Chapter 11

Retaining and Working with Expert Consultants and Potential Expert Witnesses

§ 11.01 DECIDING WHETHER TO RETAIN AN EXPERT

§ 11.01(a) The Wide Range of Possible Experts to Consider in a Juvenile Delinquency Case

There is a host of types of expert witnesses that may be useful in a delinquency case. For some examples, see § 11.03 *infra*. Some of the most commonly used are:

1. Fingerprint examiners;
2. Ballistics experts;
3. Narcotics and drug experts;
4. A variety of mental health experts, including psychiatrists, psychologists, and neurologists (see §§ 12.08-12.10 *infra*);
5. Handwriting experts and questioned-document examiners;
6. Arson experts;
7. Shoeprint/tiretread experts;
8. Polygraph examiners;
9. Serologists;
10. Forensic pathologists;
11. Hair and fiber examiners;
12. DNA experts;
13. Experts on eyewitness identifications (*see, e.g.*, *State v. Guilbert*, 306 Conn. 218, 221, 251-58, 49 A.3d 705, 712, 731-35 (2012); *People v. Lerma*, 2016 IL 118496, at *6-*7, 47 N.E.3d 985, 992-93, 400 Ill. Dec. 20, 27-28 (2016); *State v. Henderson*, 208 N.J. 208, 283-85, 289, 297-98, 27 A.3d 872, 916-17, 920, 925 (2011); *People v. Santiago*, 17 N.Y.3d 661, 672-73, 958 N.E.2d 874, 883-84, 934 N.Y.S.2d 746, 754-55 (2011); *Commonwealth v. Walker*, 625 Pa. 450, 492-95, 92 A.3d 766, 791-93 (2012)); and
14. Experts on the factors that can produce a false confession (*see* Laura Nirider, Deborah Davis & Richard A. Leo, *Interrogative Susceptibility*, in DEMOSTHENES LORANDOS, ed., THE LITIGATOR'S HANDBOOK OF FORENSIC MEDICINE, PSYCHOLOGY AND PSYCHIATRY (2021); Bryan L. Cutler, Jeffrey S. Neuschatz & Charles R. Honts, *An Overview of Expert Psychological Testimony in False Confession Cases*, 44-JUN THE CHAMPION 30 (2020); *and see, e.g.*, *People v. Bedessie*, 19 N.Y.3d 147, 149, 161, 970 N.E.2d 380, 381, 388-89, 947 N.Y.S.2d 357, 358, 365-66 (2012); *State v. Perea*, 2013 UT 68, 322 P.3d 624, 638-44 (Utah 2013)).

The list of potential experts is limited only by the reach of counsel's imagination. For example,

counsel could end up using an automobile accident reconstruction expert (to explain the sequence of events in a vehicular homicide prosecution), an odontologist (to testify in an identification case that many youths other than the respondent possess gaps in their teeth that match those observed in the perpetrator), or even an arborist (to testify that the foliage on the tree at the scene and time of the crime would have been so full as to obstruct the purported eyewitness's view).

§ 11.01(b) The Wide Range of Possible Functions for a Defense Expert in a Juvenile Delinquency Case

An expert can assist defense counsel in a variety of ways that go far beyond the traditional conception of an expert witness testifying at a pretrial hearing or trial. In any case in which the prosecution is relying on scientific evidence of any sort – a medical examiner's or pathologist's report; a fire marshal's findings; testing of materials from the crime scene (DNA, blood typing, fingerprints, ballistics, hair, fibers, whatever); chemical analyses of narcotics and toxins; handwriting analyses; the testimony of accountants or other experts in business practices; reconstruction, amplification, and enhancement of surveillance recordings – an expert consultant can play a vital role in helping defense counsel develop a theory of the case; determine what portions of the prosecution's case to attack; plan the defense investigation; decide what pretrial motions to file and what claims to raise in them; assess the viability of various strategies for the pretrial hearings and the trial; and prepare to cross-examine the prosecution expert(s) by teaching counsel what s/he needs to know about the field, providing names of foundational texts for counsel to consult and possibly use in cross-examination, and critically reviewing the opposing expert's report so that counsel will know what should be attacked and what should not. The defense consultant can also sit with counsel in court during the prosecution expert's testimony and provide counsel with on-the-spot assistance in handling any portions of the witness's direct examination that were unexpected and any problematic responses by the prosecution expert to cross-examination questions. *See, e.g.*, *McWilliams v. Dunn*, 137 S. Ct. 1790, 1800-01 (2017) (discussed in § 11.03(a) *infra*) (the federal constitutional view of the role of a defense mental health expert envisions assistance to defense counsel in "'*evaluation*, . . . *preparation*, and . . . *presentation* of the defense'"; "help[ing] the defense evaluate . . .[a pretrial report submitted to the court by a state department of mental health neuropsychologist and the defendant's] extensive medical records and translate these data into a legal strategy"; "help[ing] the defense prepare and present arguments that might, for example, have explained that . . . [the defendant's] purported malingering was not necessarily inconsistent with mental illness"; and "help[ing] the defense prepare direct or cross-examination of . . . witnesses," as well as testifying if appropriate.)

As the Supreme Court recognized in *Hinton v. Alabama*, 571 U.S. 263, 273-74 (2014) (per curiam), "'Criminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence.'" (*Hinton* "was such a case. As Hinton's trial attorney recognized, the core of the prosecution's case was the state experts' conclusion that the six bullets had been fired from the Hinton revolver, and effectively rebutting that case required a competent expert on the defense side. Hinton's attorney also recognized that

