

EX PARTE PLEADING – TO BE FILED UNDER SEAL

IN THE CIRCUIT COURT OF MAYCOMB COUNTY, ALABAMA

STATE OF ALABAMA,

v.

JOE CLIENT.

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Case No. CC-00-0000

EX PARTE MOTION TO PROVIDE FUNDS FOR ASSISTANCE OF EXPERT FORENSIC SEROLOGIST

Joe Client respectfully moves this Court to approve the expenditure of up to \$0000 for the services of Sarah Serologist, M.S., a forensic serologist, subject to application for additional funds if needed. In support thereof, he submits the following:

1. Mr. Client, who is indigent, is before the Court awaiting trial on a charge of capital murder during a rape or attempted rape. Ala. Code § 13A-5-40(a)(3). The State is seeking the death penalty.

2. The State intends to present testimony from a state serologist that one of three rape kit swabs obtained from the decedent revealed semen – unlinked to Mr. Client by blood type – in the vaginal vault, which is the State’s only evidence supporting the allegation of rape or attempted rape.

3. Mr. Client requires funds to retain Sarah Serologist, a forensic serologist,¹ to:

a. Examine the state laboratory’s determination of the presence of semen and, if necessary and possible, perform her own tests to verify the accuracy of that determination. The state laboratory’s conclusions cannot go unchecked in light of the well-documented and rampant inaccuracy of forensic laboratories. See Randolph N. Jonakait, Forensic Science: The Need For Regulation, 4 Harv. J. L. & Tec. 109-191 (1991); National Research Council, Forensic Analysis: Weighing Bullet Lead Evidence (2004) (questioning FBI testimony regarding bullet lead matches); United

¹ Ms. Serologist’s curriculum vitae is appended to this motion and hereby incorporated by reference. **Note to Counsel: The experts’ resumes or CVs should be attached to this motion.**

States Dep't of Justice, The FBI DNA Laboratory: A Review of Protocol and Practice Vulnerabilities (2004) (describing investigation of FBI lab where biologist admitted falsifying DNA reports in more than 100 cases); Flynn McRoberts, Steve Mills, & Maurice Possley, When Labs Falter, Defendants Pay, Chi. Trib., Oct. 20, 2004 (documenting practices in crime labs that led to false convictions); Gilchrist v. Bd. of Review, 94 P.3d 72, 73-75 & 75 n.2 (Okla. 2004) (citing cases in which Oklahoma City Police Department forensic chemist testified falsely about DNA test results).

b. Explain to the jury that the presence of semen in the vaginal vault is not necessarily indicative of recent intercourse because semen can remain in the vaginal vault for days after intercourse.

c. Assist counsel to develop and present a defense theory and to cross-examine the State's expert.

4. Counsel is not sufficiently knowledgeable in the area of forensic serology to examine adequately the state expert's reports and the physical evidence and discern how that evidence, or lack of evidence, bears on the rape issue.

5. Mr. Client is entitled to funds for a defense expert because whether the decedent's death took place during the course of a rape or attempted rape is a "critical element" in determining whether Mr. Client is guilty of capital murder and eligible for the death penalty. See Ake v. Oklahoma, 470 U.S. 68, 86-87 (1985); Ex parte Moody, 684 So. 2d 114, 119 (Ala. 1996); Ex parte Dubose, 662 So. 2d 1189, 1194-95 (Ala. 1995); see also Commentary to American Bar Association Guideline for the Appointment and Performance of Defense Counsel in Death Penalty Cases 4.1, 31 Hofstra L. Rev. 913, 955 (2003) (requiring access to consulting experts, including serologists).

6. The services of a defense serologist are necessary to enable counsel to prepare effectively for trial and present evidence on Mr. Client's behalf. A denial of this motion would violate Mr. Client's equal protection rights because he certainly would hire a defense serologist if he were not indigent. See United States v. Meriwether, 486 F.2d 498, 506 (5th Cir. 1973) (equal protection questions raised when indigent defendant's case subjected to pretrial scrutiny by prosecutor, while nonindigent defendant able to proceed without such scrutiny); see also Griffin v. Illinois, 351 U.S. 12, 19 (1956) ("There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."); Moody, 684 So. 2d at 120 (indigent and nonindigent defendants should be treated equally).

7. Because this is a capital case, this Court must apply heightened standards to ensure that it is fair. Under the Eighth Amendment, the "fundamental respect for humanity"

requires heightened reliability in determining whether the death penalty is appropriate. Johnson v. Mississippi, 486 U.S. 578, 584 (1988) (quoting Gardner v. Florida, 430 U.S. 349, 363-64 (1977)); see also Ex parte Monk, 557 So. 2d 832, 836-37 (Ala. 1989) (“death penalty is the special circumstance” that justifies expansion of constitutional rights).

8. Mr. Client therefore requests authorization to spend up to \$0000 for the services of Mr. Expert, whose hourly rate is \$000. Counsel will apply to the Court for additional funds if warranted.

9. If Mr. Client is denied this expert assistance, he will be deprived of due process, equal protection, effective assistance of counsel, a fair trial, and his right to confront the witnesses against him and present evidence on his own behalf as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the Alabama Constitution.

For these reasons, Mr. Client respectfully requests that this Court:

- a. schedule an ex parte hearing on this motion;
- b. seal the record of the ex parte hearing on this motion;
- c. enter an order granting the motion.

Respectfully submitted,

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STATEMENT REGARDING SERVICE

Because this is an ex parte application, a copy has not been served upon the District Attorney.

[MOTION UPDATED ON 09/29/17]