Expert Witnesses in Capital Cases

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Judicial District 19-A
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1. Cost.

   A significant expense for the taxpayers—paid by IDS.

   In one case, State v. Robinson, in Stanly County, tried from October, 2011—December, 2011, nine expert witnesses testified. The fees for some of the expert witnesses, not all of whom are listed below, totaled $156, 653, as follows:

   Defense Experts

Dr. George Corvin, M.D. Forensic Psychiatrist	$58,000
Dr. Brad Fisher, Forensic Psychologist	28,000
Dr. Callaway	1,000
Dr. Adams	2,000
Dr. James Hilkey, Forensic Psychologist	5,500

   State's Experts

Dr. Jonathan Weiner, M.D., Clinical and Forensic Psychiatrist	$43,006
Dr. Mark Hazelrigg, Forensic Psychologist	19,147

2. Procedure for both the defendant and the State for obtaining expert assistance in regard to incapacity of the defendant to proceed to trial is set forth in Article 56 of Chapter 15A of the General Statutes of North Carolina.

   N.C. Gen. Stat.§ 15A-1001.

   (a) No person may be tried, convicted, sentenced or punished for a crime where by reason of mental defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner. This condition is hereinafter referred to as "incapacity to proceed."

(b) This section does not prevent the court from going forward with any motions which can be handled by counsel without the assistance of the defendant.

N.C. Gen. Stat. § 15A-1002.

(a) The question of the capacity of the defendant to proceed may be raised at any time on motion by the prosecutor, the defendant, the defense counsel, or the court. …
(b) When the capacity of the defendant to proceed is questioned, the court shall hold a hearing to determine the defendant's capacity to proceed. … The court:

(1) May appoint one or more impartial medical experts, including forensic evaluators …to examine the defendant and return a written report describing the present state of the defendant's mental health; reports so prepared are admissible at the hearing and the court may call any expert so appointed to testify at the hearing; any expert so appointed may be called to testify at the hearing by the court at the request of either party; …

(b1) If the report pursuant to subdivision (1)… of this section indicates that the defendant lacks capacity to proceed, proceedings for involuntary civil commitment under Chapter 122C of the General Statues may be instituted on the basis of the report …

3. Defendant's *Ex Parte* Orders to Obtain and Expert.

When a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Fourteenth Amendment's due process guarantee of fundamental fairness requires that a State provide access to a psychiatrist's assistance on this issue if the defendant is indigent. Ake v. Oklahoma, 470 U.S. 68; 1055 S. Ct. 1087; 84 L. Ed. 53 (1985).

"Psychiatry is not an exact science." 470 U.S., at 81.

"The defendant's attorney may submit a motion and order *ex parte* to the court to obtain the assistance of a psychiatrist." 470 U.S., at 82-83.

Funds to pay the expert for indigent defendants:

The defendant's attorney makes a request of Indigent Defense Services for money to pay the expert by filling out a form after the court has approved the appointment. IDS normally approves the request and pays the bill. At this time medical doctors are paid $300 per hour, plus an additional $10 per hour for each 10 years of experience in the practice of the profession. Ph. Ds are paid $200 per hour.

Requests made to IDS are approved or denied by Thomas Maher, the director of IDS.

If a request for funds for an expert is denied by IDS, then the defense attorney can appeal to the court by providing the same information that was provided to IDS.

In capital cases such requests go first to the Capital Defenders Office for approval and then are approved or denied by Maher at IDS.

4. The State's expert witnesses.

   When the State wants an expert witness to, for example, rebut the defendant's psychiatric expert, the district attorney usually will file a Motion for Funds to Retain Expert.

   The presiding judge must approve the payment of the State's expert witness fees, as opposed to IDS ordering payment of the defendant's experts.

5. Mutual disclosure of experts.

   N.C. Gen. Stat. § 15A-903 (2)—Disclosure of experts by the State to defendant.