Payne was not a good expert, at least with respect to toolmark evidence. Nonetheless, he felt he was 'stuck' with Payne because he could not find a better expert willing to work for $1,000 and he believed that he was unable to obtain more than $1,000 to cover expert fees. . . . ¶ The trial attorney's failure to request additional funding in order to replace an expert he knew to be inadequate because he mistakenly believed that he had received all he could get under Alabama law constituted deficient performance." *Id*.). *See also*, *e.g.*, *Dendel' v. Washington*, 647 Fed. Appx. 612, 615 (6th Cir. 2016) (per curiam) ("We have made clear that an attorney cannot hire an expert, give him whatever evidence he happens to have on hand (but not the evidence the client pointed to) and accept the report without further discussion. . . . A reliance on uncorroborated evidence dealing with a material issue, such as the cause of death in a murder trial, constitutes as [sic] deficient performance."; trial counsel was ineffective because he "did not present any evidence of an independent investigation. . . . [H]e spoke to a friend, Dr. Burgess, and asked for a referral who could provide insight into the cause of Burley's death . . . . [T]he referral, Dr. Halsey . . . was not given any of Burley's medical records to review, yet he agreed with the prosecution's medical expert's opinion on the cause of death based on one phone conversation with trial counsel. Without attempting to corroborate Dr. Halsey's opinion by later providing him with Burley's medical records, trial counsel decided that investigating further into the cause of death was unnecessary."); *Thomas v. Clements*, 789 F.3d 760, 769 (7th Cir. 2015) ("Counsel knew or should have known that the state was going to use . . . [Coroner and Medical Examiner] Mainland's testimony to show Thomas acted intentionally based on Dr. Mainland's pretrial testimony. . . . ¶ Counsel also knew his client had said the death was unintentional and the result of what counsel later referred to as horseplay. Counsel knew there were no external marks on Oliver-Thomas's neck and no signs of any fight or struggle between Thomas and Oliver-Thomas. Counsel should have known there was reason to question a finding of intentional homicide. Based on those facts, a reasonable counsel would have at least reached out to a pathologist to see if the medical findings could be reconciled with Thomas's versions of the events. To not even contact an expert, however, was to accept Dr. Mainland's finding of intentional death without challenge and basically doom defense's theory of the case."); *Rogers v. Dzurenda*, 25 F.4th 1171, 1186 (9th Cir. 2022) (finding capital defense counsel ineffective because of numerous failings in the investigation and presentation of a NGI defense, including failure to consult a psychiatrist who had been court-appointed to assess the defendant's competency to stand trial and sanity at the time of the crime, failure to prepare adequately the defense experts whom she did consult and call to testify, and failure to work with defense experts to develop a rebuttal to the predictable testimony of the prosecution's mental health expert); *Gersten v. Senkowski*, 426 F.3d 588, 607 (2d Cir. 2005) ("[i]n sexual abuse cases, because of the centrality of medical testimony, the failure to consult with or call a medical expert is often indicative of ineffective assistance of counsel"); *State v. Denz*, 232 Ariz. 441, 447, 306 P.3d 98, 104 (Ariz. App. 2013) ("The state's medical evidence was the cornerstone of its case against Denz: that the particular injuries the infant suffered could only have resulted from events inconsistent with Denz's version of events. Counsel here expressed a belief that he could, by cross-examining the state's experts, pursue an alternative defense that the infant's injuries had been accidental. But he acknowledged he had only limited experience with medical testimony and with child abuse cases in general. Rather than seeking the advice of an independent expert,

counsel chose not to pursue any further investigation of the state's medical evidence. In sum, despite its strategic gloss, counsel's decision to not consult with an expert before settling on a defense strategy cannot qualify as a reasoned decision; it therefore fell below prevailing professional norms."); *Landry v. State*, 2016 UT App 164, 380 P.3d 25, 35 (Utah App. 2016) (in an aggravated arson prosecution, "trial counsel's failure to engage an [arson] expert of her own, at least to advise and possibly to testify, was . . . objectively unreasonable"); *State v. Whittaker*, 158 N.H. 762, 973 A.2d 299, 310 (2009) (in a negligent homicide prosecution, "the decision of the defendant's trial counsel not to consult with an accident reconstruction expert was constitutionally defective performance"); *In re Long*, 10 Cal. 5th 764, 476 P.3d 662, 272 Cal. Rptr. 3d 33 (2020) (in a murder case in which the defendant might have established an alibi for the time of the killing, defense counsel's failure to consult an adequately qualified time-of-death expert constituted ineffective assistance of counsel); *Anderson v. United States*, 981 F.3d 565 (7th Cir. 2020) (in a case in which the applicability of a sentencing enhancement depended on the source of the heroin that caused a victim's death, postconviction allegations that defense counsel failed to consult a toxicologist stated an ineffective-assistance-of-counsel claim); *Chester v. Vannoy*, 2018 WL 2970912 (E.D. La. June 11, 2018); *cf. Workman v. Superintendent Albion SCI*, 915 F.3d 928, 942 (3d Cir. 2019).

Indeed, given the extensively documented flaws in forensic-science evidence customarily used by prosecutors in criminal and juvenile delinquency trials (see § 31.09 *infra*), counsel should consider retaining an expert consultant in any case in which the prosecution is expected to rely on forensic evidence, even if the forensic reports appear unchallengeable to counsel's untrained eye. Stephen A. Saltzburg, *The Duty to Investigate and the Availability of Expert Witnesses*, 86 FORDHAM L. REV. 1709, 1719-26 (2018). *See, e.g.*, *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 318 (2009) ("Nor is it evident that what respondent [the state] calls 'neutral scientific testing' is as neutral or as reliable as respondent suggests. Forensic evidence is not uniquely immune from the risk of manipulation. According to a recent study conducted under the auspices of the National Academy of Sciences, '[t]he majority of [laboratories producing forensic evidence] are administered by law enforcement agencies, such as police departments, where the laboratory administrator reports to the head of the agency.' National Research Council of the National Academies, Strengthening Forensic Science in the United States: A Path Forward 6-1 (Prepublication Copy Feb. 2009) . . . . And '[b]ecause forensic scientists often are driven in their work by a need to answer a particular question related to the issues of a particular case, they sometimes face pressure to sacrifice appropriate methodology for the sake of expediency.' *Id*., at S-17. A forensic analyst responding to a request from a law enforcement official may feel pressure – or have an incentive – to alter the evidence in a manner favorable to the prosecution. ¶ . . . Serious deficiencies have been found in the forensic evidence used in criminal trials. One commentator asserts that '[t]he legal community now concedes, with varying degrees of urgency, that our system produces erroneous convictions based on discredited forensics.' Metzger, *Cheating the Constitution*, 59 Vand. L.Rev. 475, 491 (2006). One study of cases in which exonerating evidence resulted in the overturning of criminal convictions concluded that invalid forensic testimony contributed to the convictions in 60% of the cases. Garrett & Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 Va. L.Rev. 1, 14 (2009)."); Alex

Kozinski, *Criminal Law 2.0*, 44 GEO. L.J. ANN. REV. CRIM. PROC. v, vi (2016) ("fields of forensic expertise, long accepted by the courts as largely infallible, such as bloodstain pattern identification, foot and tire print identification and ballistics have been the subject of considerable doubt"; "Some fields of forensic expertise are built on nothing but guesswork and false common sense. . . . Many defendants have been convicted and spent countless years in prison based on evidence by arson experts who were later shown to be little better than witch doctors."; "As numerous scandals involving DNA testing labs have shown, . . . DNA evidence is only as good as the weakest link in the chain.").

