[CAPTION]

EX PARTE PLEADING -- TO BE PLACED UNDER SEAL

MOTION FOR ORDER AUTHORIZING EXPERT-AT PUBLIC EXPENSE, INCORPORATING MEMORANDUM IN SUPPORT

Defendant, by counsel, respectfully moves this Court for an order authorizing counsel to retain the services of [insert 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 the Petition, the Defendant states the following:

1. Defendant is charged with the crimes of operating a vehicle while intoxicated, in a manner that endangered a person, and operating a vehicle with an alcohol concentration equivalent to at least eight-hundredths (0.08) gram of alcohol but less than fifteen-hundredths (0.15) gram of alcohol per one hundred (100) milliliters of the person's blood or two hundred ten (210) liters of the person's breath.

2. Defendant is indigent and cannot afford the expenses associated with defending himself against the crimes with which he is charged. [Attach and refer to an Affidavit of Assets, Liabilities, Income and Expenses]. [IF APPLICABLE - 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 and 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 said order and counsel's understanding that nothing set out in this motion will be revealed to the prosecution, the press, or the public].

3. The discovery provided to the defense indicates that the arresting officer (whom defense counsel knows to be a State-certified breath test operator) administered a breath test which apparently resulted in a reading of [insert reading].

4. Thus far, potential theories of defense identified in this case include the following:

[Insert theories – For example:

a. The breath test result in this case was inaccurate and untrustworthy because, due to Defendant's medical conditions, including asthma and periodontal disease, the breath test machine yielded a falsely higher result than would have occurred but for those medical conditions.

b. The breath test result in this case was inaccurate and untrustworthy because the breath testing procedure approved by the Indiana Department of Toxicology for use in Indiana, and used in this case, is scientifically flawed in several respects].

5. In cases such as this one, Indiana law has effectively carved out exceptions to the constitutional rights customarily afforded defendants who face other types of criminal offenses. For example:

a. IC 9-30-6-3(b) provides that a motorist's refusal to provide self-incriminating evidence is itself to be treated as evidence;

c. IC 9-30-6-5:

1) provides that a State employee[1] (who is a *de facto* adversary of accused motorists in such cases) has the right to determine unilaterally what test results given by a co-State-employee will be considered scientifically acceptable;

2) allows the State to introduce such "self-approved" tests into evidence; and

3) allows such proof to be made by *certificate* so it is not subject to cross-examination.

d. IC 9-30-6-15 relieves or at least substantially lightens the State's burden of proof by creating a presumption that the result of the self-approved test was accurate.

6. In Napier v. State, 820 N.E.2d 144 (Ind.Ct.App. 2005), the Court of Appeals held that the statutory scheme set forth in the preceding paragraph was acceptable and did not violate the Defendant's right of confrontation because: a) certificates are not the kind of evidence intended by Crawford to trigger

[1] The State Director of Toxicology

the right of confrontation; b) Defendant could cross-examine the breath test operator, c) our legislature has authorized the procedure, and d) it would be unreasonable to require the State to have a toxicologist testify in every DUI case.

7. Because of the State=s scheme for facilitating DUI convictions, in the usual breath test case, a Defendant, in order to have any realistic chance of success in contesting his guilt, must shoulder the burden of presenting evidence to overcome the presumptions against him. If he is charged with a *per se* violation he must B and if charged with operating while intoxicated he had better [2] B persuade the trier of fact that reasonable doubt exists as to whether the breath test was accurate, i.e., whether his breath alcohol concentration equivalency was (0.08) gram of alcohol per two hundred ten (210) liters of his breath. Generally, there are only four types of defenses potentially available to establish (or at least highlight) such a doubt: client-based, officer-based, machine-based, and science-based.

a. Client-based defenses. These types of defenses contend that at the time he was tested, the accused suffered from a condition that caused the breath test machine (mistakenly) to record and report something other than breath alcohol. Among these conditions are: asthma[3]; GERD[4]; periodontal disease[5]; acetone[6]; and breath temperature higher than 34E C.[7] (List is not exclusive.)

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[2] IC 9-13-2-131 provides: "Prima facie evidence of intoxication" includes evidence that at the time of an alleged violation the person had an alcohol concentration equivalent to at least eight-hundredths (0.08) gram of alcohol per:
(1) one hundred (100) milliliters of the person's blood; or
(2) two hundred ten (210) liters of the person's breath

[3] (and virtually any condition that creates increased congestion in lungs or mucous in air passageways)

[4] Gastro-esophageal reflux disease, which can cause stomach alcohol to be Amachine-scored@ as breath alcohol.

[5] Diseased gums have pockets that retain alcohol. Alcohol retained in the gums can be Amachine-scored@ as breath alcohol. Each 2.8 microgram of measured alcohol increases BrAC reading by .01%.

[6] Acetone is found, *inter alia*, in diabetics and in people who have recently been on a high-protein diet.

