

STATE OF NORTH CAROLINA
COUNTY OF DURHAM

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
00 CRS 000000

STATE OF NORTH CAROLINA)
)
v.)
)
JOHN DOE,)
)
Defendant)
_____)

**EX PARTE
MOTION FOR
FUNDS FOR AN EXPERT
WITNESS**

NOW COMES Defendant, John Doe, by and through his undersigned counsel, Susan E. Brooks, and moves this Honorable Court, pursuant to the Sixth and Fourteenth Amendments to the Constitution of the United States, Articles I, Sections 19 and 23 of the Constitution of the State of North Carolina, North Carolina General Statutes § 7A-450(b) and § 7A-454, and *Ake v. Oklahoma*, 470 U.S. 68, 84 L.Ed. 2d. 53 (1985), to enter an Order providing the Defendant with reasonable funds to employ an independent expert witness in the field of psychology, specifically in the area of eyewitness perception and identification.

As grounds, Defendant states:

1. Defendant has been found indigent and entitled to appointed counsel by the Court and is charged with the offense of Armed Robbery.
2. Defendant's liberty interest is significant in that he faces the possibility of lengthy active imprisonment.
3. The undersigned counsel has been appointed to represent Defendant on the above-named charge.
4. Based on counsel's review of discovery, the State's evidence in the above-styled case appears to consist entirely of photospread identification of Defendant by the alleged victim.
5. Moreover, this photospread identification may have been improperly conducted, in that it did not employ procedures to reduce suggestiveness that are recommended by the U.S. Department of Justice, adopted by the NC Criminal Justice Education and Training Standards Commission and taught to officers, or recognized by psychologists who specialize in the area of eyewitness perception and identification. See Gary L. Wells and Elizabeth A. Olson, *Eyewitness Testimony*, 54 Annual Review of Psychology 277-95, 285-290 (2003) (Appendix A) (discussing impact of lineup identification variables on eyewitness identification).

6. Additionally, the victim's memory and identification may have been compromised by factors such as the brief length of time the victim had to view the perpetrator, the presence of a firearm during the commission of the crime, the stressful nature of the crime, and the length of time between the crime and the photospread identification procedure. *See* Appendix A at 280-82 (discussing impact of witness and event characteristics on eyewitness identification).
7. Given the above-stated issues with the victim's identification of Defendant, Defendant has a particularized need for the assistance of an independent expert in the field of eyewitness perception and identification to review and analyze the procedures and methodology utilized by law enforcement in conducting the photospread identification and the factors potentially affecting the victim's memory and identification.
8. Such issues with the victim's identification of Defendant are not within the scope of the jury's general capability and understanding as laypersons, as required by NC Rule of Evidence 704 as interpreted in *State v. Jackson*, 320 N.C. 452, 460, 358 S.E.2d 679, 683 (1987). *See* Appendix A at 284-85 (discussing problems with lay observers' judgments of accuracy).
9. The assistance of such an expert witness is an acknowledged benefit available to a defendant of monetary means. If Defendant were an individual of such means, counsel would strongly advise that Defendant employ such an expert to assist him in his defense.
10. N.C.G.S. § 7A-450(b) anticipates the need that an indigent defendant may have for the assistance of expert witnesses:

Whenever a person, under the standards and procedures set out in this Subchapter, is determined to be an indigent person entitled to counsel, it is the responsibility of the State to provide him with counsel and the other necessary expenses of representation. . . .
11. The Supreme Court of North Carolina has held that the request for an expert witness such as the type requested herein may be granted if the expert would "assist materially in the preparation of the defense" or if the denial of expert assistance would deprive the defendant of a fair trial. *State v. Abraham*, 338 N.C. 315, 348, 451 S.E.2d 131, 148 (1994).
12. Counsel for the Defendant lacks the necessary expertise to determine whether the procedures and methodology employed in the photospread identification procedure were inappropriate or whether the victim's memory and identification were compromised. Counsel is in need of the assistance of an expert witness in the field of eyewitness perception and identification to assist her in evaluating these matters.

13. Counsel for Defendant has contacted an expert witness in this field. This expert witness's fee is \$250 per hour, and he estimates that his assistance would require 10 hours of work, for a total cost of \$2,500.
14. Denial of funds to Defendant under circumstances such as those existing in the present case would amount to a violation of Defendant's rights to effective assistance of counsel, due process, and compulsory due process under the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States. *Ake v. Oklahoma*, 470 U.S. 68, 84 L.Ed. 2d. 53 (1985); *Jacobs v. United States*, 350 F.2d 571 (4th Cir. 1965); *State v. Bates*, 333 N.C. 523, 428 S.E.2d 693 (1993); *State v. Ballard*, 333 N.C. 515, 428 S.E.2d 178 (1993).
15. The prosecution has no legitimate interest in the subject matter of this Motion, which the defense seeks to have heard *ex parte*. The State would also be unfairly advantaged in anticipating defense strategies were it permitted access to the hearing of this Motion. *State v. Ballard*; *State v. Bates*; see also *State v. King*, 75 N.C. App. 618, 331 S.E.2d , writ allowed, 334 S.E.2d 229, cert. den., 324 N.C. 545, 335 S.E.2d 24, appeal dismissed, 335 S.E.2d 900 (1985) (court erred in requiring that defense ballistics report be provided to prosecution where defense did not indicate that expert would be called or report introduced). Therefore, this Court should hear and grant this Motion *ex parte* and should have this Motion and any related orders sealed in the court file of this action.

WHEREFORE, the Defendant respectfully requests this Honorable Court to enter an Order granting the defense the sum of \$2,500 to employ an expert witness in the field of psychology in the area of eyewitness perception and identification. Defendant further requests that this Motion, along with any order granting or denying the relief sought herein, be sealed in the court file and only opened upon order of the Court.

This the 18th day of May, 2006.

Susan E. Brooks
Attorney at Law

By: _____
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APPENDIX A
[Eyewitness Testimony Article]

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STATE OF NORTH CAROLINA)
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**EX PARTE
ORDER FOR
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This cause being heard by the undersigned Judge on Motion of Defendant John Doe for an Order for the reasonable funds necessary to employ an expert witness in the field of psychology in the area of eyewitness perception and identification; and it appearing to the Court that an expert in this field would assist materially in the preparation of the defense and/or the denial of such expert assistance would deprive the defendant of a fair trial.

IT IS THEREFORE ORDERED that Defendant John Doe receive \$_____ from the State of North Carolina to employ an expert witness in the field of psychology in the area of eyewitness perception and identification.

IT IS FURTHER ORDERED that Defendant's Motion and this Order be sealed in the court file and only opened upon order of the Court.

This the _____ day of _____, 2006.

The Honorable I.M. DeJudge