   (a) Upon motion of the defendant, the court must order: …

      (2) The prosecuting attorney to give notice to the defendant of any expert witnesses that the State reasonably expects to call as a witness at trial. Each such witness shall prepare, and the State shall furnish to the defendant, a report of the results of any examinations or tests conducted by the expert. The State shall also furnish to the defendant the expert's curriculum vitae, the expert's opinion, and the underlying basis for that opinion.…within a reasonable time prior to trial, as specified by the court….(Emphasis added.)

N.C. Gen. Stat. § 15A-905 —Disclosure of experts by defendant to the State.

(c) Notice of Defenses, Expert Witnesses, and Witness Lists.—If the court grants any relief sought by the defendant under G.S. 15A-903, or if disclosure is voluntarily made by the State pursuant to G.S. 15A-902(a), the court must, upon motion of the State order the defendant to:

(1) Give notice to the State of the intent to offer at trial a defense of alibi, duress, entrapment, insanity, mental infirmity, diminished capacity, self-defense, accident, automatism, involuntary intoxication, or voluntary intoxication….

(2) Give notice to the State of any expert witnesses that the defendant reasonably expects to call as a witness at trial. Each such witness shall prepare, and the defendant shall furnish to the State, a report of the results of the examinations or tests conducted by the expert. The defendant shall also furnish to the State the expert's curriculum vitae, the expert's opinion, and the underlying basis for that opinion. The defendant shall give the notice and furnish the materials required by this subdivision within a reasonable time prior to trial, as specified by the court. (Emphasis added.)

N.C. Gen. Stat. § 15A-959 (b) also bears upon the defendant's duty to give notice of the defendant's intention to offer expert testimony regarding the mental state of the defendant, as follows:

N.C. Gen. Stat. § 15A-959 (b). Notice of defense of insanity….

(b) In cases not subject to the requirements of G.S. 15A-905 (c), if a defendant intends to introduce expert testimony relating to a mental disease, defect, or other condition bearing upon the issue of whether the defendant had the mental state required for the offense charged, the defendant must within a reasonable time prior to trial file a notice of that intention….

Examination of the defendant by the State's expert.

If the defendant has a mental condition bearing upon the state of mind required for conviction of the offense charged and intends to rely upon expert testimony to prove it, then the State has the right to have the defendant examined concerning the defendant's state of mind at the time of the offense. State v. Huff, 325 N.C. 1, 381 S.E. 2d 635 (1989), vacated on other grounds, 497 U.S. 1021, 110 S. Ct. 3266, 111 L. Ed. 2d 777 (1990). If the defendant refuses to cooperate with the State's rebuttal expert who wants to examine the defendant in order to

form an opinion as to this issue, then the State may have grounds to argue for exclusion of the defendant's expert testimony on insanity, or other mental disease or defect. (This is stated in a publication from the ABA Criminal Justice Standards Committee published in 1989 by The American Bar Association. One of the members of that committee was Charles L. Becton who was, at that time a Judge of The North Carolina Court of Appeals.)

As discussed below, a judge must use caution in excluding defense expert witnesses.

6. A big problem with discovery—delays in furnishing reports of experts.

State v. Gillespie, 362 N.C. 150; 655 S.E. 2d 355; 2008 N.C. LEXIS 29 (2008).

Defendant was found guilty of first degree murder and was sentenced to life in prison without parole. The testimony of defendant's two expert witnesses was excluded by the trial court because they did not provide reports as required to evaluate the defendant's capacity at the time of the offense. The trial court had ordered that the reports be provided two weeks before the trial was scheduled to begin. This order was entered orally in open court and on the record. The case had been continued previously because the reports had not been furnished in time for trial.

N.C. Gen. Stat. § 15A-910 provides in pertinent part:

(a) If at any time during the course of the proceedings the court determines that a party has failed to comply with this Article or with an order issued pursuant to this Article, the court in addition to exercising its contempt powers may

….

(3) Prohibit the party from introducing evidence not disclosed….