Counsel's consideration of the need for an expert consultant and/or expert witness should not be limited to cases in which the prosecution is relying on scientific evidence. In many cases in which the prosecution will rely exclusively on lay evidence, the best defense strategy may be to bring in an expert consultant to help counsel prepare for trial and/or an expert witness to testify at trial. A common example of this is a run-of-the-mill eyewitness identification case in which the prosecution's proof at trial will consist exclusively or primarily of the complainant's account of the crime along with an in-court identification of the respondent by the complainant. A social scientist in the field of eyewitness identification can educate counsel about the many sorts of problems that may infect an identification (*see generally* NATIONAL RESEARCH COUNCIL OF THE NATIONAL ACADEMIES, IDENTIFYING THE CULPRIT: ASSESSING EYEWITNESS IDENTIFICATION (National Academies Press 2014), and the other sources listed in § 25.03 *supra*), and help counsel use this understanding to develop a theory of the case, plan the investigation, prepare to cross-examine the complainant, and sit by counsel's side in court to assist counsel by identifying responses of the complainant on direct, cross, or redirect that suggest problems or opportunities which counsel might otherwise have overlooked. The consultant can also advise counsel whether the case is one that would benefit from presentation of an eyewitness identification expert witness at trial or a pretrial hearing. Whereas the courts were once reluctant to allow expert witness testimony in such cases, and that is still true in some States, the situation has changed considerably and there is now extensive caselaw and social scientific data that counsel can cite to persuade a recalcitrant judge to allow a defense expert to testify. *See, e.g.*, *People v. Lerma*, 2016 IL 118496, at *6, 47 N.E.3d 985, 992-93, 400 Ill. Dec. 20, 27-28 (2016) ("The last time this court addressed the admission of . . . [expert] testimony [on "the reliability of eyewitness identifications"] . . . was in [*People v.*] *Enis*, which was decided more than 25 years ago when the relevant research was in its relative infancy. . . . The decades since *Enis*, however, have seen a dramatic shift in the legal landscape, as expert testimony concerning the reliability of eyewitness testimony has moved from novel and uncertain to settled and widely accepted. Indeed, as the Supreme Court of Pennsylvania recently noted, there is now 'a clear trend among state and federal courts permitting the admission of eyewitness expert testimony, at the discretion of the trial court, for the purpose of aiding the trier of fact in understanding the characteristics of eyewitness identification.' *Commonwealth v. Walker*, 625 Pa. 450, 92 A.3d 766, 782-83 (Pa.2014) (collecting demonstrative cases from 44 states, the District of Columbia, and 10 federal circuit courts). The reason for this trend is that, although findings of the sort described in Dr. Fulero's and Dr. Loftus's reports are now 'widely accepted by scientists,' those same findings 'are largely unfamiliar to the average person, and, in fact, many of the findings are

counterintuitive.' *State v. Guilbert*, 306 Conn. 218, 49 A.3d 705, 723-24 (Conn.2012) (collecting cases and studies demonstrating this point). . . . In other words, in the 25 years since *Enis*, we not only have seen that eyewitness identifications are not always as reliable as they appear, but we also have learned, from a scientific standpoint, why this is often the case. Accordingly, whereas *Enis* allowed for but expressed caution toward the developing research concerning eyewitness identifications, today we are able to recognize that such research is well settled, well supported, and in appropriate cases a perfectly proper subject for expert testimony.").

There are numerous other kinds of cases in which an expert consultant could assist counsel in preparing for and conducting a pretrial hearing and/or the trial, and/or in which it may be advisable to present an expert witness at a pretrial hearing or a trial. *See, e.g.*, *Williams v. Martin*, 618 F.2d 1021 (4th Cir. 1980) (requiring the provision of a state-paid independent pathologist to an indigent defendant charged with homicide when the cause of death is debatable and medically complicated); *Jones v. Sterling*, 210 Ariz. 308, 314-15, 110 P.3d 1271, 1277-78 (2005) (requiring provision of an expert to assist in the development of a selective-prosecution defense when the defendant has presented a credible preliminary showing of discrimination); *Jacobson v. Anderson*, 203 Ariz. 543, 57 P.3d 733 (Ariz. App. 2002) (a defendant in a prosecution for vehicular manslaughter and reckless endangerment is entitled to necessary funding for an accident reconstructionist and a criminalist); and cognate cases collected in § 11.03(a) *infra*. *See also*, *e.g.*, *Weeden v. Johnson*, 854 F.3d 1063, 1070-71 (9th Cir. 2017) (defense counsel deprived his 14-year-old client of effective assistance of counsel in a felony murder case by failing to seek a psychological evaluation of the client to examine whether her young age and cognitive deficits prevented her from forming the requisite *mens rea*); *Commonwealth v. Richards*, 485 Mass. 896, 906, 153 N.E.3d 1226, 1241 (2020) ("it was manifestly unreasonable for trial counsel not to retain a medical expert to help him understand the effects of the defendant's medications and physical pain on the voluntariness of his statements or the knowing and voluntary nature of his *Miranda* waivers"); *People v. Sotelo-Urena*, 4 Cal. App. 5th 732, 736-37, 209 Cal. Rptr. 3d 259, 262 (2016) (the trial court's "exclusion of the [defense] expert testimony was an abuse of discretion and deprived [the defendant] . . . of his constitutional right to present a complete defense"; the defendant, "who was homeless," should have been permitted to support his claim of self-defense with expert testimony that "homeless individuals are the victims of crime at a significantly higher rate than housed individuals" and "that as a result of this higher rate of victimization, homeless individuals experience a heightened sensitivity to perceived threats of violence"). Once counsel opens his or her mind to the possibility of using an expert, and begins to think about what an expert might do in a particular case, counsel will often spot a broad array of possibilities. Judicial receptivity to defense expert testimony and judicial willingness to authorize funding for expert assistance in indigents' cases can be expected to incease in the wake of the United States Supreme Court's conspicuous declaration in *Hinton v. Alabama*, 571 U.S. 263, 273 (2014) (per curiam) that "'Criminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence.'"

§ 11.02 SELECTING AN EXPERT

Most scientific fields have numerous sub-specialties. In selecting an expert, counsel first needs to become sufficiently familiar with the scientific issues presented by the case to know what type of specialist is needed. Counsel will usually want to consult defense experts and other authorities in the general field and ask them about sub-specialization. If the prosecution is relying on forensic experts, counsel should ordinarily interview them as well. *See Dunn v. Jess,* 981 F.3d 582 (7th Cir. 2020). Many experts, even those employed by the police and law enforcement agencies (like pathologists, toxicologists, fingerprint and ballistics examiners), view themselves as (or will be receptive to an approach by counsel that characterizes them as) neutral and concerned solely with the scientific facts. They will therefore often prove amenable to discussing their findings and the scientific theories underlying their findings with defense counsel. (Some will need to be informed or reminded that they are legally forbidden obey any instructions they have received from the police or prosecutors not to talk with defense counsel (see § 8.13 *supra*); many will not.) In the course of these discussions, counsel can become moderately educated in the relevant scientific field. Such discussions with the opposing experts also will often provide information that counsel can use in justifying to the judge the need for court appointment or compensation of a defense expert (see § 11.03 *infra*) and in preparing to cross-examine the prosecution's experts. Obtaining a prosecution expert's c.v. may well assist counsel to identify the particular field of sub-specialization implicated by the prosecution's case. (Or it may, conversely, provide information which defense counsel can use – after consultation with a defense expert – to show that the prosecution expert lacks training in the most germane sub-specialty.)

Once counsel knows enough to identify the specialty or sub-specialty relevant to the case, the next task is to gather a list of experts in that field and to develop a set of preferences. Local experts are preferable, as long as they have the requisite expertise and credentials, since they will be most readily available on a flexible schedule for pretrial consultations and – if they end up testifying – easiest to book for the dates of any relevant pretrial hearings and of trial. It is also a relevant consideration that, if counsel does decide to put the consulting expert on the stand at trial, juries (particularly in non-cosmopolitan areas) tend to favor local experts.

