NEW YORK STATE DEFENDERS ASSOCIATION*

Getting the Expert Funds You Need Under County Law § 722-c

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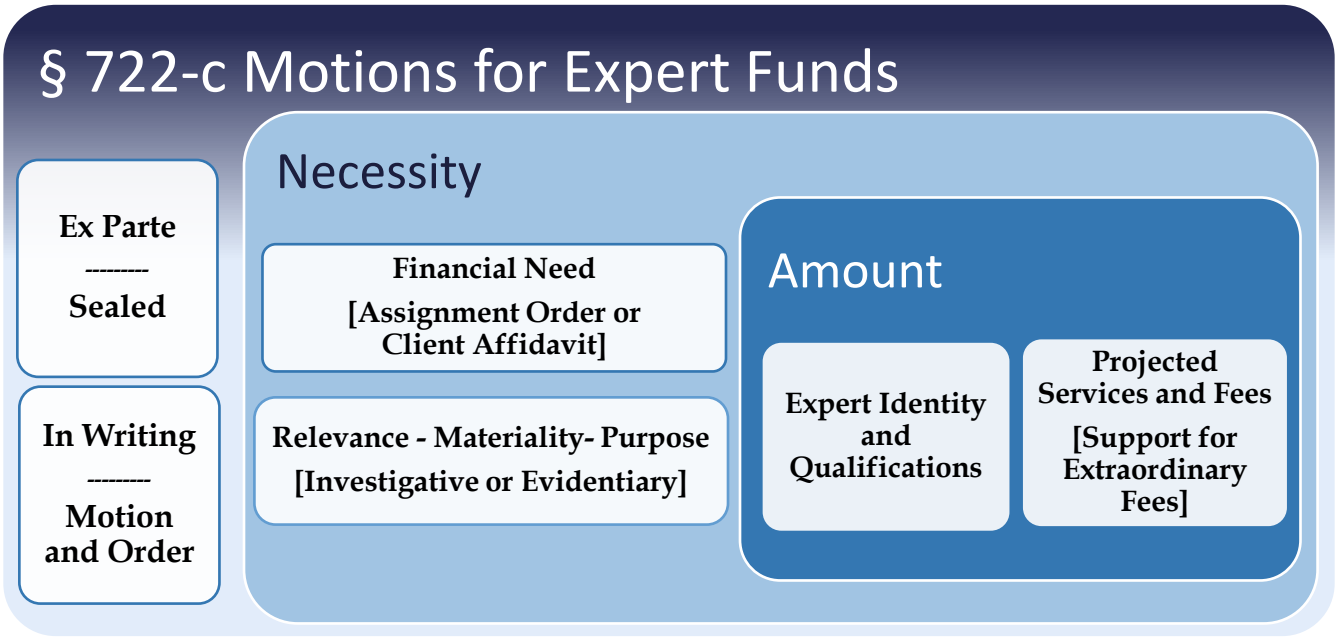

RIGHT TO EXPERT FUNDS

The right to expert and auxiliary services for those charged with crimes and unable to secure these services on their own is a matter of due process, fundamental fairness, and equal protection. *See Ake v Oklahoma*, 470 US 68 (1985); *Tyson v Keane*, 96 Civ 8044 (SAS) (AJP) (SDNY 1997) (Magistrate's Report and Recommendation) *adopted by* 991 F Supp 314 (SDNY 1998). It has been held that the assistance of experts and other ancillary services may be considered among the "basic tools" needed for meaningful representation. *Tyson*, 96 Civ 8044 (*citing Britt v North Carolina*, 404 US 226, 227 [1971]). In *People v Caldavado*, 26 NY3d 1034 (2015), the Court of Appeals reversed a conviction for ineffective assistance of counsel for defense counsel's lack of a strategic basis to forgo the calling of an expert on Shaken Baby Syndrome. The *Caldavado* court held that defense counsel's reasoning that calling a defense expert would be "futile" due to the high number of experts testifying for the prosecution was not a legitimate or reasonable tactical choice. Despite the challenges, it is likewise imperative that we not succumb to the concept of futility in seeking public funds to hire experts where fiscal forbearance has long been an obstacle.

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NOT LIMITED TO CRIMINAL CASES

In New York, the right to access public funds to cover the cost of retaining expert assistance is governed by provisions of County Law § 722-c. This section does not limit funding to litigation in criminal cases. It also applies to the application for funds for expert assistance for persons described in Family Court Act §§ 249 (minors represented by Attorneys for the Child) and 262 (adult respondents in Family Court); Corrections Law article 6-c (litigants in Sex Offender Registration Act proceedings); and Surrogate's Court Procedure Act § 407 (respondents in proceedings involving the voluntary or involuntary surrender of children into foster care; parents in adoption proceedings; parents in custody proceedings). While many of the cases discussed herein are criminal cases, and therefore the text used to describe some issues centers on criminal defense, this article is intended to help lawyers and litigants in all applicable cases and courts.

> ***§ 722-c funding is not limited to criminal cases; it also applies to cases encompassed by Family Court Act §§ 249 and 262; Correction Law article 6-c; and Surrogate's Court Procedure Act § 407.***

NOT LIMITED TO DEFENDANTS WITH APPOINTED COUNSEL

Nothing in the statute restricts the availability of funds for expert services only to those defendants represented by appointed counsel. Any defendant who cannot afford supplemental services, even those represented by retained counsel, may receive funding under § 722-c with the proper showing. *See People v Smith*, 114 Misc 2d 258 (County Ct, Dutchess Co 1982); *see also* ABA Standards for Criminal Justice, Providing Defense Services, Standard 5-1.4 and commentary at 22 (3d Ed 1992).

I. STANDARDS OF REVIEW

The threshold for obtaining funds is the need for the services and financial inability to pay. *Johnson v Harris*, 682 F2d 49 (2nd Cir 1982); *People v Dove*, 287 AD2d 806 (3rd Dept 2001). Applications for § 722-c services are left to the discretion of the trial court. *Johnson*, 682 F2d 49; *but see People v Christopher*, 65 NY2d 417, 425 (1985) [in most circumstances, the number of experts on an issue to be heard will be a matter of discretion, but refusal to hear any expert witness on behalf of the defendant in competency hearing is a violation of the statutory requirement, not a matter of discretion].

Denials of applications for expert services are reviewable on appeal for abuse of discretion. *People v Cronin,* 60 NY2d 430 (1983); *People v Mooney*, 76 NY2d 827 (1990). There are no published New York court decisions regarding the application of harmless error on appeal. However, the federal district court in *Tyson*, *supra*, held that a trial court's error in denying a § 722-c application is subject to harmless error analysis in a habeas proceeding. Denial of access to an expert is not necessarily reversible under the federal constitution. *Tyson v Keane*, 159 F3d 732, 738 (2nd Cir 1998) *affg* 991 F Supp 314.

Generally, CPLR article 78 proceedings for orders mandating the granting of a motion for § 722-c funds will not lie. *Brown v Rohl*, 221 AD2d 436 (2nd Dept 1995) [mandamus will not lie to compel a trial court to grant funds in excess of the statutory limit]; *De Jesus v Armer*, 74 AD2d 736 (4th Dept 1980) [review on direct appeal is an adequate remedy for propriety of denial of § 722-c funds, therefore action under article 78 will not lie].

Given these constraints on review it is crucial that applications for § 722-c funds be carefully and exhaustively drafted.

