

[CAPTION]

**EX PARTE MOTION FOR ORDER AUTHORIZING EXPERT AT PUBLIC  
EXPENSE**

**THIS MOTION IS FILED *EX PARTE*  
AND MUST BE MAINTAINED UNDER SEAL**

The Defendant, by counsel, respectfully requests this Court to authorize counsel to retain the services of [name of expert], [specialty of expert], and directing that the costs of such expert assistance be paid by the county. This Motion is made pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution; and Art. I, Sec. 12, 13, and 23 of the Indiana Constitution. In support of this Motion, the Defendant states the following:

1. The Defendant is indigent and is represented by appointed counsel OR has been found indigent for the purposes of hiring experts. This Court has previously ordered that all applications for funds for expert and investigative assistance shall be made by *ex parte* motion to the Court, considered *in camera*, and that any records and transcripts regarding such motions shall be under seal. The disclosures made in this motion are made in reliance upon the order and counsel's understanding that nothing set out in this motion will be revealed to the prosecution, the press, or the public.

2. The Defendant is charged with [insert offenses]. In particular, Defendant is accused of [set out the details of the crime to the extent they are known to counsel; explain how the evidence involving the area of expertise is important to the state's case against the client. As may be appropriate, depending upon the facts of the case, attach copies of police reports, autopsy, or other information which can be incorporated by reference in this motion.]

3. Assistance of this nature is critical to the jury's determination of Defendant's guilt [and/or to the determination of penalty, if a capital case]. [Explain why in detail. If appropriate, attach copies of any articles or chapters from treatises which explain the area of expertise and how experts may disagree in reaching conclusions about the area in question. If the application is for a mental health expert, detail the mental health history of the client, set out past diagnoses, descriptions of mental problems from family

members and others, including school, law enforcement, and DOC officials, and consider attaching copies of mental health records which describe the condition.]

4. [In areas such as pathology, hair and fiber comparisons, fingerprints and so forth, detail your efforts to interview the state's experts and set out why a defense expert is needed. With regard to mental health issues, if your client has been examined by a state doctor, it is advisable to attach the reports and records from the state's experts and describe any conversations you have had with the experts.]

5. [If appropriate, set out any reasons to doubt the validity or reliability of the state's expert. For example, the person who performed the autopsy is not a forensic pathologist, yet that person may state highly controversial opinions about what occurred, or a mental health expert may have conducted only a very limited evaluation. You may want to attach an affidavit from your own expert to support this.]

6. Undersigned counsel desires to retain the services of [name of expert], who is an expert in [area of expertise] for the purposes of [explain precisely the anticipated use of the expert's services; e.g., consultation with counsel with regard to the validity of the findings of the state's expert and help preparing for cross-examination, testimony in rebuttal, consultation with counsel regarding development of defense case, direct testimony, etc.]

7. [Name of expert]'s resume is appended to this motion and is hereby incorporated by reference. It sets out in detail [expert]'s qualifications and particular experience in the area of [if appropriate, describe any particular sub-specialty that relates to the anticipated use of the expert in this case; for example, the expert has studied, written and testified extensively in the area of schizophrenia and the defendant in this case has been diagnosed as schizophrenic.]

8. [If the expert will conduct any analysis or examination of evidence in the case, explain precisely what the expert proposes to do with the evidence.]

9. [In many cases, it will be appropriate to set out legal argument on the materiality and relevance of the expert testimony that you seek to present. For example, you may want to demonstrate that the expert's testimony may properly be considered in mitigation at the sentencing phase of a capital trial under the applicable decisions of the state and federal courts.]

10. Neither Defendant nor counsel is sufficiently knowledgeable in [area of expertise] to determine the validity of the opinions reached by the state's expert. Moreover, because of the need for specialized training and expertise in this area, it will be impossible for Defendant to present any evidence on this issue without the services of an expert.

11. The cost for [expert's name] is \$\_\_\_\_\_ per hour. It is anticipated that [number of hours] will be required to complete the expert's work in this case.

12. The requested expert assistance is essential for Defendant to have a fair trial. The services of a [type of expert] are necessary to enable Defendant to prepare effectively for trial, to present evidence on his own behalf, and to cross-examine the state's witnesses. Were it not for Defendant's poverty, counsel would retain the expert requested. Defendant must be provided with the requested expert assistance in order to protect his right to confront the State's witnesses (U.S. Const. 6<sup>th</sup> Amend; Ind. Const., Art. I, Sec. 13), his right to effective assistance of counsel(U.S. Const. 6<sup>th</sup> Amend; Ind. Const., Art. I, Sec. 13), his right to present a defense(U.S. Const. 6<sup>th</sup> Amend; Ind. Const., Art. I, Sec. 12 & 13), his right to call witnesses on his own behalf (U.S. Const. 6<sup>th</sup> Amend; Ind. Const., Art. I, Sec. 13), his due process right to a fair trial(U.S. Const. 5<sup>th</sup> & 14<sup>th</sup> Amend., Ake v. Oklahoma, 470 U.S. 68 (1985); Ind. Const., Art. I, Sec. 13), the equal protection of the laws (U.S. Const. 14<sup>th</sup> Amend; Ind. Const., Art. I, Sec. 23), and the protection against cruel and unusual or disproportionate punishments (U.S. Const. 8<sup>th</sup> & 14<sup>th</sup> Amend; Ind. Const., Art. I, Sec. 16). In these circumstances, the Constitutions of the United States and Indiana require that funds for expert assistance be provided.