Held: New trial. Nothing in the language of G.S. 15A-910 indicates that the authority to sanction for discovery non-compliance extends so far as to punish either the State or a criminal defendant for the actions of non-parties. The Supreme Court did mention, however, the court's inherent contempt powers in dealing with such problems. 362 N.C., at 155.

In the Matter of K.H., 2009 N.C. LEXIS 322 (2009) (unpublished). Gillespie was cited with approval for the point that the issue of the applicability of a particular discovery statute in a particular set of circumstances and whether a violation of that discovery statute actually occurred is subject to de novo review.

The appropriateness of the resulting sanction, if any, imposed by the trial court is reviewed for an abuse of discretion.

State v. Lane, 365 N.C. 7, 707 S.E. 2d 210 (2011); cert. denied, 132 S. Ct. 816; 181 L. Ed. 2d 529; 2011 U.S. LEXIS 8690 (U.S. 2011) was a case where the Supreme Court upheld the trial court's excluding expert testimony on the grounds that the report of a neuropharmacologist was insufficient to satisfy the rules of discovery. However, the exclusion of this testimony was upheld because the trial court found also that it should be excluded because of the lack of relevancy to the issues in the trial. The appellate court's opinion seems to place more emphasis on the relevancy issue rather than the persistence on the part of the expert in not filing a report as required by the discovery statutes. The appellate court did note that the trial court granted two motions to compel the expert to provide a report, and the case was continued once because the report had not been filed. The trial began several months after the first order to compel was entered, and still no report was filed. At trial the defendant attempted to call the expert, but the one-page, double-spaced letter proffered as a "report" was deemed "incomplete," and the witness was not permitted to testify.

After reading these cases it appears that the proper procedure in dealing with a recalcitrant expert would be the following:

(a) At the first opportunity after an expert is identified by a party, the court should enter a written order setting a reasonable date in advance of the trial date for the expert's report to be furnished to the State and the defendant.

(b) If the report is not provided prior to the trial date, a written order should be entered continuing the trial to another date certain, and the order should state that the case had to be continued due to the failure of the expert to provide his or her report in a timely manner; that this failure has resulted in the need to continue the case; that to do otherwise could jeopardize the right of the State as well as the defendant to a fair trial on the merits; that this has interfered with the administration of justice; and that if the report is not provided when ordered then the court will enter an order directing the expert to appear in court and show cause why he or she should not be held in contempt of court. The order should be served on the expert by personal delivery or be registered mail, return receipt requested.

(c) Do what you need to do to carry out the order entered.

7. Daubert returns to North Carolina., as of 1 October 2011.

"North Carolina is not, nor has it ever been, a Daubert jurisdiction," thus sayeth the Supreme Court of North Carolina in Howerton v. ARAI Helmet Ltd., 358 N.C. 440, 469 (2004), reaffirming the principles of State v. Goode, 341 N.C. 513 (1995).

The admissibility of expert testimony, under the Goode analysis, is much simpler that under Daubert. Preliminary questions concerning qualifications of a witness to testify and the admissibility of evidence are to be determined by the trial judge, and following the Goode rule, three questions were addressed:

(a) Is the method of proof sufficiently reliable as an area for expert testimony? (The following are indices of reliability: expert's use of established techniques, expert's professional background in the field, the use of visual aids before the jury so that the jury is not asked "to sacrifice its independence by accepting the scientific hypotheses on faith", and independent research conducted by the expert.)
(b) Is the witness is qualified as an expert to apply this method to the specific facts of the case? (It is not necessary that an expert be experienced with the identical subject matter at issue or be a specialist, licensed, or even engaged in a specific profession. It is enough that the expert witness because of his expertise is in a better position to have an opinion on the subject than is the trier of fact. Further the trial judge is afforded wide latitude of discretion when making a determination about the admissibility of expert testimony.)
(c) Is the proffered testimony relevant? (Having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Rule 401. It is admissible when such testimony can assist the jury to draw certain inferences from facts because the expert is better qualified than the jury to draw such inferences.)

From the General Assembly: Daubert returns.