II. THE APPLICATION PROCESS

The procedure for authorizing funding for expert or other auxiliary services in New York is set forth in County Law § 722-c:

> *Upon a finding in an ex parte proceeding that investigative, expert or other services are necessary and that the defendant or other person described in section two hundred forty-nine or section two hundred sixty-two of the family court act, article six-c of the correction law or section four hundred seven of the surrogate's court procedure act, is financially unable to obtain them, the court shall authorize counsel, whether or not assigned in accordance with a plan, to obtain the services on behalf of the defendant or such other person. The court upon a finding that timely procurement of necessary services could not await prior authorization may authorize the services nunc pro tunc. The court shall determine reasonable compensation for the services and direct payment to the person who rendered them or to the person entitled to reimbursement. Only in extraordinary circumstances may the court provide for compensation in excess of one thousand dollars per investigative, expert or other service provider.*
>
> *Each claim for compensation shall be supported by a sworn statement specifying the time expended, services rendered, expenses incurred and reimbursement or compensation applied for or received in the same case from any other source.*

The basic requirements are that the application:

A. is made in an ex parte proceeding;
B. must be in writing and should be prior to engagement of services, when possible;
C. must demonstrate the financial inability of the person to pay for the expert services;
D. must demonstrate the necessity of the requested services; and
E. should identify the projected costs of obtaining expert assistance, including hourly rates or full cost, as well as extraordinary circumstances if it is anticipated that funds over the statutory cap will be required.

Each of these factors is discussed below.

A. THE IMPORTANCE OF EX PARTE APPLICATIONS

The statute specifically authorizes an ex parte application for expert and auxiliary services. Take full advantage of this feature! Do not put § 722-c applications in omnibus motion filings. These motions must be carefully detailed and the District Attorney should not have any input into whether it is appropriate to grant funds to hire a defense expert. An accused cannot be forced to choose between obtaining services needed to prepare an adequate defense and safeguarding the confidentiality of emerging defense strategy. *See Marshall v United States*, 423 F2d 1315, 1318 (10th Cir 1970) ["The manifest purpose of requiring that the inquiry be ex parte is to insure that the defendant will not have to make a premature disclosure of his case."].

Ex parte applications generally take the form of a motion, with a Notice and Affirmation of Counsel supported by any other pertinent documentation, such as a statement of the client's financial qualification where required, an affidavit from the expert or the expert's curriculum vitae, and/or documentation that could be used to support the need for expert assistance, where available. Where the court expresses concern or hesitation, counsel should request an ex parte hearing at which issues can

be further addressed. Counsel may also wish to ask the court to seal the application and order in the court's files to protect the continuing confidentiality of the defense strategy. Judiciary Law § 2-b(3).

B. THE APPLICATION MUST BE IN WRITING AND SHOULD BE PRIOR TO ENGAGEMENT OF SERVICES

Applications for funds under § 722-c must be made in writing and oral requests may be denied. *Dove*, 287 AD2d at 807; *Matter of Brittenie K.*, 50 AD3d 1203 (3rd Dept 2008). Written applications are not only required by the statute, but also ensure that the application is complete and preserves all issues for later review if such application is denied. Samples of applications are available from the Backup Center.

Timing is Everything

More importantly, although the statute provides for the availability of nunc pro tunc authorization where circumstances require, attorneys should seek authorization prior to hiring the expert or risk the denial of compensation. *Matter of Tiarra D.*, 124 AD3d 973 (3rd Dept 2015) [court did not abuse its discretion in denying respondent's application for expert funds under County Law § 722-c, not made until after hearing had begun and sought amount in excess of statutory limit without establishing necessity or extraordinary circumstances]; *People v Barber*, 60 AD2d 747 (4th Dept 1977) [absent showing that expenses incurred for expert witnesses and investigation were necessary and that the timely procurement of such services could not await prior authorization, the court did not err in denying defendant's post-trial application for the payment of such expenses by the county].

Don't Give Up, Develop

Despite possible resistance to applications for expert assistance by courts seeking to safeguard funds or expedite proceedings, counsel should not be discouraged from moving for funds by presuming that an application will fail. Just as an assertion of futility in consulting a defense expert to challenge a host of prosecution experts is not an acceptable basis for a strategy decision [*Caldavado, supra*], an assertion of futility in asking a parsimonious court for ancillary funds is not an acceptable strategic basis to forgo a § 722-c application. Much of the case law related to denials presents situations where the applications were inadequate or abandoned. Perseverance and carefully drawn pleadings will often overcome perceived obstacles, as well as preserving a denial as an abuse of discretion on appellate review.

When a court denies an application, try to establish precisely why the funds are being denied; demand that the court explain or justify the denial. Judges exercising discretionary power know that a denial for no stated reason is easy; a denial for a bad reason will be scrutinized on review. Often, the application is missing the requisite details as to the issues giving rise to the need for expert assistance or the projected costs and services to be rendered. There is no prohibition against successive applications, especially where the need is critical and the costs can be verified. Dig, rewrite, and develop the details in support of the need for expert assistance. Failure to pursue requests, especially where an initial denial is based on an inadequate showing, will ensure that the appellate court will find that the court did not abuse its discretion. For example, in *People v Roman*, 125 AD3d 515 (1st Dept 2015) the Appellate Division ruled that the trial "court properly denied [the] defendant's motion to present expert testimony on false confessions, as [the] defendant's motion papers, which contained no expert affidavit, did not establish that the proposed expert's testimony would be 'relevant to the defendant and interrogation before the court' …." Had counsel renewed the application providing the trial court

with the missing information, the request may very well have been granted.

C. SPECIFIC SHOWING OF FINANCIAL INABILITY TO OBTAIN SERVICES

The right to funds under § 722-c is not limited to defendants who have appointed counsel. Any defendant who cannot afford the services may invoke the statutory mechanism for obtaining them. *People v Ulloa*, 1 AD3d 468 (2nd Dept 2003); *Smith*, 114 Misc 2d 258. It is necessary to demonstrate that the client's financial status is such that the client cannot afford to pay for the services of the expert, even if counsel may have been retained or is representing the client pro bono. *People v Pinney*, 136 AD2d 573 (2nd Dept 1988); *People v Hatterson*, 63 AD2d 736 (2nd Dept 1978).

When counsel has been assigned, presenting the court with a copy of the Order of Assignment may suffice in demonstrating financial inability. However, the assignment of counsel may not always suffice to establish financial need as required by the statute. *People v Jackson*, 80 Misc 2d 595 (County Ct, Albany Co 1975); *People v Lowery*, 7 Misc 3d 1032(A) (White Plains City Ct 2005); *but see* ABA Standards for Criminal Justice, Providing Defense Services, Standard 5-1.4 and commentary at 23 (3d Ed 1992) ("Inability to afford counsel necessarily means that a defendant is unable to afford essential supporting services, such as investigative assistance and expert witnesses.").

Local rules and practice may impact what the court requires for applications for § 722-c services by assigned counsel and whether it is necessary to file any supplemental financial information. Where counsel has been retained, a financial statement that demonstrates the client's lack of additional funds to hire an expert is an absolute necessity. Be aware that the application must include a verified statement of financial need submitted by the client; some courts have found that an affirmation of counsel asserting the client's financial ability is not sufficient. *See Matter of Cynthia H. v James H.*, 117 Misc 2d 474 (Family Ct, Queens Co 1983); *People v Powell*, 101 Misc 2d 315 (County Ct, Tompkins Co 1979); *Jackson*, 80 Misc 2d 595. In this regard, it should be the defendant's financial status that is dispositive in assessing ability to afford auxiliary services, not the resources of friends or relatives: "[I]ndigence is personal. The State is not entitled to treat the funds of others, over which a defendant has no control, as assets of the defendant." *Fullan v Commissioner of Corrections*, 891 F2d 1007, 1011 (2nd Cir 1989); *Ulloa*, 1 AD3d 468.

Whether institutional assigned counsel may apply for § 722-c funding is somewhat unclear. Most public defender offices and legal aid societies will have funds budgeted for the hiring of experts, but if the occasion arises where the funds are depleted or a provider does not have such a budget item, the wording of the statute is open to some interpretation. The issue presented itself in *People v Stott*, 137 Misc 2d 896 (County Ct, Sullivan Co 1987) with mixed results. The County Court initially granted § 722-c funds to the local Legal Aid Society to obtain a transcript for an appeal, but when the allotted amount proved to be too little and the Court was asked for additional funds to meet the difference, the Court reversed itself finding that the section was directed only at attorneys working with an Assigned Counsel Plan and that the Legal Aid Society was required to pay the expense from their own budget.