In gathering the names of potential experts and ranking them, counsel should consult: other defense attorneys who have used such experts (some public defender's offices have compiled lists of local and national experts); experts in the field or related fields whom counsel has reason to trust on the basis of his or her own or other defense attorneys' prior experience; and faculty members in the relevant departments of the state university, private universities, and community colleges. If the first expert whom counsel chooses to consult expresses an unfavorable or even incriminating opinion but there is reason to doubt it, counsel is free – and, under some circumstances, obliged – to obtain the advice of another expert. *See State v. Roseborough*, 2010-Ohio-1832, 2010 WL 1694531 (Ohio App. April 23, 2010). An expert's advice to consult a specialist for additional testing should always be followed up. *See e.g.*, *Pruitt v. Neal*, 788 F.3d 248, 252, 272 (7th Cir. 2015) ("[T]he defense's own expert [psychologist,] Dr. Olvera ["who had been retained by trial counsel to conduct IQ testing of Pruitt but had not

testified at trial"] had recommended that counsel contact an expert 'in dealing with psychosis, such as schizophrenia.' But trial counsel did not contact such an expert to have Pruitt evaluated, and counsel offered no reason for failing to do so. ¶ . . . [A] reasonably competent attorney would have realized that investigating Pruitt's mental health further was necessary to prove the defense. It was unreasonable for counsel to fail to contact an expert in psychosis . . . ."); *Bemore v. Chappell*, 788 F.3d 1151, 1171 (9th Cir. 2015); *Jefferson v. GDCP Warden*, 941 F.3d 452 (11th Cir. 2019); *United States v. Runyon*, 994 F.3d 192, 208 (4th Cir. 2021).

Additional considerations involved in selecting a mental health expert, such as a psychiatrist, psychologist, or neurologist, are discussed in § 12.10 *infra*.

The qualities that counsel seeks in an expert may vary depending on whether counsel plans to use the expert as a consultant, a witness, or both. Obviously, a central consideration in selecting a potential expert witness is how s/he will come across in court to the jury and/or to a judge in a pretrial hearing or a bench trial. For an expert consultant, counsel will be primarily concerned with the expert's capacity to handle the specific functions for which s/he will be needed, and probably also with how good a team player the expert is likely to be when working with counsel and other members of the defense team.

§ 11.03 OBTAINING STATE FUNDING FOR THE EXPERT WHEN THE CLIENT IS INDIGENT

§ 11.03(a) Constitutional Rights to State-Paid Expert Assistance

In *Ake v. Oklahoma,* 470 U.S. 68 (1985), the Court held that the "Fourteenth Amendment's due process guarantee of fundamental fairness" (*id.* at 76) requires that the State supply an indigent criminal defendant with the "'basic tools of an adequate defense"' (*id.* at 77, quoting *Britt v. North Carolina,* 404 U.S. 226, 227 (1971)), including, in appropriate cases, state funds for expert witnesses. *Accord*, *McWilliams v. Dunn*, 137 S. Ct. 1790 (2017) ("Our decision in *Ake v. Oklahoma* . . . clearly established that, when certain threshold criteria are met, the State must provide an indigent defendant with access to a mental health expert who is sufficiently available to the defense and independent from the prosecution to effectively 'assist in evaluation, preparation, and presentation of the defense.'" (*id*. at 1793); "Unless a defendant is 'assure[d]' the assistance of someone who can effectively perform these functions, he has not received the 'minimum' to which *Ake* entitles him." (*id*. at 1794)); *Conley v. Commonwealth*, 599 S.W.3d 756 (Ky. 2019); *Beshears v. State*, 254 So.3d 1133 (Fla. App. 2018) (applying *Ake* to require the appointment of an expert to assist an indigent defendant in investigating a potential defense of temporary insanity caused by his prescription medication).

The defendant in *Ake* had requested, and was denied, state funds to hire a private psychiatrist. The Court began by explaining that the question of whether an expert constitutes a "'basic tool of an adequate defense"' (470 U.S. at 77), so as to activate a due process right to state-paid expert assistance, must be determined in accordance with the three-pronged balancing

test of *Mathews v. Eldridge,* 424 U.S. 319, 335 (1976), which considers: (i) the "private interest that will be affected by the action of the State"; (ii) "the governmental interest that will be affected if the safeguard is to be provided"; and (iii) "the probable value of the additional or substitute procedural safeguards that are sought, and the risk of an erroneous deprivation of the affected interest if those safeguards are not provided." *Ake,* 470 U.S. at 77. See also §§ 13.06(a), 38.09 *infra*. The Court easily resolved the first two considerations in Ake's favor, finding that a defendant's "private interest in the accuracy of a criminal proceeding that places [his or her] . . . life or liberty at risk is almost uniquely compelling," *Ake*, 470 U.S. at 78, and that the State's financial interest in avoiding payment of a defense psychiatrist was "not substantial," especially "in light of the compelling interest of both the State and the individual in accurate dispositions," *id.* at 79. In applying the third consideration, the Court focused upon "the pivotal role that psychiatry has come to play in criminal proceedings," *id.* at 79, and the value of psychiatric testimony in enhancing "the potential accuracy of the jury's determination," *id.* at 83, and concluded that:

> when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.

Id. at 83. Since Ake had satisfied these criteria and had shown psychiatric testimony to be a significant factor both at trial and sentencing, the Court held that the denial of a state-supplied psychiatrist violated due process.

Ake was a capital case, and Chief Justice Burger, concurring in the judgment, would have limited its holding to capital cases. *Id.* at 87 (Burger, C.J., concurring); *see also id*. (Rehnquist, J., dissenting). But the majority opinion is worded broadly to encompass both capital and noncapital cases. Moreover, the Court identified the interest in state-paid expert assistance as being "compelling" whenever an individual's "life or liberty" is at stake. *Id.* at 78. Accordingly, the lower courts in most States have applied *Ake's* due process doctrine to noncapital cases. *See, e.g.*, *Cowley v. Stricklin*, 929 F.2d 640 (11th Cir. 1991); *Little v. Armontrout*, 835 F.2d 1240 (8th Cir. 1987) (en banc); *Jones v. Sterling*, 210 Ariz. 308, 314-15, 110 P.3d 1271, 1277-78 (2005); *In re Allen R.,* 127 N.H. 718, 721-22, 506 A.2d 329, 331-32 (1986) (respondent in delinquency case had federal and state constitutional right to state-paid psychologist to testify at confession suppression hearing). *See generally* Donna H. Lee, Note, *In the Wake of* Ake v. Oklahoma*: An Indigent Criminal Defendant's Lack of Ex Parte Access to Expert Services*, 67 N.Y.U. L. REV. 154, 170-71 n.122 (1992).

