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. The procedure for applying for an expert differs in noncapital and capital cases, discussed *infra* in § 5.3, Applying for Funding, but the basic showing is the same.

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 (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 (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").

A third party, such as a family member, may contribute funds for support services, such as the assistance of an expert, for an indigent defendant. *See* IDS Rule 1.9(e) & Commentary (prohibiting outside compensation for appointed attorneys beyond fees awarded in case, but permitting outside funds for support services).

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 (1992) (finding that formulation satisfies requirements of *Ake*); *State v. Moore*, 321 N.C. 327 (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 (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 (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 (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 beneficial." *Caldwell v. Mississippi*, 472 U.S. 320, 323 n.1 (1985); *see also State v. Mills*, 332 N.C. 392, 400 (1992) (explaining that "[m]ere hope or suspicion that favorable evidence is available" is insufficient to support motion for expert assistance (citation omitted)); *State v. Speight*, 166 N.C. App. 106 (2004) (trial court did not err in denying funds for medical expert and accident reconstruction expert where defendant made unsupported and admittedly speculative assertions), *aff'd as modified*, 359 N.C. 602 (2005), *vacated on other grounds*, *North Carolina v. Speight*, 548 U.S. 923 (2006). In short, defense counsel may need to make a fairly detailed, but not conclusive, showing of need.