to secure legal representation and to provide all other necessary expenses of representation in an action or proceeding enumerated in this Subchapter. An interpreter is a necessary expense as defined in Chapter 8B of the General Statutes for a deaf person who is entitled to counsel under this subsection.

(b) Whenever a person, under the standards and procedures set out in this Subchapter, is determined to be an indigent person entitled to counsel, it is the responsibility of the State to provide him with counsel and the other necessary expenses of representation. The professional relationship of counsel so provided to the indigent person he represents is the same as if counsel had been privately retained by the indigent person.

(b1) An indigent person indicted for murder may not be tried where the State is seeking the death penalty without an assistant counsel being appointed in a timely manner. If the indigent person is represented by the public defender's office, the requirement of an assistant counsel may be satisfied by the assignment to the case of an additional attorney from the public defender's staff.

(c) The question of indigency may be determined or redetermined by the court at any stage of the action or proceeding at which an indigent is entitled to representation.

(d) If, at any stage in the action or proceeding, a person previously determined to be indigent becomes financially able to secure legal representation and provide other necessary expenses of representation, he must inform the counsel appointed by the court to represent him of that fact. In such a case, that information is not included in the attorney client privilege, and counsel must promptly inform the court of that information. (1969, c. 1013, s. 1; 1981, c. 409, s. 2; c. 937, s. 3; 1985, c. 698, s. 22(a); 2000-144, s. 5.)

§ 7A-454. Supporting services.

Fees for the services of an expert witness or other witnesses, paid in accordance with G.S. 7A-314, including travel expenses, lodging, and other appearance expenses, for an indigent person and other necessary expenses of counsel shall be paid by the State in accordance with rules adopted by the Office of Indigent Defense Services. (1969, c. 1013, s. 1; 2000-144, s. 9; 2011-145, s. 31.23C(b); 2011-391, s. 64.)

§ 7A-314. Uniform fees for witnesses; experts; limit on number.

(a) A witness under subpoena, bound over, or recognized, other than a salaried State, county, or municipal law-enforcement officer, or an out-of-state witness in a criminal case, whether to testify before the court, Judicial Standards Commission, jury of view, magistrate, clerk, referee, commissioner, appraiser, or arbitrator shall be entitled to receive five dollars ($5.00) per day, or fraction thereof, during his attendance, which, except as to witnesses before the Judicial Standards Commission, must be certified to the clerk of superior court. Compensation of witnesses acting on behalf of the court or prosecutorial offices shall be paid in accordance with the rules established by the Administrative Office of the Courts. Compensation of witnesses provided under G.S. 7A-454 shall be in accordance with rules established by the Office of Indigent Defense Services.

(b) A witness entitled to the fee set forth in subsection (a) of this section, and a law-enforcement officer who qualifies as a witness, shall be entitled to receive reimbursement for travel expenses as follows:

(1) A witness whose residence is outside the county of appearance but within 75 miles of the place of appearance shall be entitled to receive mileage reimbursement at the rate currently authorized for State employees, for each mile necessarily traveled from his place of resident to the place of appearance and return, each day. Reimbursements to witnesses acting on behalf of the court or prosecutorial offices shall be paid in accordance with the rules established by the Administrative Office of the Courts. Reimbursements to witnesses provided under G.S. 7A-454 shall be in accordance with rules established by the Office of Indigent Defense Services.

(2) A witness whose residence is outside the county of appearance and more than 75 miles from the place of appearance shall be entitled to receive mileage reimbursement at the rate currently authorized State employees for one round-trip from his place of residence to the place of appearance. A witness required to appear more than one day shall be entitled to receive reimbursement for actual expenses incurred for lodging and meals not to exceed the maximum currently authorized for State employees, in lieu of daily mileage. Reimbursements to witnesses acting on behalf of the court or prosecutorial offices shall be paid in accordance with the rules established by the Administrative Office of the Courts. Reimbursements to witnesses provided under G.S. 7A-454 shall be in accordance with rules established by the Office of Indigent Defense Services.

(c) A witness who resides in a state other than North Carolina and who appears for the purpose of testifying in a criminal action and proves his attendance may be compensated at the rate allowed to State officers and employees by subdivisions (1) and (2) of G.S. 138-6(a) for one round-trip from his place of residence to the place of appearance, and five dollars ($5.00) for each day that he is required to travel and attend as a witness, upon order of the court based upon a finding that the person was a necessary witness. If such a witness is required to appear more than one day, he is also entitled to reimbursement for actual expenses incurred for lodging and meals, not to exceed the maximum currently authorized for State employees. Reimbursements to witnesses acting on behalf of the court or prosecutorial offices shall be paid in accordance with the rules established by the Administrative Office of the Courts. Reimbursements to witnesses provided under G.S. 7A-454 shall be in accordance with rules established by the Office of Indigent Defense Services.

(d) An expert witness, other than a salaried State, county, or municipal law-enforcement officer, shall receive such compensation and allowances as the court, or the Judicial Standards Commission, in its discretion, may authorize. A law-enforcement officer who appears as an expert witness shall receive reimbursement for travel expenses only, as provided in subsection (b) of this section. Compensation of

experts acting on behalf of the court or prosecutorial offices shall be paid in accordance with the rules established by the Administrative Office of the Courts. Compensation of experts provided under G.S. 7A-454 shall be in accordance with rules established by the Office of Indigent Defense Services.

(e) If more than two witnesses are subpoenaed, bound over, or recognized, to prove a single material fact, the expense of the additional witnesses shall be borne by the party issuing or requesting the subpoena.

(f) In any case in which the Judicial Department is bearing the costs of representation for a party and that party or a witness for that party does not speak or understand the English language, and the court appoints a foreign language interpreter to assist that party or witness, the reasonable fee for the interpreter's services is payable from funds appropriated to the Administrative Office of the Courts. In order to facilitate the disposition of criminal or Chapter 50B cases, the court may authorize the use of a court interpreter, paid from funds appropriated to the Administrative Office of the Courts, in cases in which an interpreter is necessary to assist the court in the efficient transaction of business. The appointment and payment shall be made in accordance with G.S. 7A-343(9c). (1965, c. 310, s. 1; 1969, c. 1190, s. 34; 1971, c. 377, s. 27; 1973, c. 503, ss. 21, 22; 1983, c. 713, s. 20; 1998-212, s. 16.25(a); 2000-144, s. 3; 2006-187, s. 5(a); 2007-323, s. 14.23; 2010-31, s. 15.7; 2011-391, s. 64.)

§ 15A-905. Disclosure of evidence by the defendant – Information subject to disclosure.

(a) Documents and Tangible Objects. – If the court grants any relief sought by the defendant under G.S. 15A-903, the court must, upon motion of the State, order the defendant to permit the State to inspect and copy or photograph books, papers, documents, photographs, motion pictures, mechanical or electronic recordings, tangible objects, or copies or portions thereof which are within the possession, custody, or control of the defendant and which the defendant intends to introduce in evidence at the trial.

(b) Reports of Examinations and Tests. – If the court grants any relief sought by the defendant under G.S. 15A-903, the court must, upon motion of the State, order the defendant to permit the State to inspect and copy or photograph results or reports of physical or mental examinations or of tests, measurements or experiments made in connection with the case, or copies thereof, within the possession and control of the defendant which the defendant intends to introduce in evidence at the trial or which were prepared by a witness whom the defendant intends to call at the trial, when the results or reports relate to his testimony. In addition, upon motion of the State, the court must order the defendant to permit the State to inspect, examine, and test, subject to appropriate safeguards, any physical evidence or a sample of it available to the defendant if the defendant intends to offer such evidence, or tests or experiments made in connection with such evidence, as an exhibit or evidence in the case.

(c) Notice of Defenses, Expert Witnesses, and Witness Lists. – If the court grants any relief sought by the defendant under G.S. 15A-903, or if disclosure is voluntarily made by the State pursuant to G.S. 15A-902(a), the court must, upon motion of the State, order the defendant to:

(1) Give notice to the State of the intent to offer at trial a defense of alibi, duress, entrapment, insanity, mental infirmity, diminished capacity, self-defense, accident, automatism, involuntary intoxication, or voluntary intoxication. Notice of defense as described in this subdivision is inadmissible against the defendant. Notice of defense must be given within 20 working days after the date the case is set for trial pursuant to G.S. 7A-49.4, or such other later time as set by the court.

a. As to the defense of alibi, the court may order, upon motion by the State, the disclosure of the identity of alibi witnesses no later than two weeks before trial. If disclosure is ordered, upon a showing of good cause, the court shall order the State to disclose any rebuttal alibi witnesses no later than one week before trial. If the parties agree, the court may specify different time periods for this exchange so long as the exchange occurs within a reasonable time prior to trial.

b. As to only the defenses of duress, entrapment, insanity, automatism, or involuntary intoxication, notice by the defendant shall contain specific information as to the nature and extent of the defense.

(2) Give notice to the State of any expert witnesses that the defendant reasonably expects to call as a witness at trial. Each such witness shall prepare, and the defendant shall furnish to the State, a report of the results of the examinations or tests conducted by the expert. The defendant shall also furnish to the State the expert's curriculum vitae, the expert's opinion, and the underlying basis for that opinion. The defendant shall give the notice and furnish the materials required by this subdivision within a reasonable time prior to trial, as specified by the court. Standardized fee scales shall be developed by the Administrative Office of the Courts and Indigent Defense Services for all expert witnesses and private investigators who are compensated with State funds.

(3) Give the State, at the beginning of jury selection, a written list of the names of all other witnesses whom the defendant reasonably expects to call during the trial. Names of witnesses shall not be subject to disclosure if the defendant certifies in

writing and under seal to the court that to do so may subject the witnesses or others to physical or substantial economic harm or coercion, or that there is other particularized, compelling need not to disclose. If there are witnesses that the defendant did not reasonably expect to call at the time of the provision of the witness list, and as a result are not listed, the court upon a good faith showing shall allow the witnesses to be called. Additionally, in the interest of justice, the court may in its discretion permit any undisclosed witness to testify.

(d) If the defendant voluntarily provides discovery under G.S. 15A-902(a), the disclosure shall be to the same extent as required by subsection (c) of this section. (1973, c. 1286, s. 1; 1975, c. 166, s. 27; 2004-154, s. 6; 2011-250, s. 3.)

1.10 Supporting Services

In non-capital criminal and non-criminal cases, the court may approve fees for the service of expert witnesses, investigators, and others providing services related to legal representation in accordance with all applicable IDS rules and policies.

[Section amended December 9, 2011]

Authority: G.S. 7A-454; 7A-498.3(c); 7A-498.5(c)(6)

Commentary

The above statutes, as revised, provide that appointment and compensation of experts, investigators, and others providing services related to legal representation shall be in accordance with IDS rules. For non-capital criminal and non-criminal cases, this rule is intended to restate in general terms the current statutory and case law on such services. This section was amended December 9, 2011 to clarify that court orders approving fees for experts and investigators shall comply with all applicable IDS rules and policies, including the standardized expert rates set by the IDS Commission pursuant to G.S. 7A-498.5(f). For capital cases, *see* Part 2, Rules 2D.1 through 2D.5.

Part 2D
Appointment and Compensation of Experts and Payment of Other Expenses Related to Legal Representation in Capital Cases

2D.1 Initial Application

Defense counsel shall make application to the IDS Director for authorization to retain experts or for other substantial expenses necessary to the defense of the capital defendant before applying to a court for such authorization, and before incurring a financial obligation for which defense counsel will apply to the IDS Director for payment by the IDS Office. The application shall be in writing, unless exceptional or extraordinary circumstances necessitate an oral motion. Defense counsel will be required to make at least as specific an application to retain experts as would be required by a fair but exacting trial judge applying G.S. 7A-450(a) and *Ake v. Oklahoma* and its progeny. The IDS Director may require counsel to make a more particularized application before approving or disapproving the application.

Authority: G.S. 7A-450(b); 7A-454; 7A-498.1(1); 7A-498.3(a), (c), (d); 7A-498.5(c)(6), (f)

Commentary

Routine expenses, such as typical long-distance telephone calls, are not substantial expenses within the meaning of this rule. Counsel can resolve any question about whether an expense requires prior approval of the IDS Director by communication with the IDS Director by telephone or email.

Ordinarily, counsel should submit to the IDS Director a written application for expert funding. However, in exceptional or extraordinary circumstances, counsel may apply for expert funding by telephone or email.

2D.2 Confidentiality of Application

The IDS Director will maintain the application in a confidential file open only to the IDS Office and the defense team.

Authority: G.S. 7A-498.3(a), (c); 7A-498.5(c)(6), (f)

2D.3 Disapproval of Application

If the IDS Director disapproves the application, timely written notice of disapproval of the application will be delivered to counsel. The IDS Director will maintain the notice of disapproval in a confidential file open only to the IDS Office and the defense team.

Authority: G.S. 7A-498.3(a), (c), (d); 7A-498.5(c)(6), (f)

2D.4 Application to Court

Defense counsel may apply to a court for appointment of experts or for other expenses following disapproval by the IDS Director. However, in no event may counsel apply to a court for a deviation from the standardized expert hourly rates following disapproval of a requested deviation by the IDS Director. If counsel applies to a court for appointment of experts or for other expenses, counsel may not submit an application to a court that includes information not contained in the application made to the IDS Director unless exceptional or extraordinary circumstances necessitate submitting such new or additional information directly to a court. If counsel makes application to a court following the IDS Director's disapproval, counsel shall submit with its application to the court a complete copy of the IDS Director's written notice of disapproval and a complete copy of the written application made to the IDS Director. Counsel must immediately forward to the IDS Director a complete copy of any court order approving funds previously disapproved by the IDS Director and a complete copy of the application made to the court. Such court order and application will be maintained in a confidential file open only to the IDS Office and the defense team.

[Section amended effective December 9, 2011]

Authority: G.S. 7A-454; 7A-498.3(a), (c), (d); 7A-498.5(c)(6), (f)

Commentary

If, after denial of an initial application to the IDS Director for appointment or compensation of experts or other supporting services, defense counsel discovers new or additional information that is relevant to such application, counsel ordinarily should submit a new application to the IDS Director before submitting an application to a court. Counsel may submit to a court an application that contains new or additional information only in exceptional or extraordinary circumstances. This section was amended December 9, 2011 to clarify that counsel may not seek judicial review of the IDS Director's decision to deny a deviation from the standardized expert hourly rates set by the IDS Commission pursuant to G.S. 7A-498.5(f).

STATE OF NORTH CAROLINA

File Nos.

_____ County

In The General Court Of Justice
☐ District ☐ Superior Court Division

Name Of Indigent Defendant Or Respondent	APPLICATION AND ORDER FOR DEFENSE EXPERT WITNESS FUNDING IN NON-CAPITAL CRIMINAL AND NON-CRIMINAL CASES AT THE TRIAL LEVEL
Highest Original Charge (Criminal) Or Nature Of Proceeding (Civil)	G.S. 7A-314(d), 7A-454, 7A-498.5(f), 15A-905(c)(2)

INSTRUCTIONS: *Use this form only if you are representing an indigent person at state expense, and then only in a case in which the Court is responsible for approving funds for experts, i.e., non-capital and non-criminal cases at the trial level. Do NOT use this form in case types where counsel must seek prior approval for expert funding from the Office of Indigent Defense Services (IDS) (e.g., potentially capital cases). Do NOT use this form for non-expert flat fee services, such as polygraph examinations, medical procedures, lab testing, or defense requested sentencing plans; to seek prior approval for such services, the attorney should submit a motion and proposed Order to the Court.*

The attorney for the defendant or respondent completes Section I and submits the form and a supporting motion justifying the requested expert services to the Court. If permitted by case law, the attorney for the defendant or respondent may submit this form and the supporting motion ex parte. If funding is approved, the Court completes Section II and the attorney provides a copy of the form to the approved expert. The expert completes Section III and Section IV after services are rendered to apply for payment. The expert then submits the completed form, along with an itemized invoice and any required receipts to IDS Financial Services, P.O. Box 2448, Raleigh, NC 27602. The expert also submits a copy to the requesting attorney.

I. DEFENSE REQUEST

Based on the attached supporting motion, the undersigned attorney for the defendant or respondent named above requests funding for the following expert services. The attorney certifies that the information provided below is true and accurate.

Name And Address Of Expert	Is the expert a current State government employee? ☐ Yes ☐ No *If Yes, Name And Address Of Employing Government Agency*
Total Amount Of Funding Requested (time and expenses) $	*Prior Total Funds Approved For This Expert* $

Type Of Expert *(check one; if none apply, skip to expert's highest education level or area of expertise)*

☐ Paralegal ☐ Licensed Private Investigator ☐ Mitigation Expert/Social Worker ☐ Attorney Serving As Expert

If None Of The Above, Expert's Highest Level Of Education Or Area Of Expertise

☐ High School or GED ☐ Associate's Degree ☐ Bachelor's Degree ☐ Master's Degree
☐ Crime Scene and Related ☐ CPA/Financial Expert ☐ Pharmacy/PharmD ☐ Information Technology
☐ Ph.D./Psy.D. ☐ Medical Doctor ☐ MD With Specialty

NOTE: *The IDS Director may grant deviations from the hourly rates in Section III when necessary and appropriate based on case-specific needs. To request a deviation, complete form AOC-G-310. If a deviation has been approved, attach a copy to this form.*

Expert's Years Of Experience *(check one if applicable)*

☐ Expert has more than 10 years of experience in the field in which he/she is providing services. Start date of experience: _____

☐ Expert has more than 20 years of experience in the field in which he/she is providing services. Start date of experience: _____

Date	Name Of Attorney Requesting Expert Funding	Telephone Number Of Attorney	Signature Of Attorney

II. COURT ORDER

☐ The Court finds that the expert identified in Section I would materially assist in the preparation of the defense in this case and that the denial of such expert assistance would deprive the defendant or respondent of a fair trial or other case resolution. Therefore, it is ORDERED that the defendant or respondent named above is entitled to $ _____ in funds appropriated to the Office of Indigent Defense Services (IDS) to employ the expert witness named in Section I; that the expert's fees and expenses shall not exceed this amount except by further Order of the Court; and that the expert witness named in Section I shall be compensated at the hourly rate specified in Section III and the applicable IDS policy.

☐ The Court finds that the expert identified in Section I would not materially assist in the preparation of the defense in this case. Therefore, it is ORDERED that this motion is denied.

☐ It is ORDERED that the motion submitted by counsel and this Order shall be sealed in the court file and only opened upon further order of the Court.

Date	Name Of Judge	Signature Of Judge

III. STANDARDIZED RATE SCHEDULE, EXPERIENCE, ENHANCEMENTS, AND DEFINITIONS

Standardized **Set** Compensation Rates *(check one box from this section if any apply; if none apply, skip to base rates below)*

☐ Paralegal	$15 per hour	☐ Mitigation Expert/Social Worker	$50 per hour
☐ Licensed Private Investigator	$50 per hour	☐ Attorney Serving as Expert	Same rate as the appointed attorney in the case

Standardized **Base** Compensation Rates *(if no set rates above apply, check one box from this section that represents highest level of education or expertise)*

☐ High School or GED	$30 per hour	☐ Pharmacy/PharmD	$125 per hour
☐ Associate's Degree	$50 per hour	☐ Information Technology	$150 per hour
☐ Bachelor's Degree	$70 per hour	☐ Ph.D./Psy.D.	$200 per hour
☐ Master's Degree	$85 per hour	☐ Medical Doctor	$250 per hour
☐ Crime Scene and Related	$100 per hour	☐ MD with Specialty	$300 per hour
☐ CPA/Financial Expert	$100 per hour		

NOTE: *For experts with base compensation rates, Time In Court Waiting and Time Traveling is compensated at 1/2 of the base rate. This reduction does not apply to experts with set compensation rates.*

Experience Enhancements *(does not apply to experts with set compensation rates; applies only to experts with base compensation rates as identified above)*

☐ For expert with more than 10 years of experience in the field in which he or she is providing services, add $10 per hour.

☐ For expert with more than 20 years of experience in the field in which he or she is providing services, add $20 per hour.

Time In Court: time testifying or observing if asked to observe by the attorney requesting the expert's services.

Time In Court Waiting: time the expert is sitting in court waiting to testify when the expert has been called but not yet sworn in; does not include time spent in court observing if asked to observe by the attorney requesting the expert's services.

Time Out Of Court: time spent reviewing files, documents, or evidence; evaluating the defendant or respondent; preparing for testimony; meeting with the attorney; or advising the defense on the case.

IV. EXPERT COMPENSATION CALCULATOR

Time In Court	
Time Out Of Court	
Time In Court Waiting *(divide by 2 for experts with base rates only)* **NOTE**: *Do NOT divide by 2 for experts with set rates*	
Time Traveling *(divide by 2 for experts with base rates only)* **NOTE**: *Do NOT divide by 2 for experts with set rates*	
Total Time *(add all time above)*	
Hourly Rate *(as determined by Section III above or form AOC-G-310)*	$
Total Hourly Compensation *(Total Time multiplied by Hourly Rate)*	▶$
Mileage/Transportation	$
Meals	$
Lodging	$
Other *(explain)* _____	$
Total Reimbursable Expenses *(based on IDS reimbursement rates)*	▶$
TOTAL COMPENSATION TO BE PAID EXPERT	▶$

NOTE: *Total Compensation To Be Paid Expert may not exceed amount preapproved by Judge.*

Name And Address Of Expert	*Name And Address Of Payee (write same if same as expert)*

Telephone Number Of Expert	*Email Address Of Expert*	*Federal Tax ID Or Social Security Number Of Payee*

I, the undersigned expert, make application for payment of pre-authorized services rendered for the indigent defendant or respondent named above, and for reimbursement of necessary expenses incurred. I certify that the above information is complete and correct to the best of my knowledge. I further certify that I have submitted a copy of this form and my itemized time sheets to the attorney of record listed in Section I.

Date	*Signature Of Expert*

For payment, mail form to IDS Financial Services, P.O. Box 2448, Raleigh, NC 27602.
Attach itemized time sheets and receipts.

STATE OF NORTH CAROLINA

File Nos.

_____ County

In The General Court Of Justice
☐ District ☐ Superior Court Division

Name Of Indigent Defendant Or Respondent	**DEFENSE PETITION FOR EXPERT HOURLY RATE DEVIATION IN NON-CAPITAL CRIMINAL AND NON-CRIMINAL CASES AT THE TRIAL LEVEL AND IDS APPROVAL OR DENIAL**
Highest Original Charge (Criminal) Or Nature Of Proceeding (Civil)	G.S. 7A-314(d), 7A-454, 7A-498.5(f), 15A-905(c)(2)

INSTRUCTIONS: *Use this form if you are representing an indigent defendant or respondent at state expense in a non-capital criminal or non-criminal case at the trial level, and you are requesting a deviation from the standardized expert hourly rates specified in the applicable IDS policy and form AOC-G-309 (Application and Order for Defense Expert Witness Funding in Non-Capital Criminal and Non-Criminal Cases at the Trial Level). Do NOT use this form in case types where counsel must seek prior approval for expert funding from the Office of Indigent Defense Services (IDS) (e.g., potentially capital cases at the trial level). Deviations will be granted only in extraordinary circumstances when they are necessary and appropriate based on case-specific needs.*

The attorney for the defendant or respondent completes Section I and submits the form to the IDS Director by mail to 123 W. Main St., Suite 400, Durham, NC 27701, by facsimile to (919) 354-7201, or by email to IDSExperts@nccourts.org. The IDS Director or his or her designee completes Section II to approve or deny the requested deviation, and returns the completed form to the requesting attorney. If an hourly rate in excess of the standardized rate is approved, the attorney must attach this form to form AOC-G-309 when it is submitted to a Court. If permitted by case law, the attorney for the defendant or respondent may submit this form ex parte and the Court may place this form under seal along with form AOC-G-309 and counsel's supporting motion.

I. DEFENSE PETITION

Name And Address Of Attorney	Name Of Requested Expert Expert's Highest Level Of Education
Telephone Number Of Attorney / Email Address Of Attorney	Expert's Area Of Expertise
Type Of Attorney ☐ Private Assigned Counsel ☐ Public Defender ☐ IDS Contract Counsel	Hourly Rate Requested For Expert: $ Total Amount Of Funding Requested From Court (time and expenses): $

List All Other Experts Already Approved For This Case *(include type of expert and total funds approved)*

Justification For Requested Rate Deviation *(check all that apply and attach additional sheets if necessary)*

☐ The requested expert services are in a new, emerging, or novel area, and there is a limited number of experts in the field.
Describe:

☐ The requested expert services are so unique that there is a limited number of available and qualified experts.
Describe:

☐ There are other exceptional circumstances that justify a deviation from the standardized rates.
Describe:

I, the undersigned attorney, certify that the above information is complete and correct to the best of my knowledge.

Date	Signature Of Attorney

II. IDS APPROVAL OR DENIAL

IDS Approval Or Denial *(IDS Director checks one box below)*

☐ The IDS Director hereby grants the requested deviation. An hourly rate of $_____ is approved for the expert identified in Section I. Reasons for granting deviation:

NOTE TO ATTORNEY: *This is not an approval of expert funding and is only an approval of a deviation from the standardized expert rates. The attorney still must complete form AOC-G-309 and obtain prior approval from a Court before incurring expert expenses.*

☐ The IDS Director hereby denies the requested deviation. Reasons for denying deviation:

Date	*Name Of IDS Director*	*Signature Of IDS Director*
	Thomas K. Maher	

STATE OF NORTH CAROLINA

_____ County

Form IDS-028 (Rev. 09/11)

▶ *File Nos.*

Name Of Indigent Defendant

EX PARTE REQUEST FOR EXPERT FUNDING
POTENTIALLY CAPITAL CASES AT THE TRIAL LEVEL

IDS Rules, Part 2D; IDS Policy, "Expert Requests and Spending"

INSTRUCTIONS: *To request funding for expert services in a potentially capital case at the trial level, appointed counsel should complete Parts I. through IV. of this form and submit it to Robert Manner Hurley, Capital Defender, by facsimile to (919) 354-7221 or by email to Robert.M.Hurley@nccourts.org with a copy to Caitlin.Fenhagen@nccourts.org. If counsel is requesting a deviation from the standardized hourly rates or this case has been declared exceptional, the Capital Defender will direct the request to the Director of the Office of Indigent Defense Services, who will then complete Part V. and return the form to the Office of the Capital Defender. The Office of the Capital Defender shall maintain the original form in a confidential file.*

I. ATTORNEY INFORMATION

Counsel Completing this Form

Name: _____
Office Phone: _____
Cell Phone: _____
Facsimile: _____
Email: _____

Co-Counsel (if applicable)

Name: _____
Office Phone: _____
Cell Phone: _____
Facsimile: _____
Email: _____

II. CASE INFORMATION

Has A Rule 24 Hearing Been Held? (check one): ☐ Yes ☐ No

If Yes: *Date:* _____

The Case Was Declared (check one): ☐ Capital ☐ Non-Capital

Current Stage Of Proceedings

Trial Date (if set)

Potential Aggravating Circumstance(s)

III. EXPERT INFORMATION

Required Details About Expert Sought

Type Of Expert: _____
Name Of Expert: _____
Name Of Company: _____
Address: _____
_____
_____
Hourly Rate (*complete page 2*): _____
Anticipated Hours Of Work: _____
Amount Requested: _____

Check One For Each Of The Following:

This is a request for:
☐ Initial or ☐ Additional funds for this expert

Has this expert agreed to work on this case?:
☐ Yes or ☐ Not yet contacted

Will This Expert Be Used For A Claim Under The Racial Justice Act?
☐ Yes ☐ No

If This Expert Is Located Out-Of-State, Have You Consulted With IDS' Forensic Resource Counsel To Confirm That There Is No Qualified And Available North Carolina Expert?
☐ Yes ☐ No

(Counsel must explain the need for an out-of-state expert in the summary of facts)

Summary Of Facts Supporting Need For Expert (attach additional sheets if necessary)

Date Of Request

Signature Of Attorney

IV. STANDARDIZED RATE SCHEDULE, EXPERIENCE ENHANCEMENTS & REQUESTS FOR DEVIATIONS

*Standardized **Set** Compensation Rates* (check one box from this section if any apply; if none apply, skip to base rates below)

☐ Paralegal/Legal Assistant	$15 per hour
☐ Licensed Private Investigator	$50 per hour
☐ Mitigation Specialist	$35/$45/$55 per hour as approved by IDS
☐ Attorney Serving as Expert	Same rate as the appointed attorney in the case

*Standardized **Base** Compensation Rates* (if no set rates above apply, check one box from this section that represents highest level of education or expertise)

☐ High School or GED	$30 per hour
☐ Associate's Degree	$50 per hour
☐ Bachelor's Degree	$70 per hour
☐ Master's Degree	$85 per hour
☐ Crime Scene and Related	$100 per hour
☐ CPA/Financial Expert	$100 per hour
☐ Pharmacy/PharmD	$125 per hour
☐ Information Technology	$150 per hour
☐ Ph.D./Psy.D.	$200 per hour
☐ Medical Doctor	$250 per hour
☐ MD with Specialty	$300 per hour

NOTE: For experts with base compensation rates, time in court waiting and time traveling is compensated at ½ of the base rate. This reduction does not apply to experts with set compensation rates.