N.C. Gen. Stat. § 8C-1, Rule 702 was changed to track the federal version of Rule 702(a) almost verbatim under Daubert. The new rule applies "to actions commenced on or after October 1, 2011," thus offering some explanation as to the deluge of medical malpractice cases that some have seen filed in Superior Court just before October 1, 2011. (Emphasis added.) The General Assembly probably was thinking in terms of civil actions according to the language used in Session Laws 2011-283. However, it would also apply to criminal matters as well.

Rule 702 (a) now provides as follows:

> **"(a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:**
>
> **(1) The testimony is based upon sufficient facts or data.**
> **(2) The testimony is the product of reliable principles and methods.**
> **(3) The witness has applied the principles and methods reliably to the facts of the case."**

Thus, Daubert is alive and well in North Carolina for actions arising on or after October 1, 2011, but the Goode rule will apply to all actions that arose before that date.

In Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L.Ed. 2d 469 (1993) the United States Supreme Court ruled that when "faced with a proffer of expert scientific testimony, then, the trial judge must determine at the outset, pursuant to Rule 104 (a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." 509 U.S. at 592-593.

The Supreme Court did provide some guidelines for judges to follow in these matters:

(a) Has the scientific theory or technique been tested, or can it be tested?

(b) Has the theory or technique been subjected to peer review and publication? Publication (which is but one element of peer review) is not a *sine qua non* of admissibility. The fact of publication (or lack thereof) in a peer reviewed journal will be a relevant, though not dispositive, consideration in assessing the scientific validity of a particular technique or methodology on which an opinion is premised.

(c) What is the known or potential rate of error?

(d) What are the maintenance standards controlling the technique's operation?

(e) A "general acceptance" standard in the scientific community can have a bearing on the inquiry, but a general acceptance principle underlying

scientific evidence is not a necessary precondition to admissibility of such evidence.

Further, the court reminded us that Rule 706 allows the trial court, in its discretion, to procure the assistance of an expert of its own choosing to assist the court.

509 U.S. at 593-595.

The United States Supreme Court then expounded further on the Daubert rule in Kuhmo Tire Co. v. Carmichael, 526 U.S. 137, 143 L. Ed. 2d 238 (1999) and made it clear that Daubert's general gatekeeping obligation of determining reliability applies not only to scientific knowledge, but also to technical or other specialized knowledge. Here, the Supreme Court upheld the trial court's exclusion of the testimony of defendant's tire expert who relied only upon his experience and observation instead of the application of scientific principles.

Kuhmo Tire does seem to mitigate the strict language in Daubert, as follows:

> "The Daubert factors do not constitute a definitive checklist or test, and the gatekeeping inquiry must be tied to the particular facts. Those factors may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of his testimony. Some of those factors may be helpful in evaluating the reliability even of experience-based expert testimony, and the Court of Appeals erred insofar as it ruled those factors out in such cases. In determining whether particular expert testimony is reliable, the trial court should consider the specific Daubert factors where they are reasonable measures of reliability." 526 U.S. at 150.

Helpful suggestions (I hope.)

Daubert specifically states that judges can take judicial notice under Rule 201 of "theories that are so firmly established as to have attained the status of scientific law." 509 U.S. 593, footnote 11. (Emphasis added.)

I think that this is a tool that is underutilized.

N.C. Gen. Stat. §8C-1, Rule 201 provides:

Judicial notice of adjudicative facts.

(a) Scope of rule.—This rule governs only judicial notice of adjudicative facts.
(b) Kinds of facts. –A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the

territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) When discretionary.—A court may take judicial notice, whether requested or not.

(d) When mandatory.—A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) Opportunity to be heard. –In a trial court, a party is entitled upon timely request to an opportunity to be heard….

(f) Time of taking judicial notice.—Judicial notice may be taken at any stage of the proceeding.

(g) Instructing the jury.—In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed. (Emphasis added.)