[7] Indiana law incorrectly assumes everyone who is tested has a breath temperature of 34E C. Actually, average body core temperature in humans is 37E C (98.6E F), and average breath temperature is 35E C. Every 1E C change in temperature results in ~6.7% change in alcohol concentration. Some people have higher breath temperature averages than others. And breath temperature in the individual increases throughout the day.

b. Officer-based defenses.[8] These defenses are usually limited to demonstrating that the officer did not comply with rules/regulations that have been established for the purpose of assuring the integrity of the breath test. Probably the most commonly violated regulation related to breath testing is the required 20 minute observation period, which is designed to eliminate many instances of machine-based error. The most common violation of this regulation is not that the officer did not wait 20 minutes before administering the test. Rather, it is that the officer did not actually observe the accused continuously, or closely enough, during the observation period, but was occupied with other things, such as paperwork and preparing the breath testing machine.[9]

c. Machine-based defenses. Like all other machines, breath testing machines occasionally malfunction. When this can be demonstrated, the correctness of the breath test result is suspect. Despite Brady[10] and Kyles[11], the State does not volunteered to an accused or his counsel that there were or may have been problems with the breath test machine used in a pending case.

Indiana's breath testing machine, the Datamaster, yields results that are not specific for ethyl alcohol. It employs an old and primitive modem and CPU, an inadequate RFI detection system, a power supply that is unusually sensitive to minor power fluctuations, a slope detector that cannot be trusted, and a recordkeeping function that is often kept "secret." The machine has a number of components (simulator solution, sample chamber, detector, breath tube, mouthpiece) that are very sensitive to temperature changes that can render the result inaccurate, and temperature is not adequately monitored.

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[8] No officer-based breath test defense has been identified in this case. And no videotape of the test being administered or of the waiting period is available.

[9] Generally, observation is sufficient so long as the officer and the accused were in each other=s presence, so that the officer could have observed the accused if he had looked. (This is one of the primary reasons the defense needs to review the videotape of the observation period.)

[10] Brady v. Maryland, 373 U.S. 83, 10 L.Ed.2d. 215, 83 S. Ct. 1194 (1963).

[11] Kyles v. Whitley, 514 U.S. 419; 115 S. Ct. 1555; 131 L. Ed. 2d 490 (1995).

In order for a machine-based defense to be presented, it must first be discovered. Generally a defense is inferentially suggested only in the machine's maintenance records and computerized error data. This information is in the exclusive possession of the Department of Toxicology (a State agency). Although potentially the information is clearly material to the issue of guilt, it is not furnished by the prosecution even if a specific request is made. Generally the most facile way for the defendant to obtain it is via a public records request to the Department of Toxicology -- and if necessary a follow-up by subpoena *duces tecum*, third-party production request, and possibly an order compelling production.

Once the information is obtained, it must be reviewed to determine whether there is a suggestion of machine error. Almost invariably this must be done by an expert, because very few defense attorneys (including defense counsel in this case) have the knowledge to do it adequately.

d. Science-based defenses. These defenses, which are separate from but related to machine-based defenses, are designed to remove the false aura of respectability that cloaks the "magic box," and to demonstrate that the State's laws and regulations are scientifically flawed. In fact, the breath testing procedure approved by the Indiana Department of Toxicology for use in this State does not meet the Quality Assurance or Quality Control standards recognized by the Committee on Alcohol and Other Drugs of the National Safety Council (NSC), and acknowledged by nearly all scientists -- and virtually all non-government-biased scientists -- as required in order to safeguard the testing process and validate its results.[12]

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[12] Kurt M. Dubowski, a breath-alcohol testing expert, published the following over 10 years ago: AEvidential breath-alcohol testing requires an adequate quality assurance (QA) program to safeguard the testing process and validate its results. A comprehensive QA program covers (a) test subject preparation and participation; (b) the analysis process; (c) test result reporting and records; (d) proficiency testing, inspections, and evaluations; and (e) facilities and personnel aspects. Particularly important are the following necessary scientific safeguards as components of quality control: (a) a pretest deprivation-observation period of at least 15 minutes; (b) blank tests immediately preceding each breath-collection step; (c) analysis of at least duplicate breath specimens; and (d) a control test accompanying every subject test. These safeguards have withstood adversarial challenges in the judicial system for more than 30 years.@ *Quality Assurance in Breath-Alcohol Analysis*, Journal of Analytical Toxicology, vol. 18, October 1994. Despite this, Indiana after more than 40 years now is one of the few states that still has not adopted safeguard b), c) or d).

8. In this particular case, counsel envisions both a machine-based and a science-based breath test defense. Thus, expert assistance of the nature sought herein will be critical to the jury's determination of Defendant's guilt. The State will introduce the breath test result into evidence without the defense being provided meaningful confrontation and cross-examination of State breath testing experts, if any. And the defense certainly will not be able to cross-examine a *certificate*. . . or a *presumption*. -- both of which support the prosecution argument of the near-infallibility of the "scientific instrument" that was "thoroughly checked out" and approved by the State Department of Toxicology.