The statute provides that where a defendant is financially unable to obtain necessary services "the court shall authorize counsel, whether or not assigned in accordance with a plan" to procure such services. This language is not as clear as the Sullivan County Court suggests in *Stott*. If an institutional provider is unable to independently pay for a needed expert, it would seem to be a matter for the attorney-in-charge to seek the funds either directly from the county administration or the court. If the county fails to grant the funds, the court should protect the defendant's rights by

authorizing the funds under § 722-c. Public defenders have succeeded in obtaining funds via § 722-c when institutional budgets could not cover the cost of hiring a necessary expert.

D. SHOWING OF NECESSITY: RELEVANCE, MATERIALITY AND PURPOSE

A thorough knowledge of the case is key to making the requisite showing of necessity. The most common reason for the denial of a § 722-c motion, and the affirmance of such denials on review, is the failure to demonstrate necessity for the particular expert. To avoid denial based on failure to establish necessity, papers must be carefully and thoroughly drafted, and should provide "specific factual details which show to a reasonable probability that the forensic services would aid in the defense or produce relevant evidence." *Lowery,* 7 Misc 3d 1032(A). In drafting applications, be sure to consider relevance and materiality of the issues and the purpose of the expert assistance in the development and presentation of the defense.

It has been held that to be effective, defense counsel is obligated to investigate and "collect the type of information that a lawyer would need in order to determine the best course of action for his or her client." People v Oliveras, 21 NY3d 339 (2013); see also People v Bennett, 29 NY2d 462 (1972). This obligation presents a strong argument for a § 722-c application where the information to be collected is extensive and/or is of such a nature that qualified assistance is necessary to identify exactly what must be sought and examined.

RELEVANCE

The pleadings must show that the need for the expert assistance is relevant to a significant issue at trial. *See People v Lewis*, 93 AD3d 1264 (4th Dept 2012) [defense counsel's failure to call ballistics expert was not ineffective assistance of counsel given failure to demonstrate that the expert's testimony would have assisted the trier of fact or that the defendant was prejudiced by the absence of such testimony]; *People v Oquendo*, 250 AD2d 419 (1st Dept 1998) [denial of the application for an expert to testify at trial regarding hand-to-hand drug transactions upheld where the request failed to establish that the testimony was relevant to a significant issue at trial].

Bare bones allegations of relevance or helpfulness to the defense are not sufficient to establish necessity. *People v Rockwell*, 18 AD3d 969 (3rd Dept 2005) [no error in denying funds for an investigator where the defendant only asserted that an investigator would be helpful]; *Matter of Jack McG.*, 223 AD2d 369 (1st Dept 1996) [denial of funds to hire a defense psychiatrist affirmed where the claim that such testimony might "add insight" into the court-appointed psychiatrist's evaluation was insufficient to require granting of request]; *People v Gallow*, 171 AD2d 1061 (4th Dept 1991) [the fact that proposed testimony would be relevant to an issue in the case is not by itself sufficient; a showing must be made that expertise is necessary for resolution of the issue]; *People v Moore*, 125 AD2d 501 (2nd Dept 1986) ["Since the defendant did not demonstrate the necessity for the appointment of a fingerprint expert on his behalf under County Law § 722-c, the trial court did not abuse its discretion in denying his request to appoint such expert."]; *People v Pride*, 79 Misc 2d 581 (Supreme Ct, Westchester Co 1974) [The "defendant's moving papers are of little help to the court in the resolution of [the] question [of necessity]."].

MATERIALITY

Pleadings must establish that there are challengeable conclusions made by witnesses or to be drawn from evidence that is material to the defense. In *Hatterson*, *supra*, the Appellate Division held that the denial of funds under § 722-c for a physician and a psychiatrist was an improvident exercise of discretion where the prosecution offered expert psychological testimony in the case in chief and on rebuttal

regarding duress the complainant endured and the defense sought to hire an expert to challenge these assertions.

Denials have been authorized where the issue is determined to be not significant or material to warrant the funding of an independent expert. *See, e.g.*, *Johnson*, 682 F2d 49 [The prosecution's expert testimony on hair identification was brief, communicated in non-technical language, and readily understandable by the defense and the jury. In addition, upon cross-examination by the defense, the prosecution's expert stated that no hair comparison can prove identity positively.]; *People v King*, 111 AD2d 1043 (3rd Dept 1985) [since the prosecution called a witness who saw the defendant endorse the check, there was no error in denial of funds for a handwriting expert]; *People v Stamp*, 120 Misc 2d 48 (Starkey Town Ct 1983) [request for expert to testify as to inadequacies of breath test machine denied where issues raised of improperly tested breathalyzer instrument, outdated ampoules, and inaccuracies attendant to low readings are not uncommon and counsel is fully capable of thoroughly exploring any anomalies which may have been present during the breathalyzer test and to bring them to the attention of the jury through cross-examination].

In *People v Jones*, 210 AD2d 904 (4th Dept 1994) *affd* 85 NY2d 998 (1995), the Appellate Division held that the trial court abused its discretion in denying the defendant's application for authorization to have neurological testing conducted based on reports that, as a child, the defendant sustained a traumatic head injury that caused permanent brain damage such that the defendant's expert physician recommended tests based upon his belief that the defendant's cognitive limitations were a result of brain damage and a 30-year history of alcoholism. In that case such testing was crucial to the defendant's asserted defense of justification. In *People v Tyson*, 209 AD2d 354 (1st Dept 1994), the Appellate Division held that the trial court erred in denying the defendant's application to hire an expert in voice identification because expert testimony proving that the defendant was not the person heard on the tape admitting to the crime would seriously damage the complainant's credibility, obviously a key issue in a date rape case.

In any § 722-c application, be sure to state the issue subject to expert analysis clearly and establish its importance to the case and the theory of defense. Then explain how the expert will be employed to assist in the development and presentation of the defense case. Since the application is ex parte, these details can be confidentially revealed to the court; requesting a sealing order at the conclusion of the process ensures that the information remains confidential.

PURPOSE

The need for the engagement of an expert takes many forms, from reviewing and helping counsel understand complex evidence, to performing independent testing of particular evidence, to offering testimony that the prosecution's conclusions about certain evidence are in error. Indeed, there may be occasions where an expert consultation is needed to make the threshold determination of whether expert testing and testimony are required.

The defense is entitled to the engagement of expert services to refute the prosecution's evidence that tends to contradict a theory of defense. In *People v Salce*, 124 AD3d 923 (3rd Dept 2015), the Appellate Division held that the defendant was entitled to have an expert—"a police officer with expertise in assaults and knives"—testify that the wounds on the defendant and the accuser were "not inconsistent with defensive action by defendant" where the prosecution elicited police testimony that the extensive nature of the accuser's injuries was considered in deciding to charge the defendant and the proof on this key factual issue conflicted sharply. *See also People v Hernandez*,

125 AD3d 885 (2nd Dept 2015) [the defendant was entitled to a Criminal Procedure Law (CPL) 440.10 hearing for a determination on the merits of the defendant's motion to vacate his conviction based on trial counsel's failure to hire or consult with an expert witness concerning child sexual abuse syndrome in an effort to refute testimony in the prosecution's case.]

Denials of requests for expert assistance have been affirmed based on findings that there already exists sufficient information to proceed without employing another expert. *See, e.g., People v Brand*, 13 AD3d 820 (3rd Dept 2004) [it is not necessary to provide a second defense expert where the defendant was able to challenge prosecution's assertions through testimony of the first defense psychiatric expert]; *c.f. People v Seavey*, 305 AD2d 937 (3rd Dept 2003); *People v Paro*, 283 AD2d 669 (3rd Dept 2001).

