

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 APPLICATION FOR FUNDS TO HIRE A MITIGATION EXPERT

Joe Client respectfully moves this Court to approve the expenditure of up to \$0000 for mitigation expert services and expenses, subject to application for additional funds if needed. In support of this motion, Mr. Client submits the following:

1. Mr. Client has been charged with capital rape-murder under Alabama Code section 13A-5-40(3) and the State is seeking the death penalty. Mr. Client has been incarcerated since his arrest. He is indigent and this Court has granted him permission to proceed *in forma pauperis*.

2. Mr. Client is seeking funds to retain Mary Mitigation, a mitigation expert,¹ to assist in mitigation investigation and aid in the preparation and presentation of evidence in the penalty phase.

3. Due process prohibits the State from “proceed[ing] against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense.” Ake v. Oklahoma, 470 U.S. 68, 77 (1985); see also Ex parte Moody, 684 So. 2d 114, 120 (Ala. 1996) (holding that there should be equality between indigent and non-indigent defendants). To this end, when an indigent defendant demonstrates that expert assistance “is needed for him to have ‘a fair opportunity to present his defense,’” Dubose v. State, 662 So. 2d 1189, 1194 (Ala. 1995) (quoting Ake, 470 U.S. at 76), the State must provide access to this assistance.

¹Ms. Mitigation’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.**

4. In a capital case, defense counsel is constitutionally obligated to investigate mitigating evidence and evidence to rebut any aggravating evidence that the State intends to introduce. See Williams v. Taylor, 529 U.S. 362, 396 (2000) (counsel has “obligation to conduct a thorough investigation”); see also Wiggins v. Smith, 539 U.S. 510, 524 (2003) (citing with approval ABA guidelines which “provide that investigations into mitigating evidence should comprise efforts to discover . . . evidence to rebut any aggravating evidence that may be used by the prosecutor” (quotation and citation omitted)); Rompilla v. Beard, 545 U.S. 374, 383-93 (2005) (ineffective assistance of counsel found and habeas relief granted where defense counsel failed to examine file on defendant’s prior conviction for rape and assault that contained significant mitigating evidence); ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.7, p. 1015 (2003) (“Counsel at every stage [has] an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty”).

5. The Eighth Amendment to the United States Constitution requires the jury to consider “as a mitigating factor, *any* aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.” Lockett v. Ohio, 438 U.S. 586, 604 (1978) (emphasis added); see also Eddings v. Oklahoma, 455 U.S. 104, 115 (1982) (sentencer may not refuse to consider, as a matter of law, any relevant mitigating evidence, including evidence of accused’s unhappy upbringing and emotional disturbance, turbulent family history, and beatings by a harsh father); Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (“[I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.” (citation omitted)).

6. Under Alabama law, “mitigating circumstances shall include any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant offers as a basis for a sentence of life imprisonment without parole instead of death, and any other relevant mitigating circumstance which the defendant offers as a basis for a sentence of life imprisonment without parole instead of death.” Ala. Code § 13A-5-52; see also Ala. Code § 13A-5-51 (specifically listing as mitigating circumstances that defendant has no significant prior criminal history; that defendant committed offense under influence of extreme mental or emotional disturbance; that victim was participant in crime; that defendant’s participation in crime was relatively minor; that defendant acted under duress or domination of another; that defendant’s capacity to appreciate criminality or conform conduct to requirements of law was substantially impaired; and defendant’s age at time of crime).

7. A mitigation specialist is necessary to explore the mitigating circumstances in this case. Defense counsel requires assistance in obtaining and presenting information and records relevant to Mr. Client's medical and mental health history; educational history; employment and training history; family and social history; correctional history; and religious or cultural influences. Additionally counsel needs expert mitigation assistance to identify, seek out, interview, and assess potential witnesses familiar with aspects of Mr. Client's life history, including members of his immediate and extended family; neighbors; friends; former teachers; clergy; employers and co-workers; social service providers; doctors; correctional officers; probation or parole officers; and members of the victim's family.

8. A mitigation expert possesses specialized information-gathering skills and training, the time and the ability to elicit sensitive evidence that Mr. Client and his family may have never discussed, clinical skills to recognize developmental and behavioral health issues, the ability to evaluate and understand how these conditions may have affected Mr. Client, and specialized knowledge to help counsel evaluate the most appropriate experts to examine Mr. Client or testify on his behalf.

9. Using a mitigation expert is the most cost-effective way to conduct the investigation. The expert can locate and interview witnesses and obtain records and documents at a lower hourly rate than would be paid to an attorney. Upon the completion of the initial stages of the investigation, counsel's time can then be utilized interviewing those witnesses whose potential testimony would be desired at trial and making a professional determination as to their usefulness.

10. Because this is a capital case, this Court must apply special considerations to ensure that it is fair. "The fundamental respect for humanity" underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special need for reliability in determining whether the death penalty is appropriate. Johnson v. Mississippi, 486 U.S. 578, 584 (1988); see also Ex parte Monk, 557 So. 2d 832, 836-37 (Ala. 1989) (death penalty is "special circumstance" that justifies expansion of constitutional rights).

11. Mr. Client seeks authorization to retain the services of a mitigation expert to be paid at the rate of \$00 per hour. Counsel estimates that approximately number (000) hours will be required. Mr. Client reserves the right to supplement his motion should the need for additional investigation become apparent.

12. If Mr. Client is not provided with funds to obtain the assistance of an investigator, he will be denied his right to due process, equal protection, effective assistance of counsel, confrontation, and to a fair trial and reliable sentencing as protected by the Fifth,

Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Alabama law.

For these reasons, Mr. Client respectfully moves this Court to enter an order granting \$0000 to retain a mitigation expert in this case.

Respectfully submitted,

/s/ Linda Lawyer

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STATEMENT REGARDING SERVICE

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

[MOTION UPDATED ON 10/03/17]