Chapter 5
Experts and Other Assistance

5.1 Right to Expert **5-2**
- A. Basis of Right
- B. Breadth of Right
- C. Right to Own Expert

5.2 Required Showing for Expert **5-4**
- A. Indigency
- B. Preliminary but Particularized Showing of Need

5.3 Applying for Funding **5-6**
- A. Noncapital Cases
- B. Capital Cases
- C. Inmate Cases

5.4 Components of Request for Funding **5-7**
- A. Generally
- B. Area of Expertise
- C. Name of Expert
- D. Amount of Funds
- E. What Expert Will Do
- F. Why Expert's Work is Necessary
- G. Documentation

5.5 Obtaining an Expert Ex Parte in Noncapital Cases **5-10**
- A. Importance of Ex Parte Hearing
- B. Who Hears the Motion
- C. Filing, Hearing, and Disposition of Motion
- D. Other Procedural Issues

5.6 Specific Types of Experts **5-13**
- A. Mental Health Experts
- B. Experts on Physical Evidence
- C. Investigators
- D. Other Experts

5.7 Confidentiality of Expert's Work **5-18**

5.8 Right to Other Assistance **5-19**
- A. Interpreters

B. Transcripts
C. Other Expenses

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 but should be considered in any case where expert assistance is necessary for an effective defense. Other forms of state-funded assistance (such as interpreters) are discussed briefly at the end of this chapter.

Experts can assist the defense in various ways, including among other things:

- reviewing the discovery relevant to their expertise, including any materials prepared by the State's experts,
- identifying gaps in the discovery that has been produced and additional discovery that should be requested,
- evaluating the client's mental state for purposes of suppression motions, trial defenses, and sentencing,
- preparing for any hearing to exclude testimony by the State's expert witnesses,
- helping defense counsel prepare for cross-examination of the State's experts, and
- testifying before the jury.

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 (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. Trolley, 290 N.C. 349, 364 (1976) (law of the land clause requires that administration of justice "be consistent with the fundamental principles of liberty and justice"); *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, available here, 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 & JAN S. SIMMONS, ABUSE, NEGLECT, DEPENDENCY, AND TERMINATION OF PARENTAL RIGHTS PROCEEDINGS IN NORTH CAROLINA § 2.4E, at 46–48 (Funds for Experts and Other Expenses) (UNC School of Government, 2019).

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,* ___ U.S. ___, 137 S Ct. 1790, 1800 (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 taken by the overwhelming majority of jurisdictions . . .").

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.

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.

5.3. Applying for Funding

Since the creation of the Office of Indigent Defense Services (IDS) in 2000, the procedures for applying for funding have become more regularized. IDS has adopted form applications for funding, rates of compensation, and procedures for payment. This section reviews the basic procedures for applying for funding. Additional resources are available on the IDS website (www.ncids.org) under the links for "Information for Counsel" and "Information for Experts."

A. Noncapital Cases

In non-capital cases (as well as non-criminal cases, such as juvenile delinquency cases), application for funding for expert assistance, investigators, and other related services is to the court. Compensation rates for expert witnesses paid from funds managed by the Office of Indigent Defense Services may not be higher than the rates set by the Administrative Office of the Courts (AOC) for expert witnesses paid from AOC funds. *See* G.S. 7A-498.5(f).

Two form applications for funding are available. A more detailed supporting motion should accompany the application. One form application contains standard compensation rates; the other requests a deviation from the standard rate. *See* AOC Form AOC-G-309, "Application and Order for Defense Expert Witness Funding in Non-Capital Criminal and Non-Criminal Cases at the Trial Level" (Feb. 2015); AOC Form AOC-G-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 (Feb. 2020). The forms state that they should be used in noncapital cases for all requests for funding for expert services except for certain flat fee services, such as lab tests. Counsel still must obtain prior approval from the court for funding for such services.

Because of the detail that counsel may need to provide, counsel should ordinarily ask to be heard ex parte on a motion for expert funding. *See infra* § 5.5, Obtaining an Expert Ex Parte in Noncapital Cases.