OTHER CONSIDERATIONS

Admissibility may become an issue in determining necessity, although the ultimate admissibility of, or the intent to introduce, expert testimony should not be dispositive of the request. Since expert assistance may be critical to the evaluation of evidence and counsel's understanding of the import of evidence in preparation of the defense case, not just to secure testimony at trial, funding should not be denied simply because particular evidence ultimately may be deemed inadmissible at trial or because the use of the expert is not necessarily intended to develop evidence to be admitted at trial. *But see People v Brown*, 136 AD2d 1 (2nd Dept 1988) (court did not err in denying the defendant's request to retain expert services on eyewitness identification at public expense where it appropriately exercised discretion in a contemporaneous determination that the desired expert testimony on the defendant's behalf would be inadmissible); *People v Hinson*, 2001 NY Slip Op 40357(U) (Supreme Ct, Kings Co 2001) [denial of funds for polygraph expert based on the defendant's failure to establish that lie detector tests have gained general scientific acceptance].

Consider using admissibility criteria as support for necessity. One element both considerations share is materiality, and while ultimately admissibility is a separate question, where the materiality of the evidence can be identified, the need for expert assistance in making use and confrontation determinations may be clarified.

Likelihood of success is similarly an erroneous standard for deciding § 722-c applications. In *People v Vale*, 133 AD2d 297 (1st Dept 1987), the Appellate Division reversed the defendant's conviction, deeming the denial of the defendant's § 722-c application for psychiatric assistance "most improvident." Citing the U.S. Supreme Court's decision in *Ake*, the court stated:

> [W]hen a state undertakes to prosecute an indigent defendant, it must also take whatever measures are necessary to assure that the defendant is able to participate meaningfully in the proceeding. The proceeding will otherwise be fundamentally unfair and offensive to the due process guarantees of the Fourteenth Amendment …. [A]n indigent need not show that an insanity defense "might succeed" to obtain access to expert psychiatric assistance, but only that the issue of the defendant's sanity will be an important factor at trial.

Vale, 133 AD2d at 299-300. The more critical the forensic evidence is to proving the case, the greater the need for expert assistance to help the defense interpret and assess the evidence, which are indispensable steps before the questions of

admissibility and likelihood of success can be addressed.

E. INVESTIGATORS AND NECESSITY

Establishing necessity can be an especially arduous task when seeking funds to employ an independent defense investigator. Many judges take the position that it is part of assigned counsels' responsibility to conduct their own investigations, a position that has been upheld to some extent in federal court habeas review where the investigation needed is not complicated. *See Thomas v Kuhlman*, 255 F Supp 2d 99, 112 (EDNY 2003) [even if no funds were forthcoming either from the defendant, defendant's family or the county pursuant to § 722-c, counsel still had a professional, ethical obligation to conduct the investigation himself.]

When seeking funds for an independent defense investigator, the application should explain the circumstances supporting necessity, including that there are no reasonable alternatives or that all other reasonable alternatives have been exhausted. *See, e.g., Rockwell*, 18 AD3d at 971 [denial of funds not an abuse of discretion where the "defendant only asserted that an investigator would be helpful.... Moreover, County Court adjourned the impending trial to allow defense counsel additional time to conduct whatever investigation he deemed necessary."]; *People v Allen*, 28 Misc 3d 1226(A) (Albany City Ct 2010) [affidavit failed to demonstrate that the defense has exhausted other investigative avenues]; *People v Baker*, 69 Misc 2d 882 (Supreme Ct, New York Co 1972) [Applications for funds to cover the services of an investigator should include information as to the nature and difficulty of the problems and issues involved, the nature and difficulty of the services to be conducted, the anticipated time to be spent, the professional and/or educational qualifications of the investigator, and whether or not the investigator is licensed in the State of New York.].

The decision in *Thomas v Kuhlman*, *supra*, offers further insight on this point. In that case, the court held that defense counsel had been ineffective for failing to conduct his own investigation of the crime scene after the trial court had refused to grant § 722-c funds to hire a private investigator. The District Court found that "[t]his is not a circumstance in which the investigation would have been unduly expensive and time consuming. No plane flights were necessary, no technical, medical or psychiatric experts were required. A simple subway or taxi ride to the crime scene and the expenditure of several hours of investigation were all that would be minimally necessary." *Thomas v Kuhlman*, 255 F Supp 2d at 112.

Based on *Baker* and *Thomas v Kuhlman*, to establish the requisite necessity for the services of an investigator, a successful application might include the fact that there are too many witnesses to be located and interviewed by counsel; or that it is important that counsel has independent corroboration of witness interviews; or there is evidence that must be located and retrieved and counsel does not have time, resources, or investigative expertise to do so; or there are witnesses and/or evidence outside the jurisdiction that require an independent defense investigator to travel and investigate. A showing that the hiring and deploying of an independent investigator will be more cost-effective than compensating counsel for the work at assigned counsel rates should go a long way toward convincing a judge to grant § 722-c funds.

F. FORENSIC CONSULTANTS AND NECESSITY

Counsel may need an expert to assist in reviewing and understanding evidence or records to prepare for cross examination or effective investigation; this is a legitimate request under § 722-c. In *Matter of Rosalie S.*, 172 Misc 2d 176, 177 (Family Ct, Kings Co 1997), the court stated that "the ability to consult with experts to prepare a complete defense is a key element of

due process. To undermine the ability of litigants freely to engage experts in a confidential manner would have a chilling effect on their use and, therefore, impair the fundamental fairness of the litigation process." *See also Matter of Lisa W. v Seine W.*, 9 Misc 3d 1125(A) (Family Ct, Kings Co 2005) (§ 722-c application granted to hire expert to act as consultant and conduct peer review of the opposing party's expert report); *People v Roraback*, 174 Misc 2d 641 (Supreme Ct, Sullivan Co 1997) [§ 722-c order authorized consult with an expert in infrared microscopy in preparation for *Frye* hearing challenging the prosecution's expert]; *People v Santana*, 80 NY2d 92, 99 (1992), *quoting Ake*, 470 US at 82 ["'[W]ithout the assistance of a psychiatrist to … present testimony, and to assist in preparing the cross-examination of a State's psychiatric witnesses, the risk of an inaccurate resolution of sanity issues is extremely high' …."].

This is especially true in regard to forensic fields. For example, when a case involves medical reports of physical injuries or an autopsy report in a homicide, the defense should be entitled to an expert to help interpret the full import of the details of the records. *See, e.g., People v Bryce*, 287 AD2d 799 (3rd Dept 2001) ["[T]he failure of the defense experts to timely examine this critical evidence prevented timely disclosure of 'a serious flaw' in the prosecution's case …."]. Similarly, when a case involves DNA evidence, the defense should be entitled to consult with an expert who can review, interpret, and prepare the attorney to confront the prosecution's evidence, even if the expert may not be called as a defense witness. *But see People v Robinson*, 70 AD3d 728 (2nd Dept 2010) [denial was proper where the defendant failed to demonstrate the necessity of the appointment of a DNA expert].

In *Tyson v Keane*, *supra*, the Second Circuit discussed the nature of expert assistance in cases where forensic analysis is the basis for seeking expert assistance. Citing *Ake v Oklahoma* and *United States v Durant*, 545 F2d 823, 829 (2nd Cir 1976), the court acknowledged that the importance of providing such experts rests on the fact that experts in these circumstances offer information and analysis that a non-expert cannot provide:

> Although the jury remains the ultimate judge of sanity, without expert assistance 'the risk of an inaccurate resolution of sanity issues is extremely high.' *Ake*, 470 U.S. at 82. Similarly, a jury cannot discern whether a fingerprint from the scene matches defendant's prints without expert assistance.

Tyson, 159 F3d at 738.

Where forensic viability has not been settled under *Frye*, especially in circumstances where the issue is new, or where forensic validity has been called into question through the evolution of scientific understanding, it may be helpful to submit a Memorandum of Law setting forth the fundamental elements of the forensic issues and ask for a hearing to establish the necessity of the expert assistance in the circumstances presented by the case. In recent years, traditional forms of forensic evidence that have been accepted virtually without challenge for decades have received some judicial scrutiny, and the number of successful defense challenges is starting to grow. *See, e.g., Maryland v Rose*, Case No. K06-0545 (Circuit Ct, Baltimore Co 2007); *Commonwealth v Patterson*, 445 Mass 626 (Mass 2005) [fingerprints]; *United States v Green*, 405 F Supp 2d 104 (D Mass 2005) [ballistics]; *United States v Hines*, 55 F Supp 2d 62 (D Mass 1999) [handwriting analysis]; *People v Bailey*, 2016 NY Slip Op 07490 (4th Dept 11/10/2016) [shaken baby syndrome].