Experience Enhancements (does not apply to experts with set compensation rates; applies only to experts with base compensation rates as identified above)

☐ For expert with 10+ years of experience in the field in which s/he is providing services, add $10/hr. Start date of experience: _____

☐ For expert with 20+ years of experience in the field in which s/he is providing services, add $20/hr. Start date of experience: _____

Definitions

Time In Court: means time testifying or observing if asked to observe by the attorney requesting the expert's services.

Time In Court Waiting: means time the expert is sitting in court waiting to testify when the expert has been called but not yet sworn in; does not include time spent in court observing if asked to observe by the attorney requesting the expert's services.

Time Out Of Court: means time spent reviewing files, documents, or evidence; evaluating the defendant or respondent; preparing for testimony; meeting with the attorney; or advising the defense on the case.

Attorney Completes This Section Only If Requesting A Deviation From The Standardized Hourly Rates Above

Justification For Requested Hourly Rate Deviation (check all that apply and attach additional sheets if necessary)

☐ The requested expert services are in a new, emerging, or novel area and there are a limited number of experts in the field.
Describe:

☐ The requested expert services are so unique that there are a limited number of available and qualified experts.
Describe:

☐ There are other exceptional circumstances that justify an exception to the standardized rates.
Describe:

V. IDS ACTION

IDS Completes This Section Only If Attorney Has Requested A Deviation From The Standardized Hourly Rates Above Or This Is An Exceptional Case

IDS Approval Or Denial Of Requested Rate Deviation (IDS Director checks one box below)

☐ The IDS Director hereby grants the requested deviation from the standard hourly rate. An hourly rate of $_____ is approved for the expert identified in Section I. Reasons for granting exception:

☐ The IDS Director hereby denies the requested deviation from the standard hourly rate. Reasons for denying exception:

Total Funding Approved	*Date*	*Name Of IDS Director*	*Signature Of IDS Director*
		Thomas K. Maher	

THOMAS K. MAHER
EXECUTIVE DIRECTOR
THOMAS.K.MAHER@NCCOURTS.ORG

TELEPHONE:
(919) 354-7200
FACSIMILE:
(919) 354-7201

OFFICE OF
INDIGENT DEFENSE SERVICES
STATE OF NORTH CAROLINA
www.ncids.org
123 WEST MAIN STREET
SUITE 400
DURHAM, N.C. 27701

MEMORANDUM

To:	Indigent Defense Experts
Re:	Expert Fee and Expense Applications (Non-Capital and Non-Criminal Cases at the Trial Level)
From:	Office of Indigent Defense Services
Date:	Effective October 17, 2011

Prior funding authorization from a Court is required for expert and investigative services in all non-capital and non-criminal cases at the trial level. Prior to October 17, 2011, that authorization may be sought by the attorney for the defendant or respondent submitting a motion and proposed Order to the presiding judge. On or after October 17, 2011, that authorization must be sought by the attorney for the defendant or respondent completing and submitting form AOC-G-309, along with a supporting motion, to the presiding judge. If permitted by case law, the attorney for the defendant or respondent may submit that form and the supporting motion *ex parte*.

The requesting attorney does not need to complete form AOC-G-309 for non-expert flat fee services, such as polygraph examinations, medical procedures, lab testing, or defense requested sentencing plans; to seek prior approval for such services, the attorney should submit a motion setting forth the factual justification for the request and a proposed Order to the Court. If approved by the Court, IDS will pay a flat fee of $500 for a defense requested sentencing plan. To request payment for flat fee services, the vendor should attach a copy of an itemized invoice to the Court Order and mail both to IDS Financial Services at P.O. Box 2448, Raleigh, NC 27602.

Experts should obtain a copy of the prior authorization from the attorney assigned to the case before commencing work on a case. The IDS Office will not compensate experts for amounts in excess of the Court's prior authorization.

I. Standardized Expert Rates for Services and Travel:

A. Definitions:

- Time In Court means time testifying or observing if asked to observe by the attorney requesting the expert's services.
- Time In Court Waiting means time the expert is sitting in court waiting to testify when the expert has been called but not yet sworn in. It does not include time spent in court observing if asked to observe by the attorney requesting the expert's services.

- Time Out Of Court means time spent reviewing files, documents, or evidence; evaluating the defendant or respondent; preparing for testimony; meeting with the attorney; or advising the defense on the case.

B. Set Compensation Rates:

- The following set compensation rates apply to the types of experts specified below for time in court, time waiting in court, time out of court, and time traveling. Such experts are not entitled to any additional hourly compensation based on years of experience.

Type of Expert	Hourly Rate
Paralegal/Legal Assistant	$15
Licensed Private Investigator	$50
Mitigation Expert/Social Worker	$50
Attorney Serving as Expert	Same rate as appointed counsel in the case

C. Base Compensation Rates by Education Level and Type of Expert:

- The hourly rates and policies outlined in the remainder of this Section apply to all expert authorizations that are dated on or after October 17, 2011. Hourly rates for services or travel that were specified on Court Orders dated before October 17, 2011 will continue to be honored.
- For any expert types that are not specified in I.B., above, the following base compensation rates apply for both time in court and time out of court as defined above:

Highest Education Level or Field of Expertise	Base Hourly Rate
High School or Equivalent	$30
Associate's Degree	$50
Bachelor's Degree	$70
Master's Degree	$85
Crime Scene and Related Experts (*e.g.*, Accident Reconstruction, Arson, Ballistics, Blood Spatter, Fingerprint, Handwriting, Use of Force)	$100
CPA/Financial Expert	$100
Pharmacy/PharmD	$125
Information Technology Experts (*e.g.*, Computers, Telecommunications, Digital Forensics)	$150
Ph.D./Psy.D	$200
Medical Doctor	$250
MD with Specialty (*e.g.*, Psychiatrist, Pathologist)	$300

These base compensation rates shall not apply if a former state employee is called to consult or testify about work done in his or her capacity as a state employee; in such cases, the applicable base compensation rate shall be ½ the rate specified above.

- For experts who fall into multiple categories above, the highest applicable hourly rate shall apply. For instance, if an attorney is seeking funding for an accident reconstruction expert with a Ph.D. in mechanical engineering, the $200 hourly rate for a Ph.D. shall apply.

- In addition to the base compensation rates set forth immediately above, experts covered by this section are entitled to an additional $10 per hour if they have more than 10 years of experience in the field relevant to the expert services or testimony, or an additional $20 per hour if they have more than 20 years of experience in the field relevant to the expert services or testimony.

D. Travel and Wait Time:

- For experts with set compensation rates—*i.e.*, those covered by Section I.B., above—time spent traveling and waiting in court shall be compensated at the same rate as time in court and time out of court.
- For all expert authorizations for experts with base compensation rates and experience enhancements—*i.e.*, those covered by Section I.C., above—that are dated on or after October 17, 2011, time spent traveling and waiting in court shall be compensated at ½ of the applicable hourly rate specified above.

E. Deviations from the Standardized Hourly Rates:

In extraordinary circumstances, the IDS Director may grant deviations to the standardized base compensation rates listed above when the requesting attorney demonstrates that they are necessary and appropriate based on case-specific needs and the following policies:

- Deviations may be granted if the requested expert services are in a new, emerging, or novel area and there are a limited number of experts in the field.
- Deviations may be granted if the requested expert services are so unique that there are a limited number of available and qualified experts. For example, there is only one expert who can provide the needed services (*e.g.*, the medical examiner who performed the autopsy) and he or she has refused to provide the services at the applicable standardized rate.
- Deviations may be granted based on other exceptional circumstances that justify a deviation from the standardized rates. For example, counsel needs the services of a specific type of expert and has contacted five or more experts in that field and none of the contacted experts were willing and available to provide the needed services at the needed time at the standardized rate.

Effective October 17, 2011, deviations shall be requested by the attorney of record by competing form AOC-G-310 and submitting it to the IDS Director pursuant to the instructions on that form. Before requesting a deviation from the standardized base hourly rates, counsel must consult with IDS' Forensic Resource Counsel to identify other similar experts in the required field.

II. Expert Services:

A. Prior Authorization Required:

- Prior authorization from a Court is required for the use of any expert services in any non-capital criminal or non-criminal case.
- To obtain prior authorization, the attorney of record should complete form AOC-G-309 and submit it and a supporting motion to the Court.
- The IDS Office will honor any Court Orders authorizing expert funding that were obtained before October 17, 2011.

B. The Expert Fee and Expense Application:

- Effective October 17, 2011, all expert fee applications in non-capital criminal and non-criminal cases at the trial level should be comprised of three parts: 1) form AOC-CR-309 ("Application and Order for Defense Expert Witness Funding in Non-Capital Criminal and Non-Criminal Cases at the Trial Level"); 2) one copy of the itemized time sheets; and 3) any required receipts. If the attorney sought and obtained approval for a deviation from the standard hourly rate, the expert fee application should also be accompanied by form AOC-CR-310 ("Defense Petition for Expert Hourly Rate Deviation in Non-Capital Criminal and Non-Criminal Cases at the Trial Level and IDS Approval or Denial").
- All expert fee applications in non-capital criminal and non-criminal cases at the trial level should be submitted to IDS' Financial Services Office at P.O. Box 2448, Raleigh, NC 27602.
- Applications will be accepted directly from the expert, or from the attorney of record on behalf of the expert.
- The expert's itemized time sheets must provide sufficient detail regarding the expert's services in the case to demonstrate that the claim for compensation is reasonable. At a minimum, the time sheets must reflect the expert's time broken down according to date, description of services, and amount of time in hours or parts thereof.
- Time sheets must be computer generated. Handwritten time sheets will not be accepted.

III. Reimbursable Expenses:

A. Travel:[1]

1. Mileage on Privately Owned Vehicles: Mileage is reimbursed at the current IDS approved rate. For all experts other than investigators and mitigation experts, out-of-county travel only is reimbursable. Because in-county travel is often a core part of the duties of investigators and mitigation experts, those experts can claim reimbursement for in-county mileage. For fee applications received at the IDS Financial Services Office on or after February 16, 2009, the mileage rate is $0.35 per mile. The expert's fee application or time sheets must indicate the number of miles traveled.
2. Rental Vehicles: Absent special circumstances, if you choose to rent a vehicle for case-related travel, you will be reimbursed for the lesser of the following: 1) the cost of the rental vehicle plus gasoline; or 2) the mileage reimbursement you would have received if you had driven your personal vehicle. You must attach a receipt to be reimbursed for rental car expenses.
3. Other Travel (e.g., airfare): Reasonable and pre-approved travel costs will be reimbursed with receipts. If the attorney of record completes and submits IDS' Travel Request Form, available at www.ncids.org, a travel agency that contracts with IDS (Travelectra) will make the travel arrangements for the expert and bill IDS directly. Unless the prior authorization states that travel expenses are authorized in

[1] Reimbursement rates for travel-related expenses are based on the current travel allowances for State employees. *See* G.S. 138-6.

THOMAS K. MAHER
EXECUTIVE DIRECTOR
THOMAS.K.MAHER@NCCOURTS.ORG

TELEPHONE:
(919) 354-7200
FACSIMILE:
(919) 354-7201

OFFICE OF
INDIGENT DEFENSE SERVICES
STATE OF NORTH CAROLINA
www.ncids.org
123 WEST MAIN STREET
SUITE 400
DURHAM, N.C. 27701

MEMORANDUM

To: Indigent Defense Experts
Re: Expert Fee and Expense Applications (Potentially Capital Cases at the Trial Level, Appeals, and Capital Post-Conviction Cases)
From: Office of Indigent Defense Services
Date: Updated September 1, 2011

Prior funding authorization from the IDS Office is required for expert services in all potentially capital cases at the trial level, all direct appeals, and all capital post-conviction proceedings. Please obtain a copy of this authorization from the attorney you are working with before commencing work on a case. Absent truly exceptional circumstances, the IDS Office will not compensate experts for amounts in excess of the prior authorization.

I. Standardized Expert Rates:

A. Definitions:

- Time In Court means time testifying or observing if asked to observe by the attorney requesting the expert's services.
- Time In Court Waiting means time the expert is sitting in court waiting to testify when the expert has been called but not yet sworn in. It does not include time spent in court observing if asked to observe by the attorney requesting the expert's services.
- Time Out Of Court means time spent reviewing files, documents, or evidence; evaluating the defendant or respondent; preparing for testimony; meeting with the attorney; or advising the defense on the case.

B. Set Compensation Rates:

The following set compensation rates apply to the types of experts specified below for time in court, time in court waiting, time out of court, and time traveling. Such experts are not entitled to any additional hourly compensation based on years of experience.

Type of Expert	Hourly Rate
Paralegal/Legal Assistant	$15
Licensed Private Investigator	$50
Mitigation Specialist	$35/$45/$55 (as approved by IDS)
Attorney Serving as Expert	Same rate as appointed counsel in the case

C. Base Compensation Rates by Education Level and Type of Expert:

- The hourly rates and policies outlined in the remainder of Section I. apply to all expert authorizations that are dated on or after September 1, 2011. Hourly rates for services or travel that were specified on expert authorization forms dated before September 1, 2011 will continue to be honored.
- For any expert types that are not specified in I.B., above, the following base compensation rates apply for both time in court and time out of court as defined above:

Highest Education Level or Field of Expertise	Base Hourly Rate
High School or Equivalent	$30
Associate's Degree	$50
Bachelor's Degree	$70
Master's Degree	$85
Crime Scene and Related Experts (*e.g.*, Accident Reconstruction, Arson, Ballistics, Blood Spatter, Fingerprint, Handwriting, Use of Force)	$100
CPA/Financial Expert	$100
Pharmacy/PharmD	$125
Information Technology Experts (*e.g.*, Computers, Telecommunications, Digital Forensics)	$150
Ph.D./Psy.D	$200
Medical Doctor	$250
MD with Specialty (*e.g.*, Psychiatrist, Pathologist)	$300

These base compensation rates shall not apply if a former state employee is called to consult or testify about work done in his or her capacity as a state employee; in such cases, the applicable base compensation rate shall be ½ the rate specified above.

- For experts who fall into multiple categories above, the highest applicable hourly rate shall apply. For instance, if an attorney is seeking funding for an accident reconstruction expert with a Ph.D. in mechanical engineering, the $200 hourly rate for a Ph.D. shall apply.
- In addition to the base compensation rates set forth immediately above, experts covered by this section are entitled to an additional $10 per hour if they have more than 10 years of experience in the field relevant to the expert services or testimony, or an additional $20 per hour if they have more than 20 years of experience in the field relevant to the expert services or testimony.

D. Travel and Wait Time:

- For experts with set compensation rates—*i.e.*, those covered by Section I.B., above—time spent traveling and waiting in court shall be compensated at the same rate as time in court and time out of court.
- For all expert authorizations for experts with base compensation rates and experience enhancements—*i.e.*, those covered by Section I.C., above—that are dated on or after September 1, 2011, time spent traveling and waiting in court shall be compensated at ½ of the applicable hourly rate specified above.

E. Deviations from the Standardized Hourly Rates:

In extraordinary circumstances, the IDS Director may grant deviations from the standardized base compensation rates listed above when the requesting attorney demonstrates that they are necessary and appropriate based on case-specific needs and the following policies:

- Deviations may be granted if the requested expert services are in a new, emerging, or novel area and there are a limited number of experts in the field.
- Deviations may be granted if the requested expert services are so unique that there are a limited number of available and qualified experts. For example, there is only one expert who can provide the needed services (*e.g.*, the medical examiner who performed the autopsy) and he or she has refused to provide the services at the applicable standardized rate.
- Deviations may be granted based on other exceptional circumstances that justify a deviation from the standardized rates. For example, counsel needs the services of a specific type of expert and has contacted five or more experts in that field and none of the contacted experts were willing and available to provide the needed services at the needed time at the standardized rate.

Deviations shall be requested by the attorney of record on form IDS-028 (for capital cases at the trial level) or form IDS-029 (capital post-conviction cases). Before requesting a deviation from the standardized base hourly rates, counsel must consult with IDS' Forensic Resource Counsel to identify other similar experts in the required field.

II. Expert Services:

A. Prior Authorization Required:

- Prior authorization is required for the use of any expert services in any case under the direct oversight of the IDS Office—*i.e.*, first-degree murder or undesignated degree of murder cases at the trial level, all capital and non-capital appeals, and capital post-conviction proceedings. Attorneys and experts are expected to monitor any expert spending and, absent exceptional circumstances, the IDS Office will not compensate experts for amounts in excess of the prior authorization.
- Unless otherwise indicated on the IDS Expert Authorization form, the maximum amount authorized includes both fees and necessary expenses.
- To obtain prior authorization in a potentially capital case at the trial level, the attorney of record should complete form IDS-028 and mail, fax, or email that form to the Office of the Capital Defender. If funds are being requested after a case has been finally disposed at the trial level, the Office of the Capital Defender no longer has authority to approve funds and the attorney of record must submit the request to the IDS Director, along with an explanation for why funds were not sought and obtained in a timely fashion.
- To obtain prior authorization in a capital post-conviction case, the attorney of record should complete form IDS-029 and mail, fax, or email the form to the IDS Office.
- To obtain prior authorization in a direct appeal, the attorney of record should mail, fax, or email a written request for funds to the IDS Office.

- If an expert plans to bill for the services of any other person pursuant to the expert's authorization, the attorney must seek and obtain specific prior approval for the services of that other person.
- The IDS Office will honor any Court authorizations for expert funding that were obtained before July 1, 2001, or those that result from any appeal to a Judge from a denial by the IDS Office. *See* Rules of the Commission on Indigent Defense Services, Rule 2D.4 (2001).

B. Policy Concerning Trial Attendance by Investigators and Mitigation Specialists: Effective April 1, 2004, IDS will compensate investigators and mitigation specialists for attending portions of a trial when their assistance is necessary, as long as that service can be provided within the amount pre-authorized for the investigator or mitigation specialist. However, IDS will not compensate investigators or mitigation specialists for attendance at an entire trial unless there are extraordinary circumstances justifying that attendance and the attorney of record obtains prior approval.

C. Interim and Final Fees:

- All expert fee applications should indicate whether the request is for interim or final payment.
- The IDS Office will only process interim expert fee requests when one of the following two conditions has been met: 1) the interim fee application covers a time period of 2 or more months; or 2) the interim fee application involves a payment amount of $1,000.00 or more. Assuming those conditions have been met, an expert may submit an application for interim fees, which the IDS Director may grant in his discretion.

D. The Expert Fee and Expense Application:

- All expert bills in all cases under the direct oversight of the IDS Office should be submitted directly to the IDS Office, and not to the Administrative Office of the Courts or the State Controller's Office.
- Applications will be accepted directly from the expert, or from the attorney of record on behalf of the expert.
- Effective July 1, 2005, an expert fee application that is directed to the IDS Office should be comprised of four parts: 1) form IDS-003 ("Expert Witness Fee Application Award of Payment (Capital Cases and All Appeals")); 2) one copy of the funding authorization from the IDS Office or Capital Defender; 3) one copy of the itemized time sheets; and 4) any required receipts.
- The expert's itemized time sheets must provide sufficient detail regarding the expert's services in the case to demonstrate that the claim for compensation is reasonable. At a minimum, the time sheets must reflect the expert's time broken down according to date, description of services, and amount of time in hours or parts thereof. When an expert or investigative firm submits a fee application, the time sheets also must identify the name of the person(s) who actually performed the services on each date covered by the application.
- Time sheets must be computer generated. Handwritten time sheets will not be accepted.

V. Expert and Support Services

A. Expert Fees:

- *Attorneys should never pay an expert with their own funds and then seek reimbursement.*
- Prior authorization is required for the use of any expert services. Prior to October 17, 2011, that authorization may be sought by the attorney for the defendant or respondent submitting a motion and proposed Order to the presiding judge. On or after October 17, 2011, that authorization must be sought by the attorney for the defendant or respondent completing and submitting form AOC-G-309, along with a supporting motion, to the presiding judge. If permitted by case law, the attorney for the defendant or respondent may submit that form and the supporting motion *ex parte*. The requesting attorney does not need to complete form AOC-G-309 for non-expert flat fee services, such as polygraph examinations, medical procedures, lab testing, or defense requested sentencing plans;[4] to seek prior approval for such services, the attorney should submit a motion and proposed Order to the Court.
- Form AOC-G-309 sets forth a standardized hourly rate schedule for different types of experts, and also serves as the vehicle for the expert to seek payment.
- In extraordinary circumstances, the IDS Director may grant deviations from the standardized base compensation rates listed on form AOC-G-309 when the requesting attorney demonstrates that they are necessary and appropriate based on case-specific needs and the following policies:
  - ✓ Deviations may be granted if the requested expert services are in a new, emerging, or novel area and there are a limited number of experts in the field.
  - ✓ Deviations may be granted if the requested expert services are so unique that there are a limited number of available and qualified experts. For example, there is only one expert who can provide the needed services (*e.g.*, the medical examiner who performed the autopsy) and he or she has refused to provide the services at the applicable standardized rate.
  - ✓ Deviations may be granted based on other exceptional circumstances that justify a deviation from the standardized rates. For example, counsel needs the services of a specific type of expert and has contacted five or more experts in that field and none of the contacted experts were willing and available to provide the needed services at the needed time at the standardized rate.
- Effective October 17, 2011, deviations shall be requested by the attorney of record by competing form AOC-G-310 and submitting it to the IDS Director pursuant to the instructions on that form. Before requesting a deviation from the standardized base hourly rates, counsel must consult with IDS' Forensic Resource Counsel to identify other similar experts in the required field.

---

[4] For defense requested sentencing plans that are preapproved by a judge, IDS pays a flat fee of $500.

B. Lay Witness Fees:

- Compensation for the time and expenses of lay witnesses is governed by G.S. 7A-314(a)-(c) & (e). Those provisions set statutory allowances for the time, mileage, lodging, and meals for lay witnesses.
- If you are seeking compensation for a lay witness in any category of case, you should complete form AOC-CR-235 ("Witness Attendance Certificate"), and submit it to the Clerk or Judge as required by G.S. 7A-314.

C. Foreign Language Interpreters:

- G.S. 7A-314(f) provides that "[i]n a criminal case when a person who does not speak or understand the English language is an indigent defendant[or] a witness for an indigent defendant, . . . and the court appoints a language interpreter to assist that defendant or witness in the case, the reasonable fee for the interpreter's services, as set by the court, are payable from funds appropriated to the Administrative Office of the Courts."
- If an attorney needs the services of a foreign language interpreter or translator in any category of case, he or she should obtain prior authorization from the Court. For details about obtaining an out-of-court interpreter or translator, see the IDS policy on out-of-court foreign language interpreters and translators, *available at* www.ncids.org under the "Rules & Procedures" link.

D. Interpreters for Deaf Persons:

- G.S. 8B-2, 8B-6, and 8B-8 (1999) govern the appointment and compensation of interpreters for deaf persons.
- If you need the services of a sign language interpreter in any category of case, you should obtain prior authorization from the Court using AOC-G-116 ("Motion, Appointment And Order Authorizing Payment Of Deaf Interpreter Or Other Accommodation"). The interpreter can then seek payment from the Clerk using that same form.

VI. Expert and Support Services:

A. Prior Authorization Required:

- Prior authorization is required for the use of any expert services in any case under the direct oversight of the IDS Office—i.e., first-degree murder or undesignated degree of murder cases at the trial level, all capital and non-capital appeals, and capital post-conviction proceedings. Attorneys and experts are expected to monitor any expert spending and, absent exceptional circumstances, the IDS Office will not compensate experts for amounts in excess of the prior authorization.
- To obtain prior authorization in a potentially capital case at the trial level, the attorney of record should complete form IDS-028 and mail, fax, or email that form to the Office of the Capital Defender. If funds are being requested after a case has been finally disposed at the trial level, the Office of the Capital Defender no longer has authority to approve funds and the attorney of record must submit the request to the IDS Director, along with an explanation for why funds were not sought and obtained in a timely fashion.
- To obtain prior authorization in a capital post-conviction case, the attorney of record should complete form IDS-029 and mail, fax, or email the form to the IDS Office.
- To obtain prior authorization in a direct appeal, the attorney of record should mail, fax, or email a written request for funds to the IDS Office.
- If an expert plans to bill for the services of any other person pursuant to the expert's authorization, the attorney must seek and obtain specific prior approval for the services of that other person.
- The IDS Office will honor any Court authorizations for expert funding that were obtained before July 1, 2001, or those that result from any appeal to a Judge from a denial by the IDS Office. *See* Rules of the Commission on Indigent Defense Services, Rule 2D.4 (2001).

B. Standardized Expert Rates for Services and Travel:

1. Definitions:

- Time In Court means time testifying or observing if asked to observe by the attorney requesting the expert's services.
- Time In Court Waiting means time the expert is sitting in court waiting to testify when the expert has been called but not yet sworn in. It does not include time spent in court observing if asked to observe by the attorney requesting the expert's services.
- Time Out Of Court means time spent reviewing files, documents, or evidence; evaluating the defendant or respondent; preparing for testimony; meeting with the attorney; or advising the defense on the case.

2. Set Compensation Rates:

The following set compensation rates apply to the types of experts specified below for time in court, time waiting in court, time out of court, and time traveling. Such experts are not entitled to any additional hourly compensation based on years of experience.

Type of Expert	Hourly Rate
Paralegal/Legal Assistant	$15
Licensed Private Investigator	$50
Mitigation Specialist	$35/$45/$55 (as approved by IDS)
Attorney Serving as Expert	Same rate as appointed counsel in the case

3. Base Compensation Rates by Education Level and Type of Expert:

- The hourly rates and policies outlined in the remainder of this Section apply to all expert authorizations that are dated on or after September 1, 2011. Hourly rates for services or travel that were specified on expert authorization forms dated before September 1, 2011 will continue to be honored.
- For any expert types that are not specified in VI.A.2, above, the following base compensation rates apply for both time in court and time out of court as defined above:

Highest Education Level or Field of Expertise	Base Hourly Rate
High School or Equivalent	$30
Associate's Degree	$50
Bachelor's Degree	$70
Master's Degree	$85
Crime Scene and Related Experts (*e.g.*, Accident Reconstruction, Arson, Ballistics, Blood Spatter, Fingerprint, Handwriting, Use of Force)	$100
CPA/Financial Expert	$100
Pharmacy/PharmD	$125
Information Technology Experts (*e.g.*, Computers, Telecommunications, Digital Forensics)	$150
Ph.D./Psy.D	$200
Medical Doctor	$250
MD with Specialty (*e.g.*, Psychiatrist, Pathologist)	$300

These base compensation rates shall not apply if a former state employee is called to consult or testify about work done in his or her capacity as a state employee; in such cases, the applicable base compensation rate shall be ½ the rate specified above.

- For experts who fall into multiple categories above, the highest applicable hourly rate shall apply. For instance, if an attorney is seeking funding for an accident reconstruction expert with a Ph.D. in mechanical engineering, the $200 hourly rate for a Ph.D. shall apply.
- In addition to the base compensation rates set forth immediately above, experts covered by this section are entitled to an additional $10 per hour if they have more than 10 years of experience in the field relevant to the expert services or testimony, or an additional $20 per hour if they have more than 20 years of experience in the field relevant to the expert services or testimony.

