

5.6 Specific Types of Experts

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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 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. The discussion below reviews cases involving requests for funding for different types of experts. For additional case summaries, see JEFFREY B. WELTY, [NORTH CAROLINA CAPITAL CASE LAW HANDBOOK](#) at 44–48 (UNC School of Government, 3d ed. 2013).

A. Mental Health Experts

Case law. North Carolina case law is generally favorable to the defense on motions for mental health experts. On a number of occasions, the N.C. Supreme Court has reversed convictions for failure to grant the defense a mental health expert. *See, e.g., State v. Jones*, 344 N.C. 722 (1996); *State v. Parks*, 331 N.C. 649 (1992); *State v. Moore*, 321 N.C. 327 (1988); *State v. Gambrell*, 318 N.C. 249 (1986). *Compare, e.g., State v. Anderson*, 350 N.C. 152, 160–63 (1999) (defendant claimed that she needed a psychiatric expert to respond to the State’s evidence and did not claim that her sanity at the time of the offense or apparently any other mental health issue was a significant factor in the case; court found that the request “was based on mere speculation of what trial tactic the State would employ rather than the requisite showing of specific need”); *State v. Sokolowski*, 344 N.C. 428 (1996) (upholding denial of funding for psychiatric expert to develop insanity defense where defendant testified he did not want to plead insanity and relied on self-defense). These cases illustrate the kinds of information that counsel can and should marshal when moving for mental health experts (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).

If the defendant already has a psychological or psychiatric expert, he or she may need to make an additional showing to obtain funds for a more specialized mental health expert. *See State v. Page*, 346 N.C. 689 (1997) (upholding denial of funds for forensic psychiatrist when defendant had assistance of both a psychiatric and psychological expert

and failed to make showing of need for more specialized expert); *State v. Rose*, 339 N.C. 172 (1994) (upholding denial of funds for neuropsychologist where defendant had already been examined by two psychiatrists); *State v. Reeves*, 337 N.C. 700 (1994) (upholding denial of funds for sexual disorder expert when defendant had assistance of psychiatric expert, who consulted with sexual disorder expert, and failed to show how specialized expert would have added to defense of case).

Impact of capacity examination. Cases involving mental health issues also may involve issues about the client’s capacity to stand trial. In such cases, counsel should consider moving for funds for a mental health expert on all applicable mental health issues (defenses, mitigating factors, etc.), including capacity, as soon as possible. *See supra* § 2.4, Obtaining an Expert Evaluation (2d ed. 2013) (discussing options for obtaining capacity evaluation). Once the expert has evaluated the client, counsel will be in a better position to determine whether there are grounds for questioning capacity.

Once counsel questions a client’s capacity, the court may order a capacity examination at a state facility (i.e., Central Regional Hospital) or at a local mental health facility depending on the offense. *See supra* § 2.5, Examination by State Facility or Local Examiner (2d ed. 2013). The impact of such an examination may vary.

- A state-conducted capacity examination may have no impact on a later motion for expert assistance. The courts have held that a capacity 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 (examination to determine capacity not substitute for mental health expert’s assistance in preparing for trial); *see also Ake v. Oklahoma*, 470 U.S. 68, 81 (1985) (psychiatry is “not . . . an exact science, and psychiatrists disagree widely and frequently”).
- A capacity examination may lend support to a motion for a mental health expert, as it could show that the defendant, even if capable to proceed, suffers from some mental health problems.
- A capacity 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 (1997) (in finding that defendant had not made sufficient showing of need, court relied in part on findings from earlier capacity examination); *State v. Campbell*, 340 N.C. 612 (1995) (on motion for assistance of mental health expert, trial court appointed same psychiatrist who had earlier found defendant capable of standing trial); *see also supra* § 2.9, Admissibility at Trial of Results of Capacity Evaluation (2d ed. 2013) (evidence from capacity examination may be admissible to rebut mental health defense).

Victim’s mental health. A defendant does not have the right to compel a victim to submit to a mental health examination; however, a defendant may be able to obtain pertinent mental health or other records of a victim through discovery or by subpoena to third parties and obtain funds for an expert to review any mental health evaluations and other records of the victim. *See State v. Horn*, 337 N.C. 449, 453–54 (1994); *State v. Williams*, 330 N.C. 711, 719 (1992) (history of drug use and mental infirmity was proper subject of

impeachment under N.C.R. Evid. 611(b) for key witness of the State; such impeachment evidence reflects on the witness's ability to perceive, recall, and recount events and is thus permissible evidence of witness credibility). For a discussion of obtaining information about the victim's mental health, including the potential importance of first making a motion for a mental health examination of the victim, see *supra* § 4.4C, Examinations and Interviews of Witnesses (2d ed. 2013).

