



6. Defendant is indigent and wishes to apply to this Court for funds with which to employ expert assistance in his case. Counsel has spoken with Dr. David Stewart, PhD a mental health provider and has received a quote for the type of examination that may prove helpful. This quote is for \$175/hour. Dr. Stewart expects this evaluation would take approximately 20 hours and he requires an up-front payment of \$3,500.

### **ARGUMENT**

In *Ake v. Oklahoma*, 470 U.S. 68, 84 L.Ed.2d 53 (1985), the United States Supreme Court ruled that an indigent capital defendant is absolutely entitled, under the Due-Process Clause of the Fourteenth Amendment, to have state-furnished access to a psychiatric expert on the issue of mental health where they make a preliminary showing that this is likely to be a “significant factor” at trial. In a non-capital case, the NC Supreme Court indicated that an indigent is entitled to an expert where he can make “a particularized showing that (1) he will be deprived of a fair trial without the expert assistance, or (2) there is a reasonable likelihood that it would materially assist him in the preparation of his case.” *State v. Ballard*, 333 NC 515, 518, 428 SE2d 178 (1993).

In the context of a mental health expert, the courts have recognized the tremendous prejudice which would result from forcing an indigent defendant to disclose confidential and strategic information to the prosecution simply to get access to his constitutionally guaranteed right to necessary expert assistance. Indeed, if indigent defendants were required to apply in open court for expert funding, they would be forced to reveal to the State the identity of experts they intend to consult, and make a public showing of their significance, solely because of their indigency. Such a procedure would violate a defendant’s right to equal protection of the laws. Moreover, in a capital case, in which heightened procedural protections must be afforded to the accused, this difference in access to expert assistance, resulting solely because of the defendant’s indigency, is repugnant to the requirements of the Eighth Amendment.

To alleviate this inequity, the Court’s have approved a procedure whereby an indigent defendant is entitled to funding for expert assistance when he is able to make an *ex parte* threshold showing to the trial court of his need.

The North Carolina Supreme Court has expressly approved *ex parte* applications for expert funding of mental health experts. In *State v. Ballard*, the Court indicated a trial court’s denial of an indigent defendant’s motion for an *ex parte* hearing of evidence supporting an indigent defendant’s request for the assistance of a psychiatric expert violates the defendant’s constitutional rights. To force this defendant to make an application for expert assistance in open court would not only run contrary to a long line of United States and North Carolina cases, it would be a fundamental violation of his constitutional right to a fair trial.

### **SPECIFIC RELIEF REQUESTED**

1. Conduct an *in camera*, *ex parte*, hearing in order to review the defense motion for expert assistance.
2. If necessary, order that a court reporter be made available to record the proceedings and order that any court reporter not reveal the contents of the proceedings.
3. Order that no transcript of the proceedings be prepared except upon application of the defendant.

4. Order that any court order granting funds to the defendant for expert assistance be kept under seal until ordered unsealed by the court upon request of the defendant.
5. That this matter be continued until such time as the examination and report is made.

This the \_\_\_\_\_ day of May, 2006.

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