4. **Travel and Wait Time:**
   - For experts with set compensation rates—*i.e.*, those covered by Section VI.A.2, above—time spent traveling and waiting in court shall be compensated at the same rate as time in court and time out of court.
   - For all expert authorizations for experts with base compensation rates and experience enhancements—*i.e.*, those covered by Section VI.A.3., above—that are dated on or after September 1, 2011, time spent traveling and waiting in court shall be compensated at ½ of the applicable hourly rate specified above.

5. **Deviations from the Standardized Hourly Rates:**
   In extraordinary circumstances, the IDS Director may grant deviations from the standardized base compensation rates listed above when the requesting attorney demonstrates that they are necessary and appropriate based on case-specific needs and the following policies:
   - Deviations may be granted if the requested expert services are in a new, emerging, or novel area and there are a limited number of experts in the field.
   - Deviations may be granted if the requested expert services are so unique that there are a limited number of available and qualified experts. For example, there is only one expert who can provide the needed services (*e.g.*, the medical examiner who performed the autopsy) and he or she has refused to provide the services at the applicable standardized rate.
   - Deviations may be granted based on other exceptional circumstances that justify a deviation from the standardized rates. For example, counsel needs the services of a specific type of expert and has contacted five or more experts in that field and none of the contacted experts were willing and available to provide the needed services at the needed time at the standardized rate.

   Deviations shall be requested by the attorney of record on form IDS-028 (for capital cases at the trial level) or form IDS-029 (capital post-conviction cases). Before requesting a deviation from the standardized base hourly rates, counsel must consult with IDS' Forensic Resource Counsel to identify other similar experts in the required field.

C. **Multiple Experts from the Same Field of Expertise:**
Authorization for more than one expert from a given field of expertise will not be granted unless counsel's request for funds establishes that a single expert from that field could not provide counsel with the needed assistance.

D. **Trial Attendance by Investigators and Mitigation Specialists:**
Effective April 1, 2004, IDS will compensate investigators and mitigation specialists for attending portions of a trial when their assistance is necessary, as long as that service can be provided within the amount pre-authorized for the investigator or mitigation specialist. However, IDS will not compensate investigators or mitigation specialists for attendance at an entire trial unless there are extraordinary circumstances justifying that attendance and the attorney of record obtains prior approval.

E. The Expert Fee and Expense Application:

- All expert bills in all cases under the direct oversight of the IDS Office should be submitted directly to the IDS Office, and not to the Administrative Office of the Courts or the State Controller's Office.
- Applications will be accepted directly from the expert or from the attorney of record on behalf of the expert.
- The application must include: 1) form IDS-003; 2) a copy of the funding authorization from the IDS Office; 3) the expert's itemized billing records; and 4) any required receipts.
- After receipt and processing, IDS will issue payment directly to the expert. *Attorneys should never pay an expert with their own funds and then seek reimbursement.*

F. Lay Witness Fees:

- G.S. 7A-314(a)-(c) & (e) set statutory allowances for the time, mileage, lodging, and meals for lay witnesses, and leave statutory authority for lay witness reimbursement with the Clerk or Judge.
- If you are seeking compensation for a lay witness in any category of case, please complete AOC-CR-235 ("Witness Attendance Certificate") and submit it to the Clerk or Judge as required by G.S. 7A-314.

G. Foreign Language Interpreters and Translators:

- G.S. 7A-314(f) (1999 & 2000) also was not modified by the IDS Act. It provides that "[i]n a criminal case when a person who does not speak or understand the English language is an indigent defendant[or] a witness for an indigent defendant, . . . and the court appoints a language interpreter to assist that defendant or witness in the case, the reasonable fee for the interpreter's services, as set by the court, are payable from funds appropriated to the Administrative Office of the Courts."
- If an attorney needs the services of a foreign language interpreter or translator in any category of case, he or she should obtain prior authorization from the Court. For details about obtaining an out-of-court interpreter or translator, see the IDS policy on out-of-court foreign language interpreters and translators, *available at* www.ncids.org under the "Rules & Procedures" link.

H. Interpreters for Deaf Persons:

- G.S. 8B-2, 8B-6, and 8B-8 (1999) govern the appointment and compensation of interpreters for deaf persons. Authority for appointment and compensation still lies with the Courts.
- An attorney requiring the services of a sign language interpreter should obtain prior authorization from the Court using AOC-G-116 ("Motion, Appointment And Order Authorizing Payment Of Deaf Interpreter Or Other Accommodation"). The interpreter can then seek payment from the Clerk using that same form.

EXPERT REQUESTS & SPENDING

IDS Policies:

Expert Requests:

When an attorney submits a request for expert funding in a potentially capital case at the trial level, it must include enough information for the IDS Director or Capital Defender to determine whether the request is reasonable and funding is justified. IDS Rule 2D.1 provides: "Defense counsel will be required to make at least as specific an application to retain experts as would be required by a fair but exacting trial judge applying G.S. 7A-450(a) and *Ake v. Oklahoma* and its progeny. The IDS Director may require counsel to make a more particularized application before approving or disapproving the application."

It is important that defense counsel understand how IDS and the Capital Defender review requests for experts under this standard. *Ake* held that when a defendant's mental health was likely to play a significant role in the trial or sentencing, an indigent defendant had a due process right to the appointment of a psychiatrist to help prepare and present a defense. North Carolina has applied *Ake* to categories of experts beyond mental health experts, but has also made clear that the right to a state-funded expert requires a particularized showing of need. In *State v. Moore*, 321 N.C. 327 (1988), the Court stated:

> We have applied the holding in *Ake* to instances when an indigent defendant moved for the assistance of experts other than psychiatrists, holding that such experts need not be provided unless the defendant "makes a threshold showing of specific necessity for the assistance of the expert" requested. *State v. Penley*, 318 N.C. 30, 51, 347 S.E. 2d 783, 795 (1986) (pathologist). *See State v. Hickey*, 317 N.C. 457, 468, 346 S.E. 2d 646, 654 (1986) (investigator); *State v. Johnson*, 317 N.C. 193, 199, 344 S.E. 2d 775, 779 (1986) (medical expert).
>
> In order to make a threshold showing of specific need for the expert sought, the defendant must demonstrate that: (1) he will be deprived of a fair trial without the expert assistance, or (2) there is a reasonable likelihood that it will materially assist him in the preparation of his case.

In *State v. Speight*, 166 N.C App. 106 (2004), the Court held that "the State is not required by law to finance a fishing expedition for the defendant in the vain hope that 'something' will turn up." The Court found no error in denying a request for an expert, observing:

> In this case, with regard to his motion to hire an accident reconstruction expert, defendant alleged no specific facts or circumstances either in his written motion or in his argument before the trial court. Instead, he simply informed the trial court that he desired an accident reconstruction expert to review the State's evidence to see if there was any evidence to undermine

> the malice element of the second degree murder charges. This undeveloped assertion by defendant is insufficient to establish the particularized showing required to receive state funds for expert assistance.

IDS and the Capital Defender follow the same standards and will authorize experts—including investigators and mitigation specialists—only when there has been a particularized showing of need. Funding for experts will not be authorized when it appears to be a fishing expedition or where counsel has not set forth specific facts that show a need for the expert. In addition, counsel must provide specific information about what the expert will do so that IDS or the Capital Defender can evaluate the reasonableness of the requested amount, and determine whether the work authorized is the work that IDS is ultimately billed for when the expert submits a fee application. For example, a request to authorize an investigator to locate and interview the eyewitnesses to a murder will not justify having the investigator spend the entire authorized amount of money reading discovery.

There is no magic formula for determining what constitutes an adequate showing, but the following tips are helpful: For investigators and mitigation specialists, a generic statement that they are needed to investigate the case is not enough. Counsel must provide some detail about the nature of the investigation and why it is needed. This does not mean that counsel needs to provide the names or titles of witnesses, or specific underlying records, but it does mean that counsel needs to provide a description of the type of information that the investigator will be working to obtain, such as interviewing eyewitnesses, identifying and interviewing alibi witnesses, obtaining and examining phone records, etc. For other experts, counsel must provide some basis for why the expert is needed. For example, if counsel wants a mental health expert, counsel needs to explain why there is reason to believe that the client's mental health is in question and what the expert will do, at least in general terms. If counsel wants a crime scene expert, counsel needs to explain why the scene is important and what the expert will do, at least in general terms.

Taking the time to provide this level of specificity will not only help IDS and the Capital Defender make appropriate decisions about requests, it may help the defense team think through the specific work that needs to be done and provide a better estimate of the time and money needed.

In making requests, please remember the following:

(1) Take the time to provide a fact-based justification for the request and specifics about what the expert will do;
(2) Take the time to confer with the expert about what they will do and how much time it will take;
(3) Make sure the expert is aware of the basis for your request and understands that he or she needs to do the work that justified the authorization of funds; and

(4) Prioritize the work for your expert so you do not discover that important work is left undone when the money runs out.

Monitoring Expert Spending:

Prior authorization is required for the use of any expert services in potentially capital cases. If the attorney of record does not obtain prior approval for expert services, or if an expert the attorney has retained exceeds the amount that was pre-approved, IDS may not pay the expert for services he or she provided in good faith. Attorneys are expected to supervise and monitor the work being performed by any experts they have retained in potentially capital cases. Attorneys should also advise their experts to keep close track of the amount of funds they have been authorized, as well as the amount of time they have spent working on the case, and to inform the attorney immediately if they are running out of authorized funds.

Policy adopted and effective August 26, 2004. Updated April 15, 2011.

Authority:
G.S. 7A-454, 7A-498.5(c)(6); IDS Rules, Part 2D.

EFFECTIVE USE OF MENTAL HEALTH EXPERTS IN POTENTIALLY CAPITAL CASES

IDS Policy:

Counsel undertaking to represent a defendant in a potentially capital case have a duty to investigate independently and fully the underlying facts and circumstances of the crime charged, as well as all aspects of the defendant's character, background, or record that might call for a sentence less than death. *See Eddings v. Oklahoma*, 455 U.S. 104 (1992); *Lockett v. Ohio*, 438 U.S. 586 (1978). Counsel generally will not be in a position to select mental health experts until after a mitigation specialist and investigator have explored the facts of the case and the background of the defendant. Once an investigation is well underway, counsel will be in the best position to identify appropriate mental health professionals with expertise in the particular field or fields that will support counsel's overall theory and strategy for both phases of a potentially capital case.

Commentary:

As the Introduction to the Commentary for the 2003 *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* points out, the Eighth Amendment right to offer mitigating evidence is dependent upon a full investigation of the unique characteristics of the particular defendant. Thus, the presentation of mitigating evidence will only be persuasive if it is: "(a) consistent with that made by the defense and the guilt phase and (b) links the evidence offered in mitigation to the specific circumstances of the client." 31 HOFSTRA L. REV. 913, 927 (2003).

Guideline 10.4 of the ABA Guidelines thus requires that the defense team include at least one mitigation specialist and one fact investigator so that a complete investigation of both the facts of the case and the background of the defendant may be thoroughly explored. The importance of the mitigation specialist is emphasized in *Rompilla v. Beard*, 545 U.S. 374 (2005), *Wiggins v. Smith*, 539 U.S. 510 (2003), and *Williams v. Taylor*, 529 U.S. 362 (2000). Once these two investigations have been well undertaken, counsel will then be in the best position to identify and explore the use of other experts who may be required and who may be helpful to a consistent theory for the trial of both phases of the case and a persuasive presentation of evidence.

While counsel should have at least one member of the team qualified by training and experience to screen the client for the presence of mental or psychological disorders and impairments, the background and training of a competent mitigation specialist fulfills this role. Therefore, *after* the mitigation specialist has explored the client's background and *after* the team has met to develop a tentative theory for the trial of both phases of the case is the time at which other experts in the field of mental health are most appropriately chosen. In other words, at that point, the team will be able to identify and choose mental health experts with an expertise in the particular field or fields that counsel chooses to use as a part of his or her overall trial strategy.

There are many mental health fields, and each case and client must be evaluated on an individual basis. For example, counsel may have a claim of mental retardation based upon school and employment records and family history developed by the mitigation specialist, and the wise choice for an expert would be a psychologist with expertise in mental retardation and/or developmental disabilities. In another case, the mitigation investigation may reveal a history of addiction with the client, along with a family history of addiction; in such a case, the wise choice for an expert would be a mental health professional with an expertise in addiction. In a final example, the mitigation specialist's work may reveal that the client has a history of diagnoses of mental illness and perhaps a genetic predisposition for mental illness; in such a case, the wise choice for an expert would be a forensic psychiatrist.

In the vast majority of cases, therefore, it is important to conduct a comprehensive investigation of the potential facts of both phases of the case *before* mental health experts are identified to evaluate the client. Of course, there are exceptions to every rule; for example, if counsel determines early on that the client appears deeply mentally disturbed or floridly psychotic, questions may immediately arise concerning competency or insanity. In such a case, counsel may legitimately require the services of a mental health professional to assist with and provide guidance on those issues quickly.

Another reason to wait until after investigation to identify potential mental health professionals is that then and only then will counsel be able to identify the appropriate referral question(s) for the expert. It is rarely fruitful to engage a mental health professional to examine the client to "see what's wrong with him." The more specific the referral question(s), the more useful the information gathered by the expert will be. The specificity of the referral question(s) is based upon information learned in the background mitigation and fact investigation. Examples of specific referral questions include:

- "Is the client competent to assist in his defense?"
- "Does the client have mental retardation?"
- "Was the client's capacity to commit first-degree murder diminished by alcohol addiction, drug addiction, or mental illness?"
- "Was the client suffering from a mental or emotional disturbance at the time of the crime?"
- "Does the client have a neurological impairment that affected him or her at the time of the crime?"
- "Was the client insane at the time of the crime?"

Policy adopted effective July 31, 2008.

Authority:
G.S. 7A-498.3(c); 7A-498.5(c)(6), (c)(7), and (f); IDS Rules, Part 2D.

North Carolina Commission on Indigent Defense Services

Performance Guidelines for Indigent Defense Representation in Non-Capital Criminal Cases at the Trial Level

Adopted November 12, 2004

available, if necessary, to testify as a defense witness at trial. Alternatively, counsel should have an investigator conduct such interviews.

(4) *The Police and Prosecution*

Counsel should utilize available discovery procedures to secure information in the possession of the prosecution or law enforcement authorities, including police reports, unless a sound tactical reason exists for not doing so (*e.g.*, defense obligations under G.S. 15A-905).

(5) *The Courts*

If possible, counsel should request and review any tapes or transcripts from previous hearings in the case. Counsel should also review the client's prior court file(s) where appropriate.

(6) *Information in the Possession of Third Parties*

Where appropriate, counsel should seek a release or court order to obtain necessary confidential information about the client, co-defendant(s), witness(es), or victim(s) that is in the possession of third parties. Counsel should be aware of privacy laws and other requirements governing disclosure of the type of confidential information being sought.

(7) *Physical Evidence*

Where appropriate, counsel should make a prompt request to the police or investigative agency for any physical evidence or expert reports relevant to the offense or sentencing. Counsel should view the physical evidence consistent with case needs.

(8) *The Scene*

Where appropriate, counsel or an investigator should view the scene of the alleged offense. This should be done under circumstances as similar as possible to those existing at the time of the alleged incident (*e.g.*, weather, time of day, lighting conditions, and seasonal changes). Counsel should consider the taking of photographs and the creation of diagrams or charts of the actual scene of the alleged offense.

(9) *Assistance from Experts, Investigators, and Interpreters*

Counsel should consider whether expert or investigative assistance, including consultation and testimony, is necessary or appropriate to:

(A) prepare a defense;

(B) adequately understand the prosecution's case;

(C) rebut the prosecution's case; and/or

(D) investigate the client's competence to proceed, mental state at the time of the offense, and/or capacity to make a knowing and intelligent waiver of constitutional rights.

If counsel determines that expert or investigative assistance is necessary and appropriate, counsel should file an *ex parte* motion setting forth the particularized showing of necessity required by *Ake v. Oklahoma*, *State v. Ballard*, and their progeny. If appropriate, counsel should file a motion to have a foreign language or sign language interpreter appointed by the court. Counsel should take all necessary steps to preserve for appeal any denial of expert, investigative, or interpreter funding.

(c) During case preparation and throughout trial, counsel should identify potential legal issues and the corresponding objections. Counsel should consider the tactics of when and how to raise those objections. Counsel should also consider how best to respond to objections that could be raised by the prosecution.

NORTH CAROLINA		**IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION**
WAKE COUNTY		**XX CRS XXXXX**
STATE OF NORTH CAROLINA	)	
	)	
VS.	)	***EX PARTE* MOTION FOR**
	)	**FUNDS FOR DEFENSE EXPERT**
DEFENDANT,	)	
	)	
Defendant.	)	

NOW COMES the Defendant, DEFENDANT, by and through the undersigned counsel, Maitri "Mike" Klinkosum, Attorney at Law, and hereby moves this Honorable Court, on an *ex parte* basis, pursuant to the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Article I §§ 19 and 23 of the North Carolina Constitution, N.C.Gen.Stat. §§ 7A-450(b), 7A-451, and 7A-454, as well as *Ake v. Oklahoma*, 470 U.S. 68, 84 L.Ed.2d 53 (1985), *State v. Ballard*, 333 N.C. 515 (1993) and *State v. Bates*, 333 N.C. 523 (1993), for an *Ex Parte* Order allocating funds to assist the defense in the evaluation and preparation of the defense of the Defendant. In Support of the foregoing *Ex Parte* Motion, the Defendant would show unto the Court as follows:

1. The Defendant is an indigent person charged in these matters with one count each of Attempted First-Degree Murder, Assault with a Deadly Weapon with Intent to Kill Inflicting Serious Injury, and First-Degree Arson.

2. The prosecution has alleged by indictment that on or about DATE, the Defendant allegedly attempted to kill, and assaulted with the intent to kill, ALLEGED VICTIM, by pouring gasoline on her and setting her on fire.

3. The prosecution has also alleged by indictment that the Defendant committed arson on DATE by willfully and maliciously burning ADDRESS, the home of the Defendant and the alleged victim.

4. Based upon a review of the discovery provided to the defense thus far, undersigned counsel believes that the prosecution will call experts in the area of arson/fire investigation, from both local law enforcement and the NC State Bureau of Investigation, to testify on behalf of the State.

5. Based upon interviews with the Defendant and upon information and evidence gathered in the investigation of these matters, the undersigned attorney has determined that in order to properly investigate the

allegations made against the Defendant and to insure that the Defendant is provided with effective assistance of counsel, the defense must be provided with monetary funding for the retention of the services of an expert in the field of arson/fire investigation.

6. Undersigned counsel lacks the necessary expertise to determine from the physical evidence and the law enforcement/fire department investigation in this case, whether or not the prosecution's claims, that the Defendant assaulted and attempted to murder the alleged victim by pouring gasoline on her and setting her on fire, are meritorious.

7. Undersigned counsel lacks the necessary expertise to determine from the physical evidence and the law enforcement/fire department investigation in this case, whether or not the prosecution's claim, that the Defendant committed the crime of arson as alleged in the indictment, is meritorious

8. Due to the fact that the undersigned counsel lacks the necessary expertise required to determine whether the prosecution's allegations are meritorious, and due to the fact that the prosecution appears likely to call its own experts to testify on behalf of the State, the Court should provide the Defendant with funding to retain the services of an arson/fire investigation expert to examine the evidence in this case and render any assistance available to the defense.

9. Denial of funding to the Defendant under the circumstances such as those existing in the present case would amount to a violation of, at the least, the Defendant's right to effective assistance of counsel, due process, and compulsory due process under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. *Ake v. Oklahoma*, 470 U.S. 68, 84 L.Ed.2d 53 (1985); *Williams v. Martin*, 618 F.2d 571 (4th Cir. 1980); *Jacobs v. United States*, 350 F.2d 571 (4th Cir. 1965); *Hintz v. Beto*, 379 F.2d 937 (5th Cir. 1967); *State v. Ballard*, 333 N.C. 515 (1983); *State v. Bates*, 333 N.C. 523 (1993).

10. Undersigned counsel has contacted an expert in the field of arson/fire investigation. The expert is _____. _____ is the Vice-President and Principal Engineer for _____. _____ charges a fee of $200.00 per hour. Upon information and belief, _____ has assisted other Defendants in NC charged with arson/fire related crimes, and other defense counsel, in the evaluation and assessment of said charges.

WHEREFORE, the Defendant respectfully prays unto this Honorable Court for the following relief:

1. That this Honorable Court issue an Order authorizing counsel for the Defendant to retain the services of the aforementioned expert in the field of arson/fire investigation for the purpose of evaluating and the prosecution's claims, as well as the opinions of the prosecution's experts, in an initial amount not to exceed $3,500.00 at a rate of $200.00 per hour unless further ordered by this Court;

2. That the State of North Carolina be required to pay the costs of the aforementioned expert's evaluation and assistance to the defense in accordance with the Order of the Court;

3. That this *Ex Parte* Motion and any Orders resulting from said *Ex Parte* Motion be sealed in the Court file of this case for appellate review and that said *Ex Parte* Motion and any Orders resulting from the same not be opened except upon order of this Court; and

4. For such other and further relief to which the Defendant may be entitled and which the Court may deem just and proper.

This the __ day of _____ 2010.

By:_____
Maitri "Mike" Klinkosum
Attorney for the Defendant
State Bar No.: [redacted]
Cheshire, Parker, Scheider, Bryan & Vitale
133 Fayetteville St., Suite 500
Raleigh, NC 27601
Telephone: [redacted]
Facsimile:
Email: [redacted]

NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION
WAKE COUNTY	FILE NOS: _____
STATE OF NORTH CAROLINA vs. _____ Defendant.	**EX PARTE MOTION FOR FUNDS FOR PSYCHOLOGICAL EXPERT**

NOW COMES the Defendant, _____, by and through the undersigned counsel, Maitri "Mike" Klinkosum, Assistant Public Defender, and hereby moves this Honorable Court, on an ***ex parte*** basis, pursuant to the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Article I §§ 19 and 23 of the North Carolina Constitution, N.C.Gen.Stat. §§ 7A-450(b), 7A-451, and 7A-454, as well as ***Ake v. Oklahoma***, 470 U.S. 68, 84 L.Ed.2d 53 (1985), ***State v. Ballard***, 333 N.C. 515 (1993) and ***State v. Bates***, 333 N.C. 523 (1993), for an Order allocating funds to assist the defense in the evaluation and preparation of the defense of the Defendant. In Support of the foregoing Motion, the Defendant would show unto the Court as follows"

1. The Defendant is an indigent person charged with one count of Attempted 2nd Degree Rape.

2. Based upon interviews with the Defendant and upon information and evidence gathered in the investigation of these matters, the undersigned attorney has determined that an evaluation of the Defendant by an expert in the field of neuropsychology is necessary to determine whether, at the time of the alleged offenses, the Defendant was insane and/or able to comprehend the consequences of his actions, whether his capacity to conform his conduct to the requirements of the law was impaired, and to identify and provide expert testimony as to statutory and non-statutory mitigating factors in the event the defendant is convicted of any crime.

3. Further, an evaluation by a neuropsychologist is necessary to determine the extent to which the Defendant suffers from brain damage. It has been documented that the Defendant has brain damage, however, the extent of the brain damage and the areas of damage have not been determined. The testing available through a neuropsychologist should be able to help determine the extent and location of the brain damage.

4. The Defendant's attorney lacks the necessary expertise to determine the

existence of any such disorders or defects which may be crucial to the outcome of the Defendant's cases. Counsel is in need of the assistance of a neuropsychologist to assist the defense in evaluating the possibility of the existence of such psychiatric conditions and the importance they may have in defending the Defendant against the charges or in sentencing.

5. The Defendant has obtained funds from the Court for the employment of a psychiatrist who is in the process of evaluating the Defendant. However, the psychiatrist's evaluation will be limited in that the psychiatrist is not the individual to give tests to the Defendant to determine the existence of any mental health problems and/or brain damage.

6. Denial of funding to the Defendant under the circumstances such as those existing in the present case would amount to a violation of, at least, the Defendant's right to effective assistance of counsel, due process, and compulsory due process under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. ***Ake v. Oklahoma***, 470 U.S. 68, 84 L.Ed.2d 53 (1985); ***Williams v. Martin***, 618 F.2d 571 (4th Cir. 1980); ***Jacobs v. United States***, 350 F.2d 571 (4th Cir. 1965); ***Hintz v. Beto***, 379 F.2d 937 (5th Cir. 1967); ***State v. Ballard***, 333 N.C. 515 (1983); ***State v. Bates***, 333 N.C. 523 (1993).

7. Undersigned counsel has already contacted a forensic neuropsychologist that undersigned counsel has retained for similar work in the past. The forensic psychiatrist is _____ of Durham, NC. Dr. _____ practices in the field of forensic neuropsychology and has assisted undersigned counsel, and other defense counsel, in the evaluation and assessment of clients. She has been admitted to testify as an expert in the field of forensic neuropsychology in several capital and non-capital trials throughout this State. She charges a fee of $300 per hour. She has indicated her willingness to provide undersigned counsel with the services needed.

WHEREFORE, the Defendant respectfully prays unto this Honorable Court for the following relief:

1. That this Motion be treated as a verified affidavit for the purposes of all trials and hearings in this matter;

2. That this Honorable Court issue an Order authorizing counsel for the Defendant to retain the services of the aforementioned forensic neuropsychologist for the purpose of evaluating and the Defendant's mental capacity and assess sanity issues, in an initial amount no to exceed $3,500.00 at a rate of $300 per hour unless further ordered by this Court;

3. That the State of North Carolina be required to pay the costs of the

psychological evaluation and assessments in accordance with the Order of the Court;

4. That this Motion and any Orders resulting therefrom be sealed in the Court file of this case for appellate review and that said Motion and any Orders not be opened except upon order of this Court; and

5. For such other and further relief to which the Defendant may be entitled and which the Court may deem just and proper.

This the _____ day of _____, 2007.

By:_____
Maitri "Mike" Klinkosum
Assistant Public Defender
Attorney for the Defendant
227 Fayetteville St. Mall, Suite 500
Raleigh, NC 27601
Telephone: (919) [redacted]
Facsimile: (919) [redacted]
Email: [redacted]

NORTH CAROLINA		**IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION**
WAKE COUNTY		**XX CRS XXXXX**
STATE OF NORTH CAROLINA	)	
	)	
VS.	)	***EX PARTE* MOTION FOR**
	)	**FUNDS FOR**
DEFENDANT,	)	**DEFENSE INVESTIGATOR**
	)	
Defendant.	)	

NOW COMES the Defendant, ***Defendant***, by and through the undersigned counsel, Maitri "Mike" Klinkosum, Attorney at Law, and hereby moves this Honorable Court, on an *ex parte* basis, pursuant to the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Article I §§ 19 and 23 of the North Carolina Constitution, N.C.Gen.Stat. §§ 7A-450(b), 7A-451, and 7A-454, as well as Ake v. Oklahoma, 470 U.S. 68, 84 L.Ed.2d 53 (1985), State v. Ballard, 333 N.C. 515 (1993) and State v. Bates, 333 N.C. 523 (1993), for an *Ex Parte* Order allocating funds to assist the defense in the evaluation and preparation of the defense of the Defendant. In Support of the foregoing *Ex Parte* Motion, the Defendant would show unto the Court as follows"

1. The Defendant is an indigent person charged in these matters with one count each of Attempted First-Degree Murder, Assault with a Deadly Weapon with Intent to Kill Inflicting Serious Injury, and First-Degree Arson.

2. The prosecution has alleged by indictment that on or about DATE, the Defendant allegedly attempted to kill, and assaulted with the intent to kill, ALLEGED VICTIM, by pouring gasoline on her and setting her on fire.

3. The prosecution has also alleged by indictment that the Defendant committed arson on DATE by willfully and maliciously burning ADDRESS, the home of the Defendant and the alleged victim.

4. Based upon a review of the discovery provided to the defense thus far, undersigned counsel believes that the prosecution intends to call several witnesses in this matter, including law enforcement and fire department investigation witnesses.

5. Based upon interviews with the Defendant and upon information and evidence gathered in the investigation of these matters, the undersigned attorney has determined that in order to properly investigate the

allegations made against the Defendant and to insure that the Defendant is provided with effective assistance of counsel, the defense must attempt to interview several witnesses involved in the investigation of the above-entitled action, as well as witnesses who, while not involved in the investigation itself, were questioned as part of the investigation.