Although *Ake* itself dealt only with psychiatric experts, the Court's reasoning applies to other kinds of expert assistance as well. The *Ake* decision is grounded upon the State's due process obligation to afford an indigent defendant "access to the raw material integral to the building of an effective defense," 470 U.S. at 77. The same obligation exists whether the necessary "raw material" is a psychiatrist or some other type of expert. "'Criminal cases will

arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence.'" *Hinton v. Alabama*, 571 U.S. 263, 273-74 (2014) (per curiam). In these cases, the state must furnish the necessary funds. *See, e.g.*, *Little v. Armontrout*, 835 F.2d 1240, 1241, 1244-45 (8th Cir. 1987) (en banc) (the trial court violated Due Process by denying the defense's motion for appointment of an "expert in hypnosis" to assist the defense at a pretrial suppression hearing and at trial in challenging the hypnotically enhanced identification of the defendant by the complainant); *Williams v. Martin*, 618 F.2d 1021 (4th Cir. 1980) (requiring the provision of a state-paid independent pathologist to an indigent defendant charged with homicide when the cause of death is debatable and medically complicated); *Cherry v. Estelle*, 507 F.2d 242, 243 (5th Cir. 1975), *subsequent history in* 424 F. Supp. 548 (N.D. Tex. 1976) (impliedly recognizing the right to provision of a state-paid independent ballistics expert under certain circumstances, *see Hoback v. Alabama*, 607 F.2d 680, 682 n.1 (5th Cir. 1979)); *Bowen v. Eyman*, 324 F. Supp. 339 (D. Ariz. 1970) (requiring provision of a state-paid defense expert when the prosecution has failed to conduct potentially exonerating chemical tests); *English v. Missildine*, 311 N.W.2d 292 (Iowa 1980) (requiring funding for a defense handwriting expert and for deposition expenses); *People v. Djurdjulov*, 2017 IL App (1st) 142258, 86 N.E.3d 1139, 416 Ill. Dec. 854 (2017) (reversing a conviction on the ground that the trial court erred under *Ake* by denying the defendant's request for funding to retain an expert to review cell phone data); *People v. Propp*, 508 Mich. 374, 2021 WL 5785265, at *4 (Mich. December 6, 2021) (in a murder case in which the defense requested but was denied funds to retain an expert in erotic asphyxiation to support the defense theory that the victim's death was accidental, the intermediate appellate court erred in affirming the defendant's conviction without evaluating his *Ake* claim under the proper standard: "whether there was a reasonable probability that the expert would have been helpful to the defense and whether the denial of expert assistance rendered the trial fundamentally unfair"); *Brown v. Eighth Judicial District Court in and for County of Clark*, 133 Nev. 916, 921, 415 P.3d 7, 11 (2017) (holding that an indigent defendant facing charges of lewdness with a minor is entitled to funding for an expert "regarding psychological issues involving child testimony, parental influence on that testimony, children's motivations regarding false allegations, and the influences upon a child's accusations in a sexual prosecution" and to "the services of an investigator to serve subpoenas on and obtain statements from witnesses and to investigate the circumstances of the allegations"); *People v. Williams*, 328 Mich. App. 408, 412, 938 N.W.2d 42, 45 (2019) (holding that a defendant at a *Miller v. Alabama* resentencing hearing is entitled to funding for mitigation experts "to analyze the *Miller* factors, including experts with specialized knowledge in adolescent development"); *People v. Orozco*, 210 P.3d 472, 474 (Colo. App. 2009) (reversing a conviction for sexual assault on a minor because the trial judge erred "in denying . . . [the defendant's] motion for funds to hire an expert who would have testified about the likelihood of physical evidence [which was absent] being present if . . . [the minor] was sexually assaulted as he said he was"; the defendant was represented by private counsel retained by his sister, but the sister had become unable to pay counsel, and the defendant himself was indigent); *Jones v. Sterling*, 210 Ariz. at 314-15, 110 P.3d at 1277-78 (requiring provision of an expert to assist in the development of a selective-prosecution defense when the defendant has presented a credible preliminary showing of discrimination); *Jacobson v. Anderson*, 203 Ariz. 543, 57 P.3d 733 (Ariz. App. 2002) (a defendant in a prosecution for vehicular manslaughter and reckless

endangerment is entitled to necessary funding for an accident reconstructionist and a criminalist); *People v. Lawson*, 163 Ill. 2d 187, 206, 218-230, 644 N.E.2d 1172, 1181, 1187-92, 206 Ill. Dec. 119, 134-39 (1994) (the "trial court abused its discretion by denying defendant's motion for expert assistance" of a shoeprint expert "to testify at trial and assist in the preparation of his defense"); *People v. Watson*, 36 Ill. 2d 228, 221 N.E.2d 645 (1966) (requiring provision of a state-paid examiner of questioned documents); *People v. Kennedy*, 502 Mich. 206, 917 N.W.2d 355 (2018), *enforced by granting a new trial*, *People v. Kennedy*, 2020 WL 7089842 (Mich. App. 2020), summarized in § 11.03(b) *infra* (applying *Ake* to a defendant's request for appointment of a state-paid DNA expert); *State v. Moore*, 321 N.C. 327, 328, 331, 343-46, 364 S.E.2d 648, 649-50, 656-58 (1988) (the trial judge erred in denying the defendant's request for appointment of an independent psychiatrist to assist in challenging the voluntariness of his confession, and also erred in denying the defense's request for a fingerprint expert to challenge the "state expert's conclusion that defendant's palm print was found at the scene of the attack"); *Rey v. State*, 897 S.W.2d 333, 335, 346 (Tex. Crim. App. 1995) (the trial judge violated Due Process by denying the defense's motion for the appointment of "an independent forensic pathologist" to "assist in the evaluation, preparation and presentation of his defense"), and cases collected in *id.* at 338 n.4; *Stephen A. Saltzburg, The Duty to Investigate and the Availability of Expert Witnesses*, 86 FORDHAM L. REV. 1709 (2018).

The key to showing that the circumstances of any particular case give rise to an entitlement to a particular type of expert is to satisfy the third prong of the *Mathews v. Eldridge* test employed in *Ake* by making an adequate factual demonstration of "the probable value of the additional or substitute procedural safeguards that are sought, and the risk of an erroneous deprivation of the affected interest if those safeguards are not provided." *Ake*, 470 U.S. at 77. Counsel will need to show that the scientific test that the expert can perform "is likely to be a significant factor in [the respondent's] . . . defense [and that] with such assistance, the [respondent] . . . might have a reasonable chance of success." *Id.* at 82-83. *Compare Caldwell v. Mississippi*, 472 U.S. 320, 323 n.1 (1985) (finding no violation of due process in the denial of funds for defense experts where an indigent defendant "offered little more than undeveloped assertions that the requested assistance would be beneficial"). The procedures for making such a showing in an individual case are discussed in § 11.03(b) *infra*.