In the wake of the National Academy of Sciences study and report, *Strengthening Forensic Science in the United States: A Path Forward* (2009) ["NAS report"], and the recent President's Council on Science and Technology Report issued September 16, 2016, ["PCAST report"], in any case where so-called "forensic sciences" are at

issue, the defense should seek the assistance of an expert to determine whether the science involved is truly valid and to scrutinize whether proper procedures and best practices were followed in order to establish the reliability of the evidence.

G. THE RATE AND PROJECTED COST OF RETAINING THE EXPERT

A § 722-c application is not statutorily required to include the amount of funds necessary, but be aware that there is a statutory cap, currently set at $1,000. If the final compensation will exceed that cap, extraordinary circumstances must be established, if not at the outset then at the end when a voucher is submitted. Local practice will dictate whether an initial application must include the actual amount requested if it is anticipated to be less than the statutory cap. If it is anticipated from the outset that more funds will be required, or simply to strengthen the application, the best practice would be to include as much information as possible about the exact amount needed and to explain any attendant extraordinary circumstances. *People v Dearstyne*, 305 AD2d 850 (3rd Dept 2003) ["In order to prevail on a motion pursuant to County Law § 722-c, a defendant must show both necessity and, if the compensation sought is in excess of [the statutory limit], extraordinary circumstances …."].

The statute does not define extraordinary circumstances, nor is there any case law on point. By common usage of the term, extraordinary circumstances may include factors such as the need for a great amount of time to review and assess complex evidence, that the expertise is unique and specialists are rare, or that the only available expert is from a distant jurisdiction. *See Dove*, 287 AD2d at 807 [The "application was oral and failed to address details concerning the necessity for the expert, the time to be expended by the expert, the precise services to be rendered by the expert, or the extraordinary circumstances which would warrant expenditure in excess of [the statutory limit]."].

Working with a circumspect court to satisfy lingering concerns should increase the likelihood of ultimately gaining the needed funds. There are cases in which the trial court's initial denial without prejudice or leave to renew was affirmed, the issue being lost on appeal because the defense failed to follow up. *Id*. ["[A]lthough the initial application was denied, defendant failed to seek an adjournment of the trial in order to locate an expert who could examine the recordings at a more reasonable sum …."]; *see also Brittenie K*., 50 AD3d 1203; *People v Graves*, 238 AD2d 754 (3rd Dept 1997); *People v Lane*, 195 AD2d 876 (3rd Dept 1993).

Where a court is hesitant to grant funds, obtaining more information to satisfy the prongs of materiality and necessity and thereafter renewing a request can often turn the tide. Locating an expert closer to the jurisdiction, providing more details as to a particular expert's credentials where a specialty is in question, better defining how the expert will be used; any of these may be enough to persuade a court to grant an application previously denied. *See People v Koberstein*, 262 AD2d 1032 (4th Dept 1999) ["At the time of his prior trial …, defendant received $1,150 to retain an odontologist who was never called as an expert witness at that trial. Although the court initially denied defendant's request for funds [in the amount of $4,200], when defense counsel renewed his request for the lesser amount of $3,000, the court noted that it was 'receptive' and told defendant to confer with the court prior to making any expenditures. Defendant never raised the issue again. In the circumstances of this case, the court did not abuse its discretion in denying defendant's inflated request to retain a new expert after the court had previously allocated funds to obtain the services of an expert who did not testify at defendant's prior trial …. Moreover, defendant never pursued the matter after the

court expressed its receptiveness to the retention of an expert at a more reasonable cost ….”].

If the assistance sought is outside the bounds of reasonableness, the court will likely deny the § 722-c application. In *People v Thomas*, 139 Misc 2d 158 (County Ct, Schoharie Co 1988), the defense sought an order directing the county to pay for costs associated with transporting the defendant to Ottawa for a particular examination to obtain an expert opinion relative to his culpability, including having the sheriff provide transportation over a 72-hour period. The court found that “[t]he cost would not only be extraordinary, but phenomenal …, [and the] application fails to sufficiently convince the court that such expert services are truly necessary within the meaning and intent of County Law § 722-c. In addition, because of the logistics, security risk, and huge expense involved, this court holds and determines that the defendant's application should be and is hereby denied in all respects.” *Id*. at 159-160.

This type of situation presents the opportunity for counsel to persevere and persuade the court to reconsider where the expertise is critical and there are no other available alternatives. Some issues where an expert is needed may be novel or complex and therefore qualified experts may not be readily accessible. Counsel should not abandon efforts in this regard, but rather continue to seek assistance and return to the court with renewed and updated requests where it can be shown that costs can be reduced or qualified experts have refused to accept the case because the fees are unacceptably low. Making a complete record to establish on appeal the importance of the expertise and diligent efforts to secure assistance will avoid findings of abandonment of the issue and may help to gain a reversal where the expert was denied.

The U.S. Supreme Court has held that the defendant received ineffective assistance of counsel where counsel did not know that state law allowed the defense to seek additional funds for an expert. Hinton v Alabama, 134 S Ct 1081 (2014).

III. STAGES OF PROCEEDINGS

Section 722-c does not limit expert or other assistance to certain types of cases, levels of seriousness, or to any particular stage of the proceedings (*e.g.*, only after arraignment on indictment). *But see Stamp*, 120 Misc 2d 48 [request for expert assistance on breath test machine inadequacies denied in non-felony DWI case]. *Stamp* stands alone and in the years since that decision, the collateral consequences of even less serious convictions such as non-felony DWI can be devastating. Where an application is resisted because of an asserted lack of importance of the case or potential conviction, it is incumbent upon counsel to press the issue as a matter of due process and fundamental fairness to ensure that a person does not suffer undue consequences for the lack of ability to thoroughly examine the evidence and present a defense.

The importance of being allowed to hire experts in the early stages of a case relates to their use as consultants: the need for assistance in evaluating evidence to make reasonable strategic decisions, including whether to accept or reject a plea offer. *See Bennett*, 29 NY2d 462 [It is well settled that the defendant's right to effective representation entitles him to have counsel “‘conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself time for reflection and preparation for trial.’”]; *People v Reed*, 152 AD2d 481 (1st Dept 1989) [noting counsel’s obligation to convey accurate information in consideration of plea negotiation]. The United States Supreme Court’s 2012 decisions in *Lafler v Cooper*, 566 US 156 (2012) and *Missouri v Frye*, 566 US 133 (2012), regarding the critical nature of effective assistance counsel in

plea cases, underscores how important it is that attorneys seek to use every available resource to investigate and properly counsel clients in the disposition of their cases.

Similarly, the use of mitigation experts has been accepted in cases where a defendant's history presents issues requiring evaluation. *See People v Louis*, 161 Misc 2d 667 (Supreme Ct, New York Co 1994) [approval of fees in excess of statutory amount based on extraordinary circumstances for mitigation expert in pre-plea investigation].

