

**DEFENDANT’S MOTION FOR APPROPRIATION OF FUNDS  
FOR A CONSULTING INVESTIGATION EXPERT**

Defendant, through counsel, respectfully moves this Court for an order authorizing defense expenditures to enable them to engage an expert in criminal investigation, as a consulting expert, to enable defense counsel to effectively prepare for trial.

**MEMORANDUM IN SUPPORT**

Defendant stands before this Court charged with capital murder. If convicted, he faces a possible sentence of death. To guarantee the reliability of the proceedings, it is essential that defense counsel be provided with the assistance of an expert criminal investigator to assist counsel in effectively preparing for trial. State’s counsel obviously benefited from, and will continue to benefit from, the assistance of many law enforcement officials who conduct investigations to assist the prosecution. State law-enforcement investigators spent many hours investigating for the prosecution. It would be fundamentally unfair and unconstitutional to deny Defendant the funds needed to employ at least one investigator to assist defense counsel in trial preparation.

Defendant needs to engage the expert assistance of Investigator **[INSERT NAME OF INVESTIGATOR]**. The Investigator bills at the rate of **[INSERT HOURLY RATE]** per hour plus travel expenses. Given the complexity of this case as already revealed by the indictment and media accounts **[INSERTS FACTS AS APPROPRIATE]**, Defendant asks this Court to authorize an initial appropriation of funds in the amount of **[INSERT TOTAL SUM REQUESTED AND INDICATE THE MINIMAL NUMBER OF HOURS AT THE INVESTIGATOR’S HOURLY RATE THAT AMOUNT WOULD FUND]**. This initial,

minimal request no doubt reflects far fewer hours than the State's law enforcement officials have already invested on behalf of the prosecution.

If it turns out that the Investigator needs to invest more time than the hours accounted for in this initial funding requests, Defendant's counsel will return to this Court to detail why it is "reasonably necessary" to appropriate additional funds in order to protect Defendant's constitutional rights. State v. Mason, 82 Ohio St.3d 144, syllabus (1998).

The Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 16 of the Ohio Constitution guarantee Defendant the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). Defense counsel must conduct investigations of facts in order to provide a defendant with effective representation. Id. at 691-92.

Further, the Sixth Amendment guarantees Defendant the right to compulsory process, which includes the "right to present the defendant's version of the facts." Washington v. Texas, 388 U.S. 14, 19 (1967). Without an investigator to look into the circumstances surrounding the offenses with which Defendant been charged, he will be unable to effectively present his case.

The constitutional right to due process entitles Defendant to a "fair and adequate opportunity" to defend against expert testimony. Chambers v. Mississippi, 410 U.S. 284, 294, 302 (1973). Without independent experts, a criminal defendant could be denied "meaningful access to justice." Ake v. Oklahoma, 470 U.S. 68, 76-77 (1985). The constitutional right to equal protection also requires that expert assistance be provided in this case. See Britt v. North Carolina, 404 U.S. 226, 227 (1971) ("[T]he State must, as a matter of equal protection, provide indigent prisoners with the basic tools of an adequate defense or appeal, when those tools are available for a price to other prisoners.").

Effective preparation is the keystone to effective representation. In turn, effective assistance of counsel is central to the exercise of all other constitutional rights which protect capital defendants from arbitrary and capricious convictions and death sentences. U.S. Const. amends. V, VI, VIII, IX and XIV; Ohio Const. art. I, §§ 1, 2, 5, 9, 10, 16 and 20. Death is different; for that reason more process is due, not less. See Lockett v. Ohio, 438 U.S. 586 (1978); Woodson v. North Carolina, 428 U.S. 280 (1976); Ohio Adult Parole Authority v. Woodard, 523 U.S. 272 (1998) (five Justices recognized a distinct “life” interest protected by the Due Process Clause in capital cases above and beyond liberty and property interests).

Independent State law also supports the need for expert assistance. Ohio Rev. Code Ann. § 2929.024 provides for the appropriation of funds for experts and investigative services for indigent persons charged with capital crimes. These funds are available for both the trial phase and the sentencing phase of the proceedings. State v. Jenkins, 15 Ohio St. 3d 164, 473 N.E.2d 264 (1984). Additionally, C.P. Sup. R. 20 § IV(D) tracks the language of O.R.C. § 2929.024 and instructs courts presiding over capital cases to:

provide appointed counsel, as required by Ohio law or the federal Constitution, federal statutes, and professional standards, with the investigator, mitigation specialists, mental health professional, ... and other support services reasonably necessary or appropriate for counsel to prepare for and present an adequate defense at every stage of the proceedings . . . .

Assuming, arguendo, that these procedures do not emanate directly from clear constitutional provisions, nevertheless, “when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution – and, in particular, in accord with the Due Process Clause.” Evitts v. Lucey, 469 U.S. 387, 401 (1985).

In the event defense counsel determine that the defense Investigator's testimony will be necessary, they will file a document formally converting the Investigator from a "consulting expert" to a "testifying expert," at which time defense counsel will comply with all applicable discovery duties. Unless and until defense counsel make that decision, they contend that the work of the defense Investigator will remain protected by the attorney-client privilege and the attorney work-product doctrine. See Pope v. Texas, 207 S.W.3d 352 (2006) (discusses at length the jurisprudence distinguishing "consulting" and "testifying" experts, and holding the privilege protects "consulting" experts); Richey v. Mitchell, 395 F.3d 660, 686-687 (6th Cir. 2005), *reversed sub nom on other grounds*, Bradshaw v. Richey, 546 U.S. 74 (2006) (had defense in an Ohio capital trial not listed expert on witness list, prosecution could not have called the expert as a State witness).

Therefore, counsel requests authorization to expend court funds for a defense Investigator.