Because the Court in *Ake* "conclude[d] that the Due Process Clause guaranteed to Ake the assistance he requested and was denied, [the Court had] . . . no occasion to consider the applicability of the Equal Protection Clause, or the Sixth Amendment" to the issue of state-paid expert assistance. 470 U.S. at 87 n.13. Counsel can, and should, couple an *Ake* due process claim with: (i) an argument that the Equal Protection Clause guarantees the respondent the same defensive resources that a nonindigent respondent could purchase and that are necessary "to assure . . . an adequate opportunity to present his [or her] claims fairly in the context of the State's [delinquency] . . . process," *Ross v. Moffitt,* 417 U.S. 600, 616 (1974) (dictum); *see, e.g., Williams v. Martin,* 618 F.2d at 1025-27; *cf. Griffin v. Illinois,* 351 U.S. 12 (1956); and (ii) an argument that the Sixth Amendment right to compulsory process of witnesses affords an indigent respondent the right to a state-paid expert witness, *see, e.g., People v. Watson,* 36 Ill. 2d at 232-

34, 221 N.E.2d at 648-49. While these doctrines have not as yet been extensively developed, counsel may be able to argue that they support a broader right to state-paid assistance than the due process doctrine established in *Ake* and therefore afford a right to an expert even when the facts do not bring a case within the *Ake* doctrine.

McWilliams v. Dunn, *supra*, raised the question whether "a State must provide an indigent defendant with a qualified mental health expert retained specifically for the defense team, not a neutral expert available to both parties" (137 S. Ct. at 1799), but the Court left that question unresolved (*id*. at 1799-1800). It upheld McWilliams' right to a state-paid mental health expert on the narrower ground that "*Ake* clearly established that a defendant must receive the assistance of a mental health expert who is sufficiently available to the defense and independent from the prosecution to effectively 'assist in evaluation, preparation, and presentation of the defense'" (*id*. at 1793) and that the trial court's order requiring "Dr. John Goff, a neuropsychologist employed by the State's Department of Mental Health" to examine McWilliams "'in order to have the test results available for his sentencing hearing'" (*id*. at 1795) did not provide the requisite assistance.

> "We are willing to assume that Alabama met the *examination* portion of this requirement by providing for Dr. Goff's examination of McWilliams. . . . But what about the other three parts? Neither Dr. Goff nor any other expert helped the defense evaluate Goff's report or McWilliams' extensive medical records and translate these data into a legal strategy. Neither Dr. Goff nor any other expert helped the defense prepare and present arguments that might, for example, have explained that McWilliams' purported malingering was not necessarily inconsistent with mental illness (as an expert later testified in postconviction proceedings . . .). Neither Dr. Goff nor any other expert helped the defense prepare direct or cross-examination of any witnesses, or testified at the judicial sentencing hearing himself." (*Id*. at 1800-01.)

Despite the Court's "unwillingness to resolve the broader question whether *Ake* clearly established a right to an expert independent from the prosecution" (*id*. at 1800), defense counsel should feel comfortable in arguing that the answer to that question is, yes. Two aspects of *McWilliams* support this answer. First, the Court notes that McWilliams' brief "points to language in *Ake* that seems to foresee that consequence. See, *e.g.*, 470 U.S., at 81, 105 S. Ct. 1087 ('By organizing a defendant's mental history, examination results and behavior, and other information, interpreting it in light of their expertise, and then laying out their investigative and analytic process to the jury, *the psychiatrists for each party* enable the jury to make its most accurate determination of the truth on the issue before them' (emphasis added))" (*id*. at 1799). Second, *McWilliams* came to the Court in a federal habeas corpus posture, so the issue presented was not whether *Ake* requires the appointment of an independent defense expert but, rather, whether *Ake* so "clearly established" that requirement as to make it enforceable in collateral-attack proceedings governed by 28 U.S.C. § 2254(d) [see § 39.03(b) *infra*]. Under the Supreme Court's § 2254(d) jurisprudence, a finding that a right is "clearly established" by any given precedent requires a significantly stronger showing than that the right flows logically from the

precedent. *See*, *e.g.*, *Virginia v. LeBlanc*, 137 S. Ct. 1726, 1728-29 (2017). So the defense answer to a prosecutor's predictable argument that *McWilliams* leaves room for the denial of an independent defense expert under *Ake* is "not much room." In any event, counsel should urge trial courts that the appointment of an independent defense expert is the only way in which the federal constitutional requirements of *Ake* and *McWilliams* can be safely or efficiently implemented. The *McWilliams* opinion itself observes that "As a practical matter, the simplest way for a State to meet this [*Ake*] standard may be to provide a qualified expert retained specifically for the defense team. This appears to be the approach that the overwhelming majority of jurisdictions have adopted. See Brief for National Association of Criminal Defense Lawyers et al. as *Amici Curiae* 8-35 (describing practice in capital-active jurisdictions)." *McWilliams*, 137 S. Ct. at 1800. And "as a practical matter," any trial court that seeks to satisfy *Ake* and *McWilliams* by appointing a neutral expert rather than a defense-team expert is engaging in a risky crapshoot. In the ordinary case, the first point in time at which the facts necessary to adjudicate a defense contention that a neutral expert provided less-than-adequate assistance under a *post hoc* record-specific audit of the expert's performance will be the conclusion of the presentation of evidence. In many cases, as in *McWilliams*, such an adjudication will be impossible until after trial, appeals, and initial postconviction proceedings have become past history. (Note the *McWilliams* Court's partial reliance on what "an expert later testified in postconviction proceedings" (*id*.).) At these late stages, the finding of an *Ake-McWilliams* violation will require that the trial be aborted (or the conviction set aside) and a retrial ordered. Trial judges should be responsive to the argument that jeopardizing the finality of the trial they are conducting by failing to take the "simplest," safest step for implementing *Ake* – "to provide a qualified expert retained specifically for the defense team" (*McWilliams*, 137 S. Ct. at 1800) – would be altogether improvident.

§ 11.03(b) Procedures for Obtaining State Funds for an Expert

Many jurisdictions have had procedures for state funding of experts for indigent criminal defendants and delinquency respondents since long before *Ake.* These procedures typically have suffered from either or both of two flaws: (i) they establish a ceiling, or maximum amount, of state funding in an individual case; or (ii) they require that defense counsel demonstrate the need for an expert by setting forth facts in a motion that is available to the prosecution and alerts the prosecutor to defense strategy. Counsel can challenge both of these defects under *Ake.* The due process right to state-paid expert assistance established in *Ake* cannot be restricted by financial considerations. The Court specifically held that "where the potential accuracy of the [factfinder's] determination is . . . dramatically enhanced [by the expert's testimony], and where the interests of the individual and the State in an accurate proceeding are substantial, the State's interest in its fisc must yield." 470 U.S. at 83. And the *Ake* decision explicitly assumes that the defense will be permitted to make showings in support of state-funded experts by *ex parte* proceedings. *See id.* at 82-83 (explaining that the due process right will be activated when the defense "make[s] an ex parte threshold showing to the trial court"). *See, e.g.*, *Andrews v. State*, 243 So.3d 899, 901-02 (Fla. 2018) ("In making a showing of particularized need [for funding to retain a defense expert], a defendant may be required to expose privileged information or attorney work product, depending on the type of expert assistance requested. Requiring a