Funds for expert assistance may be available for post-conviction practice in the discretion of the court. Experts may be necessary in order to establish compelling issues to vacate a judgment or sentence. In *People v Bailey*, 47 Misc 3d 355 (County Ct, Monroe Co 2014), the motion court ultimately granted § 722-c funds to cover fees of a slate of experts that presented evidence related to the state of the science in Shaken Baby Syndrome cases that had dramatically changed in the years following a prosecution and conviction on that basis. The CPL article 440 proceedings were brought challenging conviction on the basis of a dramatic shift in the science related to Shaken Baby Syndrome requiring a full re-examination of the judgment of conviction. The expert testimony established that the medical and scientific understanding of injuries long attributed to the inappropriate shaking of infants was not as concrete as previously believed, and that upon careful review of the evidence in the *Bailey* case, there was significant doubt that the infant's death was reasonably attributable to shaking as opposed to a fall. At the conclusion of the hearing, the court wrote a carefully detailed opinion reviewing the experts' analysis of the science and evidence and vacated the conviction. The court had reserved on the initial § 722-c application but ultimately granted the request for funds. It was fortuitous that the experts in *Bailey* were willing to pursue their investigation and offer testimony while the funding issue remained unresolved, but in the end the case stands for the proposition that post-conviction courts should consider granting expert funds in cases of merit that otherwise may result in a continuing miscarriage of justice. The Fourth Department affirmed the trial court's decision granting the post-conviction motion. *Bailey*, 2016 NY Slip Op 07490.

IV. TYPES AND INDEPENDENCE OF EXPERTS

The defense entitlement to funding for experts is not limited to the same types of experts being used by the prosecution. In *Smith*, 114 Misc 2d 258, the court granted § 722-c funds to the defense in accordance with the Special Prosecutor's intent to use experts in particular fields. This case does not stand for the proposition that the defense is *only* entitled to the same types of experts that the prosecution intends to use. The need for expertise must be determined in accordance with the evidence and demands of the defense case, which may include assistance in refuting expert testimony presented by the prosecutor, but may also include exploring other issues that the defense can identify. Prosecutors may not seek experts relating to potential defenses until after the defense makes these defenses known. Examples include mental health defenses, challenges to eyewitness testimony, and challenges to the prosecution's theory of how an incident unfolded (which may require a scene reconstruction expert, an expert on the physical limitations imposed by a defendant's disability, or one of many other types of experts).

Ample support exists for the proposition that the right to experts to assist the defense can only be meaningful if the experts employed have sole allegiance to the defense. "The essential benefit of having an expert in the first place is denied the defendant when the services ... must be shared with the prosecution." *United States v Sloan*, 776 F2d 926, 929 (10th Cir 1985); *Cowley v Stricklin*, 929 F2d 640, 644 (11th Cir 1991); *Smith v McCormick*, 914 F2d 1153 (9th Cir 1990); *Marshall*, 423 F 2d at 1319

[an expert who shares "both a duty to the accused and a duty to the public interest" is burdened by an "inescapable conflict of interest"]; *People v McLane*, 166 Misc 2d 698 (Supreme Ct, New York Co 1995).

There is some case law that holds where the issues have been addressed by court-ordered experts or by experts previously engaged in the matter, the court may refuse funds to hire an additional expert solely for use by the defense. *Matter of Garfield M.*, 128 AD2d 876 (2nd Dept 1987) [The court did not abuse its discretion in concluding that there was no need to provide an independent psychological expert because of "the extensive evaluation and psychological examination of the appellant by the Family Court Mental Health Services and the Probation Department."]. However, it is critical to review such evidence carefully to determine whether independent expertise is necessary to assess the reliability of previous expert review and challenge the conclusions if appropriate.

Sometimes it is not possible to find an independent expert who has the expertise needed. In such instances, a court may order public experts to assist the defense as a matter of due process. In *People v Evans*, 141 Misc 2d 781 (Supreme Ct, New York Co 1988), the trial court ordered the New York Police Department Auto Crimes Unit experts to assist the defense in examining non-public Vehicle Identification Numbers. Finding that the expertise did not widely exist elsewhere and that the defense had exhausted efforts to obtain cooperation from private sources, the court held that "[w]hether or not [the defendant] has funds to hire an expert, if the only source of expertise that may reasonably be necessary to his defense resides with the government, the government must give him access. This is the essence of fairness. Due process mandates no less." *Id.* at 784.

V. PROTECTING THE PUBLIC TREASURY CANNOT BE SOLE BASIS FOR DENYING § 722-c APPLICATIONS

Courts may cite the desire to preserve government funds as a basis for denying applications for services under § 722-c. *See, e.g., Pride*, 79 Misc 2d at 583 [stating that the defense should not be allowed to "raid the public treasury"]. The federal District Court noted in *Thomas v Kuhlman*, *supra*, with some apparent consternation in regard to the denial of public funds for the employment of a defense investigator, that "[i]t is admittedly somewhat unpalatable to the court to lay responsibility for the expense of such an investigation on defense counsel where the government itself refuses to acknowledge its responsibility to make funds available in order to achieve a fair trial. In this court [US District Court], such funds would be made available in such a case." *Thomas v Kuhlman*, 255 F Supp 2d at 112.

The law is clear: where the defense makes the appropriate showing of financial inability and necessity, budgetary constraints cannot form the sole basis for denial of funds. *See Ake*, 470 US at 78-80; *Matter of Director of Assigned Counsel Plan of the City of New York*, 159 Misc 2d 109, 123 (Supreme Ct, New York Co 1993) *affd sub nom. People v Townsend*, 207 AD2d 307 (1st Dept 1994) *affd* 87 NY2d 191 (1995) [Economic issues "cannot be the overriding concern when the ability of the court to carry out its essential function of assuring justice and due process is implicated."].

VI. § 722-c AND SYSTEMIC REFORM

From a systemic standpoint, § 722-c motions for auxiliary services can be utilized as a means of developing authority supporting parity of resources for the defense. In the area of forensics, the NAS and PCAST reports decrying the scientific validity of forensic evidence as a whole should lay the groundwork for a standard practice of obtaining expert assistance in any case where the prosecution intends to use forensic evidence. Prosecutors have access to state forensic services and law enforcement databases to assist in the preparation of cases. To ensure that a person accused of a

crime has a fair opportunity to meet and challenge this wide range of evidence, defenders must be diligent in seeking similar qualified assistance.

Where counsel cannot adequately perform the required investigation because time and resources prevent it, an application for investigative assistance should be made and renewed as necessary. Defenders in offices without investigators, and other assigned counsel working under onerous conditions of limited resources and overly burdensome caseloads, should cite overall constraints of time and resources as part of the showing of necessity.

This strategy serves a twofold purpose. First, it makes a solid record on appeal if the lack of investigative assistance plays a part in preventing the preparation and presentation of a defense. Second, the regular filing of such applications will help establish the systemic need to ensure that clients in need and assigned counsel have investigators and other expert assistance available to fulfill their constitutional rights and obligations.

The ability to secure qualified expert assistance to examine, assess, and prepare a defense is bound with the constitutional right to present a defense. As careful investigation is undertaken and evidence is reviewed, and definitive theories and themes of defense are developed, § 722-c applications for experts virtually write themselves. It then becomes the task of defenders to encourage judges and the trial and appellate courts to fulfill the demands of due process and fundamental fairness by granting these applications.

CASELAW ON USE AND ENGAGEMENT OF EXPERTS

The following cases, while not exclusively dealing with § 722-c funding, should help inform motion practice with respect to specific types of experts.