9. In order to counter these presumptions, and to challenge the accuracy of the breath test results, the defense will need an expert or experts who is/are qualified to:

a. make expert assessments concerning breath testing generally, and about the Datamaster BAC specifically,

b. comment authoritatively about Indiana's Quality Assurance or Quality Control standards; and

c. evaluate the machine data to determine whether there was machine error.

10. Moreover, in this particular case there are client-based breath test defenses, because Defendant suffers from medical conditions which are relevant to breath test results, including (at least) asthma and periodontal disease. Both of these conditions can result in falsely high breath test results.

11. [Insert expert], with his expertise in the physiology of respiration, alcohol, and breath testing, is eminently and perhaps uniquely qualified to assist the Defendant in this case. [Insert expert experience. For example - is Professor of Physiology & Biophysics and of Medicine and is an Adjunct Professor of Bioengineering at the University of Washington in Seattle. Dr. Hlastala has worked in the field of lung physiology for 35 years. He has over 390 published articles; 148 full-length scientific articles and a text book entitled *Physiology of Respiration*. He has been a National Institutes of Health Review consultant for over 25 years and member of 13 national or international scientific organizations. He has testified as an expert in over 1000 cases in several states and has consulted in over 2700 cases (400 civil and 2300 criminal). His area of expertise includes: Physiology of Breath Testing, Physiology of Alcohol;

Blood and Breath Testing of Substances; operation of the DataMaster (also used in the State of Washington); Exchange of Gases by the Body; Statistical Evaluation of Standardized Field Sobriety tests. He has performed research, testified and lectured regarding alcohol breath and blood testing. His research has led to a new understanding of the exchange of alcohol in the lungs and an appreciation of the human variables influencing the accuracy of a breath alcohol test. Dr. Hlastala's (42-page) curriculum vita is available for the Court's review].

12. The cost for [expert] is [insert cost].

13. The requested expert assistance is essential for Defendant to have a fair trial. The services of such an 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. 6th Amend; Ind. Const., Art. I, Sec. 13), his right to effective assistance of counsel (U.S. Const. 6th Amend; Ind. Const., Art. I, Sec. 13), his right to present a defense (U.S. Const. 6th Amend; Ind. Const., Art. I, Sec. 12 & 13), his right to call witnesses on his own behalf (U.S. Const. 6th Amend; Ind. Const., Art. I, Sec. 13), his due process right to a fair trial (U.S. Const. 5th & 14th Amend., *Ake v. Oklahoma*, 470 U.S. 68 (1985); Ind. Const., Art. I, Sec. 13), the equal protection of the laws (U.S. Const. 14th Amend; Ind. Const., Art. I, Sec. 23), and the protection against cruel and unusual or disproportionate punishments (U.S. Const. 8th & 14th 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.

14. Upon information and belief, "in order to qualify for State reimbursement" pursuant to I.C. 33-9-14-4(b), this County must comply with the Indiana Public Defenders Commission's "Standards for Indigent Defense Services in Non-Capital Cases", standard N, which provides as follows:

> 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.

Such services are eligible for reimbursement from the public defense fund if authorized by the Court.

15. In order to qualify for any reimbursement of public defender expenditures, the County must comply with the standard.

WHEREFORE, the Defendant requests that this Court grant his motion for an order authorizing hiring of [expert] at the county's expense.

(Signature)

REFERENCES **CASEBANK Y.6**

For more information, see *Getting Funds For Experts*, a pamphlet by Paula Sites, Indiana Public Defender Council which is posted at 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 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).

Schuck v. State, 53 N.E.3d 571 (Ind.Ct.App. 2016) (trial court abused its discretion by denying Motion for Public Funds for investigation expenses, where Defendant hired private counsel but could not afford to hire investigator and adequately showed how he would benefit from an investigator; further, Defendant's private attorneys were not required to first get permission from local public defender's office before asking trial court for public funds)

Doe v. Superior Court of LA County, 39 Cal.App. 538 (Cal.Ct.App. 2005) (it was erroneous to require Defendant, seeking expert assistance in areas of battered spouse syndrome and PTSD, to select only from the experts among those on a panel; while Defendant does not necessarily have right to expert of her choosing, she has a right to competent expert who will conduct appropriate examination and assist in evaluation, preparation, and presentation of defense).

Cook v. State, 734 N.E.2d 563 (Ind. 2000) (although the Court acknowledges that there are times when an eyewitness expert may be needed, the instant case was not one; there were many eyewitnesses to the 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 need for expert testimony on the issues of coerced confessions.

NOTE

Rule of Professional Conduct 3.8 deals with the 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).