# V I R G I N I A:

**IN THE CIRCUIT COURT FOR FAIRFAX COUNTY**

**COMMONWEALTH OF VIRGINIA :**

**:**

**vs. : Criminal No.**

**Defendant**

**NOTICE AND MOTION FOR RELEASE OF COURT FUNDS FOR EXPERT ASSISTANCE**

PLEASE TAKE NOTICE that on ., or as soon thereafter as counsel may be heard, the defendant, by counsel Dawn M. Butorac and Lauren P. Whitley will move this court for an order authorizing state funds for the payment of a defense expert.

This motion is based on the defendant’s constitutional and statutory rights under Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, Article One, sections eight, nine, and eleven of the Virginia Constitution, and Virginia Code sections 19.2-163, 19.2-163.2, 19.2-332, 19.2-334, and the law and argument set forth in this motion and to be presented at a hearing on this motion.

# STATEMENT OF FACTS

The defendant is charged with felony child abuse, in violation of Virginia Code § 18.2-371.1 and felony murder, in violation of Virginia Code § 18.2-33. It is alleged that on March 16, 2009, he abused his 8-month-old son, Albert, and while doing so, accidently caused his son’s death. The Commonwealth will be relying on the testimony of Dr. Craig Futterman, an expert in Pediatric Intensive Care. At the preliminary hearing, Dr. Futterman testified regarding the alleged cause of the injuries to Albert. He also opined that the injuries were intentionally inflicted and a result of child abuse. Dr. Futterman classified the injuries sustained by Albert as Shaken Baby Syndrome.

The defendant is requesting funds in the amount of $5,000.00 to retain the services of Dr.

Ronald H. Uscinski, a neurologist and an expert in Shaken Baby Syndrome (see attached CV).

# MEMORANDUM OF LAW

The United States Supreme Court, in recognizing the imbalance between the resources available to a State versus an indigent defendant, found that the Constitution requires appointment and payment for the "basic tools of an adequate defense." Ake v. Oklahoma, 470 U.S. 68, 77 (1985).

The rationale of the court's decision in Ake applies to all experts reasonably necessary for an effective defense. Where the Commonwealth's case involves important expert testimony, the courts have required the provision of a defense expert in numerous specialties. See e.g., Williams v. United States, 618 F.2d 1021 (4th Cir. 1980) (pathologist);

Bradford v. United States, 413 F.2d 467, 474 (5th Cir. 1969) (handwriting and fingerprint experts); Barnard v. Henderson, 514 F.2d 744, 746 (1975) (firearms identification expert).

In addition to Equal Protection and Due Process, compensation for experts has been required to satisfy the Sixth Amendment's entitlement to the effective assistance of counsel:

[The] effective assistance of counsel guarantee of the Due Process Clause requires, when necessary, the allowance of investigative expenses or appointment of investigative assistance for indigent defendants to insure effective preparation of their defense by their attorneys.

Mason v. Arizona, 504 F.2d 1345, 1351 (9th Cir. 1974), cert. denied, 420 U.S. 936 (1975).

In an adversary system, it is rarely justifiable for one side to have exclusive access to the means of understanding, presenting and explaining relevant facts. Here, the defendant needs the assistance of an expert to offset the imbalance that will exist if the Commonwealth alone presents evidence gathered by its expansive investigative resources.

[The defense] expert fills a different role. He supplies expert services

"necessary to an adequate defense." He can be a partisan witness. And his services embrace pretrial and trial assistance to the defense as well as potential trial testimony.

United States v. Bass, 477 F.2d 723, 725-26 (9th Cir. 1973); see also United States v. Theriault, 440 F.2d 713 (5th Cir. 1971) (Wisdom, J., concurring) (right to independent

expert assisting the defense is "crucial to working of adversary system").

In Husske v. Commonwealth, 252 Va. 203 (1996), the Virginia Supreme Court held

that to obtain the services of an expert at state expense, the defendant must “demonstrate that the subject which necessitates the assistance of the expert is ‘likely to be a significant factor in his defense’. . .and that he will be prejudiced by the lack of expert assistance.” Husske, 252 at 212, citing Ake, 470 U.S. at 82-83. The Husske Court found no error in the

denial of defendant’s motion for appointment of an expert because he had failed to meet that standard.

The defendant submits that the assistance of this expert is "suitable for [this] particular case." Singleton v Commonwealth, 16 Va. App. 841, 842 (1993). Section 19.2-

163 of the Virginia code authorizes compensation for "reasonable expenses incurred as it deems appropriate under the circumstances of the case" to an indigent defendant. "Thus, any such expense must be both 'reasonable' and 'appropriate under the circumstances of the case.'" Singleton v. Commonwealth, 16 Va. App. 841, 842, 433 S.E.2d 507, 508 (1993)

(quoting Va. Code § 19.2-163).

“Reasonableness addresses the amount of the expense. A trial court is not permitted to direct payment of such an expense if it is of an unreasonable amount." Singleton, 16 Va. App. at 842. "Appropriateness addresses whether the purpose of the expense is suitable for the particular case. An expense would not be justified, even if reasonable in amount, if it served little or no purpose in the particular case." Singleton, 16 Va. App. at 842. The

scientific expert requested is essential and a significant factor in the accused’s defense since his counsel does not have the necessary expertise to present his defense without it. He will be prejudiced without the assistance of the requested experts.

The scientific evidence in this case is the only basis for alleging intent on the part of the defendant or to establish that the injuries to the child are in fact Shaken Baby Syndrome. Dr. Futterman’s conclusions will be a contested matter. The Commonwealth is relying on an expert in particular scientific field to prove the case against the defendant. The defense would be significantly hampered if not afforded the same opportunity. Given the accused’s status as indigent, he must rely on the Court to allow funds to pay for such experts.

The requested expert assistance is essential for the defendant to have a fair trial, to present effective evidence on his behalf, and for his counsel to competently cross-examine, on his behalf, the Commonwealth’s witnesses. Were it not for his poverty, counsel would retain the experts requested. If the defendant is not provided with this expert assistance, he will be deprived of Due Process of law, the Equal Protection of the laws, the effective assistance of counsel, his right to confront the witnesses against him, his right to a fair trial, and his right to present evidence on his own behalf. In these circumstances, the constitutions of the United States and Virginia as well as other applicable Virginia law require that funds for the expert assistance be provided. See Ake v. Oklahoma, 470 U.S. 68 (1985); Williams v. Martin, 618 F.2d 1021 (4th Cir. 1980); O’Dell v. Commonwealth, 234

Va. 672, 364 S.E. 2d 491, cert. denied, 488 U.S. 871 (1988).

WHEREFORE, the defendant respectfully submits that, under the circumstances of this case, the requested expert assistance is a basic and essential tool for the adequate preparation of the defense. The defendant further requests that funds be released to pay an expert retained by the defense to aid in the preparation of his defense.