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 (1989); *State v. Moore*, 321 N.C. 327 (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 experts 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 (1990) (ballistics evidence was important to State's case but was not only evidence connecting defendant to crime; defendant made insufficient showing of need for own ballistics expert).

If the defense needs more than one expert on physical evidence, counsel should make a showing of need as to each expert. *See, e.g., State v. McNeill*, 349 N.C. 634, 649–50 (1998) (finding that the defendant failed to make a sufficient showing for funds for a forensic crime-scene expert in addition to funds already authorized for investigator, fingerprint expert, and audiologist), *vacated sub nom. on other grounds, McNeill v. Branker*, 601 F. Supp. 2d 694 (E.D.N.C. 2009); *see also* Michael J. Yaworsky, Annotation, *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 (1989); Michael J. Yaworsky, Annotation, *Right of Indigent Defendant in State Criminal Case to Assistance of Fingerprint Expert*, 72 A.L.R.4th 874 (1989); Michael J. Yaworsky, Annotation, *Right of Indigent Defendant in State Criminal Case to Assistance of Ballistics Experts*, 71 A.L.R.4th 638 (1989).

Concerns about the reliability of particular forensic tests and crime lab procedures in general may bolster a defense request for an expert on physical evidence. *See, e.g.,* Forensic Resources, [Crime Labs—Reports and Publications](#) (collecting documents indicating concerns about forensic tests and procedures in North Carolina). For additional assistance in identifying areas in which an expert on physical evidence would be useful as well as information about possible experts and other resources, defense counsel should contact IDS's [Forensic Resource Counsel](#).

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 (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 (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 (1993) (defendant entitled to funds for investigator on proper showing); Michael J. Yaworsky, Annotation, *Right of Indigent Defendant in State Criminal Case to Assistance of Investigators*, 81 A.L.R.4th 259 (1990).

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 (1992). Identify the obligations (case load, trial schedule, etc.) that prevent you from doing the investigative work. If you are an attorney in a public defender's office, indicate why your office's investigator is unable to do the investigation (e.g., investigator is unavailable, investigation requires additional resources, etc.). If the investigation requires special skills, indicate that as well. *See generally State v. Zuniga*, 320 N.C. 233 (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. STATE BAR REV'D RULES OF PROF'L CONDUCT R. 3.7* (2003) (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 opinions upholding the denial of funds 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, and others.

Medical experts. *See, e.g., State v. Brown*, 357 N.C. 382 (2003) (trial court approved defendant's initial request for mental health expert; defendant not entitled to additional expert on physiology of substance induced mood disorder); *State v. Cummings*, 353 N.C. 281, 293–94 (2001) (upholding denial of funds for optometrist to demonstrate that

defendant could not read *Miranda* waiver form); *State v. Penley*, 318 N.C. 30, 50–52 (1986) (defendant “arguably made a 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, 50–52 (defendant “arguably made a threshold showing” for pathologist); *see also 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 (1987) (jury selection expert denied; requested expert lacked skills for stated purpose); *State v. Watson*, 310 N.C. 384 (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. Yaworsky, Annotation, *Right of Indigent Defendant in State Criminal Case to Assistance of Expert in Social Attitudes*, 74 A.L.R.4th 330 (1989).

Statisticians. *See, e.g., State v. Moore*, 100 N.C. App. 217 (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 (1991).

Digital forensics experts. While no North Carolina cases directly address the defendant’s entitlement to an expert in digital forensics, prosecutions increasingly utilize evidence obtained from a defendant’s cell phone, computer, or other digital device. Conversely, exculpatory evidence may be obtained from the digital devices of the defendant or others. Particularly where the State intends to present specialized testimony on location tracking or forensic analysis of a defendant’s digital device (or where the defendant has favorable digital evidence to affirmatively present), counsel should consider applying for funds to obtain an expert in the field to counter the State’s case or aid in presenting defense evidence. *Cf.* Shea Denning, [Serial, Cell Site Location Information, and Experts . . . on a Wednesday](#), N.C. CRIM. L., UNC SCH. OF GOV’T BLOG (Sept. 20, 2017).