CONFESSIONS

Ability to understand *Miranda* *People v Knapp*, 124 AD3d 36 (4th Dept 2014)

False confessions *People v Bedessie*, 19 NY3d 147 (2012); *People v Days*, 131 AD3d 972 (2nd Dept 2015)

Hypnotic expert *Little v Armontrout*, 835 F2d 1240 (8th Cir 1987); *People v Smith*, 114 Misc 2d 258 (County Ct, Dutchess Co 1982); *People v Tunstall,* 133 Misc 2d 640 (Supreme Ct, Richmond Co 1986)

Involuntariness *People v Oliveras*, 21 NY3d 339 (2013) (ineffective assistance of counsel for failing to review psychological records related to voluntariness)

Linguistic Discourse Analysis *People v Tyson*, 227 AD2d 322 (1st Dept 1996); *Tyson v Keane*, 991 F Supp 314 (SDNY 1998)

EYEWITNESS EVIDENCE

Admission of expert testimony *People v McCullough*, 27 NY3d 1158 (2016)

Eyewitness reliability: passage of time *People v LeGrand*, 8 NY3d 449 (2007)

- **Cross-Racial Identification** *People v Abney*, 13 NY3d 251 (2009)
- **Event Stress, Weapons Focus [*Frye* Hearing Decision and Order]** *People v Abney*, 31 Misc 3d 1231(A) (Supreme Ct, New York Co 2011)
- **Perception and memory, correlation between confidence and accuracy** *People v Lee* 96 NY2d 157 (2001); *People v Young*, 7 NY3d 40 (2006)

Jury Instructions regarding expert testimony *People v Drake*, 7 NY3d 28 (2006)

FORENSIC SCIENCES

Arson *People v Rivers*, 18 NY3d 222 (2011); *People v Chase*, 8 Misc 3d 1016(A) (County Ct, Washington Co 2005) [changes in science of arson investigation amounted to newly discovered evidence]

Blood spatter evidence *People v Whitaker*, 289 AD2d 84 (1st Dept 2001); *People v Barnes*, 267 AD2d 1020 (4th Dept 1999) [*Frye* hearing denied, "evidence has long been deemed reliable"]

Fingerprint expert *United States v Patterson*, 724 F2d 1128 (5th Cir 1984); *United States v Durant,* 545 F2d 823 (2nd Cir 1976)

Handwriting expert *People v Mencher*, 42 Misc 2d 819 (Supreme Ct, Queens Co 1964) (authorized under former Code of Criminal Procedure § 308)

Hair analysis *People v Allweiss*, 48 NY2d 40 (1979)

Infrared Microscopy [Fourier Transform Infrared Spectrophotometry or FTIR] *People v Roraback*, 174 Misc 2d 641 (Supreme Ct, Sullivan Co 1997)

Narcotics *People v Mencher*, 42 Misc 2d 819 (Supreme Ct, Queens Co 1964) (authorized under former Code of Criminal Procedure § 308)

Photogrammetry experts *People v Smith*, 114 Misc 2d 258 (County Ct, Dutchess Co 1982)

Voice spectrography *People v Tyson*, 209 AD2d 354 (1st Dept 1994)

INVESTIGATIONS AND MITIGATION

Investigator *People v Irvine*, 40 AD2d 560 (2nd Dept 1972); *Marshall v United States*, 423 F2d 1315 (10th Cir 1970)

Prepleading report preparer *People v Louis*, 161 Misc 2d 667 (Supreme Ct, New York Co 1994)

Social worker *Matter of Director of Assigned Counsel Plan of the City of New York*, 159 Misc 2d 109 (Supreme Ct, New York Co 1993) *affd sub nom. People v Townsend*, 207 AD2d 307 (1st Dept 1994) *affd* 87 NY2d 191 (1995)

INTERPRETERS

Right to assistance at any stage of criminal proceeding *People v Robles*, 86 NY2d 763 (1995)

Right to assistance to review documents in preparation for trial *People v Rodriquez*, 247 AD2d 841 (4th Dept 1998) (denial of adjournment was an abuse of discretion)

Right to meaningfully participate in trial and assist in defense *People v Ramos*, 26 NY2d 272 (1970)

MISCELLANEOUS

Jury consultant *People v Pike*, 63 AD3d 1692 (4th Dept 2009) [funds denied for failure to establish necessity under circumstances of case]

Transcript in lieu of testimony to avoid fee *Matter of Palma S. v Carmine S.*, 134 Misc 2d 34 (Family Ct, Kings Co 1986) (court denied funds to pay witness fees to compel opinion testimony but granted § 722-c funds to order and admit transcript of expert's testimony in a prior proceeding.)
[***Ed. Note**:* The decision in this case disappointingly, but unequivocally expresses the trial court's lack of interest in the particular expert testimony, but the holding is worthy in its support for the granting of funds for transcripts and the statement that "this court will not penalize a party for whom it has appointed counsel for her financial inability to pay a witness' fee …."]

SORA *People v Linton*, 94 AD3d 962 (2nd Dept 2012) [The defendant in SORA proceeding may be entitled to the appointment of expert upon finding that services are necessary; necessity not established in instant case]

Street-level drug dealing *People v Gonzalez*, 99 NY2d 76 (2002); *People v Brown*, 97 NY2d 500 (2002); *but see People v Smith*, 2 NY3d 8 (2004) *and People v Colon*, 238 AD2d 18 (1st Dept 1997) *app dms* 92 NY2d 909 (1998)

VIN Inspection by Auto Crime Division of New York City Police Department to assist in defense of car arson case *People v Evans*, 141 Misc 2d 781 (Supreme Ct, New York Co 1988)

PROCEDURAL

Access to evidence for testing *People v Nunez*, 155 Misc 2d 160 (Supreme Ct, New York Co 1992)

Expert testimony at pretrial hearings on admissibility of *Ventimiglia/Molineux* evidence *People v Denson*, 26 NY3d 179 (2015)

Expert presence in courtroom during witness testimony *People v Novak*, 41 Misc 3d 737 (County Ct, Sullivan Co 2013); *People v Medure,* 178 Misc 2d 878 (Supreme Ct, Bronx Co 1998); *People v Santana*, 80 NY2d 92 (1992)

Extent of non-record evidence admissible to support opinion *People v Angelo*, 88 NY2d 217 (1996)

PHYSICAL MEDICINE

Bitemarks: Odontologist *People v Koberstein*, 262 AD2d 1032 (4th Dept 1999)

- **Admissibility of Evidence** *People v Bethune*, 105 AD2d 262 (2nd Dept 1984)

EEG examination *United States v Hartfield*, 513 F2d 254 (9th Cir 1975) (to determine if the defendant has epilepsy)

Forensic medicine *People v Smith*, 114 Misc 2d 258 (County Ct, Dutchess Co 1982)

Forensic pathologist *Williams v Martin*, 618 F2d 1021 (4th Cir 1980) (on cause of death); *People v Smith*, 114 Misc 2d 258 (County Ct, Dutchess Co 1982)

Physician and psychotherapist *People v Hatterson*, 63 AD2d 736 (2nd Dept 1978)

Shaken Baby Syndrome *People v Bailey*, 47 Misc 3d 355 (County Ct, Monroe Co 2014) *affd* 2016 NY Slip Op 07490 (4th Dept 11/10/2016); *but see People v Thomas*, 46 Misc 3d 945 (County Ct, Westchester Co 2014) (denial of *Frye* hearing on SBS)

PSYCHIATRIC/PSYCHOLOGICAL/NEUROLOGICAL/ TRAUMA-INFORMED

Battered woman's syndrome *Dunn v Roberts*, 963 F2d 308 (10th Cir 1992); *People v Seeley*, 186 Misc 2d 715 (Supreme Ct Kings Co 2000)

Child Sex Abuse Accommodation Syndrome *People v Spicola*, 16 NY3d 441 (2011)

Complainant testimony: capacity to lie, developmental disability *People v Brown*, 7 AD3d 726 (2nd Dept 2004)

Memory impairment of the defendant *People v Segal*, 54 NY2d 58 (1981) (to admit defense evidence must submit to examination by prosecution expert)

Neonatacide Syndrome *People v Wernick*, 89 NY2d 111 (1996)

Neurological testing for Traumatic Brain Injury *People v Jones*, 210 AD2d 904 (4th Dept 1994) *affd* 85 NY2d 998 (1995); *People v Phillips*, 16 NY3d 510 (2011)

Psychological automatism *People v Brand*, 13 AD3d 820 (3rd Dept 2004)

Intoxication and intent *People v Cronin*, 60 NY2d 430 (1983); *People v Donohue*, 123 AD2d 77 (3rd Dept 1987)

Second neurologist *People v McClane*, 166 Misc 2d 698 (Supreme Ct, New York Co 1995) (to assist defense counsel and psychiatrist who admitted he lacked ability to evaluate relationship between brain structure, behavior, and emotions)

Second validator in child sex abuse case *Matter of Tiffany M.*, 145 Misc 2d 642 (Family Ct, Queens Co 1989)

TOXICOLOGY

Driver impairment *People v Heidgen*, 22 NY3d 259 (2013)

