

EX PARTE PLEADING – TO BE FILED UNDER SEAL

IN THE CIRCUIT COURT OF MAYCOMB COUNTY, ALABAMA

STATE OF ALABAMA,

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v.

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Case No. CC-00-0000

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JOE CLIENT.

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**EX PARTE MOTION TO PROVIDE FUNDS FOR
EXPERT PSYCHIATRIC AND PSYCHOLOGICAL ASSISTANCE**

Joe Client respectfully moves this Court to approve the expenditure of up to \$0000 to retain Serena Psychiatrist, M.D., a forensic psychiatrist, and up to \$0000 to retain Sydney Psychologist, Ph.D., a forensic psychologist, subject to application for additional funds if needed. Mr. Client submits the following in support of this motion:

1. The State has charged Mr. Client with capital murder and is seeking the death penalty. Mr. Client is indigent.

2. Mr. Client requires Dr. Psychiatrist and Dr. Psychologist's assistance to prepare for the penalty phase of Mr. Client's trial should he be convicted of capital murder.

3. Counsel's investigation interviews with Mr. Client have revealed that:

a. Mr. Client appears to suffer from intellectual disability as defined by the United States Supreme Court in Atkins v. Virginia, 536 U.S. 304, 308 n.3 (2002). He has exhibited since early childhood "significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work." Id. Mr. Client, as evidenced by school records placing him in the bottom one percentile nationally in several basic mental skills, has carried through life the burden of extremely limited intellect. He likely suffered brain injury prior to birth due to a seizure disorder his mother had during pregnancy and – a separate and distinct cause – because of his mother's consumption of alcohol during the pregnancy. In addition, Mr. Client was born prematurely. Based on a preliminary assessment, it appears that these factors resulted in intellectual disability that is manifest in both Mr. Client's low intelligence and his poor adaptive behavior throughout life.

b. Mr. Client, now more than thirty-five years of age, has suffered from substance abuse since grade school. He has demonstrated physical addiction to alcohol and cocaine, as well as psychological dependence on marijuana. Due to his family background, Mr. Client was exceptionally vulnerable to substance abuse. His parents, brother, paternal grandparents, maternal grandmother, two maternal uncles, paternal aunt, stepbrother, and cousins have histories of serious alcohol abuse.

4. Undersigned counsel desires to retain the services of Dr. Serena Psychiatrist, a forensic psychiatrist and faculty member at the Vanderbilt Medical School,¹ to:

a. review medical, school, and institutional records and interview members of Mr. Client's family;

b. conduct a psychiatric evaluation and physical and neurological examination of Mr. Client so that concrete evidence of impairment can be presented to the jury;

c. prescribe appropriate psychological testing to determine the existence of any disabilities and, if they exist, to document them;

d. express an opinion within a reasonable degree of medical certainty as to any causal connection between any impairments or environmental/genetic vulnerabilities and the behavior with which Mr. Client is charged;

e. assist counsel in understanding and presenting evidence of Mr. Client's mental impairments to the jury; and

f. testify with regard to her findings and conclusions.

5. Mr. Client requires funds to retain Dr. Sydney Psychologist, a psychologist and member of the psychiatry faculty at the University of Alabama-Birmingham Medical School, to conduct the neurological testing required to determine the extent of Mr. Client's impairments. Administration of the Wechsler Adult Intelligence Scale Revised (WAIS-R), among other psychological tests, is necessary to make such determinations. The WAIS-R, which the United States Supreme Court has recognized as the "standard instrument in the

¹ The curriculum vitae of each expert is appended to this motion and hereby incorporated by reference. **Note to Counsel: The experts' resumes or CVs should be attached to this motion.**

United States for assessing intellectual functioning,” Atkins, 536 U.S. at 309 n.5, is the most widely used test of adult cognitive function (IQ). Two days of testing may be required.

6. Counsel is not sufficiently knowledgeable in forensic psychiatry or psychology to determine the extent of Mr. Client’s impairments or vulnerabilities or their effect on his behavior as an adult. Members of Mr. Client’s family are understandably reluctant to discuss family problems and substance abuse. The services of specialists are needed to explore these areas with the family and to document what occurred during and after Joe Client’s childhood.