6. Based upon the fact that undersigned counsel has a significant caseload, including several homicide cases, undersigned counsel is in need of investigative assistance in locating and interviewing the aforementioned witnesses.

7. In addition, were undersigned counsel required to interview the aforementioned witnesses himself, a very real possibility exists that undersigned counsel could unintentionally cause himself to become a witness in the trial of the above-referenced matter.

8. Based upon the foregoing, the Court should provide the Defendant with funding to retain the services of a private investigator to locate and interview witnesses and render any investigative assistance available to the defense.

9. Denial of funding to the Defendant under the circumstances such as those existing in the present case would amount to a violation of, at the least, the Defendant's right to effective assistance of counsel, due process, and compulsory due process under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. ***Ake v. Oklahoma***, 470 U.S. 68, 84 L.Ed.2d 53 (1985); ***Williams v. Martin***, 618 F.2d 571 (4th Cir. 1980); ***Jacobs v. United States***, 350 F.2d 571 (4th Cir. 1965); ***Hintz v. Beto***, 379 F.2d 937 (5th Cir. 1967); ***State v. Ballard***, 333 N.C. 515 (1983); ***State v. Bates***, 333 N.C. 523 (1993).

10. Undersigned counsel has contacted a private investigator, _____. Upon information and belief, _____ has assisted other defendants and defense attorneys in Wake County and the State of NC with the investigation of their cases and charges a fee of $55 per hour.

WHEREFORE, the Defendant respectfully prays unto this Honorable Court for the following relief:

1. That this Honorable Court issue an Order authorizing counsel for the Defendant to retain the services of the aforementioned private investigator for the purposes of locating and interviewing witnesses in the above-referenced matter and rendering any investigative assistance available to the defense, in an initial amount no to exceed $3,500.00 at a rate of $55 per hour unless further ordered by this Court;

2. That the State of North Carolina be required to pay the costs of the aforementioned expert's evaluation and assistance to the defense in accordance with the Order of the Court;

3. That this *Ex Parte* Motion and any Orders resulting from said *Ex Parte* Motion be sealed in the Court file of this case for appellate review and that said *Ex Parte* Motion and any Orders resulting from the same not be opened except upon order of this Court; and

4. For such other and further relief to which the Defendant may be entitled and which the Court may deem just and proper.

This the ___ day of _____ 2010.

By:_____
Maitri "Mike" Klinkosum
Attorney for the Defendant
State Bar No.: [redacted]
Cheshire, Parker, Scheider, Bryan & Vitale
133 Fayetteville St., Suite 500
Raleigh, NC 27601
Telephone: (919) [redacted]
Facsimile: (919) [redacted]
Email: [redacted]

Service: **Get by LEXSEE®**
Citation: **470 U.S. 68**

*470 U.S. 68, *; 105 S. Ct. 1087, **;*
*84 L. Ed. 2d 53, ***; 1985 U.S. LEXIS 52*

AKE v. OKLAHOMA

No. 83-5424

SUPREME COURT OF THE UNITED STATES

470 U.S. 68; 105 S. Ct. 1087; 84 L. Ed. 2d 53; 1985 U.S. LEXIS 52; 53 U.S.L.W. 4179

November 7, 1984, Argued
February 26, 1985, Decided

PRIOR HISTORY: CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF OKLAHOMA.

DISPOSITION: 663 P. 2d 1, reversed and remanded.

CASE SUMMARY

PROCEDURAL POSTURE: Petitioner, who was indigent, sought review by certiorari of a judgment of the Court of Criminal Appeals of Oklahoma, which affirmed his conviction for murder after finding that he was not entitled to the assistance of a psychiatrist in preparing his insanity defense.

OVERVIEW: Petitioner was convicted of murder. He appealed his conviction, claiming that the State should have provided him with access to a psychiatrist in order to prepare his defense of insanity. The court of appeals affirmed the conviction. On review, the Court determined that when a State brought its judicial power to bear on an indigent defendant in a criminal proceeding it was required to take steps to assure that the defendant had a fair opportunity to present a defense. The Court found that the State had ample notice that petitioner intended to present a defense of insanity to the murder charges against him. Due process required that the State provide petitioner with access to a psychiatrist both to assist in the preparation of his insanity defense to the charges and in any sentencing proceedings. Petitioner's murder conviction was therefore reversed and remanded for a new trial.

OUTCOME: The Court reversed the judgment and remanded the matter for a new trial.

CORE TERMS: psychiatrist, sanity, indigent, psychiatric, insanity, future dangerousness, mental condition, murder, preparation, competency, insanity defense, capital cases, reasonable doubt, safeguard, guilt, juror, stand trial, mental state, mental illness, psychiatric

examination, psychiatric testimony, sentencing phase, constitutional right, court-appointed, competent to stand trial, sentencing proceeding, criminal proceeding, probable value, arraignment, opposing

LEXISNEXIS® HEADNOTES Hide

Criminal Law & Procedure > Appeals > Reviewability > Waiver > General Overview

Criminal Law & Procedure > Appeals > Standards of Review > Plain Error > General Overview

HN1 The Oklahoma waiver rule does not apply to fundamental trial error. Under Oklahoma law, federal constitutional errors are fundamental. More Like This Headnote | *Shepardize:* Restrict By Headnote

Criminal Law & Procedure > Appeals > Reviewability > Waiver > General Overview

Criminal Law & Procedure > Appeals > Standards of Review > Plain Error > General Overview

HN2 Before applying the waiver doctrine to a constitutional question, a state court must rule, either explicitly or implicitly, on the merits of the constitutional question. More Like This Headnote | *Shepardize:* Restrict By Headnote

Civil Procedure > Federal & State Interrelationships > Erie Doctrine

Civil Procedure > Judgments > Preclusion & Effect of Judgments > Full Faith & Credit > General Overview

Constitutional Law > The Judiciary > Jurisdiction > General Overview

HN3 When resolution of a state procedural law question depends on a federal constitutional ruling, the state-law prong of the state court's holding is not independent of federal law, and the United States Supreme Court's jurisdiction is not precluded. More Like This Headnote | *Shepardize:* Restrict By Headnote

Constitutional Law > Equal Protection > Poverty

Criminal Law & Procedure > Counsel > Assignment

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Due Process

HN4 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. More Like This Headnote | *Shepardize:* Restrict By Headnote

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection

Criminal Law & Procedure > Defenses > Insanity > Insanity Defense

Evidence > Testimony > Experts > Criminal Trials

HN5 Three factors are relevant to determining if the State is required to provide an indigent defendant with access to competent psychiatric assistance in preparing a

defense. The first is the private interest that will be affected by the action of the State. The second is the governmental interest that will be affected if the safeguard is to be provided. The third is the probable value of the additional or substitute procedural safeguards that are sought, and the risk of an erroneous deprivation of the affected interest if those safeguards are not provided. More Like This Headnote | *Shepardize:* Restrict By Headnote

Evidence > Testimony > Experts > Criminal Trials

HN6 Psychiatry is not an exact science. More Like This Headnote | *Shepardize:* Restrict By Headnote

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection

Criminal Law & Procedure > Defenses > Insanity > Insanity Defense

Evidence > Testimony > Experts > Criminal Trials

HN7 Without the assistance of a psychiatrist to conduct a professional examination on issues relevant to the defense, to help determine whether the insanity defense is viable, to present testimony, and to assist in preparing the cross-examination of a State's psychiatric witnesses, the risk of an inaccurate resolution of sanity issues is extremely high. More Like This Headnote | *Shepardize:* Restrict By Headnote

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection

Criminal Law & Procedure > Sentencing > Imposition > Evidence

Evidence > Testimony > Experts > Criminal Trials

HN8 Where the consequence of error is so great, the relevance of responsive psychiatric testimony so evident, and the burden on the State so slim, due process requires that an indigent defendant have access to a psychiatric examination on relevant issues, to the testimony of the psychiatrist, and to assistance in preparation at the sentencing phase. More Like This Headnote | *Shepardize:* Restrict By Headnote

Available Briefs and Other Documents Related to this Case:

Go To Oral Argument Transcript
Go To Supreme Court Brief(s)

LAWYERS' EDITION DISPLAY ⊞ **Show**

SYLLABUS

Petitioner, an indigent, was charged with first-degree murder and shooting with intent to kill. At his arraignment in an Oklahoma trial court, his behavior was so bizarre that the trial judge, *sua sponte*, ordered him to be examined by a psychiatrist. Shortly thereafter, the examining psychiatrist found petitioner to be incompetent to stand trial and suggested that he be committed. But six weeks later, after being committed to the state mental hospital, petitioner was found to be competent on the condition that he continue to be sedated within an antipsychotic drug. The State then resumed proceedings, and at a pretrial conference petitioner's attorney informed the court that he would raise an insanity defense, and requested a psychiatric

evaluation at state expense to determine petitioner's mental state at the time of the offense, claiming that he was entitled to such an evaluation by the Federal Constitution. On the basis of *United States ex rel. Smith* v. *Baldi*, 344 U.S. 561, the trial court denied petitioner's motion for such an evaluation. At the guilt phase of the ensuing trial, the examining psychiatrists testified that petitioner was dangerous to society, but there was no testimony as to his sanity at the time of the offense. The jury rejected the insanity defense, and petitioner was convicted on all counts. At the sentencing proceeding, the State asked for the death penalty on the murder counts, relying on the examining psychiatrists' testimony to establish the likelihood of petitioner's future dangerous behavior. Petitioner had no expert witness to rebut this testimony or to give evidence in mitigation of his punishment, and he was sentenced to death. The Oklahoma Court of Criminal Appeals affirmed the convictions and sentences. After rejecting, on the merits, petitioner's federal constitutional claim that, as an indigent defendant, he should have been provided the services of a court-appointed psychiatrist, the court ruled that petitioner had waived such claim by not repeating his request for a psychiatrist in his motion for a new trial.

Held:

1. This Court has jurisdiction to review this case. The Oklahoma Court of Criminal Appeals' holding that the federal constitutional claim to a court-appointed psychiatrist was waived depended on the court's federal-law ruling and consequently does not present an independent state ground for its decision. Pp. 74-75.

2. When a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue if the defendant cannot otherwise afford one. Pp. 76-85.

(a) In determining whether, and under what conditions, a psychiatrist's participation is important enough to preparation of a defense to require the State to provide an indigent defendant with access to a psychiatrist, there are three relevant factors: (i) the private interest that will be affected by the State's actions; (ii) the State's interest that will be affected if the safeguard is to be provided; and (iii) the probable value of the additional or substitute safeguards that are sought and the risk of an erroneous deprivation of the affected interest if those safeguards are not provided. The private interest in the accuracy of a criminal proceeding is almost uniquely compelling. The State's interest in denying petitioner a psychiatrist's assistance is not substantial in light of the compelling interest of both the State and petitioner in accurate disposition. And without a psychiatrist's assistance to conduct a professional examination on issues relevant to the insanity defense, to help determine whether that defense is viable, to present testimony, and to assist in preparing the cross-examination of the State's psychiatric witnesses, the risk of an inaccurate resolution of sanity issues is extremely high. This is so particularly when the defendant is able to make an *ex parte* threshold showing that his sanity is likely to be a significant factor in his defense. Pp. 78-83.

(b) When the State at a capital sentencing proceeding presents psychiatric evidence of the defendant's future dangerousness, the defendant, without a psychiatrist's assistance, cannot offer an expert's opposing view, and thereby loses a significant opportunity to raise in the jurors' minds questions about the State's proof of an aggravating factor. In such a circumstance, where the consequence of error is so great, the relevance of responsive psychiatric testimony so evident, and the State's burden so slim, due process requires access to a psychiatric examination on relevant issues, to a psychiatrist's testimony, and to assistance in preparation at the sentencing phase. Pp. 83-84.

(c) *United States ex rel. Smith* v. *Baldi, supra*, is not authority for absolving the trial court of its obligation to provide petitioner access to a psychiatrist. Pp. 84-85.

3. On the record, petitioner was entitled to access to a psychiatrist's assistance at his trial, it being clear that his mental state at the time of the offense was a substantial factor in his defense, and that the trial court was on notice of that fact when the request for a court-appointed psychiatrist was made. In addition, petitioner's future dangerousness was a significant

factor at the sentencing phase, so as to entitle him to a psychiatrist's assistance on this issue, and the denial of that assistance deprived him of due process. Pp. 86-87.

COUNSEL: Arthur B. Spitzer argued the cause for petitioner. With him on the briefs were Elizabeth Symonds, Charles S. Sims, Burt Neuborne, and William B. Rogers.

Michael C. Turpen, Attorney General of Oklahoma, argued the cause for respondent. With him on the brief was David W. Lee, Assistant Attorney General. *

* Briefs of amici curiae urging reversal were filed for the New Jersey Department of the Public Advocate by Joseph H. Rodriguez and Michael L. Perlin; for the American Psychiatric Association by Joel I. Klein; and for the American Psychological Association et al. by Margaret Farrell Ewing, Donald N. Bersoff, and Bruce J. Ennis. Briefs of amici curiae also supporting petitioner were filed for the Public Defender of Oklahoma et al. by Robert A. Ravitz, Frank McCarthy, and Thomas J. Ray, Jr.; and for the National Legal Aid and Defender Association et al. by Richard J. Wilson and James M. Doyle.

JUDGES: MARSHALL, J., delivered the opinion of the Court, in which BRENNAN, WHITE, BLACKMUN, POWELL, STEVENS, and O'CONNOR, JJ., joined. BURGER, C. J., filed an opinion concurring in the judgment, post, p. 87. REHNQUIST, J., filed a dissenting opinion, post, p. 87.

OPINION BY: MARSHALL

OPINION

[*70] [*58] [**1090]** JUSTICE MARSHALL delivered the opinion of the Court.

[*LEdHR1A]** [1A]The issue in this case is whether the Constitution requires that an indigent defendant have access to the psychiatric examination and assistance necessary to prepare an effective defense based on his mental condition, when his sanity at the time of the offense is seriously in question.

I

Late in 1979, Glen Burton Ake was arrested and charged with murdering a couple and wounding their two children. He was arraigned in the District Court for Canadian County, **[*71]** Okla., in February 1980. His behavior at arraignment, and in other prearraignment incidents at the jail, was so bizarre that the trial judge, *sua sponte*, ordered him to be examined by a psychiatrist "for the purpose of advising with the Court as to his impressions of whether the Defendant may need an extended period of mental observation." App. 2. The examining psychiatrist reported: "At times [Ake] appears to be frankly delusional. . . . He claims to be the 'sword of vengeance' of the Lord and that he will sit at the left hand of God in heaven." *Id.*, at 8. He diagnosed Ake as a probable paranoid schizophrenic and recommended a prolonged psychiatric evaluation to determine whether Ake was competent to stand trial.

In March, Ake was committed to a state hospital to be examined with respect to his "present sanity," *i. e.*, his competency to stand trial. On April 10, less than six months after the incidents for which Ake was indicted, the chief forensic psychiatrist at the state hospital informed the court that Ake was not competent to stand trial. The court then held a competency hearing, at which a psychiatrist testified:

"[Ake] is a psychotic . . . his psychiatric diagnosis was that of paranoid schizophrenia -- chronic, with exacerbation, that is with current upset, and that in addition . . . he is dangerous. . . .

[Because] of the severity of his mental illness and because of the intensities of his rage, his poor control, his delusions, he requires a maximum security facility within -- I **[***59]** believe -- the State Psychiatric Hospital system." *Id.*, at 11-12.

The court found Ake to be a "mentally ill person in need of care and treatment" and incompetent to stand trial, and ordered him committed to the state mental hospital.

Six weeks later, the chief forensic psychiatrist informed the court that Ake had become competent to stand trial. At the time, Ake was receiving 200 milligrams of Thorazine, an antipsychotic drug, three times daily, and the psychiatrist indicated that, if Ake continued to receive that dosage, his **[*72]** condition would remain stable. The State then resumed proceedings against Ake.

At a pretrial conference in June, Ake's attorney informed the court that his client would raise an insanity defense. To enable him to prepare and present such a defense adequately, the attorney stated, a psychiatrist would have to examine Ake with respect to his mental condition at the time of the offense. During Ake's 3-month stay at the state hospital, no inquiry had been made into his sanity at the time of the offense, and, as an indigent, Ake could not afford to pay for a psychiatrist. Counsel asked the court either to arrange to have a psychiatrist perform the examination, or to provide funds to allow the defense to arrange one. The trial judge rejected counsel's argument that the Federal Constitution requires that an indigent defendant receive the assistance of a psychiatrist when that assistance is necessary to the defense, and he denied the motion for a psychiatric evaluation at state expense on the basis of this Court's decision in *United* **[**1091]** *States ex rel. Smith* v. *Baldi*, 344 U.S. 561 (1953).

Ake was tried for two counts of murder in the first degree, a crime punishable by death in Oklahoma, and for two counts of shooting with intent to kill. At the guilt phase of trial, his sole defense was insanity. Although defense counsel called to the stand and questioned each of the psychiatrists who had examined Ake at the state hospital, none testified about his mental state at the time of the offense because none had examined him on that point. The prosecution, in turn, asked each of these psychiatrists whether he had performed or seen the results of any examination diagnosing Ake's mental state at the time of the offense, and each doctor replied that he had not. *As a result, there was no expert testimony for either side on Ake's sanity at the time of the offense*. The jurors were then instructed that Ake could be found not guilty by reason of insanity if he did not have the ability to distinguish right from wrong at the time of the alleged offense. They **[*73]** were further told that Ake was to be presumed sane at the time of the crime unless *he* presented evidence sufficient to raise a reasonable doubt about his sanity at that time. If he raised such a doubt in their minds, the jurors were informed, the burden of proof shifted to the State to prove sanity beyond a reasonable doubt. [1] The jury rejected **[***60]** Ake's insanity defense and returned a verdict of guilty on all counts.

FOOTNOTES

1 Oklahoma Stat., Tit. 21, § 152 (1981), provides that "[all] persons are capable of committing crimes, except those belonging to the following classes . . . (4) Lunatics, insane persons and all persons of unsound mind, including persons temporarily or partially deprived of reason, upon proof that at the time of committing the act charged against them they were incapable of knowing its wrongfulness." The Oklahoma Court of Criminal Appeals has held that there is an initial presumption of sanity in every case, "which remains until the defendant raises, by sufficient evidence, a reasonable doubt as to his sanity at the time of the crime. If the issue is so raised, the burden of proving the defendant's sanity beyond a reasonable doubt falls upon the State." 663 P. 2d 1, 10 (1983) (case below); see also *Rogers* v. *State*, 634 P. 2d 743 (Okla. Crim. App. 1981).

At the sentencing proceeding, the State asked for the death penalty. No new evidence was presented. The prosecutor relied significantly on the testimony of the state psychiatrists who had

examined Ake, and who had testified at the guilt phase that Ake was dangerous to society, to establish the likelihood of his future dangerous behavior. Ake had no expert witness to rebut this testimony or to introduce on his behalf evidence in mitigation of his punishment. The jury sentenced Ake to death on each of the two murder counts, and to 500 years' imprisonment on each of the two counts of shooting with intent to kill.

On appeal to the Oklahoma Court of Criminal Appeals, Ake argued that, as an indigent defendant, he should have been provided the services of a court-appointed psychiatrist. The court rejected this argument, observing: "We have held numerous times that, the unique nature of capital cases notwithstanding, the State does not have the responsibility of **[*74]** providing such services to indigents charged with capital crimes." 663 P. 2d 1, 6 (1983). Finding no error in Ake's other claims, [2] the court affirmed the convictions and sentences. We granted certiorari. 465 U.S. 1099 (1984).

FOOTNOTES

2 The Oklahoma Court of Criminal Appeals also dismissed Ake's claim that the Thorazine he was given during trial rendered him unable to understand the proceedings against him or to assist counsel with his defense. The court acknowledged that Ake "stared vacantly ahead throughout the trial" but rejected Ake's challenge in reliance on a state psychiatrist's word that Ake was competent to stand trial while under the influence of the drug. 663 P. 2d, at 7-8, and n. 5. Ake petitioned for a writ of certiorari on this issue as well. In light of our disposition of the other issues presented, we need not address this claim.

[*LEdHR1B]** [1B]We hold that when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a **[**1092]** psychiatrist's assistance on this issue if the defendant cannot otherwise afford one. Accordingly, we reverse.

II

[*LEdHR2A]** [2A]Initially, we must address our jurisdiction to review this case. After ruling on the merits of Ake's claim, the Oklahoma court observed that in his motion for a new trial Ake had not repeated his request for a psychiatrist and that the claim was thereby waived. 663 P. 2d, at 6. The court cited *Hawkins* v. *State*, 569 P. 2d 490 (Okla. Crim. App. 1977), for this proposition. The State argued in its brief to this Court that the court's holding on this issue therefore rested on an adequate and independent state ground and ought not be reviewed. Despite the court's state-law ruling, we conclude that the state court's judgment does not rest on an independent state ground and that our jurisdiction is therefore properly exercised.

HN1 The Oklahoma waiver rule does **[***61]** not apply to fundamental trial error. See *Hawkins* v. *State, supra*, at 493; **[*75]** *Gaddis* v. *State*, 447 P. 2d 42, 45-46 (Okla. Crim. App. 1968). Under Oklahoma law, and as the State conceded at oral argument, federal constitutional errors are "fundamental." Tr. of Oral Arg. 51-52; see *Buchanan* v. *State*, 523 P. 2d 1134, 1137 (Okla. Crim. App. 1974) (violation of constitutional right constitutes fundamental error); see also *Williams* v. *State*, 658 P. 2d 499 (Okla. Crim. App. 1983). Thus, the State has made application of the procedural bar depend on an antecedent ruling on federal law, that is, on the determination of whether federal constitutional error has been committed. HN2 Before applying the waiver doctrine to a constitutional question, the state court must rule, either explicitly or implicitly, on the merits of the constitutional question.

[*LEdHR2B]** [2B] **[***LEdHR3]** [3]As we have indicated in the past, HN3 when resolution of the state procedural law question depends on a federal constitutional ruling, the state-law prong of the court's holding is not independent of federal law, and our jurisdiction is not precluded. See *Herb* v. *Pitcairn*, 324 U.S. 117, 126 (1945) ("We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we

corrected its views of Federal laws, our review could amount to nothing more than an advisory opinion"); *Enterprise Irrigation District* v. *Farmers Mutual Canal Co.*, 243 U.S. 157, 164 (1917) ("But where the non-Federal ground is so interwoven with the other as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other, our jurisdiction is plain"). In such a case, the federal-law holding is integral to the state court's disposition of the matter, and our ruling on the issue is in no respect advisory. In this case, the additional holding of the state court -- that the constitutional challenge presented here was waived -- depends on the court's federal-law ruling and consequently does not present an independent state ground for the decision rendered. We therefore turn to a consideration of the merits of Ake's claim.

[*76] III

This Court has long recognized that HN4 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. In recognition of this right, this Court held almost 30 years ago that once a State offers to criminal defendants the opportunity to appeal their cases, it must provide a trial transcript to an indigent defendant if the transcript is necessary to a decision on the merits of the appeal. **[**1093]** *Griffin* v. *Illinois*, 351 U.S. 12 (1956). Since then, this Court has held that an indigent defendant may not be required to pay a fee before filing a notice of appeal of his conviction, **[***62]** *Burns* v. *Ohio*, 360 U.S. 252 (1959), that an indigent defendant is entitled to the assistance of counsel at trial, *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), and on his first direct appeal as of right, *Douglas* v. *California*, 372 U.S. 353 (1963), and that such assistance must be effective. See *Evitts* v. *Lucey*, 469 U.S. 387 (1985); *Strickland* v. *Washington*, 466 U.S. 668 (1984); *McMann* v. *Richardson*, 397 U.S. 759, 771, n. 14 (1970). [3] Indeed, in *Little* v. *Streater*, 452 U.S. 1 (1981), we extended this principle of meaningful participation to a "quasi-criminal" proceeding and held that, in a paternity action, the State cannot deny the putative father blood grouping tests, if he cannot otherwise afford them.

FOOTNOTES

[3] This Court has recently discussed the role that due process has played in such cases, and the separate but related inquiries that due process and equal protection must trigger. See *Evitts* v. *Lucey; Bearden* v. *Georgia*, 461 U.S. 660 (1983).

[*77] Meaningful access to justice has been the consistent theme of these cases. We recognized long ago that mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and that a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense. Thus, while the Court has not held that a State must purchase for the indigent defendant all the assistance that his wealthier counterpart might buy, see *Ross* v. *Moffitt*, 417 U.S. 600 (1974), it has often reaffirmed that fundamental fairness entitles indigent defendants to "an adequate opportunity to present their claims fairly within the adversary system," *id.*, at 612. To implement this principle, we have focused on identifying the "basic tools of an adequate defense or appeal," *Britt* v. *North Carolina*, 404 U.S. 226, 227 (1971), and we have required that such tools be provided to those defendants who cannot afford to pay for them.

[*LEdHR4]** [4]To say that these basic tools must be provided is, of course, merely to begin our inquiry. In this case we must decide whether, and under what conditions, the participation of a psychiatrist is important enough to preparation of a defense to require the State to provide an indigent defendant with access to competent psychiatric assistance in preparing the defense. HN5

Three factors are relevant to this determination. The first is the private interest that will be affected by the action of the State. The second is the governmental interest that will be affected if the safeguard is to be provided. The third is the probable value of the additional or substitute procedural safeguards that are sought, and the risk of an erroneous deprivation of the affected interest if those safeguards are not provided. See *Little* v. *Streater, supra*, at 6; *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976). We turn, then, to **[***63]** apply this standard to the issue before us.

[*78] A

The private interest in the accuracy of a criminal proceeding that places an individual's life or liberty at risk is almost uniquely compelling. Indeed, the host of safeguards fashioned by this Court over the years to diminish the risk of erroneous conviction stands as a testament to that concern. The interest of the individual in the outcome of the State's effort to overcome the presumption of innocence is obvious and weighs heavily in our analysis.

We consider, next, the interest of the State. Oklahoma asserts that to provide Ake with psychiatric assistance on the **[**1094]** record before us would result in a staggering burden to the State. Brief for Respondent 46-47. We are unpersuaded by this assertion. Many States, as well as the Federal Government, currently make psychiatric assistance available to indigent defendants, and they have not found the financial burden so great as to preclude this assistance. [4] This is **[*79]** especially so when the obligation of the State is limited to provision of one competent psychiatrist, as it is in many States, and as we limit the right we recognize today. At the same time, it is difficult to identify any interest of the States, other than that in its economy, that weighs against recognition of this right. The State's interest in prevailing at trial -- unlike that of a private litigant -- is necessarily tempered by its interest in the fair and accurate adjudication of criminal cases. Thus, also unlike a private litigant, a State may not legitimately assert an interest in maintenance of a strategic advantage over the defense, if the result of that advantage is to cast a pall on the accuracy of the verdict obtained. We therefore conclude that the governmental interest in denying Ake the assistance of a psychiatrist is not **[***64]** substantial, in light of the compelling interest of both the State and the individual in accurate dispositions.

