5.1 Right to Expert
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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 (1985), in which the United States 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 on a proper showing of need. *See, e.g., State v. Tatum*, 291 N.C. 73 (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 (1993) (Sixth Amendment right to assistance of counsel entitles defendant to apply ex parte for appointment of expert).

State constitutional provisions, such as article I, section 19 (law of the land) and article I, section 23 (rights of accused), also may support appointment of an expert. *See generally State v. Tolley*, 290 N.C. 349, 361 (1976) (law of the land clause requires that "administration of justice 'be consistent with the fundamental principles of liberty and justice'") (citation omitted); *State v. Hill*, 277 N.C. 547, 552 (1971) (under article I, section 23, "accused has the right to have counsel for his defense and to obtain witnesses in his behalf").

Statutory grounds. Section 7A-450(b) of the North Carolina General Statutes (hereinafter G.S.) 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 (1976); G.S. 7A-454 (authorizing payment of fees and other expenses for expert witnesses and other witnesses for an indigent person).

IDS rules. The Rules of the N.C. Commission on Indigent Defense Services (IDS Rules) recognize the right of an indigent defendant to expert assistance when needed and incorporate procedures for obtaining funding, discussed throughout this chapter. The IDS Rules reinforce a defendant's constitutional and statutory rights to an expert; they do not

alter them.

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. On 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 (1993) (right to expert in noncapital murder case); *State v. Parks*, 331 N.C. 649 (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, 518 (listing some of the experts considered by the North Carolina courts); *State v. Moore*, 321 N.C. 327 (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 (1990) (recognizing right to expert assistance in post-conviction proceedings); *Moore*, 321 N.C. 327 (right to psychiatrist for purpose of assisting in preparation and presentation of motion to suppress confession); *State v. Gambrell*, 318 N.C. 249 (1986) (right to psychiatrist for both guilt and sentencing phases); *see also 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).

Other cases in which a defendant has the right to expert assistance. For a discussion of the right to expert assistance in abuse, neglect, and dependency cases, see SARA DEPASQUALE & CAITLIN LITTLE, ABUSE, NEGLECT, DEPENDENCY, AND TERMINATION OF PARENTAL RIGHTS PROCEEDINGS IN NORTH CAROLINA § 2.4F, Funds for Experts and Other Expenses at 53-54 (UNC School of Government, 2025).

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. Thus, the defense determines the work to be performed by the expert (although not, of course, the expert's conclusions). *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 (recognizing requirements of majority opinion in *Ake*); *Smith v. McCormick*, 914 F.2d 1153, 1157 (9th Cir. 1990) (stating the "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"); *see also McWilliams v. Dunn,* 582 U.S. 183, 197 (2017) (declining to resolve the scope of the defendant's rights to his or her own defense expert but recognizing appointment of an independent defense expert was the "simplest way" to satisfy *Ake* and that such practice was apparently "the approach that the overwhelming majority of jurisdictions have adopted").

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 (1995) (on defendant's motion for psychiatric assistance, no error where trial court appointed state psychiatrist who had performed earlier capacity 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). However, trial judges generally allow the defendant to hire an expert of his or her choosing.