WHEREFORE, the Defendant, by counsel, respectfully requests that this Court grant his motion for an order authorizing hiring of [Name of expert, area of expertise] at the County's expense, and for all other relief just and proper in the premises.

(Signature)

## REFERENCES

## CASEBANK Y.6

For more information, see *Getting Funds For Experts*, a pamphlet by Paula Stites, Indiana Public Defender Council which is posted at [www.in.gov/pdc](http://www.in.gov/pdc).

## CASE LAW

Scott v. State, 593 N.E.2d 198 (Ind. 1992)(appointment of expert assistance is within the trial court's discretion, and the Defendant bears the burden of demonstrating need; while the determination is case sensitive, the court has set out some factors to consider: (1) presence of specific showing of what the expert would provide for the Defendant; (2) whether the proposed expert's services would bear on an issue which is generally regarded to be one for which an expert opinion would be necessary; (3) the probability that the proposed expert could demonstrate that which the Defendant desires; (4) whether expert services will go toward answering a substantial question or simply an ancillary one; (5) how technical the evidence is; (6) how serious the charge and penalty facing the Defendant are; (7) how complex the case is; (8) the cost of the services requested; (9) the timeliness of the request; and (10) the likelihood of admissibility of the expert's testimony at trial).

Scott v. State, 593 N.E.2d 198, 201 (Ind. 1992) ("If the State is relying upon an expert and expending substantial resources on the case and defendants with monetary resources probably would choose to hire an expert, the trial court should strongly consider such an appointment to assist defense counsel in investigating the same matters, cross-examining the State's expert, or providing testimony.")

Beauchamp v. State, 788 N.E.2d 881 (Ind.Ct.App. 2003) (trial court urged to reconsider ruling, in event of retrial, denying a requests for funds for a forensic pathologist, ophthalmologist, and a pediatric neurologist made by Beauchamp who hired a private attorney but could not afford experts; the State's case hinged on inferences from opinions of six medical doctors with various specialties and the charge was serious, a Class B felony).

Cook v. State, 734 N.E.2d 563 (Ind. 2000) (although the Court acknowledges that there are times when eyewitness expert may be needed, instant case was not one; there were many eyewitnesses to crime). See also Reed v. State, 687 N.E.2d 209 (Ind.Ct.App. 1997).

Miller v. State, 770 N.E.2d 763 (Ind. 2002) (in a murder prosecution, where the Defendant's statement played a prominent role in the State's case, the trial court erroneously excluded the testimony of the psychologist called by the defense as an expert in the field of police interrogation and false confessions). NOTE: Although not addressing funding for experts, this case could be used to show the importance of expert testimony on the issues of coerced confessions.

Arrieta v. State, 878 N.E.2d 1238 (Ind. 2008) (although the trial court must always provide a court-funded proceedings interpreter to translate any non-English testimony, absent a showing of indigency, a defendant is not entitled to the appointment of an interpreter at government expense).

Nur v. State, 869 N.E.2d 472 (Ind.Ct.App. 2007) (whenever trial court is put on notice that Defendant has significant language difficulty, the trial court shall make a determination of whether an interpreter is needed to protect the Defendant's due process rights; the trial court is put on notice of a potential language barrier when the Defendant manifests significant language).

Beauchamp v. State, 788 N.E.2d 881 (Ind.Ct.App. 2003) (trial court urged to reconsider ruling, in event of retrial, denying a requests for funds for a forensic pathologist, ophthalmologist, and a pediatric neurologist made by Beauchamp who hired a private attorney but could not afford experts; the State's case hinged on inferences from opinions of six medical doctors with various specialties and the charge was serious, a Class B felony).

## **NOTE**

Rule of Professional Conduct 3.8 imposes special ethical responsibilities of a prosecutor. “A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.” Comment to Ind.R.Prof.Conduct 3.8. It is the prosecutor’s role is to seek justice, not balance the County budget. As a minister of justice, there is no argument the State could make against a level playing field. Thus, the State has little, if any, role in the determination of what funds are granted for the defense because both parties have an interest in a just and fair verdict. See Ake v. Oklahoma, 470 U.S. 68 (1985).