

[CAPTION]

**MOTION FOR EX PARTE DETERMINATION OF DEFENDANT'S
MOTION FOR APPOINTMENT OF EXPERTS**

The Defendant, by counsel, respectfully requests this Court to 1) permit the Defendant to file an *Ex Parte Motion For Appointment of Experts and Memorandum of Facts and Law in Support Thereof Ex Parte Motion* under seal, 2) conduct an *ex parte* hearing upon the Motion, and 3) order the court reporter and all other court personnel to maintain all pleadings and hearings concerning the Defendant's application for appointment of experts confidential and not discuss or disclose to any person including the prosecutor or any of his/her agents. In support of the Motion, the Defendant states the following:

1. The Defendant is indigent and unable to retain the experts necessary to assure him a fair trial.

2. The Defendant is entitled to an *ex parte* proceeding on his application for appointment of experts under Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985).

3. A trial court may, upon a showing of good cause, permit an *ex parte* request for funds for assistance. Stevens v. State, 770 N.E.2d 739, 759 (Ind. 2002). Further, the Indiana Supreme Court has amended Criminal Rule 24, effective January 1, 2001, to specifically authorize *ex parte* hearings on funds applications in capital cases. There is no reason why *ex parte* hearings in non-capital cases should be considered improper.

4. The appointment of experts in this case is necessary to an adequate defense, a showing which Defendant is prepared to make if this motion is granted.

5. To effectively show the need for assistance and enable his Court to make informed decisions, defense counsel must reveal to this Court his theory of defense, attorney-client confidences, work product material and other information. The best way to protect against unnecessary expenditures for investigative and expert defense assistance is for defense counsel to explain what his investigation has revealed which makes him believe that use of further investigative or expert assistance is necessary, and

what indications make it probable that the particular assistance sought will be useful. See Scott v. State, 593 N.E.2d 198 (Ind. 1992).

6. Denial of this motion would force the Defendant to an adversarial hearing on his application for appointment of experts. Forcing the Defendant to make his request for funds in a public, adversarial hearing would restrict his ability to make a detailed showing of need and would deprive this court of information necessary to make its decisions regarding expenditure of funds.

7. An adversarial hearing would violate the provisions of Indiana Trial Rule 26(B)(4), which is based on the work-product privilege and provides that counsel need not disclose the names and opinions of experts unless and until the defense decides that these experts will be called as witnesses at trial. American Bldgs. Co. v. Kokomo Grain Co., Inc., 506 N.E.2d 56 (Ind. App. 1987); Marcovich Land Co. v. J.J. Newberry Co., 413 N.E.2d 935 (Ind. App. 1980).

8. A defendant with sufficient funds to hire his/her own experts would not be required to disclose the names of experts used for consultation and investigation unless and until it was determined that these experts would be called as witnesses at trial. It is impossible to state at this point in the investigation whether the experts the accused seeks will be called as witnesses at trial. This is a decision that can be made only after they conduct their tests, evaluations and investigation.

9. Granting a wealthy defendant the protection afforded by the work product privilege while denying an indigent the same protection solely because of his/her economic status violates equal protection, as guaranteed by the United States Constitution, Fourteenth Amendment and the Indiana Constitution, Art. 1, Sect. 23. In Beauchamp v. State, 788 N.E.2d 881 (Ind.Ct.App. 2003), the Court of Appeals rejected an equal protection challenge to the denial of *ex parte* funds requests, finding a rational basis for requiring a specific showing of need for expert assistance. However, the Beauchamp Court did not address the equal protection implications of requiring an indigent Defendant make this showing in open court, revealing work product and other information to the prosecution. The Defendant does not object to the requirement of making a specific showing of need for expert expenditures, but rather objects

to the requirement that he make this showing in open court, revealing work product and otherwise protected information to the prosecution.

10. The Defendant has no voice in the selection of expert witnesses by the state and law enforcement officials who assist the prosecution in preparing the case against him. To allow the prosecution to have a voice in preparation of the defense case would violate principles of fundamental fairness.

12. The denial of this Motion would violate the Defendant's rights to fundamental fairness, to the effective assistance to counsel, to present evidence, to be free from compulsory self incrimination, to confront witnesses, to compulsory process, and to equal protection of the laws as guaranteed by the United States Constitution, Fifth, Sixth, Eighth, and Fourteenth Amendments, and the Indiana Constitution, Art. 1, Sections. 12, 13, 14, 19 and 22.

13. The *Ex Parte Motion For Appointment of Experts and Memorandum of Facts and Law in Support Thereof Ex Parte Motion* would be filed under seal and would not be served upon the Prosecuting Attorney. The Motion and Memorandum would be sealed and preserved as part of the record in this case for future appellate review should such review be necessary.

14. The hearing on the *Ex Parte Motion For Appointment of Experts and Memorandum of Facts and Law in Support Thereof Ex Parte Motion* would be recorded by the Court Reporter, transcribed and sealed for purposes of appellate review should such review be necessary.

WHEREFORE, the Defendant, by counsel, respectfully requests that this Court conduct the proceedings on the Defendant's application for appointment of experts *ex parte*, without the presence or participation of the Prosecuting Attorney or any of his agents, and for all other relief just and proper in the premises.

(Signature)

NOTE

Even if your client has privately-retained your services, your client is still entitled to the appointment of experts at public expense if he or she is unable to afford necessary experts. See 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); Indiana Public Defenders Commissions (Standards for Indigent Defense Services in Non-Capital Cases, Standard N) ("The comprehensive plan shall authorize expenditures for investigative, expert, or other services for a person who has retained private counsel for a trial or appeal when the person is unable to pay for the services and such services are necessary to prepare and present an adequate defense.").

Although the Indiana Supreme Court in Stevens v. State, 770 N.E.2d 739, 759 (Ind. 2002), declined to follow many of these cases requiring an automatic constitutional entitlement to an *ex parte* hearing, a number of jurisdictions recognize that indigent defendants should be allowed to make *ex parte* applications for funds to employ investigative and expert assistance. See, e.g., Ex Parte Moody, 684 So.2d 114, 120 (Ala. 1996); Brooks v. State, 385 S.E.2d 81, 82-84 (Ga. 1989); Arnold v. Higa, 61 Haw. 203, 600 P.2d 1383, 1385 (1979); State v. Touchet, 642 So.2d 1213, 1219- 21 (La. 1994); People v. Loyer, 169 Mich. App. 105, 425 N.W.2d 714, 722-23; State v. Ballard, 428 S.E.2d 178 (N.C. 1993); McGregor v. State, 733 P.2d 416, 416-17 (Okla. Cr. 1987), *conviction rev'd after remand*, 754 P.2d 1216, 1217 (Okla. Cr. 1988); State v. Barnett, 909 S.W.2d 423, 429-30 (Tenn. 1995); Williams v. State, 958 S.W.2d 186 (Tx. Ct. Crim. App. 1997). Additionally, a number of jurisdictions provide for *ex parte* applications by statute. See, e.g., 18 U.S.C. 3006A(e)(1) (1997); Cal. Pen. Code Sec. 987.9 (2008); Kan. Stat. Ann. Sec. 22-4508 (Supp. 1981); Minn. Stat. Sec. 611.21 (1982); Nev. Rev. Stat. Sec. 7.135 (1983); N.Y. County Law Sec. 722-C (McKinney Supp. 2004); S.C. Code Sec. 16-3-26(C) (1988 Cum. Supp.).