FOOTNOTES

[4] See Ala. Code § 15-12-21 (Supp. 1984); Alaska Stat. Ann. § 18.85.100 (1981); Ariz. Rev. Stat. Ann. § 13-4013 (1978) (capital cases; extended to noncapital cases in *State* v. *Peeler*, 126 Ariz. 254, 614 P. 2d 335 (App. 1980)); Ark. Stat. Ann. § 17-456 (Supp. 1983); Cal. Penal Code Ann. § 987.9 (West Supp. 1984) (capital cases; right recognized in all cases in *People* v. *Worthy*, 109 Cal. App. 3d 514, 167 Cal. Rptr. 402 (1980)); Colo. Rev. Stat. § 18-1-403 (Supp. 1984); *State* v. *Clemons*, 168 Conn. 395, 363 A. 2d 33 (1975); Del. Code Ann., Tit. 29, § 4603 (1983); Fla. Rule Crim. Proc. 3.216; Haw. Rev. Stat. § 802-7 (Supp. 1983); *State* v. *Olin*, 103 Idaho 391, 648 P. 2d 203 (1982); *People* v. *Watson*, 36 Ill. 2d 228, 221 N. E. 2d 645 (1966); *Owen* v. *State*, 272 Ind. 122, 396 N. E. 2d 376 (1979) (trial judge may authorize or appoint experts where necessary); Iowa Rule Crim. Proc. 19; Kan. Stat. Ann. § 22-4508 (Supp. 1983); Ky. Rev. Stat. §§ 31.070, 31.110, 31.185 (1980); *State* v. *Madison*, 345 So. 2d 485 (La. 1977); *State* v. *Anaya*, 456 A. 2d 1255 (Me. 1983); Mass. Gen. Laws Ann., ch. 261, § 27C(4) (West Supp. 1984-1985); Mich. Comp. Laws Ann. § 768.20a(3) (Supp. 1983); Minn. Stat. § 611.21 (1982); Miss. Code Ann. § 99-15-17 (Supp. 1983); Mo. Rev. Stat. § 552.030.4 (Supp. 1984); Mont. Code Ann. § 46-8-201 (1983); *State* v. *Suggett*, 200 Neb. 693, 264 N. W. 2d 876 (1978) (discretion to appoint psychiatrist rests with trial court); Nev. Rev. Stat. § 7.135 (1983); N. H. Rev. Stat. Ann. § 604-A:6 (Supp. 1983); N. M. Stat. Ann. §§ 31-16-2, 31-16-8 (1984); N. Y. County Law § 722-c (McKinney Supp. 1984-1985); N. C. Gen. Stat. § 7A-454 (1981); Ohio Rev. Code Ann. § 2941.51 (Supp. 1983); Ore. Rev. Stat. § 135.055(4) (1983); *Commonwealth* v. *Gelormo*, 327 Pa. Super. 219, 227, and n. 5, 475 A. 2d 765, 769, and n. 5 (1984); R. I. Gen. Laws § 9-17-19 (Supp. 1984); S. C. Code § 17-3-80 (Supp. 1983); S. D. Codified Laws § 23A-40-8 (Supp. 1984); Tenn. Code Ann. § 40-14-207 (Supp. 1984); Tex. Code Crim. Proc. Ann., Art. § 26.05 (Vernon Supp. 1984);

Utah Code Ann. § 77-32-1 (1982); Wash. Rev. Code §§ 10.77.020, 10.77.060 (1983) (see also *State* v. *Cunningham*, 18 Wash. App. 517, 569 P. 2d 1211 (1977)); W. Va. Code § 29-21-14(e)(3) (Supp. 1984); Wyo. Stat. §§ 7-1-108; 7-1-110; 7-1-116 (1977).

Last, we inquire into the probable value of the psychiatric assistance sought, and the risk of error in the proceeding if such assistance is not offered. We begin by considering the pivotal role that psychiatry has come to play in criminal proceedings. More than 40 States, as well as the Federal Government, have decided either through legislation or judicial decision that indigent defendants are entitled, under certain circumstances, to the assistance of a psychiatrist's expertise. [5] For example, in subsection (e) of the Criminal Justice Act, 18 U. S. C. § 3006A, Congress has provided that indigent **[*80]** defendants shall receive the assistance of all experts "necessary for an adequate defense." Numerous state statutes guarantee reimbursement for expert services under a like standard. And in many States that have not assured access to psychiatrists through the legislative process, state courts have interpreted the State or Federal Constitution to require that psychiatric assistance be provided to indigent defendants when necessary for an adequate defense, or when insanity is at issue. [6]

FOOTNOTES

[5] See n. 4, *supra*.

[6] *Ibid*.

[1095]** These statutes and court decisions reflect a reality that we recognize today, namely, that when the State has made the defendant's mental condition relevant to his criminal culpability and to the punishment he might suffer, the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense. In this role, psychiatrists gather facts, through professional examination, interviews, and elsewhere, that they will share with the judge or jury; they analyze the information gathered and from it draw plausible conclusions about the defendant's mental condition, and about the effects of any disorder on behavior; and they offer opinions about how the defendant's mental condition might have affected his behavior at the time in question. They know the probative questions to ask of the opposing party's psychiatrists and how to interpret their answers. Unlike lay witnesses, who can merely describe symptoms they believe might be relevant to the defendant's mental state, psychiatrists can identify the "elusive and often deceptive" symptoms of insanity, *Solesbee* v. *Balkcom*, 339 U.S. 9, 12 (1950), and tell the jury why their observations are relevant. Further, where permitted by evidentiary rules, psychiatrists can translate a medical diagnosis into language that will assist the trier of fact, and therefore offer evidence in a form that has meaning for the task at hand. Through this process of investigation, interpretation, and testimony, psychiatrists **[*81]** ideally assist lay jurors, who generally have no training in psychiatric matters, to make a sensible and educated determination about the mental condition of the defendant at the time of the offense.

*HN6*Psychiatry is not, however, an exact science, and psychiatrists disagree widely and frequently on what constitutes mental illness, on the appropriate diagnosis to be attached to given behavior and symptoms, on **[***65]** cure and treatment, and on likelihood of future dangerousness. Perhaps because there often is no single, accurate psychiatric conclusion on legal insanity in a given case, juries remain the primary factfinders on this issue, and they must resolve differences in opinion within the psychiatric profession on the basis of the evidence offered by each party. When jurors make this determination about issues that inevitably are complex and foreign, the testimony of psychiatrists can be crucial and "a virtual necessity if an insanity plea is to have any chance of success." [7] By organizing a defendant's mental history, examination results and behavior, and other information, interpreting it in light of their expertise, and then laying out their investigative and analytic process to the jury, the psychiatrists for each party enable the jury to make its most accurate determination of the truth on the issue before them. It is for this reason that States rely on psychiatrists as examiners, consultants, and

witnesses, and that private individuals do as well, **[*82]** when they can afford to do so. [8] In **[**1096]** so saying, we neither approve nor disapprove the widespread reliance on psychiatrists but instead recognize the unfairness of a contrary holding in light of the evolving practice.

FOOTNOTES

7 Gardner, The Myth of the Impartial Psychiatric Expert -- Some Comments Concerning Criminal Responsibility and the Decline of the Age of Therapy, 2 Law & Psychology Rev. 99, 113-114 (1976). In addition, "[testimony] emanating from the depth and scope of specialized knowledge is very impressive to a jury. The same testimony from another source can have less effect." F. Bailey & H. Rothblatt, Investigation and Preparation of Criminal Cases § 175 (1970); see also ABA Standards for Criminal Justice 5-1.4, Commentary, p. 5x20 (2d ed. 1980) ("The quality of representation at trial . . . may be excellent and yet valueless to the defendant if the defense requires the assistance of a psychiatrist . . . and no such services are available").

8 See also *Reilly* v. *Barry*, 250 N. Y. 456, 461, 166 N. E. 165, 167 (1929) (Cardozo, C. J.) ("[Upon] the trial of certain issues, such as insanity or forgery, experts are often necessary both for prosecution and for defense. . . . [A] defendant may be at an unfair disadvantage, if he is unable because of poverty to parry by his own witnesses the thrusts of those against him"); 2 I. Goldstein & F. Lane, Goldstein Trial Techniques § 14.01 (2d ed. 1969) ("Modern civilization, with its complexities of business, science, and the professions, has made expert and opinion evidence a necessity. This is true where the subject matters involved are beyond the general knowledge of the average juror"); Henning, The Psychiatrist in the Legal Process, in By Reason of Insanity: Essays on Psychiatry and the Law 217, 219-220 (L. Freedman ed., 1983) (discussing the growing role of psychiatric witnesses as a result of changing definitions of legal insanity and increased judicial and legislative acceptance of the practice).

[*LEdHR1C]** [1C]The foregoing leads inexorably to the conclusion that, HN7 without the assistance of a psychiatrist to conduct a professional examination on issues relevant to the defense, to help determine whether the insanity defense is viable, to present testimony, and to assist in preparing the cross-examination of a State's psychiatric witnesses, the risk of an inaccurate resolution of sanity issues is extremely high. With such assistance, the defendant is fairly able to present at least enough information to the jury, in a meaningful manner, as to permit it to make a sensible determination.

A defendant's mental condition is not necessarily at issue in every criminal proceeding, however, and it is unlikely that psychiatric assistance of the kind we have described would be of probable value in cases where it is not. The risk of error from denial of such assistance, as well as its probable value, is most **[***66]** predictably at its height when the defendant's mental condition is seriously in question. When the defendant is able to make an *ex parte* threshold showing to the trial court that his sanity is likely to be a significant factor in **[*83]** his defense, the need for the assistance of a psychiatrist is readily apparent. It is in such cases that a defense may be devastated by the absence of a psychiatric examination and testimony; with such assistance, the defendant might have a reasonable chance of success. In such a circumstance, where the potential accuracy of the jury's determination is so dramatically enhanced, and where the interests of the individual and the State in an accurate proceeding are substantial, the State's interest in its fisc must yield. [9]

FOOTNOTES

9 In any event, before this Court the State concedes that such a right exists but argues only that it is not implicated here. Brief for Respondent 45; Tr. of Oral Arg. 52. It therefore recognizes that the financial burden is not always so great as to outweigh the individual

interest.

[*LEdHR1D]** [1D]We therefore hold that when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense. This is not to say, of course, that the indigent defendant has a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own. Our concern is that the indigent defendant have access to a competent psychiatrist for the purpose we have discussed, and as in the case of the provision of counsel we leave to the States the decision on how to implement this right.

B

[*LEdHR5A]** [5A]Ake also was denied the means of presenting evidence to rebut the State's evidence of his future dangerousness. The foregoing discussion compels a similar conclusion in the context of a capital sentencing proceeding, when the State presents psychiatric evidence of the defendant's future dangerousness. We have repeatedly recognized the defendant's compelling interest in fair adjudication at the sentencing phase of a capital case. The State, too, has a profound interest **[*84]** in assuring that its ultimate sanction is not erroneously imposed, and we do not see why monetary considerations should be more persuasive in this context than at trial. The variable on which we must focus is, therefore, the probable value that the assistance of a psychiatrist will have in this area, and the risk attendant on its absence.

This Court has upheld the practice in many States of placing before the jury psychiatric testimony on the question of future dangerousness, see *Barefoot* v. *Estelle*, 463 U.S. 880, 896-905 (1983), at least **[**1097]** where the defendant has had access to an expert of his own, *id.*, at 899, n. 5. In so holding, the Court relied, in part, on the assumption that the factfinder would have before it both the views of the prosecutor's psychiatrists and the "opposing views of the defendant's doctors" and would therefore be competent to "uncover, recognize, and take due account of . . . shortcomings" **[***67]** in predictions on this point. *Id.*, at 899. Without a psychiatrist's assistance, the defendant cannot offer a well-informed expert's opposing view, and thereby loses a significant opportunity to raise in the jurors' minds questions about the State's proof of an aggravating factor. In such a circumstance, HN8 where the consequence of error is so great, the relevance of responsive psychiatric testimony so evident, and the burden on the State so slim, due process requires access to a psychiatric examination on relevant issues, to the testimony of the psychiatrist, and to assistance in preparation at the sentencing phase.

C

The trial court in this case believed that our decision in *United States ex rel. Smith* v. *Baldi*, 344 U.S. 561 (1953), absolved it completely of the obligation to provide access to a psychiatrist. For two reasons, we disagree. First, neither *Smith*, nor *McGarty* v. *O'Brien*, 188 F.2d 151, 155 (CA1 1951), to which the majority cited in *Smith*, even suggested that the Constitution does not require any psychiatric examination or assistance whatsoever. Quite to the contrary, the **[*85]** record in *Smith* demonstrated that neutral psychiatrists in fact had examined the defendant as to his sanity and had testified on that subject at trial, and it was on that basis that the Court found no additional assistance was necessary. *Smith, supra*, at 568; see also *United States ex rel. Smith* v. *Baldi*, 192 F.2d 540, 547 (CA3 1951). Similarly, in *McGarty*, the defendant had been examined by two psychiatrists who were not beholden to the prosecution. We therefore reject the State's contention that *Smith* supports the broad proposition that "[there] is presently no constitutional right to have a psychiatric examination of a defendant's sanity at the time of the offense." Brief in Opposition 8. At most it supports the proposition that there is no constitutional right to more psychiatric assistance than the defendant in *Smith* had received.

In any event, our disagreement with the State's reliance on *Smith* is more fundamental. That case was decided at a time when indigent defendants in state courts had no constitutional right to

even the presence of counsel. Our recognition since then of elemental constitutional rights, each of which has enhanced the ability of an indigent defendant to attain a fair hearing, has signaled our increased commitment to assuring meaningful access to the judicial process. Also, neither trial practice nor legislative treatment of the role of insanity in the criminal process sits paralyzed simply because this Court has once addressed them, and we would surely be remiss to ignore the extraordinarily enhanced role of psychiatry in criminal law today. [10] Shifts in all these areas since the time of *Smith* convince us that the opinion in that case was addressed to altogether different **[***68]** variables, and that we are not limited by it in considering whether fundamental fairness today requires a different result.

FOOTNOTES

[10] See Henning, *supra* n. 8; Gardner, *supra* n. 7, at 99; H. Huckabee, Lawyers, Psychiatrists and Criminal Law: Cooperation or Chaos? 179-181 (1980) (discussing reasons for the shift toward reliance on psychiatrists); Huckabee, Resolving the Problem of Dominance of Psychiatrists in Criminal Responsibility Decisions: A Proposal, 27 SW. L. J. 790 (1973).

[*86] IV

[*LEdHR6]** [6]We turn now to apply these standards to the facts of this case. On the record before us, it is clear that Ake's mental state at the time of the offense was a substantial factor in his defense, and that the trial court was on notice of that fact when the request for a court-appointed psychiatrist **[**1098]** was made. For one, Ake's sole defense was that of insanity. Second, Ake's behavior at arraignment, just four months after the offense, was so bizarre as to prompt the trial judge, *sua sponte*, to have him examined for competency. Third, a state psychiatrist shortly thereafter found Ake to be incompetent to stand trial, and suggested that he be committed. Fourth, when he was found to be competent six weeks later, it was only on the condition that he be sedated with large doses of Thorazine three times a day, during trial. Fifth, the psychiatrists who examined Ake for competency described to the trial court the severity of Ake's mental illness less than six months after the offense in question, and suggested that this mental illness might have begun many years earlier. App. 35. Finally, Oklahoma recognizes a defense of insanity, under which the initial burden of producing evidence falls on the defendant. [11] Taken together, these factors make clear that the question of Ake's sanity was likely to be a significant factor in his defense. [12]

FOOTNOTES

[11] See n. 1, *supra*.

[12] We express no opinion as to whether any of these factors, alone or in combination, is necessary to make this finding.

[*LEdHR5B]** [5B]In addition, Ake's future dangerousness was a significant factor at the sentencing phase. The state psychiatrist who treated Ake at the state mental hospital testified at the guilt phase that, because of his mental illness, Ake posed a threat of continuing criminal violence. This testimony raised the issue of Ake's future dangerousness, which is an aggravating factor under Oklahoma's capital sentencing scheme, Okla. Stat., Tit. 21, § 701.12(7) (1981), and on which the prosecutor relied at sentencing. We therefore conclude that Ake also **[*87]** was entitled to the assistance of a psychiatrist on this issue and that the denial of that assistance deprived him of due process. [13]

FOOTNOTES

[13] Because we conclude that the Due Process Clause guaranteed to Ake the assistance he

requested and was denied, we have no occasion to consider the applicability of the Equal Protection Clause, or the Sixth Amendment, in this context.

Accordingly, we reverse and remand for a new trial.

It is so ordered.

CONCUR BY: BURGER

CONCUR

CHIEF JUSTICE BURGER, concurring in the judgment.

This is a capital case in which the Court is asked to decide whether a State may refuse an indigent defendant "any opportunity whatsoever" to obtain psychiatric evidence for the preparation and presentation of **[***69]** a claim of insanity by way of defense when the defendant's legal sanity at the time of the offense was "seriously in issue."

The facts of the case and the question presented confine the actual holding of the Court. In capital cases the finality of the sentence imposed warrants protections that may or may not be required in other cases. Nothing in the Court's opinion reaches noncapital cases.

DISSENT BY: REHNQUIST

DISSENT

JUSTICE REHNQUIST, dissenting.

The Court holds that "when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue if the defendant cannot otherwise afford one." *Ante*, at 74. I do not think that the facts of this case warrant the establishment of such a principle; and I think that even if the factual predicate of the Court's statement were established, the constitutional rule announced by the Court is far too broad. I would limit the rule to capital cases, and make clear that the entitlement is to an independent psychiatric evaluation, not to a defense consultant.

[*88] Petitioner Ake and his codefendant Hatch quit their jobs on an oil field rig in October 1979, borrowed a car, and went looking for a location to burglarize. They drove to the rural home of Reverend and Mrs. Richard Douglass, and gained entrance **[**1099]** to the home by a ruse. Holding Reverend and Mrs. Douglass and their children, Brooks and Leslie, at gunpoint, they ransacked the home; they then bound and gagged the mother, father, and son, and forced them to lie on the living room floor. Ake and Hatch then took turns attempting to rape 12-year-old Leslie Douglass in a nearby bedroom. Having failed in these efforts, they forced her to lie on the living room floor with the other members of her family.

Ake then shot Reverend Douglass and Leslie each twice, and Mrs. Douglass and Brooks once, with a .357 magnum pistol, and fled. Mrs. Douglass died almost immediately as a result of the gunshot wound; Reverend Douglass' death was caused by a combination of the gunshots he received, and strangulation from the manner in which he was bound. Leslie and Brooks managed to untie themselves and to drive to the home of a nearby doctor. Ake and his accomplice were apprehended in Colorado following a month-long crime spree that took them through Arkansas, Louisiana, Texas, and other States in the western half of the United States.

Ake was extradited from Colorado to Oklahoma on November 20, 1979, and placed in the city jail in El Reno, Oklahoma. Three days after his arrest, he asked to speak to the Sheriff. Ake gave the Sheriff a detailed statement concerning the above crimes, which was first taped, then reduced to 44 written pages, corrected, and signed by Ake.

Ake was arraigned on November 23, 1979, and again appeared in court with his codefendant Hatch on December 11th. Hatch's attorney requested and obtained an order transferring Hatch to the state mental hospital for a 60-day observation period to determine his competency to stand trial; although Ake was present in court with his attorney **[*89]** during **[***70]** this proceeding, no such request was made on behalf of Ake.

On January 21, 1980, both Ake and Hatch were bound over for trial at the conclusion of a preliminary hearing. No suggestion of insanity at the time of the commission of the offense was made at this time. On February 14, 1980, Ake appeared for formal arraignment, and at this time became disruptive. The court ordered that Ake be examined by Dr. William Allen, a psychiatrist in private practice, in order to determine his competency to stand trial. On April 10, 1980, a competency hearing was held at the conclusion of which the trial court found that Ake was a mentally ill person in need of care and treatment, and he was transferred to a state institution. Six weeks later, the chief psychiatrist for the institution advised the court that Ake was now competent to stand trial, and the murder trial began on June 23, 1980. At this time Ake's attorney withdrew a pending motion for jury trial on present sanity. Outside the presence of the jury the State produced testimony of a cellmate of Ake, who testified that Ake had told him that he was going to try to "play crazy."

The State at trial produced evidence as to guilt, and the only evidence offered by Ake was the testimony of the doctors who had observed and treated him during his confinement pursuant to the previous order of the court. Each of these doctors testified as to Ake's mental condition at the time of his confinement in the institution, but none could express a view as to his mental condition at the time of the offense. Significantly, although all three testified that Ake suffered from some form of mental illness six months after he committed the murders, on cross-examination two of the psychiatrists specifically stated that they had "no opinion" concerning Ake's capacity to tell right from wrong at the time of the offense, and the third would only speculate that a psychosis might have been "apparent" at that time. The Court **[*90]** makes a point of the fact that "there was no expert testimony for either side on Ake's sanity at the time of the offense." *Ante*, at 72 (emphasis deleted). In addition, Ake called no lay witnesses, although some apparently existed who could have testified concerning Ake's actions that might have had a bearing **[**1100]** on his sanity at the time of the offense; and although two "friends" of Ake's who had been with him at times proximate to the murders testified at trial at the behest of the prosecution, defense counsel did not question them concerning any of Ake's actions that might have a bearing on his sanity.

The Court's opinion states that before an indigent defendant is entitled to a state-appointed psychiatrist the defendant must make "a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial." *Ante*, at 74. But nowhere in the opinion does the Court elucidate how that requirement is satisfied in this particular case. Under Oklahoma law, the burden is initially on the defendant to raise a reasonable doubt as to his sanity at the time of the offense. Once that burden is satisfied, the burden shifts to the State to prove sanity beyond a reasonable doubt. *Ake* v. *State*, 663 P. 2d 1, 10 (1983). Since the State introduced *no* evidence concerning Ake's sanity at the time of the offense, it seems clear that as a matter of state law Ake failed to carry **[***71]** the initial burden. Indeed, that was the holding of the Oklahoma Court of Criminal Appeals. *Ibid*.

Nor is this a surprising conclusion on the facts here. The evidence of the brutal murders perpetrated on the victims, and of the month-long crime spree following the murders, would not seem to raise any question of sanity unless one were to adopt the dubious doctrine that no one in his right mind would commit a murder. The defendant's 44-page confession, given more than a month after the crimes, does not suggest insanity; nor does the failure of Ake's attorney to

move for a competency hearing at the time the codefendant **[*91]** moved for one. The first instance in this record is the disruptive behavior at the time of formal arraignment, to which the trial judge alertly and immediately responded by committing Ake for examination. The trial commenced some two months later, at which time Ake's attorney withdrew a pending motion for jury trial on present sanity, and the State offered the testimony of a cellmate of Ake who said that the latter had told him that he was going to try to "play crazy." The Court apparently would infer from the fact that Ake was diagnosed as mentally ill some six months after the offense that there was a reasonable doubt as to his ability to know right from wrong when he committed it. But even the experts were unwilling to draw this inference.

Before holding that the State is obligated to furnish the services of a psychiatric witness to an indigent defendant who reasonably contests his sanity at the time of the offense, I would require a considerably greater showing than this. And even then I do not think due process is violated merely because an indigent lacks sufficient funds to pursue a state-law defense as thoroughly as he would like. There may well be capital trials in which the State assumes the burden of proving sanity at the guilt phase, or "future dangerousness" at the sentencing phase, and makes significant use of psychiatric testimony in carrying its burden, where "fundamental fairness" would require that an indigent defendant have access to a court-appointed psychiatrist to evaluate him independently and -- if the evaluation so warrants -- contradict such testimony. But this is not such a case. It is highly doubtful that due process requires a State to make available an insanity defense to a criminal defendant, but in any event if such a defense is afforded the burden of proving insanity can be placed on the defendant. See *Patterson* v. *New York*, 432 U.S. 197 (1977). That is essentially what happened here, and Ake failed to carry his burden under state law. I do not believe the Due Process Clause superimposes a federal **[*92]** standard for determining how and when sanity can legitimately be placed in issue, and I would find no violation of due process under the circumstances.

[1101]** With respect to the necessity of expert psychiatric testimony on the issue of "future dangerousness," as opposed to sanity at the time of the offense, there is even less support for the Court's holding. Initially I would note that, given the Court's holding that Ake is entitled to a new trial with respect to guilt, there was no need to reach issues raised by the sentencing proceedings, so the discussion **[***72]** of this issue may be treated as dicta. But in any event, the psychiatric testimony concerning future dangerousness was obtained from the psychiatrists when they were called as *defense* witnesses, not prosecution witnesses. Since the State did not initiate this line of testimony, I see no reason why it should be required to produce still more psychiatric witnesses for the benefit of the defendant.

Finally, even if I were to agree with the Court that some right to a state-appointed psychiatrist should be recognized here, I would not grant the broad right to "access to a competent psychiatrist who will conduct an appropriate examination *and assist in evaluation, preparation, and presentation of the defense*." *Ante*, at 83 (emphasis added). A psychiatrist is not an attorney, whose job it is to advocate. His opinion is sought on a question that the State of Oklahoma treats as a question of *fact*. Since any "unfairness" in these cases would arise from the fact that the only competent witnesses on the question are being hired by the State, all the defendant should be entitled to is one competent opinion -- whatever the witness' conclusion -- from a psychiatrist who acts independently of the prosecutor's office. Although the independent psychiatrist should be available to answer defense counsel's questions prior to trial, and to testify if called, I see no reason why the defendant should be entitled to an opposing view, or to a "defense" advocate.

For the foregoing reasons, I would affirm the judgment of the Court of Criminal Appeals of Oklahoma.

REFERENCES

21, 21A Am Jur 2d, Criminal Law 71, 79, 771

8, 9 Federal Procedure, L Ed, Criminal Procedure 22:333-22:336, 22:911

7 Federal Procedural Forms, L Ed, Criminal Procedure 20:521 et seq.

8 Am Jur Pl & Pr Forms (Rev), Criminal Procedure, Forms 191 et seq.

8 Am Jur Proof of Facts 1, Mental Disorder and Incapacity

2 Am Jur Trials 357, Locating Medical Experts; 2 Am Jur Trials 585, Selecting and Preparing Expert Witnesses

USCS, Constitution, Fifth and Fourteenth Amendments

US L Ed Digest, Criminal Law 53

L Ed Index to Annos, Criminal Law; Incompetent Persons; Physical and Mental Examination; Poor Persons

ALR Quick Index, Criminal Law; Incompetent or Insane Persons; Psychiatric Examination; Poor and Poor Laws

Federal Quick Index, Criminal Law; Insane and Incompetent Persons; Physical and Mental Examination; Poor Persons

Annotation References:

Validity, construction, and application of federal statutes providing for pretrial determination of mental competency of person accused of federal crime. 4 L Ed 2d 2077.

Right of federal indigent criminal defendant to obtain independent psychiatric examination pursuant to Subsection (e) of Criminal Justice Act of 1964, as amended (18 USCS 3006A(e)). 40 ALR Fed 707.

Power of court, in absence of statute, to order psychiatric examination of accused for purpose of determining mental condition at time of alleged offense. 17 ALR4th 1274.

Right of indigent defendant in criminal case to aid of state by appointment of investigator or expert. 34 ALR3d 1256.

Service: **Get by LEXSEE®**
Citation: **470 U.S. 68**
View: Full
Date/Time: Friday, April 20, 2012 - 11:52 AM EDT

* Signal Legend:
- Warning: Negative treatment is indicated
- Questioned: Validity questioned by citing refs
- Caution: Possible negative treatment
- Positive treatment is indicated
- Citing Refs. With Analysis Available
- Citation information available

* Click on any *Shepard's* signal to *Shepardize*® that case.

*333 N.C. 515, *; 428 S.E.2d 178, **;*
*1993 N.C. LEXIS 136, ****

STATE OF NORTH CAROLINA v. LONNIE WINSLOW BALLARD

No. 255A92

SUPREME COURT OF NORTH CAROLINA

333 N.C. 515; 428 S.E.2d 178; 1993 N.C. LEXIS 136

March 17, 1993, Heard in the Supreme Court
April 8, 1993, Filed

PRIOR HISTORY: [*1]** Appeal of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Hight, J., at the 26 February 1992 Regular Criminal Session of Superior Court, Durham County, on a jury verdict finding defendant guilty of first-degree murder.

DISPOSITION: NEW TRIAL.

CASE SUMMARY

PROCEDURAL POSTURE: Defendant was tried for murder in the first degree. The Superior Court, Durham County (North Carolina), denied defendant's motion that his request for appointment of a psychiatric expert be heard in camera and ex parte. Defendant appealed.

OVERVIEW: Defendant sought an in camera and ex parte hearing so as not to jeopardize his defense. After his motion was denied, a hearing to determine defendant's competency to stand trial was held, and it was concluded that he was competent. The state claimed that defendant's right to a fair trial did not require granting defendant an ex parte hearing on a motion for expert assistance. Defendant claimed that the denial of his motion forced him to jeopardize his privilege against self-incrimination and his right to the effective assistance of counsel under by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. The court held that an indigent defendant who requested an ex parte hearing of evidence supporting his motion for expert psychiatric assistance was constitutionally entitled to one. Defendant should not have been required to endanger his privilege against self-incrimination to show that he required psychiatric assistance. Effective assistance of counsel required access to expert witnesses as necessary, and the right to an ex parte hearing could be a critical component of an indigent defendant's right to expert psychiatric assistance.