7. Counsel is constitutionally obligated to investigate and present mitigating evidence, Wiggins v. Smith, 539 U.S. 510, 533-34 (2003), including the impact on Mr. Client of alcohol and drug abuse in the years leading up to the alleged offense; the history of substance abuse in his family that made Mr. Client especially susceptible to addiction; the fact that Mr. Client has, throughout his life, had very limited intellectual functioning; and other factors relating to his traumatic upbringing and mental impairments.

[E]vidence about the defendant’s background and character is relevant [to an individualized assessment of the appropriateness of the death penalty] because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.

California v. Brown, 479 U.S. 538, 545 (1987) (O’Connor, J., concurring); see also Tennard v. Dretke, 542 U.S. 274, 287 (2004) (evidence of impaired intellectual functioning inherently mitigating); Atkins, 536 U.S. at 321 (intellectually disabled persons cannot be sentenced to death); Eddings v. Oklahoma, 455 U.S. 104, 114 (1982) (childhood trauma must be considered by sentencer); Lockett v. Ohio, 438 U.S. 586, 604 (1978) (sentencer must “not be precluded from considering, as a *mitigating factor*, any aspect of a defendant’s character or record . . . as a basis for a sentence less than death”); Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (any of “diverse frailties of humankind” regarding accused must be taken into consideration); Hodges v. State, 856 So. 2d 875, 893 (Ala. Crim. App. 2001) (“[A]n individual’s abusive or unstable upbringing is a nonstatutory mitigating circumstance.”).

8. Mr. Client is entitled to expert assistance because mental disability will be a “significant factor” at his sentencing. McWilliams v. Dunn, 137 S. Ct. 1790 (2017); Ake v. Oklahoma, 470 U.S. 68, 86 (1985); see also Ex parte Dobyne, 672 So. 2d 1354, 1359 (Ala. 1995) (defendant entitled to mental health expert at sentencing where need shown); Guideline 10.4, American Bar Association Guidelines for the Appointment and Performance

of Counsel in Death Penalty Cases, 31 Hofstra L. Rev. 903, 952 (2003) (requiring at least one person on defense team qualified to screen for mental or psychological disorders or impairments). Moreover, Mr. Client is entitled to *defense* experts who are independent of the state and whose communications with the defense team are confidential. Sending a capital defendant to a state mental hospital is not adequate. See McWilliams, 137 S. Ct. at 1799-1801 (examination of Alabama capital defendant by court-appointed psychologist did not satisfy Ake where expert not independent of State and did not assist defense); Morris v. State, 956 So. 2d 431, 447 (Ala. Crim. App. 2005) (mental health experts whose court-ordered evaluations were made available to both parties did not satisfy Ake; defendant was entitled to an independent expert devoted to assisting his defense).

9. The services of a forensic psychiatrist and psychologist are necessary to enable counsel to prepare effectively for trial and present evidence on Mr. Client's behalf. Were it not for Mr. Client's poverty, counsel would certainly retain the experts requested. Ex parte Dubose, 662 So. 2d 1189 (Ala. 1995); see also Ake v. Oklahoma, 470 U.S. 68, 76 (1985) (“[J]ustice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake.”); Ex parte Moody, 684 So. 2d 114, 120 (Ala. 1996) (holding that there should be equality between indigent and nonindigent defendants).

10. 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).

11. Counsel requests authorization to spend up to \$0000 for the services of Dr. Psychiatrist, whose hourly rate is \$000, and up to \$0000 for Dr. Psychologist, whose hourly rate is \$000. Testing likely will be conducted on two separate days. Additional time will be necessary for consultation with counsel and possibly in-court testimony. Counsel will apply to the Court for additional funds for either doctor if warranted.

12. If Mr. Client is not provided with this expert assistance, he will be deprived of due process, equal protection, effective assistance of counsel, a fair trial, a reliable sentencing proceeding, 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 Alabama law.

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,

/s/ Linda Lawyer

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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]