defendant to reveal to the prosecutor the name of an expert witness whom the defendant may wish to consider calling, along with the reasons why this witness may be of value to the defense, is 'contrary to the work-product doctrine because it would serve to highlight the thought processes and legal analysis of the attorneys involved.' . . . Even if the defendant is only required to disclose the expert's name and area of expertise, that is information that the State would otherwise not be entitled to know at that stage. In fact, the State's presence at the hearing puts the defendant in the difficult situation of having to choose between fully supporting the motion for the appointment of an expert and not revealing information to the State that it would not otherwise be privy to. . . . ¶ Additionally, depending on the reason for the expert requested, it is possible that a defendant may be forced to disclose self-incriminating information, in violation of the defendant's Fifth Amendment rights. . . . ¶ Accordingly, ex parte hearings are necessary in this context to protect indigent defendants' rights. Federal law and other states also require ex parte hearings in this context."); *Brooks v. State*, 259 Ga. 562, 565, 385 S.E.2d 81, 84 (1989) ("While exercising . . . ["the right of the indigent defendant to obtain the expert assistance necessary to assist in preparing his defense"], the defendant also has the right to obtain that assistance without losing the opportunity to prepare the defense in secret. Otherwise, the defendant's 'fair opportunity to present his defense,' acknowledged in *Ake*, will be impaired."); *accord*, *Putnal v. State*, 303 Ga. 569, 579-82, 814 S.E.2d 307, 315-17 (2018) (detailing in a useful exposition many of the ways in which a refusal to allow an indigent to proceed *ex parte* and under seal when applying for state funding can prejudice the defense); *State v. Dahl*, 874 N.W.2d 348, 353-54 (Iowa 2016) ("If the trial court requires defense counsel to make a record of the facts supporting a defendant's reasonable need for investigative services in the presence of the prosecutor, the State could deduce defense counsel's trial strategy from those disclosures. Disclosure of the defense counsel's trial strategy to the State impairs an indigent defendant's right to effective assistance of counsel. . . . ¶ 'The right to counsel is the right to the effective assistance of counsel.'. . . However, we need not decide whether the trial court's failure to provide an ex parte hearing on Dahl's application for appointment of a private investigator violated any of Dahl's constitutional rights because we agree with Congress [citing 18 U.S.C. § 3006A(e)(1)] that an open hearing may possibly cause a defendant to reveal his defense. ¶ Accordingly, we exercise our supervisory powers . . . to articulate a protocol to balance the statutory right of an indigent defendant to the appointment of a private investigator . . . against his or her burden to present sufficient information to the trial court to support the granting of an application for appointment of a private investigator at state expense. . . . ¶ When a trial court deems an indigent defendant's application for appointment of a private investigator may have some merit but does not contain adequate information for the court to determine whether it should grant the application, the court should hold an ex parte hearing before ruling on the merits of the application. At that hearing, the court should require the defendant to provide additional information that will allow it to rule on the merits. If the court holds an ex parte hearing, the court must report the ex parte hearing. The court must also seal any transcript or order that would disclose defense strategy or work product and file a separate order announcing its decision to grant or deny the application."); *cf. Morrison v. State*, 575 S.W.3d 1, 7 (Tex. App. 2019) ("'[T]he Sixth Amendment . . . imposes on the State an affirmative obligation to respect and preserve the accused's choice to seek assistance,' which means, 'at the very least, the prosecutor . . . [has] an

affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel." . . . Because billing records exist to secure an indigent defendant's right to the appointment of counsel, the prosecutor's 'affirmative obligation' requires a prosecuting attorney to refrain from reviewing indigent defense billing records during the case against the defendant, regardless of how the prosecutor may acquire that information and regardless of whether any privilege attendant to those records was waived by public disclosure. ¶ If the prosecutor nevertheless reviews those records, he purposefully intrudes into the defendant's attorney-client relationship. If, at trial, (1) any of 'the State's evidence originated in the [intrusion],' (2) the information obtained from the records was 'used in any other way to the substantial detriment of [the defendant],' or (3) the State learned details about the defendant's trial preparations from the records, then the intrusion prejudiced the defendant. . . . Error of this type is fundamental and may be raised on appeal even in the absence of a trial objection."); *United States v. Sellers*, 275 F.R.D. 620, 624-25 (D. Nev. 2011) (Federal Criminal "Rule 17(b) allows an *ex parte* application by a defendant unable to pay for an order compelling a witness to appear. Rule 17(c) [dealing with subpoenas duces tecum], however, does not contain any language allowing an *ex parte* application for pretrial production by a defendant without financial means. Courts are split as to whether a party may make an *ex parte* application for a pretrial subpoena *duces tecum* . . .¶ This court agrees with those courts which have found that an indigent defendant should be permitted to make an *ex parte* application for pretrial production of documents under limited circumstances, such as where identification of the source of evidence potentially imperils the source or integrity of evidence; or where notice of a subpoena *duces tecum* would compromise defense counsel's trial strategy; or where a constitutional interest of a defendant is implicated. . . . ¶ . . . The court also finds Seller's [sic] application and supporting affidavit were appropriately filed *ex parte* and should remain sealed to protect the mental impressions and trial strategy of defense counsel."); Donna H. Lee, Note, *In the Wake of* Ake v. Oklahoma*: An Indigent Criminal Defendant's Lack of Ex Parte Access to Expert Services*, 67 N.Y.U. L. REV. 154, 170-71 n.122 (1992).

If local procedure allows *ex parte* motions for state-paid assistance and does not establish a ceiling that would conflict with counsel's needs in any particular case, counsel should follow it in drafting and filing the motions. (If unfamiliar with the prevailing procedures, counsel should check local statutes and court rules and consult experienced defense attorneys practicing in the juvenile court.) In particular, counsel should take advantage of statutes, court rules, and local practice that support the provision of funds to the defense without the factually specific preliminary demonstration of need required to trigger the due process doctrine announced in *Ake*.

When practicing in jurisdictions whose standards or procedures for state funding of defense experts are more restrictive than those established by *Ake* and are too restrictive to satisfy counsel's needs, counsel will have to file a motion requesting state funding and challenging those aspects of local practice that violate *Ake*. *Cf. Hinton v. Alabama*, 571 U.S. 263, 264, 267, 273-74 (2014) (per curiam) ("Hinton's trial attorney rendered constitutionally deficient performance" by presenting a toolmark "expert he knew to be inadequate" when counsel "could not find a better expert willing to work for $1,000" and counsel mistakenly "believed that he was unable [under