Narcotics: chemical analysis, odor *People v Darby*, 263 AD2d 112 (1st Dept 2000)

Poison: administration and effects *People v Feldman*, 299 NY 153 (1949)

Radioimmunoassay [RIA]: human hair *Matter of Adoption of Baby Boy L.*, 157 Misc 2d 353 (Family Ct, Suffolk Co 1993)

WEAPONS

Ballistics expert *People v Jenkins*, 98 NY2d 280 (2002) (preclusion of prosecution ballistics evidence not warranted where the defense declined opportunity to retain an expert)

Bullet trajectory *People v Dewey*, 23 AD2d 960 (4th Dept 1965); *People v Hamilton*, 127 AD3d 1243 (3rd Dept 2015); *United States v Durant*, 545 F2d 823 (2nd Cir 1976)

Firearms expert *People v Hull*, 71 AD3d 1336 (3rd Dept 2010)

Knives: assault *People v Salce*, 124 AD3d 923 (3rd Dept 2015)

Toolmarks *People v Givens*, 30 Misc 3d 475 (Supreme Ct, Bronx Co 2010)

QUICK REFERENCE LIST: STATE AND NATIONAL STANDARDS ON DEFENSE ACCESS TO AND FUNDING FOR EXPERTS

Below is a list of New York and national standards regarding public defense access to independent experts, including investigators, interpreters/translators, forensic scientists, and medical and mental health professionals, and funding to retain such experts.

NEW YORK STANDARDS

New York State Office of Indigent Legal Services, *Standards and Criteria for the Provision of Mandated Representation in Cases Involving a Conflict of Interest*
(eff. July 1, 2012, January 1, 2013 [standards and criteria made applicable to all mandated representation])
https://www.ils.ny.gov/files/Conflict%20Defender%20Standards%20and%20Criteria.pdf
"Counties must ensure, through their plans for providing public defense representation and other provisions, that attorneys and programs providing mandated legal services in conflict cases: … 4. Have access to and use as needed the assistance of experts in a variety of fields including mental health, medicine, science, forensics, social work, sentencing advocacy, interpretation/translation, and others. See *NYSBA Standard* H, Support Services/Resources."

New York State Office of Indigent Legal Services, *Standards for Parental Representation in State Intervention Matters* (2015)
https://www.ils.ny.gov/files/Parental%20Representation%20Standards%20Final%20110615.pdf
"O-7. Expert witnesses. Identify, secure, prepare, and qualify any expert witness. Prepare to cross-examine the opposition's experts, including, when possible, interviewing them.
Commentary
State intervention cases often require multiple experts in different fields, such as physical and mental health, drug and alcohol use, parenting or psychosexual assessments, and others. Experts may be used by either party for ongoing case consultation as well as for providing testimony at trial. See Standard G-2."

See also Standard D-1 commentary and G-2 commentary.

Indigent Defense Organization Oversight Committee (First Department), *General Requirements for all Organized Providers of Defense Services to Indigent Defendants* (July 1, 1996 [as amended May 2011])
www.nycourts.gov/courts/ad1/Committees&Programs/IndigentDefOrgOversightComm/general%20_requirements.pdf
"VII.B.3.a: Lawyers should have access to the professional services of psychiatrists, forensic pathologists and other experts at all stages of the case, and should be able to rely upon such experts not only to serve as trial witnesses, but also to provide pre-trial analysis and advice. Quality representation requires that defense lawyers have the services of interpreters to assist in communicating with their non-English speaking clients and witnesses at all stages of the case."

New York State Bar Association, *Revised Standards for Providing Mandated Representation* (2015)
http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=44644
"H-5. Assigned counsel plans shall ensure that assigned counsel have the investigatory, expert, and other support services, including, but not limited to, social work, mental health and other relevant social services, and facilities necessary to provide quality legal representation…."

"H-6. Because persons eligible for mandated representation have the right to all appropriate investigatory and expert services, courts should routinely grant requests for such services made by assigned counsel. In Family Court expert services, including social worker, family treatment, and forensics, are often crucial at the outset and should be requested by counsel prior to fact finding…."

See also Standard H-1.

New York State Defenders Association, *Standards for Providing Constitutionally and Statutorily Mandated Legal Representation in New York State* (2004)
http://66.109.34.102/ym_docs/04_NYSDA_StandardsProvidingConstitutionallyStatutorilyMandatedRepresentation.pdf
VII. "E. Publicly-funded services, including but not limited to transcription of court proceedings, investigators, interpreters, and experts, should not be denied to a person who is financially eligible for publicly-provided legal services but is

represented by counsel acting pro bono or paid by a third person. Nor should publicly-funded auxiliary services be denied to a person whose financial condition after payment of a reasonable fee to retained counsel makes that person unable to obtain necessary auxiliary services without substantial hardship to themselves or their families."

VIII.A. "6. Unless inconsistent with the best interest of the client, counsel should conduct an independent investigation regardless of the accused's admissions or statements to the lawyer of facts constituting guilt. The investigation should be conducted as promptly as possible. Counsel should secure the assistance of investigators and/or other experts, including providers of social services, whenever needed for preparing any aspect of the defense, including but not limited to bail applications, pretrial motions, plea negotiations, defense at trial including developing an understanding of or rebuttal of the prosecution's case, and sentencing."

VIII.A.8. "c. Should fully prepare for pretrial proceedings and trial …. Counsel should obtain expert assistance whenever it is needed for any aspect of case preparation and presentation, including but not limited to the assistance of mental health experts, forensic scientists, and persons knowledgeable about any aspect of the case that counsel cannot adequately understand or present without assistance."

See also Standards VIII.B.6 and VIII.B.8.c, which are Family Court counterparts to the two standards immediately above. And see also Standard III "C. …Salaries and fees should be sufficient to compensate attorneys, other professionals (such as investigators, social workers, sentencing experts, expert witnesses, and consultants), and support staff commensurate with their qualifications and experience, and should be at least comparable to compensation of their counterparts in the justice system …."

NATIONAL STANDARDS

American Bar Association (ABA), *Ten Principles of a Public Defense Delivery System* (2002)
www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf
"8 There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system." *See* Commentary to this standard, which says in relevant part: "There should be parity of workload, salaries and other resources (such as … access to forensic services and experts) between prosecution and public defense …." [Endnote omitted]

ABA, *Standards for Criminal Justice: Providing Defense Services,* 3d ed., (1990, 1992)
www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_defsvcs_blk.html#1.4
"Standard 5-1.4 Supporting services
The legal representation plan should provide for investigatory, expert, and other services necessary to quality legal representation. These should include not only those services and facilities needed for an effective defense at trial but also those that are required for effective defense participation in every phase of the process. In addition, supporting services necessary for providing quality legal representation should be available to the clients of retained counsel who are financially unable to afford necessary supporting services."

See also Standard 5-3.3 Elements of the contract for services, subparagraph (x).

National Study Commission on Defense Services, *Guidelines for Legal Defense Systems in the United States* (1976)
http://www.nlada.net/sites/default/files/nsc_guidelinesforlegaldefensesystems_1976.pdf
Guideline "3.1 Assigned Counsel Fees and Supporting Services…. Funds should be available in a budgetary allocation for the services of investigators, expert witnesses and other necessary services and facilities…."

See also Guidelines 1.5, 3.4, 4.3, and 5.8.

National Advisory Commission on Criminal Justice Standards and Goals - *Courts, Chapter 13, The Defense* (1973)
http://www.nlada.net/sites/default/files/nac_standardsforthedefense_1973.pdf
"Standard 13.14 Supporting Personnel and Facilities…. The budget of a public defender for operational expenses other than the costs of personnel should be substantially equivalent to, and certainly not less than, that provided for other components of the justice system with whom the public defender must interact, such as the courts, prosecution, the private bar, and the police. The budget should include: ….
3. Funds for the employment of experts and specialists, such as psychiatrists, forensic pathologists, and other scientific experts in all cases in which they may be of assistance to the defense …."