

## APPROPRIATE SAFEGUARDS FOR DEFENSE EXAMINATION OF THE STATE'S SCIENTIFIC EVIDENCE

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### I. PURPOSE:

The purpose of this paper is to suggest appropriate safeguards for defense expert examination of the State's scientific evidence.

### II. THE LAW:

While a defendant does have a constitutional right to an ex parte hearing on the appointment of a mental health expert upon a threshold showing to the trial court that his sanity is likely to be a significant factor in his defense, Ake v. Oklahoma, 470 U.S. 68, 84 L. Ed. 2d 53 (1985), such right does not exist for non-mental health experts. State v. Ballard, 333 NC 515 (1993). In fact, it has been recently held that an indigent defendant was not entitled as a matter of right to an ex parte hearing on a motion for funds to hire a private investigator. State v. Sylvia Ipock White, \_\_\_\_\_ N.C. \_\_\_\_\_ (filed 2 June 1995). The Court in White analogized this case to an ex parte hearing for a fingerprint expert and distinguished it from an ex parte hearing for a psychologist or psychiatrist.

However, the defense may be entitled to an independent expert to examine the State's scientific evidence if the defendant can make a showing of specific necessity or particularized need for expert assistance. State v. Tucker, 329 NC 709, 719-20 (1991), State v. Moore, 321 N.C. 327, 335 (1988). While a generalized assertion of need, or that expert assistance would be beneficial or even essential to preparing the defense is insufficient to meet the threshold

requirements of specific necessity. State v. Moseley, 338 N.C. at 20-21. A particularized showing of need by an indigent defendant requires proof that 1) he will be deprived of a fair trial without the expert assistance, or 2) there is a reasonable likelihood that the expert assistance will materially assist him in the preparation of his case. State v. Coffey, 326 N.C. 268, 284 (1990).

Generally, strong claims of specific necessity can be made where 1) the scientific evidence in question is the sole evidence against the defendant and the State lacks other evidence of the defendant's guilt and 2) where a lay person would lack the ability to understand the technical evidence without the aid of an expert. While a prosecutor may be able to fight a defense request for an expert based on specific need in many cases, it is advisable not to contest the appointment of a DNA expert due to the complexity of the DNA evidence. However, you should force them to make the required showing. Even denial of requests for DNA experts have been held proper where the defendant failed to make the required showing. SEE State v. Mills, 332 N.C. 392 (1992).

Should the defense move, and be granted an expert, they may also request that their expert be allowed to re-examine the state's scientific evidence. They will generally be entitled to re-examine the state's evidence provided they follow appropriate safeguards. There is currently no case law defining "appropriate safeguards" (per Bob Farb).

### III. TYPES OF DEFENSE EXAMINATION:

When the defense makes a motion to re-examine the state's evidence, force him to commit to what type of examination he expects to be done. There are two types:

- A. **Re-Analysis:** the defense expert merely examines the State's lab results and findings to verify the State's conclusions and findings. The benefits of this method to the State are numerous:

1. Will only take days to do;

2. Does not require the extensive chain of custody safeguards suggested below, since the re-analysis is done by reviewing case files obtained via court order from the SBI Lab; and,
  3. Is much less expensive.
- B. Re-Testing: the defense expert takes the State's evidence and starts from the beginning doing all the testing again. The disadvantages to the State in this method mirror the advantages of re-analysis:
1. Will often take weeks to do (and months for DNA);
  2. Will require extensive safeguards, as described below; and,
  3. Is much more expensive; and,
  4. Some or all of the the evidence material may have been consumed in earlier testing and unavailable for re-testing.

#### IV. RE-ANALYSIS SAFEGUARDS:

- A. Try to insure a competent defense expert by arguing for a competent defense testing lab (listed below) and beware of the defense "whores."
- B. If you have questions or doubts about the defense expert's competence contact Mark Nelson at the SBI Lab at 1-919-662-4500 ext. 527;
- C. Have the analysis conducted in the defense lab, since the SBI will not allow the defense expert in the SBI lab and do not wish to meet with them;
- D. Contact the SBI Lab ASAP after you learn of the defense request so that the Lab can begin preparing for discovery and obtaining information on the expert for you; and,
- E. ~~Prepare to cross-examine him as you would the mental health expert:~~ get his resume, research his background, contact the Conference of District Attorney's to see if they have anything on the expert in their files, make arrangements with your SBI expert to sit with you during the defense expert's testimony and aid you on cross examination, and finally, try to get copies of his prior

transcripts to review before trial sometimes they contradict themselves.

#### V. RE-TESTING SAFEGUARDS:

##### A. CHOOSE A REPUTABLE LAB the best ones are:

1. Roche Biomedical Labs (in North Carolina);
- ~~2. Genetic Design (in North Carolina); and,~~
3. CellMark Labs (in Maryland).