As to scientific evidence or theories "so firmly established as to have attained the status of scientific law," to which reference is made in footnote 11 in Daubert, consider the following cases:

Taylor v. Abernathy, 149 N.C. App. 263, 560 S.E.2d 233 (2002) Handwriting expert testimony should have been admitted. Expert testimony may be deemed reliable notwithstanding that it is not based in science. The trial court erred in refusing to permit a handwriting expert to render an expert opinion on the basis that handwriting analysis is not based in science and has not been scientifically proven. This case was decided when the Court of Appeals apparently thought, as did most of us, that Daubert applied in North Carolina because Daubert was cited and discussed. 149 N.C. App. at 273. It was not until the Howerton decision by the North Carolina Supreme Court in 2004 that we had a clear ruling that we were not a Daubert jurisdiction.

The appellate cases before Howerton may provide some help and guidance in determining how to apply Daubert in those "actions commenced on or after October 1, 2011," but these cases are not necessarily binding now because of Howerton. Taylor v. Abernathy is one of those cases. The Court of Appeals noted that the expert had no scientific training, but had a vast amount of practical experience that formed the basis of his opinion. Further, it was noted that our Supreme Court focused on the following indicia of reliability: "…the expert's use of established techniques, the expert's professional background in the field, the use of visual aids before the jury…and independent research conducted by the expert." 149 N.C. App. at 273.

"Moreover, nothing in Daubert or Goode requires that the trial court re-determine in every case the reliability of a particular field of specialized knowledge consistently accepted as reliable by our courts, absent some new

evidence calling that reliability into question. Our courts have consistently held expert testimony in the field of handwriting analysis to be admissible…." Taylor v. Abernathy, 149 N.C. App. at 274.

State v. Davis, 142 N.C. App. 81 (2001) No Daubert analysis was required for an expert toxicologist to testify about extrapolation evidence because we have accepted extrapolation evidence since 1985. No abuse of discretion to admit.

State v. Underwood, 134 N.C. App. 533, 540 (1999) (Mitochondrial DNA testing held scientifically reliable.)

APPENDIX

The following is a checklist for use in determining the admissibility of expert testimony that appeared in The Judge's Evidence Bench Book, by Leo H. Whinery, Theodore P. Roberts and Robert B. Smith, Professors of Law at the University of Oklahoma in cooperation with The National Judicial College:

Determining the Admissibility of Expert Testimony.

__ Is the proponent offering a witness to testify as an expert?

If so, does the testimony involve

___scientific

___technical, or

___specialized knowledge?

If so, is the expert qualified in the relevant field of knowledge through

___knowledge,

___skill,

___experience,

___training, or

___education, and

___are the expert's qualifications related to the nature of the issue upon which the expert is to relate an opinion, and

___will the opinion of the expert assist the trier of fact to

___understand the evidence, or

___determine a fact in issue?

If so, the testimony of the expert in the form of an opinion or otherwise is admissible, providing the reliability requirements for the admissibility of expert testimony have been met.

Determining the Reliability of the Proffered Expert Testimony.

Is the testimony of the expert in the form of an opinion or otherwise

___based upon sufficient facts or data, such as

___reliable opinions of other experts

___reliable sources that expert relies upon in forming opinions, or

___other reliable data? If so, this requirement is satisfied, unless the facts or data are

___incomplete,

___speculative,

___conjectural, or

___conclusory in nature such that will invade the fact-finding process of the trier of fact.

If not, is the testimony of the expert in the form of an opinion or otherwise based upon the product of reliable principles and methods, such as

___being capable of testing, or tested,

___having been subject to peer review,

___having identified that known or potential rate of error when applied,

___having standards for controlling their operation,

___the extent to which they have been generally accepted in the concerned scientific community, or

___other reliability factors and

___has the expert applied the principles and methods reliably to the facts of the case?

If so, the testimony of the expert in the form of an opinion or otherwise is admissible.

Determining the Relevancy of the Evidence.

___Is the testimony of the expert in the form of an opinion or otherwise relevant in that it is sufficiently related to the facts of the case?

If so, the evidence is admissible unless

___its relevancy is substantially outweighed by the danger of unfair prejudice or will mislead the trier of fact.