

EXPERT REQUESTS & SPENDING

IDS Policies:

Expert Requests:

When an attorney submits a request for expert funding in a capital post-conviction case, it must include enough information for the IDS Director to determine whether the request is reasonable and funding is justified. IDS Rule 2D.1 provides: “Defense counsel will be required to make at least as specific an application to retain experts as would be required by a fair but exacting trial judge applying G.S. 7A-450(a) and *Ake v. Oklahoma* and its progeny. The IDS Director may require counsel to make a more particularized application before approving or disapproving the application.”

It is important that defense counsel understand how IDS reviews requests for experts under this standard. *Ake* held that when a defendant’s mental health was likely to play a significant role in the trial or sentencing, an indigent defendant had a due process right to the appointment of a psychiatrist to help prepare and present a defense. North Carolina has applied *Ake* to categories of experts beyond mental health experts, but has also made clear that the right to a state-funded expert requires a particularized showing of need. In *State v. Moore*, 321 N.C. 327 (1988), the Court stated:

We have applied the holding in *Ake* to instances when an indigent defendant moved for the assistance of experts other than psychiatrists, holding that such experts need not be provided unless the defendant “makes a threshold showing of specific necessity for the assistance of the expert” requested. *State v. Penley*, 318 N.C. 30, 51, 347 S.E. 2d 783, 795 (1986) (pathologist). See *State v. Hickey*, 317 N.C. 457, 468, 346 S.E. 2d 646, 654 (1986) (investigator); *State v. Johnson*, 317 N.C. 193, 199, 344 S.E. 2d 775, 779 (1986) (medical expert).

In order to make a threshold showing of specific need for the expert sought, the defendant must demonstrate that: (1) he will be deprived of a fair trial without the expert assistance, or (2) there is a reasonable likelihood that it will materially assist him in the preparation of his case.

In *State v. Speight*, 166 N.C App. 106 (2004), the Court held that “the State is not required by law to finance a fishing expedition for the defendant in the vain hope that ‘something’ will turn up.” The Court found no error in denying a request for an expert, observing:

In this case, with regard to his motion to hire an accident reconstruction expert, defendant alleged no specific facts or circumstances either in his written motion or in his argument before the trial court. Instead, he simply informed the trial court that he desired an accident reconstruction expert to review the State’s evidence to see if there was any evidence to undermine the malice element of the second degree murder charges. This

undeveloped assertion by defendant is insufficient to establish the particularized showing required to receive state funds for expert assistance.

IDS follows the same standards and will authorize experts—including investigators and mitigation specialists—only when there has been a particularized showing of need. Funding for experts will not be authorized when it appears to be a fishing expedition or where counsel has not set forth specific facts that show a need for the expert. In addition, counsel must provide specific information about what the expert will do so that IDS can evaluate the reasonableness of the requested amount, and determine whether the work authorized is the work that IDS is ultimately billed for when the expert submits a fee application. For example, a request to authorize an investigator to locate and interview the eyewitnesses to a murder will not justify having the investigator spend the entire authorized amount of money reading discovery.

There is no magic formula for determining what constitutes an adequate showing, but the following tips are helpful: For investigators and mitigation specialists, a generic statement that they are needed to investigate the case is not enough. Counsel must provide some detail about the nature of the investigation and why it is needed. In addition, in post-conviction cases, counsel must specify whether the desired investigation was previously done at an earlier stage of the case. This does not mean that counsel needs to provide the names or titles of witnesses, or specific underlying records, but it does mean that counsel needs to provide a description of the type of information that the investigator will be working to obtain, such as interviewing eyewitnesses, identifying and interviewing alibi witnesses, obtaining and examining phone records, etc. For other experts, counsel must provide some basis for why the expert is needed. For example, if counsel wants a mental health expert, counsel needs to explain why there is reason to believe that the client’s mental health is in question and what the expert will do, at least in general terms. If counsel wants a crime scene expert, counsel needs to explain why the scene is important and what the expert will do, at least in general terms.

Taking the time to provide this level of specificity will not only help IDS make appropriate decisions about requests, it may help the defense team think through the specific work that needs to be done and provide a better estimate of the time and money needed.

In making requests, please remember the following:

- (1) Take the time to provide a fact-based justification for the request and specifics about what the expert will do;
- (2) Take the time to confer with the expert about what they will do and how much time it will take;
- (3) Make sure the expert is aware of the basis for your request and understands that he or she needs to do the work that justified the authorization of funds; and
- (4) Prioritize the work for your expert so you do not discover that important work is left undone when the money runs out.

Monitoring Expert Spending:

Prior authorization is required for the use of any expert services in capital post-conviction cases. If the attorney of record does not obtain prior approval for expert services, or if an expert the attorney has retained exceeds the amount that was pre-approved, IDS may not pay the expert for services he or she provided in good faith. Attorneys are expected to supervise and monitor the work being performed by any experts they have retained in capital post-conviction cases. Attorneys should also advise their experts to keep close track of the amount of funds they have been authorized, as well as the amount of time they have spent working on the case, and to inform the attorney immediately if they are running out of authorized funds.

Policy adopted and effective August 26, 2004. Updated April 15, 2011.

Authority:

G.S. 7A-454, 7A-498.5(c)(6); IDS Rules, Part 2D.