

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

Defendant, through counsel, respectfully moves this Court for an order authorizing defense expenditures to enable them to engage [NAME MITIGATION SPECIALIST], 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 a Mitigation Specialist to assist counsel in effectively preparing for the possibility of a mitigation hearing in this matter.

Counsel proposes to utilize the expertise of [NAME MITIGATION SPECIALIST]. It is estimated that at least [INSERT PRESUMPTIVE NUMBER OF HOURS NEEDED] hours of the Mitigation Specialist’s time will be needed. The Mitigator’s billing rate is [INSERT HOURLY RATE] per hour, plus travel expenses. At this initial stage, Defendant requests that this Court authorize funding in the amount of [INSERT TOTAL AMOUNT REQUESTED]. In the event this case requires more hours, defense counsel will present this Court with a supplemental motion.

Undersigned counsel represent that the Mitigator’s services are essential if counsel is to honor Defendant’s right to effective preparation for trial and representation at trial. See Rompilla v. Beard, 545 U.S. 374, 387 (2005); Wiggins v. Smith, 539 U.S. 510, 524 (2003). 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 a mitigator to gather Defendant’s social history and relevant records and

documents, defense counsel cannot effectively prepare for and present evidence at the possible mitigation hearing.

The constitutional right to due process entitles Defendant to a “fair and adequate opportunity” to confront the State’s case with reasonably necessary experts. 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).

Ohio law requires the court to fund experts “reasonably necessary” for either phase of a capital trial. State v. Mason, 82 Ohio St. 3d 144, 694 N.E.2d 932 (1998), syllabus; State v. Jenkins, 15 Ohio St. 3d 164, 473 N.E.2d 264 (1984), syl. para. 4; Ohio Rev. Code § 2929.024; C.P. Sup. R. 20 § IV(D). In this case, it is by definition reasonably necessary to prepare for the possibility of a mitigation hearing precisely because the indictment contains a capital offense.

Ohio Rev. Code Ann. § 2929.024 provides for the appropriation of funds for experts and a mitigation specialist 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 determines it will be necessary to call the Mitigation Specialist as a witness, they will comply with the appropriate rules of discovery, and the Mitigation Specialist will be converted from a “consulting expert” to a “testifying expert.” Unless and until defense counsel make that decision, they contend that the work of the Mitigation Specialist 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 (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 engage a Mitigation Specialist as part of Defendant's defense team.