##### B. SBI LAB POLICY:

The SBI Lab, as part of its standard operating procedure, will divide all material left after their analysis and retain half of the material and any extracted DNA. The other half and the original evidence packages will be sent back to the submitting agencies.

##### C. PRESERVATION OF THE CHAIN OF CUSTODY:

1. Obtain a list from the defense laboratory on what evidence they will need to conduct their test.
2. Contact the SBI Lab ASAP after you learn of the defense request so that the Lab can begin preparing for discovery and obtaining information on the expert for you; and,
3. Contact the SBI Lab to see what if any evidence they have retained on file and what may have been sent back to the submitting agency.
4. If possible, only submit the items in the custody of the submitting agency to the testing lab - not the ones in the SBI lab's custody. This will at least preserve the chain on the items tested and in the SBI's possession.

5. Have the investigating officer (or evidence custodian) transport the evidence package(s) to the defense lab.
6. Have the defense laboratory sign the chain of custody form.
7. Have the defense laboratory and the submitting officer to date and initial the outer package and note that it was sealed at the time it was received at the defense laboratory.
8. Open the outer package and date and initial all the inside packages - noting on the inner packages that they were received in a sealed condition.
9. The officer should then open each package containing material ONE AT A TIME and have the defense expert to re-package the evidence in his own containers. This will allow the SBI expert to identify the packaging containers that he returned the evidence in should the defense expert loose them. Or, in the alternative, obtain a CONCRETE STIPULATION from the defense that they will not question the Chain of Custody during the trial.
10. The officer should reseal each of the original containers and initial it.
11. The officer, and defense expert, should initial the defense packages.
12. The officer should document what items were delivered and turned over to the defense lab.
13. The officer should then return the original packages to the evidence room to await trial.
14. Have the defense laboratory ordered to maintain a chain of custody form/listing on the evidence.

15. Have the defense laboratory ordered to return any remaining evidence to the evidence custodian or agency via first class mail or to call them to pick it up.
16. Upon return of the evidence the officer should, with a witness, open and document what items were returned, compare this to the list of items left at the defense lab and re-seal them.

#### D. OBTAIN DEFENSE DISCOVERY

1. The defense lab should be ordered to return the following with the evidence; however, if you cannot get this in the original order, then seek it specifically through reciprocal discovery:
  - a. Chain of custody list including addresses and phone numbers;
  - b. Any lab reports and findings; and,
  - c. Listing of tests done, procedures used, copies of all lab notes, and resumes of lab testing personnel.
  - d. In DNA testing, the SBI lab will be asked to turn over the following, so you should specifically request the defense do the same:
    - 1) All notes made during and subsequent to the DNA testing;
    - 2) Xerox copies of the photographs of the gels;
    - 3) Computer sizing results (a printout showing each band size and a video printout of each autorad with computer generated size markers);
    - 4) A copy of the laboratory report;
    - 5) A copy of the database used in the particular case, including the bin frequencies for each locus for each race;

- 6) A copy of the population frequency calculations, including the final frequencies;
  - 7) A list of critical materials, including the probes utilized in the particular case and their lot number;
  - 8) A copy of the sizing measurements of any controls run on each case, showing the acceptable ranges and a certification that the controls fall within the required ranges;
  - 9) Duplicate photographic copies of the autorads used in the interpretation of the particular case; and,
  - 10) Such other evidence, material or data in the possession of the defense lab which is necessary to a complete independent scientific review.
2. Reciprocal Discovery: If the Court should refuse to order in the original Order that the items listed in 1. above be provided, then a specific reciprocal discovery motion should immediately be prepared and served on the defense counsel citing N.C.G.S. 15A-905 and 907, and, State v. Cunningham, 108 N.C. App. 185 (1992).

CAUTION: You are only entitled to a disclosure of reports intended to be introduced at trial or to reports relating to the testimony of an expert whom the defendant intends to call at trial. N.C.G.S. 15A-905(b) and State v. White, 331 N.C. 604 (1992). However, hold the defendant's feet to the fire, since he can be deciding whether he will introduce it until the time he offers it into evidence and you will not have any time for your expert to examine the expert's testing procedures or results.

3. Subpoena Duces Tecum: Subpoena the expert and specifically ask that a list of all his fees be listed for the year and his career. This will help to

show his bias, interest, prejudice and predisposition. Then, contact the Administrative Office of Courts and request the same information from them for the expert. This will allow you to compare the two lists AND to judge the witness' honesty and truthfulness.

E. STATE'S RE-ANALYSIS:

Carry all of the material listed above, if turned over by the defense laboratory, back to your expert and ask him to do a re-analysis of the defense testing. This will give you good information to use in cross-examination. Also, give your expert plenty of notice so that he can plan to be available during the defense testimony and aid you in cross examination.

*WITH SPECIAL THANKS TO:*

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