B. Capital Cases

In capital cases, requests for expert funding are governed by Part 2D of the IDS Rules. A "capital" case is defined as any case that includes a charge of first-degree murder or an undesignated degree of murder, except cases in which the defendant was under 18 years of age at the time of the offense and therefore ineligible for the death penalty. *See* IDS Rule 2A.1. Counsel first must apply to the Director of IDS or his or her designee for authorization to retain and pay for an expert. The director's designee for requests for expert funding in capital cases is the Capital Defender. Counsel must apply in writing, and the request should be as specific as the motion required under *Ake* and G.S. 7A-450(a). Applications to IDS for funding in capital cases are automatically ex parte and confidential. *See* IDS Rule 2D.2. Counsel should use the

form request developed by IDS. *See* Form IDS-028, "Ex Parte Request for Expert Funding: Potentially Capital Cases at the Trial Level" (May 2016).

If IDS does not approve a request for expert funding in a capital case, counsel then may apply to the court in which the case is pending; counsel must attach to the application a copy of IDS's notice of disapproval and a copy of counsel's original request. If application to the court is necessary, counsel should apply ex parte. Counsel must send to IDS a copy of any court order approving expert funds. If counsel discovers new or additional information relevant to the request, counsel should submit a new application to IDS before submitting a request to the court.

C. Inmate Cases

In cases in which IDS provides counsel in cases pursuant to the State's obligation to provide inmates with legal assistance and access to the courts (*see infra* § 12.1A, Right to Appointed Counsel (2d ed. 2013)), requests for funds for experts go to IDS. The procedure is similar to the procedure for obtaining funds in capital cases, discussed above. *See* IDS Rule 4.6.

5.4 Components of Request for Funding

A. Generally

This section discusses potential ingredients of a motion for funds for an expert. Many of these ingredients are now included in the form applications for expert funding, referenced *supra* in § 5.3, Applying for Funding. Some of these components, such as a more detailed description of and justification for the work to be performed, should be included in the supporting motion.

In motions to a judge in a noncapital case, 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 making the motion to the judge. In either event, counsel should be prepared to present all supporting evidence to make the request as persuasive as possible and to preserve the record for appeal.

The exact showing will vary with the type of expert sought. For a discussion of different types of experts, see *infra* § 5.6, Specific Types of Experts. Sample motions for experts are available in the Non-Capital Trial Motions Bank on the IDS website.

B. 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 (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 on a proper showing, a blunderbuss request for several experts is unlikely to succeed. *See, e.g.*, *State v. Mills*, 332 N.C. 392 (1992) (characterizing motion as fanciful "wish list" and denying in entirety motion for experts in psychiatry, forensic serology, DNA identification testing, forensic chemistry, statistics, genetics, metallurgy, pathology, private investigation, and canine tracking).

C. Name of Expert

Counsel should determine the expert he or she wants to use before applying for funding. Identifying the expert (and describing his or her qualifications) not only authorizes payment to the expert if the motion is granted but also helps substantiate the need for expert assistance. A curriculum vitae can be included with the motion. Counsel should interview the prospective expert before making the motion, both to determine his or her and suitability and availability for the case (before and during trial) and to obtain information in support of 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 Forensic Resource Counsel Office of IDS, which maintains a database of forensics experts; the Capital Defender's Office of IDS, www.ncids.org, and the Center for Death Penalty Litigation, www.cdpl.org, which work on capital cases but may have information about experts who would be helpful in noncapital cases; and organizations of criminal lawyers (such as the National Association of Criminal Defense Lawyers and National Legal Aid & Defender Association). Counsel also can look at university faculty directories, membership lists of professional associations, and professional journals for potential experts.

D. 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 specify the amount of money needed (based on compensation 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. Counsel may reapply for additional funds as needed. The expert may not be paid if his or her time exceeds the preapproved amount.

Compensation rates for expert witnesses paid from IDS funds may not be higher than the rates set by the Administrative Office of the Courts (AOC) for expert witnesses paid from AOC funds under G.S. 7A-314(d). *See* G.S. 7A-498.5(f). Counsel therefore should find out from the potential expert whether he or she is willing to work within state rates. IDS may authorize a deviation from the standard rates when justified. The applicable form applications, referenced *supra* in § 5.3, Applying for Funding, contain the standard rates and grounds for requesting a deviation. *See also* "Information for Experts" on the IDS website, www.ncids.org.

Practice note: The form application for funding in noncapital cases includes an order by the court authorizing a specified amount of money for the expert's services as well as a compensation calculator to be filled out by the expert on completion of the work. The expert submits the entire form to IDS for payment on completion of the work and provides a copy, along with an itemized time sheet, to defense counsel.