state law] to obtain more than $1,000 to cover expert fees"; the trial judge who granted counsel's request for funding for an expert cited a $1,000 statutory maximum, but counsel should "have corrected the trial judge's mistaken belief that a $1,000 limit applied" and sought additional funding); *Yun Hseng Liao v. Junious*, 817 F.3d 678, 682-83, 695 (9th Cir. 2016) (the defendant was deprived of effective assistance of counsel because his lawyer relied on a court clerk's erroneous statement that a motion for funds for an additional expert evaluation of the defendant had been denied when in fact it had been granted; counsel's "failure to verify what the court clerk" said, and counsel's failure to conduct "any further inquiry into the status of his motion," and his decision to instead proceed "to trial without the benefit of the [additional] medical examination" were prejudicial because they "eviscerated a viable defense"); *People v. Kennedy*, 502 Mich. 206, 226-27, 917 N.W.2d 355, 366-67 (2018), *enforced by granting a new trial*, *People v. Kennedy*, 2020 WL 7089842 (Mich. App. 2020) (holding that *Ake* supersedes the state statutory provision regulating appointment of defense experts for an indigent, and adopting a "reasonable probability" standard for applying *Ake*: "Until an expert is consulted, a defendant might often be unaware of how, *precisely*, the expert would aid the defense. If, in such cases, the defendant were required to prove in detail with a high degree of certainty that an expert would benefit the defense, the defendant would essentially be tasked with the impossible: to get an expert, the defendant would need to already know what the expert would say. At the same time, the defendant's bare assertion that an expert would be beneficial cannot, without more, entitle him or her to an expert; otherwise, every defendant would receive funds for experts upon request. ¶ A majority of states confronting this problem have adopted a reasonable probability standard.").

The requisite showing for activating *Ake* rights is described in § 11.03(a) *supra*. As explained there, counsel should ordinarily ground the request for expert funding not only on *Ake's* due process ground but also on equal-protection and Sixth Amendment compulsory-process grounds. If local practice does not provide for motions to be filed *ex parte,* counsel should couch the assertion of the need for expert assistance in very general terms, explaining that a more particularized description would reveal counsel's "litigating strategies" (*United States v. Valenzuela-Bernal,* 458 U.S. 858, 862 n.3 (1982)) to the prosecution, and offering to make a more detailed factual showing *ex parte* – either in chambers or by a sealed affidavit – as contemplated by *Ake,* 470 U.S. at 82-83.

§ 11.04 WORKING WITH THE EXPERT DURING THE PRETRIAL STAGE

§ 11.04(a) Working with an Expert Consultant to Prepare the Case

It will often be the case that counsel does not know enough about the expert's field to identify all of the functions an expert can usefully serve. So it is advisable, in any case involving a defense consultant, for counsel to enlist the expert's advice at the outset in defining the expert's role in the case. And because cases often take unexpected turns, counsel should check in with defense consultants periodically to discuss new developments in the case and to consider whether any of these call for expanding or modifying the scope of the services the experts are providing.

Still, counsel cannot afford to rely entirely on the expert when issues relating to his or her specialty arise in the case. Counsel himself or herself will need to acquire considerable familiarity with the field in order to be able to cross-examine prosecution experts effectively. *See*, *e.g.*, John T. Philipsborn, *Feature: When Fine Print Matters; Reviewing Mental Health Assessment and Testing-Related Literature and Test Manuals is a Key to Effectively Preparing and Examining Mental Health Experts*, 37-FEB THE CHAMPION 40 (2013). A solid grasp of the field will also be crucial if counsel decides to call an expert witness for the defense at a pretrial hearing or at trial, so that counsel can plan how best to present the expert's testimony and to deal with objections by the prosecutor. Here again, an expert consultant can play a vital role by identifying for counsel the specific matters s/he should seek to learn, steering counsel to background sources, explaining technical matters that counsel inevitably will find difficult, and addressing other questions counsel may have.

Counsel should discuss with each expert consultant what factual investigation needs to be conducted in order to gather the background materials necessary for the expert to evaluate the case and to support his or her opinions if it is decided that s/he should testify. Responsibility for specific investigative tasks should be assigned to the expert, counsel, and/or an investigator at the outset, and regular, periodic exchanges of information to coordinate additional assignments should be made as the investigation progresses. All material gathered by defense team members should be conveyed to the expert in ample time for the expert to evaluate it, and counsel should discuss with the expert what use or explanation each significant piece of information requires in order to make it consonant with the expert's analysis and conclusions. *See Rogers v. Dzurenda*, 25 F.4th 1171, 1186 (9th Cir. 2022) (finding capital defense counsel ineffective for failing, *inter alia*, to "to adequately discuss . . . [police reports and pretrial mental-health evaluations of the defendant] with the [defense] experts or discuss how the expert would respond to expected lines of inquiry on cross-examination").

§ 11.04(b) Expert Witnesses

§ 11.04(b)(1) Obtaining a Written Report from the Expert for Use at a Pretrial Hearing or Trial

In any case in which an expert witness will testify at a pretrial hearing or at trial, counsel will probably want to have the expert prepare a written report for use at the hearing or trial. Such a report will be useful to the expert in reviewing the case prior to the hearing or trial; it will be useful to counsel in examining the expert at the hearing or trial; and it may be admissible in evidence to illuminate and clarify the witness's testimony (see § 33.15 *infra*). So used, it provides an easy way of assuring that all points are presented and cohesively connected.

A report of this sort, however, may be subject to discovery by the prosecution after the expert has testified at trial, whether or not it has been used in direct examination or reviewed by the expert in preparing to testify (see § 27.12(b) *infra*); and it might even become discoverable before trial under the circumstances and within the limitations described in §§ 9.11-9.13 *supra*.

Counsel should therefore ask the expert not to make an *initial* report in writing. The risks are altogether too great that a legally untutored person – or even a person with considerable forensic experience who has not been thoroughly advised about the defense to be presented in a particular case – may expose himself or herself to impeachment by unconsidered or incautious phrasing.

After the expert has made an initial oral report (or more than one, in complex matters), counsel should decide whether s/he is going to use that expert in the respondent's defense. If so, the expert's testimony should be hammered out, with attention to details of phrasing, in a series of interviews and dry-run examinations in which counsel advises the expert completely of the needs and pitfalls of the case and of the expert's role in it. Counsel should also inform the expert that his or her report will be available to the prosecutor for cross-examination and should instruct the expert, with specific examples, of the ways in which an adept cross-examiner can turn ambiguous language into inconsistencies. *Then* the expert should be asked to prepare a *draft* report, which can be finalized after it has been reviewed by counsel. See § 33.15 *infra*. Because any notes made by the expert in the course of his or her examinations, researches, or preparations may also be discoverable, counsel should tell the expert *before the expert begins any work on the case* that notes or memoranda must be made with extreme caution.

§ 11.04(b)(2) Preparing the Expert to Testify

An expert's testimony should be keyed to the level of understanding of the fact-finder. Obviously, in a jury trial the expert's testimony should be phrased more simply than it needs to be in a bench trial. Use of commonly intelligible, dramatic illustrations and examples is one of the best methods of clarifying expert testimony. Concepts of mathematical probability, for example, may be expressed in terms of the likelihood that a coin which is flipped fairly will come up heads 5,000 times in a row. Or the level of probability that the expert's test results are not due to chance may be favorably compared with the level of probability used in testing new medical drugs before they can be marketed. For additional suggestions concerning expert testimony, see §§ 33.11-33.16 *infra*.