OUTCOME: Because it was impossible to know what defendant would have presented in support of his request for psychiatric assistance had he not been required to make his showing in open court, the court could not find that the error was harmless beyond a reasonable doubt. Therefore, the court ordered a new trial.

CORE TERMS: ex parte hearing, indigent, assistance of counsel, self-incrimination, psychiatric, psychiatric expert, psychiatrist, fingerprint, threshold, preparation, disclosure, appointment, guaranteed, atmosphere, insanity, prosecutor, in camera, court-appointed, evidence supporting, new trial, inhibition, jeopardize, waive', withdraw, hearing of evidence, defense strategy, available evidence, harmless beyond, reasonable doubt, constitutionally required

LEXISNEXIS® HEADNOTES ⊟ **Hide**

Criminal Law & Procedure > Discovery & Inspection > Discovery by Defendant > Expert Testimony > Indigents

Criminal Law & Procedure > Preliminary Proceedings > Preliminary Hearings > General Overview

Evidence > Testimony > Experts > Criminal Trials

HN1 Once a defendant has made an ex parte threshold showing to the trial court that his sanity is likely to be a significant factor in his defense, fundamental fairness requires the state, at a minimum, to assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense. Fundamental fairness and the principle that an indigent defendant must be given a fair opportunity to present his defense underlie the indigent defendant's right to the assistance of an expert at state expense. These principles apply to defendants' motions for many kinds of experts, including independent investigators, medical experts, and fingerprint experts. The indigent defendant is entitled to the assistance of an expert in preparation of his defense when he makes a threshold showing of specific necessity. The indigent defendant must make a particularized showing that (1) he will be deprived of a fair trial without the expert assistance, or (2) there is a reasonable likelihood that it would materially assist him in the preparation of his case. More Like This Headnote | *Shepardize:* Restrict By Headnote

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > Preliminary Proceedings > Preliminary Hearings > General Overview

Criminal Law & Procedure > Counsel > Effective Assistance > Sentencing

HN2 Whereas an indigent defendant's access to the basic tools of an adequate defense is a core requirement of a fundamentally fair trial, the need for an ex parte hearing on a motion for expert assistance is not. Although an ex parte hearing is not constitutionally required in every case, there are strong reasons for conducting the hearing ex parte, including the defendant's right to obtain the expert assistance necessary to assist in preparing his defense without losing the opportunity to prepare the defense in secret. More Like This Headnote | *Shepardize:* Restrict By Headnote

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Self-Incrimination Privilege

Criminal Law & Procedure > Defenses > Insanity > Insanity Defense

Evidence > Testimony > Experts > Helpfulness

HN3 When an indigent defendant is seeking the assistance of a psychiatric expert, the

strong reasons for conducting a hearing on the defendant's motion for expert assistance ex parte are especially applicable. To expose to the state testimony and evidence supporting a defendant's request for an independent psychological evaluation and a psychiatrist's trial assistance lays bare his insanity or related defense strategy. A hearing open to the state necessarily impinges upon the defendant's right to the assistance of counsel and his privilege against self-incrimination. These constitutional rights and privileges, guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, entitle an indigent defendant to an ex parte hearing on his request for a psychiatric expert. More Like This Headnote | *Shepardize:* Restrict By Headnote

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Self-Incrimination Privilege

Evidence > Privileges > Self-Incrimination Privilege > Elements

Evidence > Privileges > Self-Incrimination Privilege > Scope

HN4 The privilege against self-incrimination, guaranteed by the Fifth and Fourteenth Amendments, is to be liberally construed. It applies not only to criminal prosecutions but to any proceeding sanctioned by law and to any investigation, litigious or not. The protection afforded by the privilege against self-incrimination does not merely encompass evidence which may lead to criminal conviction, but includes information which would furnish a link in the chain of evidence that could lead to prosecution, as well as evidence which an individual reasonably believes could be used against him in a criminal prosecution. The privilege against self-incrimination protects against real, not remote and speculative dangers, but a witness need not prove the hazard. To require him to do so would compel him to surrender the very protection the privilege is designed to guarantee. The privilege, to be sustained, need be evident only from the implications of the question and in the setting in which it is asked. These must show only that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. More Like This Headnote | *Shepardize:* Restrict By Headnote

Criminal Law & Procedure > Preliminary Proceedings > Preliminary Hearings > General Overview

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Remain Silent > Self-Incrimination Privilege

Criminal Law & Procedure > Defenses > Insanity > Insanity Defense

HN5 In the setting of a pre-trial hearing at which the defendant must make a threshold showing of need for psychiatric assistance or risk losing his opportunity to rely on the defense of insanity, what the defendant must divulge is compelled by the circumstances; his statements, therefore, are not voluntary testimony by which he would waive the privilege against self-incrimination. More Like This Headnote

Criminal Law & Procedure > Preliminary Proceedings > Preliminary Hearings > General Overview

Criminal Law & Procedure > Counsel > Effective Assistance > Pretrial

Evidence > Testimony > Experts > Criminal Trials

HN6 See 18 U.S.C.S. § 3006A(e)(1).

Criminal Law & Procedure > Trials > Burdens of Proof > Defense

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Remain Silent > Self-Incrimination Privilege

Criminal Law & Procedure > Defenses > Insanity > Insanity Defense

HN7 When a defendant has already been evaluated by a psychiatrist, who is to aid in the defendant's showing, the information at the psychiatrist's disposal may include not only what the patient's words directly express; he lays bare his entire self, his dreams, his fantasies, his sins, and his shame. When a defendant must make this showing absent such assistance, he somehow must prove to the court the instability of his mental state at the time of the crime, not only opening his thoughts and feelings to public and prosecutorial scrutiny, but also risking exposure of his role in potentially incriminating events in which such thoughts and feelings arose. Cross-examination by the state exacerbates the risk. More Like This Headnote

Criminal Law & Procedure > Counsel > Effective Assistance > Pretrial

Criminal Law & Procedure > Defenses > Insanity > Insanity Defense

Evidence > Testimony > Experts > Helpfulness

HN8 The Sixth Amendment right to the assistance of counsel presupposes the right to the effective assistance of counsel. The effective assistance of counsel requires adequate trial preparation, including access to expert witnesses where appropriate. When insanity is the principal defense, access to psychiatric experts is essential to assist the attorney in presenting an adequate case. More Like This Headnote | *Shepardize:* Restrict By Headnote

Criminal Law & Procedure > Counsel > Effective Assistance > General Overview

Evidence > Privileges > Attorney-Client Privilege

Evidence > Testimony > Experts > Criminal Trials

HN9 The attorney-client privilege, critical to the effective assistance of counsel, rests on the theory that encouraging clients to make the fullest disclosure to their attorneys enables the latter to act more effectively, justly and expeditiously -- benefits out-weighing the risks of truth-finding posed by barring full disclosure in court. A defendant's disclosures to his counsel cannot be used to furnish proof in the government's case. Disclosures made to the attorney's expert should be equally unavailable, at least until he is placed on the witness stand. The attorney must be free to make an informed judgment with respect to the best course for the defense without the inhibition of creating a potential government witness. More Like This Headnote | *Shepardize:* Restrict By Headnote

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > Discovery & Inspection > Discovery by Defendant > Expert Testimony > Indigents

Criminal Law & Procedure > Defenses > Diminished Capacity

HN10 The ex parte hearing procedure may be a critical component of the indigent defendant's right to expert psychiatric assistance -- itself an indispensable tool to his defense once he has made a threshold showing of need. A hearing out of the

presence of the prosecutor protects the defendant's insanity or diminished capacity defense strategy and enables him to put forward his best evidence in support of a motion that, if granted, might give him a reasonable chance of success, but if denied could devastate his defense. Only in the relative freedom of a nonadversarial atmosphere can the defense drop inhibitions regarding its strategies and put before the trial court all available evidence of a need for psychiatric assistance. Only in such an atmosphere can the defendant's privilege against self-incrimination and his right to the effective assistance of counsel not be subject to potential violation by the presence of the state. More Like This Headnote | *Shepardize:* Restrict By Headnote

HEADNOTES ⊞ **Show**

COUNSEL: *Michael F. Easley, Attorney General, by Jeffrey P. Gray, Assistant Attorney General, for the State.*

Malcolm Ray Hunter, Jr., Appellate Defender, by Janine Crawley, Assistant Appellate Defender, for defendant-appellant.

JUDGES: Whichard, Justice.

OPINION BY: WHICHARD

OPINION

[*516] **[**179]** Defendant was tried in a noncapital trial for murder in the first degree of Marlon Branch. The trial court denied defendant's motion that he be allowed to give evidence supporting his request for appointment of a psychiatric expert *in camera* and *ex parte*. We hold that an indigent defendant who requests that evidence supporting his motion for expert psychiatric assistance be presented in an *ex parte* hearing is constitutionally entitled to have such a hearing, and that the trial court erred in denying defendant's request to be heard on this matter *ex parte*.

On 11 October 1990 defendant's court-appointed counsel moved before Judge Orlando F. Hudson for an **[***3]** *in camera* review of information supporting the appointment of a psychiatric expert to assist defendant in the preparation of his defense. When Judge Hudson asked whether the *in camera* review was to be "with or without the prosecutor," defense counsel responded: "Without the presence of the District Attorney." Judge Hudson then denied the motion, but offered to hear such information in open court. Defense counsel moved for the appointment of a psychiatric expert but stated that he could not "particularize [defendant's] need in the presence of the District Attorney . . . because in so doing . . . I may jeopardize my client's defense." The trial court, in its discretion, again ruled that it would "not hold an *in camera* . . . hearing, *ex parte* of the State," to which defendant excepted.

Defendant's court-appointed attorney was permitted to withdraw as counsel on 13 December 1990. He was succeeded by the appointment of the Public Defender, who was subsequently disqualified following a hearing on the State's motion because of a potential conflict of interest.

[*517] On 3 September 1991 Judge Coy Brewer, Jr., heard two motions from a third court-appointed attorney. **[***4]** The first motion requested that defendant be committed to Dorothea Dix Hospital for an evaluation of his competency to proceed to trial. In the second the attorney requested the court's permission to withdraw as defendant's counsel. Both motions

were granted, and on 5 September 1991 a fourth attorney was appointed to represent defendant.

On 21 November 1991 Judge J. Milton Read, Jr., held a hearing regarding defendant's competency to stand trial. Dr. Patricio P. Lara, a forensic psychiatrist at Dorothea Dix Hospital, testified that defendant had declined to take psychological tests normally given to patients undergoing evaluation. Nevertheless, defendant was interviewed and observed over the course of eighteen or nineteen days at the hospital, and Dr. Lara was able to conclude, based on these observations, that defendant was competent to stand trial.

On 10 February 1992 defendant's fourth court-appointed attorney moved to withdraw as counsel, in part because defendant had recently refused to meet with him or to respond to the attorney's letters. Subsequently, at trial, defendant stated that he wished to represent himself; the trial court allowed defendant to proceed *pro se* **[***5]** and directed defendant's fourth counsel to assist him in his defense.

Defendant contends that denying his motion for an *ex parte* hearing of evidence supporting his request for the assistance of a psychiatric expert forced him to jeopardize his privilege against self-incrimination and his right to the effective assistance of counsel, guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. We agree.

In *Ake v. Oklahoma*, 470 U.S. 68, 84 L. Ed. 2d 53 (1985), the Supreme Court held that HN1 once a defendant has made "an *ex parte* threshold showing to the trial court that his sanity is likely to be a significant factor in his defense," fundamental fairness requires "the State . . ., at a minimum, [to] assure the defendant access to a competent psychiatrist who will **[**180]** conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." *Ake*, 470 U.S. at 82-83, 84 L. Ed. 2d at 66. Since *Ake*, this Court has frequently recognized that "fundamental fairness and the principle that an indigent defendant must be given **[***6]** a fair opportunity to present his defense" underlie the indigent defendant's **[*518]** right to the assistance of an expert at state expense. *State v. Parks*, 331 N.C. 649, 655, 417 S.E.2d 467, 471 (1992) (quoting *State v. Tucker*, 329 N.C. 709, 718, 407 S.E.2d 805, 811 (1991)). We have applied these principles to defendants' motions for many kinds of experts, including independent investigators, *e.g., State v. Hickey*, 317 N.C. 457, 346 S.E.2d 646 (1986); pathologists, *e.g., State v. Penley*, 318 N.C. 30, 347 S.E.2d 783 (1986); medical experts, *e.g., State v. Johnson*, 317 N.C. 193, 344 S.E.2d 775 (1986); psychiatrists, *e.g., State v. Parks*, 331 N.C. 649, 417 S.E.2d 467; and fingerprint experts, *e.g., State v. Phipps*, 331 N.C. 427, 418 S.E.2d 178 (1992). In each of these cases we have noted, in accord with *Ake*, that the indigent defendant is entitled to the assistance **[***7]** of an expert in preparation of his defense when he makes a "threshold showing of specific necessity." *E.g., State v. Parks*, 331 N.C. at 656, 417 S.E.2d at 471. The indigent defendant must "make[] a particularized showing that (1) he will be deprived of a fair trial without the expert assistance, or (2) there is a reasonable likelihood that it would materially assist him in the preparation of his case." *Id.*

In none of these cases, however, did we address directly the question raised in this appeal -- whether the trial court is constitutionally required, upon timely motion, to allow a defendant to show a need for psychiatric assistance in an *ex parte* hearing. In *State v. Phipps*, 331 N.C. 427, 418 S.E.2d 178, this Court considered whether a defendant's rights to due process of law, to effective assistance of counsel, and to reliable sentencing in a capital trial mandated that his motion for an independent fingerprint expert be heard *ex parte*. Under the facts of that case, we concluded: HN2 "Whereas an indigent defendant's access to the 'basic tools of an adequate defense' is a core **[***8]** requirement of a fundamentally fair trial, the need for an *ex parte* hearing on a motion for expert assistance is not." *Phipps*, 331 N.C. at 450, 418 S.E.2d at 190 (quoting *Ake*, 470 U.S. at 77, 84 L. Ed. 2d at 62). Although we stated in *Phipps* that "an *ex parte* hearing is not constitutionally required in every case," we acknowledged that "[t]here are strong reasons for conducting the hearing *ex parte," id.* at 451, 418 S.E.2d at 191, including the defendant's "right to obtain [the expert] assistance [necessary to assist in preparing his defense] without losing the opportunity to prepare the defense in secret." *Id.* at 449, 418 S.E.2d

at 189 (quoting *Brooks v. State*, 259 Ga. 562, 565, 385 S.E.2d 81, 84 (1989)).

[*519] HN3 When the indigent defendant is seeking the assistance of a psychiatric expert, the "strong reasons for conducting the hearing *ex parte*" are especially applicable. To expose to the State testimony and evidence supporting a defendant's request for an independent psychological evaluation and a psychiatrist's trial **[***9]** assistance lays bare his insanity or related defense strategy. A hearing open to the State necessarily impinges upon the defendant's right to the assistance of counsel and his privilege against self-incrimination. We hold that these constitutional rights and privileges, guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, entitle an indigent defendant to an *ex parte* hearing on his request for a psychiatric expert.

That the defendant in *Phipps* was requesting an *ex parte* hearing in order to apply for funds for a *fingerprint* expert distinguishes that case critically from the case now before us. The key difference between a hearing on the question of an indigent defendant's right to a fingerprint expert and one on the question of his right to a psychiatric expert is that the object of adversarial scrutiny is not mere physical evidence, but the defendant himself. The matter is not tactile and objective, but one of an intensely sensitive, personal nature. The public, adversarial nature of an open **[**181]** hearing is inevitably intimidating when the issue is the defendant's mental instability. This atmosphere can daunt the defendant's **[***10]** desire to put before the trial court all his evidence in support of his motion. This was plainly one reason defendant in this case failed to make a threshold showing of his need for an independent psychiatric expert: he was willing to present evidence to the trial court in chambers, but he was not willing to reveal it to the State.

Moreover, because the area of psychiatric expertise differs importantly from that of fingerprint analysis, defendant's constitutional rights are far less likely to be jeopardized by the presence of the prosecutor when defendant attempts a threshold showing for a fingerprint expert than when he offers evidence to support his need for a psychiatrist. *See State v. Moore*, 321 N.C. 327, 348-49, 364 S.E.2d 648, 659 (1988) (Mitchell, J., concurring) ("The issue of sanity is one about which experts can and frequently do disagree, even though all experts in the field have received years of intensive and highly specialized and demanding training. . . . The taking and analysis of fingerprints is largely a mechanical function, although admittedly one which requires some training and experience."). In *State v. Moore* **[***11]** , we held that the defendant **[*520]** made the requisite threshold showing of specific necessity for a fingerprint expert by showing that (1) he would be unable to assess adequately the State's conclusion that a palm print found at the scene of the crime was his; (2) because there were no eyewitnesses to the crime, the print was critical evidence; and (3) defendant's mental retardation limited his abilities to communicate and reason and thus his ability to assist his counsel in his defense. *Moore*, 321 N.C. at 344-45, 364 S.E.2d at 653. None of these statements nor their underlying proof, including objective evidence of the defendant's mental retardation, would jeopardize the defendant's privilege against self-incrimination or violate his right to the effective assistance of counsel or the associated attorney-client privilege.

HN4 The privilege against self-incrimination, guaranteed by the Fifth and Fourteenth Amendments, is to be liberally construed. It applies not only to criminal prosecutions but to any proceeding sanctioned by law and to any investigation, litigious or not. *Allred v. Graves*, 261 N.C. 31, 35, 134 S.E.2d 186, 190 (1964) **[***12]** (quoting 98 C.J.S. *Witnesses* § 433, at 245 (1955)). "[T]he protection afforded by the privilege against self-incrimination 'does not merely encompass evidence which may lead to criminal conviction, but includes information which would furnish a link in the chain of evidence that could lead to prosecution, as well as evidence which an individual reasonably believes could be used against him in a criminal prosecution.'" *Trust Co. v. Grainger*, 42 N.C. App. 337, 339, 256 S.E.2d 500, 502, *cert. denied*, 298 N.C. 304, 259 S.E.2d 300 (1979) (quoting *Maness v. Meyers*, 419 U.S. 449, 461, 42 L. Ed. 2d 574, 585 (1975)). The privilege against self-incrimination protects against real, not remote and speculative dangers, *Zicarelli v. Investigation Comm'n*, 406 U.S. 472, 478, 32 L. Ed. 2d 234, 240 (1972), *quoted in Trust Co. v. Grainger*, 42 N.C. App. at 339, 256 S.E.2d at 502, but a

witness need not prove the hazard. To require him to do so would compel him to surrender **[***13]** the very protection the privilege is designed to guarantee. The privilege, to be sustained, need be evident only from the implications of the question and in the setting in which it is asked. These must show only that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. *Hoffman v. United States*, 341 U.S. 479, 486-87, 95 L. Ed. 2d 1118, 1124 (1951), *quoted in Trust Co. v. Grainger*, 42 N.C. App. at 339-40, 256 S.E.2d at 502, *and in State v. Smith*, 13 N.C. App. 46, 52, 184 S.E.2d 906, 910 (1971).

[*521] HN5 In the setting of a pre-trial hearing at which the defendant must make a threshold showing of need for psychiatric assistance or risk losing his opportunity to rely on the defense of insanity, what the defendant must divulge is compelled by the circumstances; his statements, therefore, **[**182]** are not voluntary testimony by which he would waive the privilege. *See Marshall v. United States*, 423 F.2d 1315, 1318 (10th Cir. 1970) **[***14]** ("Certainly the movant cannot be said to 'waive' disclosure of his case and his concomitant rights against self-incrimination and to due process by proceeding under subsection [3006A](e)." [1]). *Cf. Harrison v. U.S.*, 392 U.S. 219, 222, 20 L. Ed. 2d 1047, 1051 (1968) (a defendant who chooses to testify waives his privilege against compulsory self-incrimination with respect to the testimony he gives); *State v. Glover*, 77 N.C. App. 418, 421, 250 S.E.2d 86, 89 (1978).

FOOTNOTES

[1] HN6 18 U.S.C. 3006A(e)(1) (1988) provides, in pertinent part:

> Upon request. -- Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for adequate representation 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.

[*15]** HN7

When a defendant has already been evaluated by a psychiatrist, who is to aid in the defendant's showing, the information at the psychiatrist's disposal may include "not only what [the patient's] words directly express; he lays bare his entire self, his dreams, his fantasies, his sins, and his shame." *Taylor v. United States*, 222 F.2d 398, 401 (1955) (quoting Manfred F. Guttmacher and Henry Weihofen, *Psychiatry and the Law* 272 (1952)). When a defendant must make this showing absent such assistance, he somehow must prove to the court the instability of his mental state at the time of the crime, not only opening his thoughts and feelings to public and prosecutorial scrutiny, but also risking exposure of his role in potentially incriminating events in which such thoughts and feelings arose. Cross-examination by the State exacerbates the risk.

HN8 The Sixth Amendment right to the assistance of counsel presupposes the right to the *effective* assistance of counsel. *E.g., McMann v. Richardson*, 397 U.S. 759, 771 n.14, 25 L. Ed. 2d 763, 773 n.14 (1970). The effective assistance of counsel requires adequate trial **[***16]** **[*522]** preparation, including access to expert witnesses where appropriate. *See United States v. Wright*, 489 F.2d 1181, 1188 n.6 (D.C. Cir. 1973); *see also, e.g., Mason v. Arizona*, 504 F.2d 1345, 1351 (1974), *cert. denied*, 420 U.S. 936, 43 L. Ed. 2d 412 (1975) (due process right to effective assistance of counsel includes right to ancillary services necessary in the preparation of a defense). When insanity is the principal defense, access to psychiatric experts is essential to assist the attorney in presenting an adequate case. *United States v. Taylor*, 437

F.2d 371, 377 n.9 (4th Cir. 1971); *United States ex rel. Edney v. Smith*, 425 F. Supp. 1038, 1047 (1976), *aff'd*, 556 F.2d 556 (2d Cir.), *cert. denied*, 431 U.S. 958, 53 L. Ed. 2d 276 (1977); *see also Ake*, 470 U.S. at 82, 84 L. Ed. 2d at 65 (psychiatrist can assist in determining whether the insanity defense is viable, in presenting testimony, **[***17]** and in preparing for cross-examination of the State's psychiatric witnesses).

HN9 The attorney-client privilege, critical to the effective assistance of counsel, "rests on the theory that encouraging clients to make the fullest disclosure to their attorneys enables the latter to act more effectively, justly and expeditiously -- benefits out-weighing the risks of truth-finding posed by barring full disclosure in court." *United States ex rel. Edney v. Smith*, 425 F. Supp. at 1046. A defendant's disclosures to his counsel cannot be used to furnish proof in the government's case. "Disclosures made to the attorney's expert should be equally unavailable, at least until he is placed on the witness stand. The attorney must be free to make an informed judgment with respect to the best course for the defense without the inhibition of creating a potential government witness." *Id.* at 1054.

HN10 The *ex parte* hearing procedure may be a critical component of the indigent defendant's right to expert psychiatric assistance -- itself an indispensable tool to his **[**183]** defense once he has made a threshold showing of need. A hearing out **[***18]** of the presence of the prosecutor protects the defendant's insanity or diminished capacity defense strategy and enables him to put forward his best evidence in support of a motion that, if granted, might give him a reasonable chance of success, but if denied could devastate his defense. *See Ake*, 470 U.S. at 83, 84 L. Ed. 2d at 66. Only in the relative freedom of a nonadversarial atmosphere can the defense drop inhibitions regarding its strategies and put before the trial court all available evidence of a need for psychiatric assistance. Only in such an atmosphere can the defendant's privilege against self-incrimination **[*523]** and his right to the effective assistance of counsel not be subject to potential violation by the presence of the State.

We thus hold that the trial court erred in denying defendant an *ex parte* hearing on his timely request for the appointment of a psychiatrist in violation of rights guaranteed him under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution. Because we cannot know what defendant would have presented in support of his request had he not been required to make his showing **[***19]** in open court, [2] we cannot say that the error was harmless beyond a reasonable doubt. N.C.G.S. § 15A-1443(b) (1988). Defendant therefore is entitled to a new trial.

FOOTNOTES

2 We cannot expect defendant here to have made an offer of proof. "It could hardly be thought if the court would not hear the defendant outside of the presence of the government attorney that it would have heard an offer of proof with any greater privacy." *Holden v. United States*, 393 F.2d 276, 278 (1st Cir. 1968).

Because we award a new trial, we need not consider defendant's remaining assignments of error, which are unlikely to recur upon retrial.

NEW TRIAL.

*333 N.C. 523, *; 428 S.E.2d 693, **;*
*1993 N.C. LEXIS 135, ****

STATE OF NORTH CAROLINA v. JOSEPH EARL BATES

No. 145A91

SUPREME COURT OF NORTH CAROLINA

333 N.C. 523; 428 S.E.2d 693; 1993 N.C. LEXIS 135

October 6, 1992, Heard in the Supreme Court
April 8, 1993, Filed

PRIOR HISTORY: [*1]** Appeal of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Rousseau, J., at the 25 February 1991 Special Criminal Session of Superior Court, Yadkin County, on a jury verdict finding defendant guilty of first-degree murder and first-degree kidnapping. On 15 April 1992 this Court allowed defendant's motion to bypass the Court of Appeals on the kidnapping conviction.

DISPOSITION: NEW TRIAL.

CASE SUMMARY

PROCEDURAL POSTURE: Defendant sought review of a judgment of the Special Criminal Session of the Superior Court, Yadkin County (North Carolina), which sentenced him to death for his convictions of first-degree murder and first-degree kidnapping.

OVERVIEW: Defendant admitted to shooting the victim and to throwing his body in the river. Defendant, who was indigent, filed a motion for an ex parte hearing to apply for funds that were necessary to employ a forensic psychologist to aid in his insanity defense. The superior court, at the request of the prosecution, allowed defendant to be evaluated in response to his assertion of the insanity defense. The superior court's order stated that the evaluation was to determine defendant's capacity to proceed and for the purpose of evaluating his insanity at the time that the crime occurred. The evaluating psychiatrist concluded that defendant did not suffer from any disorders that would have relieved him of responsibility for his actions. The court reversed defendant's conviction by the superior court and ordered a new trial because it was error to deny defendant's motion for an ex parte hearing regarding his request for expert assistance. Defendant's request for a forensic psychologist rather than a psychiatrist was irrelevant to his entitlement to an ex parte hearing on the issue of expert assistance regarding his insanity defense.

OUTCOME: The court reversed the judgment of the superior court that sentenced defendant to death for his convictions of first-degree murder and first-degree kidnapping. The court ordered a new trial for defendant.

CORE TERMS: ex parte hearing, psychologist, murder, psychiatrist, forensic, indigent, harmless beyond, reasonable doubt, new trial, prosecutor, pre-trial, insanity, harassment, assistance of counsel, defense counsel's, sentenced to death, insanity defense, self-incrimination, disturbance, criminality, mitigating, appreciate, proffered, emotional, expertise, tendered, impaired, training, felony, expert witnesses

LEXISNEXIS® HEADNOTES ⊟ **Hide**

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > Counsel > Right to Counsel > General Overview

Criminal Law & Procedure > Defenses > Insanity > Insanity Defense

HN1 It is error to deny the motion of an indigent defendant for an ex parte hearing regarding his request for the assistance of a psychiatrist. More Like This Headnote | *Shepardize:* Restrict By Headnote

HEADNOTES ⊞ **Show**

COUNSEL: *Lacy H. Thornburg, Attorney General, by David F. Hoke, Assistant Attorney General, for the State.*

Malcolm R. Hunter, Jr., Appellate Defender, by Gordon Widenhouse, Assistant Appellate Defender, for defendant appellant.

JUDGES: Whichard, Justice. Justice Parker did not participate in the consideration or decision of this case.