E. What Expert Will Do

Counsel should specifically describe the work to be performed by the expert—review or interpretation 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 State v. Parks*, 331 N.C. 649 (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 (1988) (motion denied where defendant indicated only that assistance of psychologist might be helpful to him in preparing his defense).

F. 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 (1996) (to determine the requisite showing, the "court should consider all the facts and circumstances known to it at the time the motion" is made (citation omitted)). 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 (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.*, *Jones*, 344 N.C. 722 (1996) (defendant entitled to psychiatric expert because only possible defense to charges was mental health defense); *State v. Moore*, 321 N.C. 327 (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), 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. 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 (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 (1996) (defense failed to present any specific evidence or argument on why counsel needed assistance of jury selection expert in conducting voir dire).

G. 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.

5.5 Obtaining an Expert Ex Parte in Noncapital Cases

A. Importance of Ex Parte Hearing

Grounds to obtain ex parte hearing. In noncapital cases, the court hears requests for expert funding. Regardless of the type of expert sought, defense counsel should always ask that the court hear the motion ex parte—that is, without notice to the prosecutor and without the prosecutor present. In capital cases, applications for funding are made to IDS and are always ex parte; however, if IDS denies the application and the defendant requests funding from the court, the defendant should ask the court to hear the request ex parte. *See supra* § 5.3, Applying for Funding.

North Carolina first recognized the defendant's right to an ex parte hearing in *State v. Ballard*, 333 N.C. 515 (1993), and *State v. Bates*, 333 N.C. 523 (1993), which held that an indigent defendant is entitled 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 (which the court found to be an essential part of the Sixth Amendment right to counsel) 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 (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. Most judges now proceed ex parte as a matter of course if requested by the defendant. (Although earlier appellate cases in North

Carolina found that the trial court did not abuse its discretion in refusing to hold an ex parte hearing (*see State v. White*, 340 N.C. 264 (1995); *State v. Garner*, 136 N.C. App. 1 (1999)), no reported appellate decision has addressed the issue recently.) 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. The defendant need not meet the threshold for obtaining funding for an expert to justify the holding of an ex parte hearing. *See State v. White*, 340 N.C. 264, 277 (so stating); *see also State v. Phipps*, 331 N.C. 427, 451 (1992) (although the court denied defendant's motion for an ex parte hearing on a fingerprint identification expert, the court stated that there are "strong reasons" to hold all hearings for expert assistance ex parte); *United States v. Sutton*, 464 F.2d 552 (5th Cir. 1972) (per curiam) (trial court erred by failing to hold hearing ex parte, as required by federal law, 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 for ex parte hearing 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 discussed below. These principles may make it riskier for a trial court to refuse to hear a request for funding ex parte.

- If the defendant makes the motion in open court and the trial judge refuses to fund an expert, the defendant can argue on appeal that he or she could have made a stronger showing if allowed to do so ex parte. *See Bates*, 333 N.C. 523 (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 may not need to make an offer of proof to preserve for appellate review the trial judge's refusal to hold an ex parte hearing (*Ballard,* 333 N.C. 515, 523 n.2); nevertheless, counsel should ask to submit the supporting evidence to the trial court 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 in a noncapital case ordinarily may be heard by any superior court judge of the judicial district in which the case is pending. *Compare* N.C. GEN. R. PRAC. SUPER. & DIST. CT. 25(2) (for capital motions for appropriate relief (MARs), rule requires that expert funding requests made before filing of MAR and after denial of funding by IDS [discussed *supra* in § 5.3, Applying for Funding] 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 on 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 may want to retain a mental health expert as soon after the offense as possible. Counsel should be able to obtain authorization for funding for an expert from a district court judge in that instance. *See State v. Jones*, 133 N.C. App. 448, 463 (1999), *aff'd in part and rev'd in part on other grounds*, 353 N.C. 159 (2000) (holding that before transfer of a felony case to superior court, the district court has jurisdiction to rule on preliminary matters, in this instance, production of certain medical records). The superior court also may have authority to hear the motion. *See State v. Jackson*, 77 N.C. App. 491 (1985) (court notes jurisdiction of superior court before indictment to enter commitment order to determine defendant's capacity to stand trial).

