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GETTING AN EXPERT: An overview for new felony defenders

June 18-20, 2003, Durham Hilton, Durham NC

Sponsored by the Institute of Government and Office of Indigent Defense Services

I. HOW YOU KNOW YOU NEED AN EXPERT

A. Client interview

1. mental health issues

- a. client sounds like a nut or stupid
mental illness; mental retardation
- b. client has given a statement (knowing, voluntary)
if taped, leading questions?
If written, his writing? No? What does his
Signature look like? Childish; bizarre?

2. eyewitness identification issues

- a. show up ID
- b. cross-racial identification
- c. weapon focus
- d. conditions of ID (lighting, distance, etc.)
- e. alibi

B. Warrant/Indictment

(nature of the offense: arson, rape, murder, drugs, etc.)

C. Discovery

1. SBI reports
(fingerprint, DNA, bloodspatter, hair and fiber, ballistics, etc.)
2. Notice from State of intent to use scientific data w/ expert testimony

3. Even w/o notice, but suspect expert testimony and an opinion, ask to discover it -- you will know if you need expert and what kind based on what the state is going to rely on

D. Other sources

As presented by your case; *e.g.*, a comment by a mental health examiner as to possible issues

II. HOW TO GET AN EXPERT

- A. **Research into who's "good"** (ask other attorneys, CDPL, Capital Defender's Office, check Lawyers' Weekly, The Champion, contact NCATL "The Academy")
- B. **Make initial contact.** Tell the expert about the issue where you need expertise. Ask are they available and are they the right expert, what is their hourly fee, anticipated time needed given the issue presented
- C. **File ex parte motion with particularized showing of need; have a proposed order prepared.** Learn from other attorneys what judges in your area will be amenable to allowing your expert; go to this judge privately (that's the whole point of an *ex parte* motion) and describe what you need and why; file the motion and order under seal.

*****If you are unsuccessful at getting an *ex parte* order, you need to **preserve this issue** for appeal. The appellate lawyer wasn't in the room when the judge denied your motion for expert funds, so they aren't going to know to raise this issue, nor can they without a record. Tell the judge that you need to make a record--at a minimum, have the judge initial and date your motion, with "denied" noted on it. Preferable to request a hearing, *ex parte*, with a court reporter, make your showing on the record and have the judge make a ruling on the record.*****

May make your request for expert funds in district court if case has not yet been indicted.

III. WHAT TO DO WITH EXPERT

- A. **Send your expert a copy of your motion and the signed order;** tell them to keep track of how much time and money they use. If you are near the end of your funds, go the judge for additional funds. You will be responsible for getting them paid. At the end of service, include the expert's invoice and a copy of the Order along with a cover letter to the judge (cc'd to the expert) requesting that the expert be paid the amount billed.

- B. **Send copy of ALL discovery** (with some caveats; is there some information you would prefer your expert not have? Discuss this with other attorneys and your expert before withholding anything; *e.g.*, having a client retested for MR)

- C. **Where appropriate, have your expert interview your client** (mental health issues). Make arrangements at the jail for expert to have access. Go to or call the jail; advise them that a member of the defense team will need to meet with client and ask how they wish for you to arrange that.

IV. WHAT THE EXPERT CAN DO

- A. **Review the discovery and any investigation you've already done**
evaluate the state's case, evaluate your case

- B. **Review the state's response to your request for *Cunningham* material**
(§15A-903); evaluate state's expert and their tests, conclusions, etc.

- C. **Help with any additional specific discovery motions** (*e.g.*, protocols from the lab)

- D. **Prepare you for and attend any *Daubert* hearing** (a *voir dire* hearing to discovery and limit or exclude expert testimony by a state's witness) and prepare you for the trial; help prepare cross-examination of state's expert at each

- E. **Conduct independent research to:**
 - 1. teach you the science and how to research it
 - 2. prepare to cross-examine the state's witnesses
 - 3. help you develop a theory of the case
 - 4. help you conduct treatise cross-examination

- F. **Testify**
 - 1. teach the jury the science
 - 2. demonstrate for the jury the errors in the state's science

- G. **Rx Xanax**