OPINION BY: WHICHARD

OPINION

[*524] **[**693]** Defendant was tried capitally for murder in the first degree of Charlie Jenkins and, pursuant to the jury's unanimous recommendation, was sentenced to death for the murder. Defendant's pre-trial motion that his preliminary showing of need for funds to hire a mental health expert be heard *ex parte* was denied by the trial court. We hold, for reasons more fully articulated in *State v. Ballard*, 333 N.C. 515, 428 S.E.2d 178 (1993), that the trial court's ruling violated defendant's rights under the United States Constitution. As we held in *Ballard*, this error cannot be shown to have been harmless beyond a reasonable doubt. Defendant is accordingly entitled to a new trial.

On 31 August 1990, following advisement as to his constitutional rights, defendant gave a statement in which **[***3]** he admitted shooting the victim and throwing his hog-tied body into a river. The victim had approached defendant in the parking lot at a bar and asked for a ride home. Defendant had been living in a tent behind his boss's house since someone had broken into and fired into his house. Defendant believed his ex-wife and her boyfriend **[*525]** were responsible for his harassment, and he thought the victim, who later admitted to **[**694]** defendant that he knew defendant's ex-wife, was setting him up and leading him into a trap.

On 29 November 1990 defendant filed a Motion for an *Ex Parte* Hearing at which he would apply for funds necessary to employ expert witnesses to aid in his defense. Defendant's Notice of Defense of Insanity and Intent to Introduce Expert Testimony Relating to Mental Disease, Defect or Condition was filed the next day.

At a pre-trial motions hearing held 18 December 1990, defendant moved orally for an *ex parte* hearing for funds necessary to employ expert witnesses to aid in his defense. The trial court denied defense counsel's specific request that the defense be permitted to present evidence supporting his motion for funds in an *ex parte* hearing. **[***4]** Defense counsel then tendered a Motion for Funds for Expert Assistance, to which he attached an affidavit by Dr. John Warren, a forensic psychologist. In the affidavit the psychologist concluded "that the defendant was probably psychologically disturbed to a significant degree," based on Dr. Warren's having been informed that at the time of the murder

> [defendant] had been suffering from extreme harassment by an individual or individuals which placed the defendant in such fear that he moved out of his home and into a tent in the woods, could not and did not sleep for a significant period of time, was later fired from his job because of the harassment and became obsessed with this fear for his life [and that] defendant . . . attempted suicide while incarcerated in the Yadkin County Jail.

In addition to Dr. Warren's affidavit, the motion was supported by defendant's testimony as to his depression, stress, and memory loss. Following her cross-examination of defendant, the prosecutor suggested to the trial court that defendant's motion "under all the circumstances, perhaps, . . . should be granted."

The trial court denied defendant's motion for his own expert, but allowed the **[***5]** State's motion that defendant be evaluated in response to defendant's notice of intent to rely on the defense of insanity. The trial court accordingly ordered that defendant be sent to Dorothea Dix Hospital for observation as to his capacity to proceed. The trial court's written order specifically stated that **[*526]** defendant's being committed to Dorothea Dix Hospital was "for purposes of . . . evaluating his sanity at the time of the alleged offenses and determining his capacity to proceed to trial."

The resulting evaluation included findings that defendant was a heavy alcohol drinker with an IQ of 82 who feels uneasy in social situations and is possibly hypersensitive to criticism. The evaluation stated that defendant's memory was "intact with no obvious perceptual motor difficulties," his cognitive functioning represented no brain dysfunction or deterioration, and his personality showed "[n]o indications of mood thought disorder." The evaluating psychiatrist concluded that defendant did not have "a disorder that would prevent him from being capable of proceeding to trial or relieve him of responsibility for his actions."

At an open, pre-trial hearing held 16 January 1991, **[***6]** defense counsel again tendered a motion for the expert assistance of a psychologist. Defense counsel did not reiterate his request that the hearing be *ex parte*. The request was directed specifically at defendant's need for assistance with proof of the mitigating circumstances that the capital felony had been committed while defendant was under the influence of mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2) (1988); the capacity of the defendant to appreciate the criminality of his conduct was impaired, N.C.G.S. § 15A-2000(f)(6) (1988); and the "catchall factor," N.C.G.S. § 15A-2000(f)(9) (1988). To this motion defense counsel attached the affidavit by Dr. Warren and an affidavit by defendant. The results of defendant's evaluation at Dorothea Dix Hospital were also before the court. The trial court again denied defendant's motion for expert assistance.

On 24 January 1991 the trial court filed its written order denying defendant's 29 November 1990 motion for an *ex parte* **[**695]** hearing and denying defendant's 18 December 1990

Motion for Funds for Expert Assistance.

Defendant's petitions for *certiorari* and *supersedeas* and his motion for a temporary stay, **[***7]** filed with this Court 25 January 1991, cited both the trial court's failure to allow defendant's motion for expert assistance to be heard *ex parte* and its denial of the motion itself as subjects of the requested review. This Court denied defendant's petitions on 7 February 1991.

[*527] Defendant thus proceeded to trial without the assistance of a psychologist. The jury found him guilty of first-degree kidnapping and of first-degree murder on the bases of both premeditation and deliberation and felony murder. At sentencing the jury found the aggravating circumstances that the murder had been committed while defendant was engaged in the commission of a kidnapping and that it had been especially heinous, atrocious or cruel. Among the circumstances in mitigation the jury found that the murder had been committed while defendant was under the influence of mental or emotional disturbance, but it did not find that the capacity of defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law had been impaired. After weighing the mitigating and aggravating circumstances it had found, the jury recommended that defendant be sentenced **[***8]** to death.

We held in *State v. Ballard* that HN1 it is error to deny the motion of an indigent defendant for an *ex parte* hearing regarding his request for the assistance of a psychiatrist. We reasoned that the risk of exposing the defendant's insanity or related defense strategy to the State and the associated risks of self-incrimination and encroachment upon the defendant's right to the effective assistance of counsel jeopardize the defendant's rights and privileges under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. *Ballard*, 333 N.C. at 519, 428 S.E.2d at 180.

Here, defendant sought the assistance of a forensic psychologist rather than a psychiatrist, but this is a distinction without a difference with regard to a defendant's entitlement to an *ex parte* hearing on the issue of expert assistance regarding an insanity defense. Both psychologists and psychiatrists are trained to recognize and treat mental illness. Their training and expertise, and the fact that the subject of their study cannot be mechanically assessed, distinguishes them materially from such experts in physical evidence as fingerprint **[***9]** analysts. *See State v. Moore*, 321 N.C. 327, 348-49, 364 S.E.2d 648, 659 (1988) (Mitchell, J., concurring). But their training, expertise, and subject of study does not significantly differentiate one from the other with regard to the ability of each to assist in an insanity defense.

It is impossible for this Court to know what additional evidence defendant might have proffered in support of his motion had he been able to do so out of the presence of the prosecutor. For **[*528]** this reason, the trial court's error in denying the request for an *ex parte* hearing on his motion for a psychiatrist or psychologist cannot be shown to be harmless beyond a reasonable doubt. N.C.G.S. § 15A-1443(b) (1988). *See State v. Ballard*, 333 N.C. at 523, 428 S.E.2d at 183. Defendant thus is entitled to a new trial.

We do not address defendant's remaining assignments of error, as they will not likely recur on retrial.

NEW TRIAL.

*291 N.C. 73, *; 229 S.E.2d 562, **;*
*1976 N.C. LEXIS 935, ****

STATE OF NORTH CAROLINA v. HENRY AARON TATUM

No. 4

SUPREME COURT OF NORTH CAROLINA

291 N.C. 73; 229 S.E.2d 562; 1976 N.C. LEXIS 935

November 4, 1976, Filed

PRIOR HISTORY: [*1]** Appeal by defendant from *Albright, J.*, 24 March 1975 Special Session, Durham Superior Court.

Defendant was charged in separate bills of indictment with the crimes of kidnapping, armed robbery and first-degree murder. The cases were consolidated for trial and defendant, through his court-appointed counsel William M. Sheffield, entered a plea of not guilty to each charge.

The State offered the testimony of Kenneth Earl Blake who, in substance, testified that on the night of 20 July 1974, he and defendant saw Howard Ellis at about 10:45 p.m. near North Durham Five Points. Ellis, an acquaintance of defendant, was a security guard. Defendant and Blake entered Ellis' automobile. Defendant sat in the front seat and talked to Ellis while Blake sat in the back seat and smoked a cigarette. After a short time defendant and Blake went to the Duke Tavern where they had some beer. They left the tavern some time after midnight and defendant flagged Ellis down near Carpenter Motors in Durham. When Ellis stopped the car defendant pulled out a .38 caliber pistol, ordered Ellis out of the car and took his pistol. He gave the pistol to Blake and upon defendant's instructions both Ellis **[***2]** and Blake entered the rear of the automobile. Defendant then drove to a deserted house on Scoggins Street where, after ordering Ellis out of the car, he took the officer's handcuffs and handcuffed his hands behind his back. In response to defendant's questions, Ellis stated that the only money he had was a $ 100 check in the back of the car. Thereupon defendant took a box containing green bags from the trunk of the car and placed it on the back seat. Blake found a check in the box. Defendant then took Ellis into the house and shortly thereafter Blake heard four shots. Defendant came out of the house alone and drove Ellis' automobile to the corner of Gary and Liberty Streets where he and Blake removed a shotgun, a nightstick, a flashlight, shotgun shells and bullets. They left on foot and returned to defendant's home where they found Willie Laney and George Cleveland who had been with them earlier that night. The four of them went to the location where the property was hidden and picked up the guns, ammunition and other property. A few days later, in response to questions by Officers Roop and Rigsbee, Blake related the happenings of 20 July 1974.

On cross-examination, Blake **[***3]** admitted to defense counsel that he had previously told him that the district attorney had assured him that if he presented false testimony against

defendant Tatum he would be paid certain sums of money, charges would not be brought against him and he would not have to spend any time in jail. He further admitted that he told defense counsel that he testified for the State at the preliminary hearing because of these promises.

The State offered further testimony of police officers to the effect that the body of Howard Ellis was found on 22 July 1974 at a house on Scoggins Street. He was lying on his back with handcuffs on his wrists and there were four bullet wounds in his head.

George Cleveland and Willie Laney testified that they were in the presence of defendant and Kenneth Earl Blake in the early part of the night of 20 July 1974 and at that time defendant was armed with a pistol. Both of these witnesses saw defendant and Blake enter the automobile of deceased and sit there for about five minutes. After midnight they accompanied defendant and Blake to the place where they picked up a shotgun, blackjack and some ammunition. They all returned to defendant's home and Blake told **[***4]** them about the shooting and the taking of the property. Their testimony generally corroborated Blake's account of the shooting and theft.

The State also offered evidence tending to show that defendant's fingerprints and Blake's fingerprints were taken from the Ellis automobile. There was medical testimony tending to show that Ellis died as a result of the gunshot wounds to his head.

Defendant testified that he was with Blake, Cleveland and Laney during the early hours of 20 July 1974 and after having a beer with Blake he gave his .38 pistol to Blake and went home. Blake came to his home later that night and asked defendant to go with him. They went to an old house at the corner of Liberty and Gary Streets where Blake removed a shotgun, nightstick and a pistol from nearby bushes and placed them in defendant's car. This property was left in defendant's home for some time. Blake refused to tell him where he had obtained these articles. Defendant testified that he did not commit any of the crimes for which he was being tried.

The jury returned a verdict of guilty as to each charge and defendant was sentenced to death on the verdict of guilty of murder in the first degree. A **[***5]** sentence of imprisonment for 99 years was imposed on the verdict of guilty of kidnapping. The trial judge allowed defendant's motion for arrest of judgment on the charge of armed robbery. Defendant appealed from the judgments entered.

DISPOSITION: No error in the trial. Death sentence vacated.

CASE SUMMARY

PROCEDURAL POSTURE: Defendant appealed a judgment from the Durham Superior Court (North Carolina), which convicted him of kidnapping, armed robbery, and first-degree murder after the jury returned a verdict of guilty as to each charge and sentenced defendant to death on the verdict of guilty of murder in the first degree.

OVERVIEW: Defendant was charged in separate bills of indictment with the crimes of kidnapping, armed robbery and first-degree murder. The cases were consolidated for trial. The jury returned a verdict of guilty as to each charge and defendant was sentenced to death on the verdict of guilty of murder in the first degree. Defendant appealed and the court vacated the death sentence and remanded the case with directions for the trial court to enter a judgment imposing life imprisonment. The court held that defendant had no right to inspect the notes of the investigating police officers under N.C. Gen. Stat. § 15-155.4. The court found that the appointment of an expert was within the discretion of the trial judge and that the denial of defendant's motion for the appointment of an investigator did not violate his constitutionally guaranteed rights to equal protection of the laws. The court substituted a sentence of life imprisonment in lieu of the death penalty because the United States Supreme Court had invalidated the death penalty provisions of N.C. Gen. Stat. § 14-17 (Cum. Sup.

1975), which was the statute under which defendant was indicted, convicted, and sentenced to death.

OUTCOME: The court vacated defendant's death sentence and remanded the case to the trial court with directions that the presiding judge enter a judgment imposing life imprisonment for the first-degree murder of which defendant had been convicted.

CORE TERMS: murder, discovery, investigator, indigent, kidnapping, felony-murder, felonious, police officers', assignment of error, breaking and entering, defense counsel, perpetration, juror, appointment, homicide, felony, criminal cases, district attorney, premeditation, deliberation, favorable, deceased, sentence, killed, private investigator, reasonable doubt, public defender, imprisonment, robbery, Criminal Law

LEXISNEXIS® HEADNOTES ⊟ Hide

Criminal Law & Procedure > Discovery & Inspection > Discovery by Defendant > General Overview

HN1 There is no common-law right of discovery in criminal cases. More Like This Headnote | *Shepardize:* Restrict By Headnote

Criminal Law & Procedure > Discovery & Inspection > Brady Materials > Brady Claims

Criminal Law & Procedure > Discovery & Inspection > Discovery Misconduct > General Overview

Criminal Law & Procedure > Pretrial Motions & Procedures > Suppression of Evidence

HN2 The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. One of the minimum requirements of materiality of evidence, in the context of discovery, is that the evidence sought might have affected the outcome of the trial. More Like This Headnote | *Shepardize:* Restrict By Headnote

Criminal Law & Procedure > Discovery & Inspection > Discovery by Defendant > Tangible Objects > General Overview

HN3 Discovery under N.C. Gen. Stat. § 15-155.4 is limited to exhibits which are specifically identified and which are to be used in the trial of the case. More Like This Headnote | *Shepardize:* Restrict By Headnote

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > Counsel > Right to Counsel > General Overview

Evidence > Testimony > Experts > Helpfulness

HN4 The federal constitution does not require that expert witnesses or investigators be supplied to indigent defendants in criminal cases at state expense. All defendants in criminal cases shall enjoy the right to effective assistance of counsel and the state must provide indigent defendants with the basic tools for an adequate trial defense or appeal. More Like This Headnote | *Shepardize:* Restrict By Headnote

Criminal Law & Procedure > Discovery & Inspection > Discovery by Defendant > Expert Testimony > Indigents

Criminal Law & Procedure > Counsel > Costs & Attorney Fees

Evidence > Testimony > Experts > Criminal Trials

HN5 N.C. Gen. Stat. § 7A-454 provides: The court, in its discretion, may approve a fee for the service of an expert witness who testifies for an indigent person, and shall approve reimbursement for the necessary expenses of counsel. Fees and expenses accrued under § 7A-454 shall be paid by the state. More Like This Headnote | *Shepardize:* Restrict By Headnote

Criminal Law & Procedure > Counsel > Assignment

Criminal Law & Procedure > Counsel > Right to Counsel > General Overview

HN6 N.C. Gen. Stat. § 7A-450(b) provides: Whenever a person, under the standards and procedures set out in § 7A-450(b), is determined to be an indigent person entitled to counsel, it is the responsibility of the state to provide him with counsel and the other necessary expenses of representation. More Like This Headnote | *Shepardize:* Restrict By Headnote

Criminal Law & Procedure > Discovery & Inspection > Discovery by Defendant > Expert Testimony > Indigents

Criminal Law & Procedure > Trials > Judicial Discretion

Evidence > Testimony > Experts > Court-Appointed Experts > Compensation

HN7 Whether an expert should be appointed at state expense to assist an indigent defendant within the sound discretion of the trial judge. More Like This Headnote | *Shepardize:* Restrict By Headnote

Constitutional Law > Equal Protection > Poverty

Constitutional Law > Equal Protection > Scope of Protection

Criminal Law & Procedure > Defenses > General Overview

HN8 The equal protection clause of the Fourteenth Amendment prevents a state from making arbitrary classifications which result in invidious discrimination. It does not require absolute equality or precisely equal advantages. A state need not equalize economic conditions. A man of means may be able to afford the retention of an expensive, able counsel not within reach of a poor man's purse. Those are contingencies of life which are hardly within the power, let alone the duty, of a state to correct or cushion. More Like This Headnote | *Shepardize:* Restrict By Headnote

Criminal Law & Procedure > Counsel > Assignment

Criminal Law & Procedure > Counsel > Costs & Attorney Fees

Public Health & Welfare Law > Social Services > Legal Aid

HN9 N.C. Gen. Stat. § 7A-468 provides that each public defender is entitled to the services of one investigator, to be appointed by the defender to serve at his pleasure. Section 7A-468 places the services of an investigator at the disposal of each public defender, to be used by him whenever, in his discretion, a particular

case indicates the need therefor. The statutory plan established in N.C. Gen. Stat. § 7A-454 and N.C. Gen. Stat. § 7A-450 vests in the discretion of the trial court the decision of whether an investigator is a necessary expense of representation in the case of a defendant with court-appointed counsel. More Like This Headnote | *Shepardize:* Restrict By Headnote

Civil Procedure > Judicial Officers > Judges > Discretion

Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury > General Overview

Criminal Law & Procedure > Appeals > Standards of Review > General Overview

HN10 It is provided by N.C. Gen. Stat. § 9-14, that the judge shall decide all questions as to the competency of jurors, and his rulings thereon are not subject to review on appeal unless accompanied by some imputed error of law. More Like This Headnote | *Shepardize:* Restrict By Headnote

Civil Procedure > Judicial Officers > Judges > Discretion

Criminal Law & Procedure > Witnesses > Sequestration

Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > Witnesses

HN11 The sequestration of the witnesses is a matter within the trial judge's discretion and his ruling thereon is not reviewable absent a showing of abuse of that discretion. More Like This Headnote | *Shepardize:* Restrict By Headnote

Constitutional Law > Congressional Duties & Powers > Census > Composition of the U.S. Congress

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Right to Jury Trial

Criminal Law & Procedure > Trials > Burdens of Proof > Defense

HN12 If the motion to quash alleges racial discrimination in the composition of the jury, the burden is upon the defendant to establish it. A person has no right to be indicted or tried by a jury of his own race or even to have a representative of his race on the jury. He does have the constitutional right to be tried by a jury from which members of his own race have not been systematically and arbitrarily excluded. More Like This Headnote

Criminal Law & Procedure > Criminal Offenses > Homicide > Murder > Felony Murder > General Overview

Criminal Law & Procedure > Criminal Offenses > Homicide > Murder > First-Degree Murder > Elements

Criminal Law & Procedure > Criminal Offenses > Homicide > Murder > First-Degree Murder > Penalties

HN13 N.C. Gen. Stat. § 14-17 provides: A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, kidnapping, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death. More Like This Headnote | *Shepardize:* Restrict By Headnote

Criminal Law & Procedure > Criminal Offenses > Homicide > Murder > First-Degree Murder > Penalties

Criminal Law & Procedure > Sentencing > Merger

HN14 When a person is convicted of murder in the first degree no separate punishment may be imposed for any lesser included offense. More Like This Headnote | *Shepardize:* Restrict By Headnote

Criminal Law & Procedure > Sentencing > Capital Punishment > General Overview

Governments > Legislation > Expirations, Repeals & Suspensions

HN15 The United States Supreme Court invalidated the death penalty provisions of N.C. Gen. Stat. § 14-17 (Cum. Sup. 1975). More Like This Headnote | *Shepardize:* Restrict By Headnote

HEADNOTES ⊞ **Show**

COUNSEL: *Attorney General Edmisten, by Associate Attorney Jack Cozort for the State.*

William M. Sheffield, by John F. Hester, attorney for defendant appellant.

JUDGES: Branch, Justice.

OPINION BY: BRANCH

OPINION

[*77] **[**565]** Defendant assigns as error the trial judge's ruling on his pre-trial motion for discovery.

Prior to the appointment of defendant's counsel the Durham Redevelopment Commission demolished the house on Scoggins **[*78]** Street in which the body of Howard Ellis was found. Defendant **[***12]** contends that, in light of this development, he should have been allowed to discover and inspect photographs taken at the scene, physical evidence taken therefrom, and notes of police investigators pertaining to the house. An examination of defendant's motion for discovery reveals that these items fall within the following requests:

> 3. The original notes of the arresting officers.
>
> * * *
>
> 11. Any and all photographs or other evidence concerning or depicting the situs of the commission of the crimes alleged herein, ballistics tests arising therefrom, fingerprints therein taken, blood and other stains noted or tested, documents, papers (including checks), handcuffs, weapons, or any other tangible things which are evidentiary or which are relevant or material to the case for the defense or for the State.

HN1 There is no common-law right of discovery in criminal cases. *State v. Davis*, 282 N.C. 107, 191 S.E. 2d 664; *State v. Goldberg*, 261 N.C. 181, 134 S.E. 2d 334, *cert. denied*, 377 U.S. 978, 12 L.Ed. 2d 747, 84 S.Ct. 1884. The discovery statute in effect at the time of this trial was G.S.

15-155.4, which, in pertinent part, provided:

> In all criminal cases before **[***13]** the superior court, the superior court judge . . . shall for good cause shown, direct the solicitor or other counsel for the state to produce for inspection, examination, copying and testing by the accused or his counsel any specifically identified exhibits to be used in the trial of the case . . . .

It should be noted initially that the District Attorney in this case indicated his willingness to provide defendant with "all photographs intended to be introduced at trial" and Judge Braswell included such photographs in his order allowing discovery. Likewise, the discovery order directed the District Attorney to allow defendant to inspect those reports relating to physical evidence obtained at the scene of the crime, which the State intended to introduce at the trial. It is apparent that Judge Braswell's discovery order was fully in compliance with G.S. 15-155.4 with respect to the items listed in defendant's request number 11.

[*79] We turn to the question of whether the denial of defendant's request for discovery and inspection of "the original notes of the arresting officers" was proper.

In his affidavit in support of his discovery motion, defendant argued that denial **[***14]** of this discovery request would be a violation of due process. This contention is based primarily on the case of **[**566]** *Brady v. Maryland*, 373 U.S. 83, 10 L.Ed. 2d 215, 83 S.Ct. 1194, which holds that HN2"the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *See also, Moore v. Illinois*, 408 U.S. 786, 33 L.Ed. 2d 706, 92 S.Ct. 2562. One of the minimum requirements of *materiality* of evidence, in the context of discovery, is that the evidence sought might have affected the outcome of the trial. *United States v. Agurs*, U.S. , 49 L.Ed. 2d 342, 96 S.Ct. 2392. Defendant explains his need for the police notes relating to the scene of the crime by stating that "[i]t may well be that knowledge of the scene would have enabled defense counsel to have more effectively cross-examined Blake so as to destroy his credibility with the jury." We are not convinced that defendant has met the "favorable character" and "materiality" tests fashioned by *Brady*. Moreover, we believe that defendant's **[***15]** due process argument is overcome when measured by the rule set forth in *Moore v. Illinois, supra*, to wit: "We know of no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case." *Accord: State v. Goldberg, supra.*

HN3Discovery under G.S. 15-155.4 is limited to exhibits which are "specifically identified" and which are "to be used in the trial of the case." The notes taken by investigating police officers relating to the house on Scoggins Street were not exhibits to be used in the trial. *See State v. Macon*, 276 N.C. 466, 173 S.E. 2d 286. Nor were these particular notes specifically identified as required by the statute. *See State v. Peele*, 281 N.C. 253, 188 S.E. 2d 326. "Defendant was not entitled to the granting of his motion for a fishing expedition nor to receive the work product of police or State investigators." *State v. Davis, supra.* Thus, defendant had no right to inspect the notes of the investigating police officers under G.S. 15-155.4.

We note the current expression of public policy with respect to this type of discovery, contained in G.S. 15A-904. It **[*80]** **[***16]** is there stated that the present criminal discovery statute "does not require the production of reports, memoranda, or other internal documents made by the solicitor, law-enforcement officers, or other persons acting on behalf of the State in connection with the investigation or prosecution of the case . . . ."

We do not attempt to discuss the remaining portions of defendant's sweeping and all-encompassing notice. Suffice it to say that the affidavit filed in support of the motion contained conclusory statements unsupported by any showing that the evidence sought by discovery was favorable to defendant or met the test of materiality.

Judge Braswell's ruling on defendant's motion for discovery was in compliance with constitutional and statutory requirements. We, therefore, overrule this assignment of error.

Defendant next assigns as error the denial of his pretrial motion that the State provide funds for the employment of a private investigator.

The narrow question presented by this assignment of error has not been decided by this Court. We, therefore, turn to other jurisdictions for guidance.

In *United States ex rel. Smith v. Baldi*, 344 U.S. 561, 97 L.Ed. 549, 73 S.Ct. 391, **[***17]** the United States Supreme Court considered the question of whether an indigent was entitled to the appointment of an expert witness to assist in his defense. There, the court stated: "We cannot say that the State has that duty by constitutional mandate." However, the holding in this case clearly indicating that HN4 the Federal Constitution does not require that expert witnesses or investigators be supplied to indigent defendants in criminal cases at State expense, was soon beclouded by the now well-recognized holdings that all defendants in criminal cases shall enjoy the right to effective assistance of counsel and that the State must provide indigent defendants with the basic tools for an adequate trial defense or **[**567]** appeal. *Gideon v. Wainwright*, 372 U.S. 335, 9 L.Ed. 2d 799, 83 S.Ct. 792; *Avery v. Alabama*, 308 U.S. 444, 84 L.Ed. 377, 60 S.Ct. 321; *Britt v. North Carolina*, 404 U.S. 226, 30 L.Ed. 2d 400, 92 S.Ct. 431; *State v. Cradle*, 281 N.C. 198, 188 S.E. 2d 296, *cert. denied*, 409 U.S. 1047, 34 L.Ed. 2d 499, 93 S.Ct. 537.

[*81] Some jurisdictions interpret the cases guaranteeing effective assistance of counsel to require the State to furnish expert **[***18]** assistance to an indigent defendant at State expense. *Greer v. Beto*, 379 F. 2d 923; *McCollum v. Bush*, 344 F. 2d 672; *United States ex rel. Robinson v. Pate*, 345 F. 2d 691; *People v. Watson*, 36 Ill. 2d 228, 221 N.E. 2d 645. On the other hand, other courts follow the holding of *Baldi* and adhere to the view that the Constitution creates no right in an indigent to demand that the State pay for expert assistance in his defense. *Watson v. Patterson*, 358 F. 2d 297, *cert. denied*, 385 U.S. 876, 17 L.Ed. 2d 103, 87 S.Ct. 153; *Utsler v. Erickson*, 315 F. Supp. 480, *cert. denied*, 404 U.S. 956, 30 L.Ed. 2d 272, 92 S.Ct. 319; *Houghtaling v. Commonwealth*, 209 Va. 309, 163 S.E. 2d 560, *cert. denied*, 394 U.S. 1021, 23 L.Ed. 2d 46, 89 S.Ct. 1642; *State v. Superior Court of Pima County*, 2 Ariz. App. 458, 409 P. 2d 742.

Our research does not reveal that the United States Supreme Court has reconsidered its decision in *Baldi*, and we adhere to the holding in that decision. However, we do not interpret *Baldi* to obviate the doctrine of "fundamental fairness" guaranteed by the due process clause of the Fourteenth Amendment to the United States Constitution. **[***19]** *United States ex rel. Robinson v. Pate, supra; State v. Taylor*, 202 Kan. 202, 447 P. 2d 806; *People v. Watson, supra; Corbett v. Patterson*, 272 F. Supp. 602.