C. Filing, Hearing, and Disposition of Motion

In moving ex parte for funds for an expert in a noncapital case, counsel should keep in mind maintaining the confidentiality of the proceedings as well as preserving the record for appeal.

The motion papers and any other materials should be presented directly to the judge who will hear the matter. Ordinarily, a separate written motion requesting to be heard ex parte (in addition to the motion for funds for an expert) is unnecessary. The request to be heard ex parte and request for funding for an expert can be combined into a single motion. Sample motions can be found in the Non-Capital Trial Motions Bank on the IDS website.

If the judge hears the motion ex parte but denies funds for an expert, counsel may renew the motion upon obtaining additional supporting evidence. *See generally State v. Jones*, 344 N.C. 722 (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 and ex parte). For purposes of appeal, it is imperative to present on the record all evidence and arguments supporting the motion. You should ask the judge to order that the motion, supporting materials, and order denying the motion 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 the record. Be sure to keep a copy of the motion and order for your own files. Also provide a copy of the signed order to the expert, which is necessary for the expert to obtain payment for his or her work.

D. Other Procedural Issues

There is no time limit on a motion for expert assistance. *But cf. State v. Jones*, 342 N.C. 523 (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 (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). For a further discussion of the right to presence, see 2 NORTH CAROLINA DEFENDER MANUAL § 21.1, Right to Be Present.

5.6 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 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).

5.7 Confidentiality of Expert's Work

If counsel obtains funds for expert assistance, counsel will need to meet with the expert and provide the expert with information on those aspects of the case with which the expert will be involved. Depending on the type of expert, counsel may need to provide the expert with witness statements, reports, photographs, physical evidence, and other information obtained through discovery and investigation; in cases in which the defendant's state of mind is at issue, the expert may need to meet with and interview the client. To make the most effective use of the funds authorized for the expert's work, counsel may not want to provide the expert with all of the discovery in the case, particularly if voluminous, but counsel should provide the expert with all pertinent information. The failure to do so may make it more difficult for the expert to form an opinion and expose him or her to damaging cross-examination.

Counsel should anticipate that the information reviewed and work generated by an expert will be discoverable by the prosecution, including statements by the defendant and correspondence between the expert and counsel. Some protections exist, however.

- 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, including materials on which the expert relied if not otherwise discoverable. *See supra* "Nontestifying experts" in § 4.8C, Results of Examinations and Tests (2d ed. 2013) (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 generally is entitled to pretrial discovery about the expert and his or her findings. *See supra* § 4.8C, Results of Examinations and Tests (2d ed. 2013). The expert also must prepare a written report and provide it to the prosecution. *See supra* § 4.8D, Witnesses (2d ed. 2013).
- Once on the stand, an expert may be required to disclose the basis of his or her opinion, including materials he or she reviewed and communications with the defendant, if not revealed earlier in discovery. *See supra* "Testifying experts" in § 4.8C, Results of Examinations and Tests (2d ed. 2013); *see also generally* N.C. R. EVID. 705 (disclosure of basis of opinion); 2 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 188, at 760–72 (8th ed. 2018) (discussing application of Rule 705).

To prevent disclosure of the expert's work until required, counsel may want to have the expert enter into a nondisclosure agreement. A sample agreement is available in the Non-Capital Trial Motions Bank on the IDS website. *See also* N.C. STATE BAR REV'D RULES OF PROF'L CONDUCT R. 3.4(f) (2006) (lawyer may request person other than client to refrain from voluntarily giving relevant information to another party if person is agent of client and the lawyer reasonably believes that person's interests will not be adversely affected by refraining from giving the information).

In *Crist v. Moffatt*, 326 N.C. 326 (1990), the Supreme Court held in a civil case that the defendant's lawyer could not interview the plaintiff's physician without the plaintiff's

consent and could obtain information from the plaintiff's physician only through statutorily recognized methods of discovery. In *State v. Jones*, 133 N.C. App. 448, 463 (1999), *aff'd in part and rev'd in part on other grounds*, 353 N.C. 159 (2000), the Court of Appeals questioned whether this prohibition applies in criminal cases but did not decide the issue because it was not properly preserved. Regardless of whether a prosecutor may contact a defense expert without the defendant's consent, defense counsel still may instruct a defense expert not to discuss the case without the defendant's consent or unless otherwise ordered to do so.

