

[CAPTION]

**EX PARTE PLEADING -- TO BE PLACED UNDER SEAL**

**MOTION FOR ORDER AUTHORIZING FIELD SOBRIETY TESTING  
EXPERT AT PUBLIC EXPENSE**

Defendant, by counsel, moves this Court for an order authorizing counsel to retain the services of [insert experts] and directing that the costs of such expert assistance be paid by the County. [Experts], both of whom are former police officers, are experts (and master instructors) in field sobriety testing. Their curriculum vitae are attached hereto as Exhibit A.

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:

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. *See* Affidavit of Assets, Liabilities, Income and Expenses, attached hereto as Exhibit B and by reference incorporated herein. [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 NHTSA-qualified SFST practitioner) administered field sobriety exercises, which

in the officer's opinion Defendant failed. *See* officer's case report, a copy of which is annexed as Exhibit C.

4. [ESTABLISH WHAT DEFENDANT HOPES TO SHOW WITH EXPERTS: FOR EXAMPLE -I have reviewed NHTSA training manual for standardized field sobriety exercises. As defense counsel in this case, I have also been provided and reviewed a copy of the officer's in-car video in this case, partially recording his administration of the field sobriety exercises. Based upon the discovery received and my own research, it is my opinion that due to environmental conditions and Defendant's medical conditions: a) none of the SFSTs should have been administered to him; and b) it is unlikely he would have been able to perform the exercises successfully even if he had nothing to drink.]

5. It is a theory of defense in this case that the police officer's conclusions regarding the Defendant's field sobriety exercises were invalid, untrustworthy and unfair because of the manner in which they were administered and evaluated.

6. Current Indiana law permits police officers, upon establishing a "proper foundation," to testify concerning field sobriety tests and their results." Smith v. State, 751 N.E.2d 280 (Ind.Ct.App. 2001); Cooper v. State, 761 N.E.2d 900, (Ind.Ct.App. 2003). Furthermore, the only foundation required for the WAT (walk-and-turn) and OLS (one-leg-stand) tests is that the officer through whom the evidence is offered establishes his training and experience in administering such tests. Smith, 751 N.E.2d at 282. And the only additional foundational requirement for the HGN (horizontal gaze nystagmus) test is that the officer establish that the procedure was properly administered. Cooper v. State, 761 N.E.2d at 903; see also Hinds v. State, 906 N.E.2d 877 (Ind.Ct.App. 2009); O'Banion v. State, 789 N.E.2d 516 (Ind.Ct.App. 2003).

7. The State will be offering the arresting officer as its expert (or quasi-expert) in the field sobriety testing.

8. The defense needs a qualified standard field sobriety testing expert to review the in-car video, advise counsel regarding preparation of the defense and preparation for deposing and cross-examination of the police officer, and (probably but not certainly) for testimony at trial. See, e.g.,

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 defense experts where the State's case hinged on inferences from opinions of six medical doctors with various specialties).

9. For obvious reasons, both ethical and tactical, it will not be possible for defense counsel to testify. 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.

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

11. "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.

12. Upon information and belief, in order to qualify for any reimbursement of public defender expenditures, the County must comply with the standard.

13. Denial of this Motion would result in violation of the Defendant=s right to fundamental fairness, to the effective assistance of counsel, to present evidence and a defense, to confront witnesses, and to compulsory process, all as guaranteed by the United States Constitution, Fifth, Sixth, Eighth, and Fourteenth Amendments, and the Indiana Constitution, Article I, Sections 12, 13, 14, 19 and 23.

WHEREFORE, the Defendant requests that this Court grant his motion for an order authorizing the hiring of [insert experts] at public 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 on the IPDC website.

## 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.

## NOTES

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).