We find the language in *State v. Taylor, supra*, particularly persuasive. There the Supreme Court of Kansas considered and rejected defendant's contention that he had been denied effective assistance of counsel because he was not provided with a fingerprint expert at the State's expense. In so deciding the court, in part, stated:

> In the absence of statute the duty to provide such [expert witness] may arise and be exercised because of an inherent authority in courts to provide a fair and impartial trial as guaranteed by Section ten of the Kansas Bill of Rights and the due process clause of the United States constitution. . . .
>
> . . . In the absence of statute a request for supporting services must depend upon the facts and circumstances of each case. Therefore it must rest in the sound discretion of the trial court. [Citations omitted.]
>
> **[*82]** . . . Mere hope or desire to discover some shred of evidence when not

> coupled with a showing the same is reasonably available and necessary for a proper **[***20]** defense does not support a claim of prejudicial error.

We are aware that our General Assembly has enacted legislation providing expert services to an indigent defendant. HN5 G.S. 7A-454 provides:

> The court, *in its discretion*, may approve a fee for the service of an expert witness who testifies for an indigent person, and shall approve reimbursement for the necessary expenses of counsel. Fees and expenses accrued under this section shall be paid by the State. [Emphasis ours.]

Similarly, HN6 G.S. 7A-450(b) provides:

> Whenever a person, under the standards and procedures set out in this sub-chapter, is determined to be an indigent person entitled to counsel, it is the responsibility of the State to provide him with counsel and the *other necessary expenses of representation.* . . . [Emphasis ours.]

The language contained in these statutes is consistent with the rule that appointment of experts lies within the discretion of the trial judge. *In re Moore*, 289 N.C. 95, 221 S.E. 2d 307.

We conclude that our statutes and the better reasoned decisions place the question of HN7 whether an expert should be appointed at State expense to assist an indigent **[**568]** **[***21]** defendant within the sound discretion of the trial judge. We adopt that rule. However, we feel that the appointment of an investigator as an expert witness is a matter *sui generis*. There is no criminal case in which defense counsel would not welcome an investigator to comb the countryside for favorable evidence. Thus, such appointment should be made with caution and only upon a clear showing that specific evidence is reasonably available and necessary for a proper defense. Mere hope or suspicion that such evidence is available will not suffice. For a trial judge to proceed otherwise would be to impede the progress of the courts and to saddle the State with needless expense. *See State v. Montgomery*, 291 N.C. 91, 229 S.E. 2d 572, decided this day.

In instant case, counsel made no showing as to the reasonable availability of any evidence necessary for a proper defense. Defendant had the benefit of a favorable discovery order and **[*83]** the testimony of his client makes it obvious that he was aware of all persons who could shed light on the happenings of the night of 20 July 1974. His motion was, in effect, a request for a State-paid fishing expedition. No abuse of **[***22]** discretion on the part of the trial judge has been shown.

By this assignment of error defendant also contends that the refusal of his request for a private investigator at State expense is a denial of equal protection as guaranteed by the Fourteenth Amendment to the United States Constitution.

HN8 The equal protection clause of the Fourteenth Amendment prevents a state from making arbitrary classifications which result in invidious discrimination. It "does not require absolute equality or precisely equal advantages." *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 36 L.Ed. 2d 16, 93 S.Ct. 1278. In this case the State has imposed no arbitrary barriers which hinder or impede defense counsel's investigation or preparation of his case. There has merely been a refusal to provide defendant with an additional defense tool which is available to wealthier persons accused of crime. It was recognized in *Griffin v. Illinois*, 351 U.S. 12, 100 L.Ed. 891, 76 S.Ct. 585, which defendant cites in support of his argument, that this

circumstance alone does not amount to a denial of equal protection by the State:

> . . . Of course a State need not equalize economic conditions. **[***23]** A man of means may be able to afford the retention of an expensive, able counsel not within reach of a poor man's purse. Those are contingencies of life which are hardly within the power, let alone the duty, of a State to correct or cushion. (Frankfurter, J., concurring in the judgment.)

Defendant further contends that the State has made an arbitrary and unconstitutional distinction between indigent defendants represented by court-appointed counsel and those represented by a public defender in those districts where such an office has been established. He argues that since the services of an investigator are available to those defendants represented by a public defender, the refusal of his request for similar assistance denies him equal protection of the laws.

*HN9*G.S. 7A-468 provides that "[e]ach public defender is entitled to the services of one investigator, to be appointed by the defender to serve at his pleasure." We interpret this statute to **[*84]** place the services of an investigator at the disposal of each public defender, to be used by him whenever, *in his discretion*, a particular case indicates the need therefor. As we have indicated above, the statutory plan **[***24]** established in G.S. 7A-454 and G.S. 7A-450 vests in the discretion of the trial court the decision of whether an investigator is a "necessary expense" of representation in the case of a defendant with court-appointed counsel. We believe that these two statutory schemes for providing the services of an investigator to indigent defendants are substantially equivalent. *See Mason v. Arizona*, 504 F. 2d 1345, *cert. denied*, 420 U.S. 936, 43 L.Ed. 2d 412, 95 S.Ct. 1145. In neither case is a defendant entitled to an investigator at State expense upon demand. **[**569]** In both instances he is entitled to a State-appointed investigator when he has made a showing of need sufficient to convince a public official, in the exercise of his discretion, that those services are necessary to a fundamentally fair trial. There is then no real distinction between indigent defendants represented by a public defender and those with court-appointed counsel with respect to the availability of State-provided investigative assistance. We, therefore, hold that the denial of defendant's motion for the appointment of an investigator did not violate his constitutionally guaranteed rights to equal protection **[***25]** of the laws.

This assignment of error is overruled.

Defendant argues that the trial judge's denial of his challenge for cause of Juror Harry D. Woods constituted prejudicial error.

On the *voir dire* examination of the prospective juror, he stated that he worked with the brother of the State's chief prosecuting witness, Kenneth Earl Blake. He further stated that he was friendly with several law enforcement officers and that he felt uncomfortable about serving on the jury. In response to the court's questions the prospective juror said that he had formed no opinion about the case that would prevent him from giving defendant a fair trial; that he did not know defendant nor the codefendant Kenneth Earl Blake; and that his acquaintance with Blake's brother would not prevent him from basing his verdict solely upon the evidence presented at trial and the applicable law. He further stated that he would require proof of guilt beyond a reasonable doubt before returning a verdict of guilty and that his friendship with police officers (not involved **[*85]** in the investigation of this case) would not prevent him from giving defendant a fair trial. He explained that his discussion **[***26]** of the case with Blake's brother concerned only the question of whether charges had been brought against codefendant Blake. He never discussed the evidence in the case.

HN10"It is provided by G.S., 9-14, that the judge 'shall decide all questions as to the competency of jurors,' and his rulings thereon are not subject to review on appeal unless

accompanied by some imputed error of law." *State v. DeGraffenreid*, 224 N.C. 517, 31 S.E. 2d 523. *Accord: State v. Watson*, 281 N.C. 221, 188 S.E. 2d 289, *cert. denied*, 409 U.S. 1043, 34 L.Ed. 2d 493, 93 S.Ct. 537. We find no error of law or abuse of discretion in the trial judge's ruling denying the defendant's challenge for cause. We, therefore, overrule this assignment of error.

Defendant next argues that the trial judge erred by admitting into evidence the testimony of the witnesses Laney and Cleveland.

Prior to introduction of evidence defendant moved that all State's witnesses be sequestered. The court ordered that Kenneth Earl Blake be sequestered and "as to police officers and technical witnesses the court will not order them sequestered." At the time of this ruling, neither the trial judge nor defense counsel knew that the **[***27]** witnesses Laney and Cleveland would be called by the State. There is also evidence to the effect that the district attorney was not certain, at this time, that these witnesses would be called. The record discloses that the challenged witnesses were in court at the time the State's chief witness Kenneth Earl Blake testified.

Neither statute nor common law requires the State to furnish a defendant with the names and addresses of all the witnesses the State intends to call. *State v. Davis, supra*; G.S. 15A-901, *et seq. See particularly*, Official Commentary following G.S. 15A-903. Moreover, it is firmly established that HN11 the sequestration of the witnesses is a matter within the trial judge's discretion and his ruling thereon is not reviewable absent a showing of abuse of that discretion. *State v. Gaines*, 283 N.C. 33, 194 S.E. 2d 839; *State v. Barrow*, 276 N.C. 381, 172 S.E. 2d 512; 1 Stansbury's North Carolina Evidence § 20 (Brandis Rev. 1973).

We note that during the argument of this motion defense counsel admitted that his central objection to the admission of **[*86]** this testimony was that he was not prepared **[**570]** to cross-examine the witnesses. The **[***28]** trial judge then stated that he would allow the witnesses to testify but would permit defense counsel to prepare for cross-examination of the witnesses overnight and that he would require the State to furnish defendant with any criminal record of the witnesses that the State might have in its possession. The record does not reveal that defense counsel asked for any further extension of time to prepare for cross-examination.

Under these circumstances no abuse of discretion or substantial prejudice to defendant is made to appear. This assignment of error is overruled.

Defendant contends that the trial judge erroneously denied his challenge to the jury as constituted because the district attorney arbitrarily and systematically excluded all black males by the use of peremptory challenges. We reject this contention.

This assignment of error is squarely controlled by our holding in *State v. Alford*, 289 N.C. 372, 222 S.E. 2d 222. We quote from that case:

> Defendants next contend that their rights under the Fourteenth Amendment to the United States Constitution were violated by the systematic exclusion of blacks from the trial jury. In **[***29]** *State v. Cornell*, 281 N.C. 20, 187 S.E. 2d 768 (1972), we said:
>
> > HN12 "If the motion to quash alleges racial discrimination in the composition of the jury, the burden is upon the defendant to establish it. [Citations omitted.] . . .
> >
> > * * *
> >
> > "A person has no right to be indicted or tried by a jury of his own race or even to have a representative of his race on the jury. He does have

> the constitutional right to be tried by a jury from which members of his own race have not been systematically and arbitrarily excluded. [Citations omitted.]"

The basis for this assignment of error lies in the fact that all prospective black jurors were peremptorily challenged by the district attorney, and that both defendants were blacks. There is no suggestion in the record that the district attorney had previously followed practices which **[*87]** prevented blacks from serving on the juries in his district. The United State Supreme Court has squarely ruled against the contentions here urged by defendants. In *Swain v. Alabama*, 380 U.S. 202, 13 L.Ed. 2d 759, 85 S.Ct. 824 (1965), the Court, in part, stated:

> ". . . The presumption in any particular case must be that the prosecutor is using the State's challenges to obtain **[***30]** a fair and impartial jury to try the case before the court. The presumption is not overcome and the prosecutor thereby subjected to examination by allegations that in the case at hand all Negroes were removed from the jury or that they were removed because they were Negroes. . . .
>
> * * *
>
> ". . . But defendant must, to pose the issue, show the prosecutor's systematic use of peremptory challenges against Negroes *over a period of time*. . . ." [Emphasis ours.]

Defendants have failed to make out a *prima facie* case of arbitrary or systematic exclusion of blacks from the jury. This assignment of error is overruled.

Defendant assigns as error the ruling of the trial judge in denying his motion in arrest of judgment and to set aside the verdict as to the charge of kidnapping.

Prior to the rewrite of G.S. 14-39, effective 1 July 1975, kidnapping was defined as the unlawful taking and carrying away of a human being against his will by force, threats or fraud. *State v. Dix*, 282 N.C. 490, 193 S.E. 2d 897; *State v. Barbour*, 278 N.C. 449, 180 S.E. 2d 115, *cert. denied*, 404 U.S. 1023, 30 L.Ed. 2d 673, 92 S.Ct. 699.

*HN13*G.S. 14-17 provides:

> A murder which shall be **[***31]** perpetrated by means of poison, lying in wait, imprisonment, **[**571]** starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, *robbery, kidnapping*, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death. . . . [Emphasis ours.]

[*88] The Bill of Indictment in this case was drawn in the form prescribed by G.S. 15-144 and is therefore sufficient to support a verdict of guilty of murder in the first degree if the jury found beyond a reasonable doubt that defendant killed deceased with malice and after premeditation

and deliberation *or* in the perpetration of a robbery or a kidnapping. *State v. McLaughlin*, 286 N.C. 597, 213 S.E. 2d 238; *State v. Moore*, 284 N.C. 485, 202 S.E. 2d 169.

In this case, the underlying felony of kidnapping would have supported a verdict of murder in the first degree under the felony-murder statute since there was no break in the chain of events leading from the initial felony of kidnapping to the shooting which caused the death of Howard Ellis. In other words, **[***32]** the homicide and the kidnapping were parts of a series of acts which formed one continuous transaction. *State v. Thompson*, 280 N.C. 202, 185 S.E. 2d 666; 40 Am. Jur. 2d *Homicide* § 73, p. 367.

In *State v. Thompson, supra*, the trial judge submitted the charge of first-degree murder on the felony-murder theory where there had been a killing perpetrated during a felonious breaking and entering and larceny. The charges of felonious breaking and entering and felonious larceny were also submitted to the jury as separate charges. The jurors returned verdicts of guilty on all charges and in the murder case the judgment pronounced imposed a sentence of imprisonment for life. In the felonious breaking and entering case and in the felonious larceny case, separate judgments were pronounced imposing prison sentences of ten years to run consecutively.

Arresting the judgments in the breaking and entering and the larceny cases, this Court in part stated:

> . . . HN14 When a person is convicted of murder in the first degree no separate punishment may be imposed for any lesser included offense. Technically, feloniously breaking and entering a dwelling is never a lesser included offense **[***33]** of the crime of murder. However, in the present and similar factual situations, a cognate principle applies. Here, proof that defendant feloniously broke into and entered the dwelling of Cecil Mackey, to wit, Apartment # 3, 3517 Burkland Drive, was an essential and indispensable element in the State's proof of murder committed in the perpetration of the felony of feloniously breaking into and **[*89]** entering that particular dwelling. The conviction of defendant for felony-murder, that is, murder in the first degree without proof of malice, premeditation or deliberation, was based on a finding by the jury that the murder was committed in the perpetration of the felonious breaking and entering. In this sense, the felonious breaking and entering was a lesser included offense of the felony-murder. Hence, the separate verdict of guilty of felonious breaking and entering affords no basis for additional punishment. If defendant had been acquitted in a prior trial of the separate charge of felonious breaking and entering, a plea of former jeopardy would have precluded subsequent prosecution on the theory of felony-murder. . . .
>
> * * *
>
> . . . For the reasons stated above with **[***34]** reference to the felonious breaking and entering count in the separate bill of indictment, the felonious larceny was, under the circumstances of this case, a lesser included offense of the felony-murder, in the special sense above mentioned.

Accord: State v. Woods, 286 N.C. 612, 213 S.E. 2d 214.

In instant case the trial judge submitted the charge of first-degree murder upon the theory of felony-murder upon a finding by the jury beyond a reasonable doubt that the murder was committed in the perpetration of an armed robbery or upon a finding by **[**572]** the jury beyond a reasonable doubt that defendant killed deceased with malice and after premeditation and deliberation. In this connection the court, in part, charged:

> . . . Now, I instruct you, members of the jury, that for you to find the defendant guilty of first degree murder, either the State must prove beyond a reasonable doubt that the defendant Tatum unlawfully killed the deceased Ellis while

> perpetrating or attempting to perpetrate the felony of robbery with a firearm, or the State must prove beyond a reasonable doubt that the defendant Tatum unlawfully killed the deceased Ellis with malice and with **[***35]** premeditation and deliberation.

Thompson is distinguishable from this case. In *Thompson* the judgments were arrested as to charges which were used as the underlying felonies to prove felony-murder. On the other hand, it is clear that the offense of kidnapping was here submitted **[*90]** to the jury as a separate and distinct offense and not as a basis for a possible finding by the jury that deceased was killed during the perpetration of the felony of kidnapping. Obviously kidnapping is not a lesser-included offense of murder. Neither was the kidnapping charge an essential or indispensable element in the State's proof of felony-murder. If defendant had been acquitted in a former trial of the charge of kidnapping, a plea of former jeopardy would have been of no avail in the prosecution of murder as here submitted.

The trial judge correctly denied defendant's motion to arrest judgment and set aside the verdict on the charge of kidnapping.

Defendant next attacks the imposition of the death penalty in North Carolina. In *Woodson v. North Carolina*, U.S. , 49 L.Ed. 2d 944, 96 S.Ct. 2978, HN15 the United States Supreme Court invalidated the death penalty provisions **[***36]** of G.S. 14-17 (Cum. Sup. 1975), the statute under which defendant was indicted, convicted and sentenced to death. Therefore, by authority of the provisions of 1973 Sess. Laws, c. 1201, § 7 (1974 Session), effective 8 April 1974, a sentence of life imprisonment is substituted in lieu of the death penalty in this case. We, therefore, do not deem it necessary to discuss this assignment of error.

This case is remanded to the Superior Court of Durham County with directions (1) that the presiding judge, without requiring the presence of defendant, enter a judgment imposing life imprisonment for the first-degree murder of which defendant has been convicted; and (2) that in accordance with this judgment the clerk of superior court issue a commitment in substitution for the commitment heretofore issued. It is further ordered that the clerk furnish to the defendant and his attorney a copy of the judgment and commitment as revised in accordance with this opinion.

No error in the trial.

Death sentence vacated.

*344 N.C. 722, *; 477 S.E.2d 147, **;*
*1996 N.C. LEXIS 521, ****

STATE OF NORTH CAROLINA v. ELWIN ANEURIN JONES

No. 545A95

SUPREME COURT OF NORTH CAROLINA

344 N.C. 722; 477 S.E.2d 147; 1996 N.C. LEXIS 521

October 15, 1996, Heard In The Supreme Court
November 8, 1996, Filed

PRIOR HISTORY: [*1]** Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Seay, J., at the 7 August 1995 Criminal Session of Superior Court, Wilkes County, upon a jury verdict finding defendant guilty of first-degree murder.

DISPOSITION: NEW TRIAL.

CASE SUMMARY

PROCEDURAL POSTURE: Defendant appealed from the judgment of the Criminal Session of Superior Court, Wilkes County (North Carolina), which imposed a sentence of life imprisonment upon a jury verdict finding defendant guilty of first-degree murder.

OVERVIEW: Defendant was tried for the first-degree murder of his estranged wife. Defendant contended that the trial court committed reversible error in denying his pretrial motion for the appointment of a psychiatric expert to assist in the preparation of his defense. The court ordered a new trial. The court determined that defendant's counsel demonstrated that the only defense he intended to raise or could have raised was that at the time of the killing, defendant suffered from diminished capacity. The court determined that there was sufficient evidence, which indicated that defendant suffered from mental illness and that he had suicidal inclinations. The court concluded that defendant made the requisite threshold showing that his mental capacity when the offense was committed would have been a significant factor at trial and that there was a reasonable likelihood that an expert would have been of material assistance in the preparation of his defense. The court noted that defendant was entitled to present information on defendant's mental state at the time of the murder to the jury in an intelligible manner so as to assist it in making an informed and sensible determination.

OUTCOME: The court reversed the judgment of the trial court, which convicted defendant of first-degree murder and imposed a life sentence. The court ordered a new trial.

CORE TERMS: murder, psychiatric expert, preparation, depression, threshold, killing, appointment, intent to kill, premeditation, medication, suicidal, defense counsel, prescribed, mental illness, mental processes, side effects, deliberation, counteract, requisite, violence, mental condition, pretrial, diminished capacity, reasonable likelihood, circumstances known, premeditated, psychiatric, inclinations, indigent, estranged wife

LEXISNEXIS® HEADNOTES ⊟ Hide

Criminal Law & Procedure > Defenses > Insanity > Insanity Defense

HN1 When an indigent defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the state must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense. More Like This Headnote

Criminal Law & Procedure > Counsel > Costs & Attorney Fees

HN2 Upon a threshold showing of a specific need for expert assistance, the provision of funds for an expert is required. To make a threshold showing of specific need for the assistance of an expert, a defendant must demonstrate either that he will be deprived of a fair trial without expert assistance or that there is a reasonable likelihood that it will materially assist him in the preparation of his case. In determining whether a defendant makes the requisite threshold showing, the court should consider all the facts and circumstances known to it at the time the motion for psychiatric assistance is made. More Like This Headnote

HEADNOTES ⊞ Show

COUNSEL: Michael F. Easley, Attorney General, by Daniel F. McLawhorn, Special Deputy Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, for defendant-appellant.

JUDGES: WHICHARD, Justice.

OPINION BY: WHICHARD

OPINION

[*724] [147]** WHICHARD, Justice.

Defendant was tried noncapitally for the first-degree murder of his estranged wife, Lisa Jones. The jury found defendant guilty as charged. The trial court sentenced him to a mandatory term of life imprisonment.

The evidence presented at trial tended to show that in January 1994, defendant and his wife, Lisa Jones, lived in Richmond, Virginia. They were having marital difficulties, and defendant suffered from severe depression as a result. In February 1994 defendant went to see Dr. J. Daniel Foster for advice and treatment concerning his mental condition. Dr. Foster found

defendant to be suffering from depression and hypertension and prescribed **[***2]** the medication Prozac. The Prozac made defendant nervous and unable to sleep, so Dr. Foster prescribed additional drugs to counteract its side effects.

Sometime in February, Lisa told defendant that she no longer loved him and wished to separate. In March the two had a heated argument in the course of which defendant threatened to kill himself, pulled out a gun, and fired a shot. On 1 June 1994 Lisa obtained a restraining order barring defendant from their apartment. Shortly thereafter, defendant left for Europe. When he returned, he learned that Lisa had moved to **[**148]** Wilkesboro, North Carolina, due to a job transfer. He further learned that she was accompanied by her daughter and by Ed Jordan, a man with whom she had forged a close personal relationship.

Defendant went to Wilkesboro in pursuit of Lisa. On 23 July 1994 defendant followed her from her hotel towards the K-Mart where she worked. He caught up with her in a parking lot near Wal-Mart and asked if they could work things out, to which Lisa replied that their relationship was over. Defendant then asked her if it was true that Ed Jordan had been staying at their apartment while defendant was out of town. Lisa responded that it **[***3]** was. She then drove away.

Defendant followed Lisa to the K-Mart. Once there, he parked and walked over to her car. He opened the door, grabbed Lisa by the neck, and fired multiple shots into the back of her head. Defendant immediately fled the scene. He was apprehended six months later in Calhoun, Georgia.

Defendant contends the hearing court committed reversible error in denying his pretrial motion for the appointment of a psychiatric expert to assist in the preparation of his defense. We agree.

[*725] Defense counsel filed a written pretrial motion requesting the appointment of a psychiatric expert to evaluate defendant's mental condition. On 24 April 1995 Judge Julius Rousseau conducted an *ex parte* hearing on the motion. At the hearing defense counsel argued that he had a medical statement from Dr. Foster in Richmond establishing that defendant had been treated for depression and suicidal tendencies in the months preceding the murder. Counsel further noted that defendant had no history of violence or criminal activity of any sort prior to this incident. He concluded that without professional evaluation of defendant's mental state at the time of this crime, defendant could not **[***4]** be provided a proper and adequate defense.

In response Judge Rousseau stated that a particularized need for an expert had to be shown and that defendant's motion had fallen short of meeting that threshold. He left the motion open with instructions for defense counsel to file a supplementary supporting affidavit demonstrating a particularized need for a psychiatric expert.

The hearing resumed on 2 May 1995. At that time defense counsel presented his own affidavit, wherein he stated in part:

> I believe that a psychological evaluation of the Defendant is absolutely necessary for me to properly defend him. The Defendant is charged with first degree murder in this case and has absolutely no history of criminal or violent behavior. Prior to the alleged murder, the Defendant had been treated by Dr. J. Daniel Foster of Richmond, Virginia for depression and other medical problems. On or about the time of the alleged murder, the Defendant was taking Prozac as prescribed by Dr. Foster, as well as other medications. These medications may have had an effect on the Defendant's mentality or behavior at the time of said murder. The Defendant has advised Counsel that he had no intent or **[***5]** premeditation with respect to the alleged murder, and further, that the mental processes which controlled his behavior at that time were not within his own control. Based on the history of the Defendant given to Counsel, he has made a number of suicide attempts both before

> and after the alleged murder.
>
> . . . Evaluation is crucial to my defending the Defendant in that his entire defense in this case may revolve around the question of whether there was premeditation and deliberation.

Attached to the affidavit were copies of three pages of medical notes from Dr. Foster, documenting his treatment of defendant for **[*726]** mental illness from 11 February 1994 until 17 May 1994. According to the notes, defendant suffered from depression as a result of family stress and marital discord. He had frequent suicidal ideations and felt like he "[was] falling apart." He had difficulty sleeping and was described as "listless, agitated and hostile." Over the course of his treatment, defendant lost seventeen pounds. At each visit, Dr. Foster prescribed Prozac in an attempt to stabilize defendant's mental condition.

Judge Rousseau subsequently denied defendant's motion for the appointment **[***6]** of a **[**149]** psychiatric expert. He made no findings of fact or conclusions of law.

Ake v. Oklahoma, 470 U.S. 68, 84 L. Ed. 2d 53, 105 S. Ct. 1087 (1985), and our cases decided pursuant to *Ake*, compel the conclusion that the hearing court erred in denying defendant's motion for a psychiatric expert to assist in the preparation of his defense. In *Ake*, the United States Supreme Court held:

> HN1 When a[n indigent] defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.

Id. at 83, 84 L. Ed. 2d at 66. This Court, following *Ake*, has required, HN2 upon a threshold showing of a specific need for expert assistance, the provision of funds for an expert. *State v. Moore*, 321 N.C. 327, 364 S.E.2d 648 (1988).

To make a threshold showing of specific need for the assistance of an expert, a defendant must demonstrate either that he will be deprived of a fair trial without expert assistance or that there is a reasonable likelihood **[***7]** that it will materially assist him in the preparation of his case. *State v. Phipps*, 331 N.C. 427, 446, 418 S.E.2d 178, 187 (1992). In determining whether a defendant has made the requisite threshold showing, the court should consider all the facts and circumstances known to it at the time the motion for psychiatric assistance is made. *State v. Gambrell*, 318 N.C. 249, 256, 347 S.E.2d 390, 394 (1986).

In this case, counsel for defendant clearly demonstrated to the hearing court that the only defense he intended to raise or could raise **[*727]** was that at the time of the killing, defendant suffered from diminished capacity and therefore may not have acted with premeditation and deliberation or the specific intent to kill. There was sufficient evidence before the court, in the form of Dr. Foster's dated medical notes, indicating that defendant suffered from mental illness, particularly depression, and that he had suicidal inclinations. Defendant was being treated with Prozac, a psychotropic drug, as well as other drugs to counteract the side effects of the Prozac. He had been taking this medication for more than five months prior to the killing, with only variable results. Defendant **[***8]** had no history of prior violence, and it was evident that his homicidal conduct in this instance was inconsistent with this prior history. Defense counsel presented his own affidavit wherein, under oath, he stated that defendant admitted to not being in control of his mental processes at the time of the murder and had advised counsel that he had no premeditated intent to kill.

We conclude that, under all the facts and circumstances known at the time the motion for psychiatric assistance was ruled upon, defendant had made the requisite threshold showing that

his mental capacity when the offense was committed would be a significant factor at trial and that there was a reasonable likelihood that an expert would be of material assistance in the preparation of his defense. Defendant's mental state at the time of the murder was the only triable issue of fact in this case. He was entitled to present information on this issue to the jury in an intelligible manner so as to assist it in making an informed and sensible determination. He must therefore be given a new trial at which the court must, upon the threshold showing of need made here, appoint a psychiatric expert for the purpose of evaluating **[***9]** defendant and assisting him in preparing and presenting his defense.

In view of our disposition of this issue and the improbability that the other errors assigned will recur upon retrial, we find it unnecessary to address defendant's remaining arguments.

NEW TRIAL.

Service: **Get by LEXSEE®**
Citation: **344 N.C. 722**
View: Full
Date/Time: Friday, April 20, 2012 - 11:59 AM EDT

* Signal Legend:
- Warning: Negative treatment is indicated
- Questioned: Validity questioned by citing refs
- Caution: Possible negative treatment
- Positive treatment is indicated
- Citing Refs. With Analysis Available
- Citation information available

* Click on any *Shepard's* signal to *Shepardize®* that case.

Chapter 5: Experts and Other Assistance

(Forms list on other side)

Chapter 5: Forms

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.