5.8 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. For an AOC form for appointment of a deaf interpreter, see AOC-G-116, "Motion, Appointment and Order Authorizing Payment of Sign Language Interpreter Or Other Communication Access Service Provider" (Oct. 2019). The superior court clerk should have a list of qualified interpreters. *See* G.S. 8B-6.

For clients with limited English proficiency (LEP). An indigent criminal defendant with limited English proficiency is entitled to a foreign language interpreter for in-court proceedings (such as trials, hearings, and other appearances) and out-of-court matters (such as interviews of the defendant and of LEP witnesses). Obtaining an interpreter is a routine matter, not subject to the requirements on appointment of experts discussed above. The AOC is responsible for administering the foreign language interpreter program, and an AOC has issued a form for appointment of a foreign language interpreter (AOC-G-107, "Motion and Appointment Authorizing Foreign Language Interpreter/Translator" (Mar. 2007)). The form covers both in-court and out-of-court services. Under an agreement between IDS and AOC, IDS funds out-of-court interpreter services for defendants and AOC funds in-court services, but the procedure for obtaining an interpreter is the same. *See* Office of Indigent Defense Services, Out-of-Court Foreign Language Interpretation and Translation for Indigent Defendants and Respondents (Sept. 10, 2015).

No North Carolina statute specifically addresses the right to a foreign language interpreter. *See generally* G.S. 7A-343(9c) (AOC director's duties include prescribing policies and procedures for appointment and payment of foreign language interpreters); *see also State v. Torres*, 322 N.C. 440 (1988) (recognizing court's inherent authority to

appoint foreign language interpreter). G.S. 7A-314(f), which dealt specifically with interpreters for indigent defendants, was repealed in 2012 and was replaced by an uncodified provision directing the Judicial Department to provide assistance to LEP individuals, assist the courts in the fair, efficient, and accurate transaction of business, and provide more meaningful access to the courts. *See* 2012 N.C. Sess. Laws Ch. 142, § 16.3(c) (H 950). The 2012 legislative change was intended to expand services and was prompted by a March 2012 report from the U.S. Department of Justice finding that North Carolina's provision of interpreter services was unduly limited and did not comply with federal law. *See* Report of Findings (U.S. Dep't. of Justice, Mar. 8, 2012).

An indigent defendant also may obtain necessary translation services. (Translation refers to converting written text from one language to another, while interpretation refers to rendering statements spoken in one language into statements spoken in another language.) For a discussion of obtaining translation services, see Office of Indigent Defense Services, Out-of-Court Foreign Language Interpretation and Translation for Indigent Defendants and Respondents at 4 (Sept. 10, 2015) (describing procedure for obtaining translation of attorney-client correspondence and circumstances in which translation of discovery may be appropriate).

For others. An interpreter may be appointed whenever the defendant's normal communication is unintelligible. *See State v. McLellan*, 56 N.C. App. 101 (1982) (defendant had speech impediment). For a discussion of other issues relating to interpreters in criminal cases, see Jonathan Holbrook, *Courtroom Interpreters: Need vs. Want,* N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Feb. 11, 2020).

B. Transcripts

As a matter of equal protection, an indigent defendant is entitled to a transcript of prior proceedings when the transcript is needed for an effective defense or appeal. *Britt v. North Carolina*, 404 U.S. 226, 227 (1971); *see also* G.S. 7A-450(b) (indigent defendant entitled to "counsel and the other necessary expenses of representation"). The test is "(1) whether a transcript is necessary for preparing an effective defense and (2) whether there are alternative devices available to the defendant which are substantially equivalent to a transcript." *State v. Rankin*, 306 N.C. 712, 716 (1982). Under this test, an indigent defendant may be entitled to a transcript of prior proceedings in the case, such as the transcript of a probable cause hearing or other evidentiary proceeding. *See generally State v. Reid*, 312 N.C. 322, 323 (1984) (per curiam) (defendant entitled to new trial where not provided with transcript of prior trial before retrial); *State v. Tyson*, 220 N.C. App. 517 (2012) (same). A sample motion for production of transcript of a probable cause hearing in a juvenile case is available on the IDS website in the Juvenile Trial Motions and Forms Index.

C. Other Expenses

Under G.S. 7A-450(b), the State has the responsibility to provide an indigent defendant with counsel and "the 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.