**SAMPLE**

**EX PARTE MOTION FOR FUNDS TO SECURE SERVICES OF A MITIGATION SPECIALIST.**

COMES NOW Defendant, by and through his attorneys, and moves this Court pursuant to Miss. Code Ann. §§ 99-15-15 and 99-15-17, Article 3, §§ 14, 16 and 28 of the Mississippi Constitution, and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, to order the county to provide him with funds to retain a mitigation specialist. As grounds for this motion, the defendant states the following:

1. Defendant is an indigent who is represented by appointed counsel. Counsel is a public defender with an extremely large caseload. She has little knowledge of mental health issues and no experience investigating life histories.
2. Defendant has been charged with capital murder and the State of Mississippi is seeking his death by execution.
3. The defense cannot proceed in conformity with the Sixth Amendment to the United States Constitution without the services a mitigation specialist. The American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (Revised Edition February 2003) are unequivocal: "The defense team should consist of no fewer than two attorneys..., an investigator, *and a mitigation specialist."* Guideline 4.1 (A) (1) (emphasis added). The commentary explains:

A mitigation specialist is ... an indispensable member of the defense team throughout all capital proceedings. Mitigation specialists possess clinical and information­ gathering skills and training that most lawyers simply do not have. They have the time and the ability to elicit sensitive, embarrassing and often humiliating evidence (e.g., family sexual abuse) that the defendant may have never disclosed. They have the clinical skills to recognize such things as congenital, mental or neurological conditions, to understand how these conditions may have affected the defendant's

development and behavior, and to identify the most appropriate experts to examine the defendant or testify on his behalf. Moreover, they may be critical to assuring that the client obtains therapeutic services that render him cognitively and emotionally competent to make sound decisions concerning his case.

Perhaps most critically, having a qualified mitigation specialist assigned to every capital case as an integral part of the defense team insures that the presentation to be made at the penalty phase is integrated into the overall preparation of the case rather than being hurriedly thrown together by defense counsel still in shock at the guilty verdict. The mitigation specialist compiles a comprehensive and well­ documented psycho-social history of the client based on an exhaustive investigation; analyzes the significance of the information in terms of impact on development, including effect on personality and behavior; finds mitigating themes in the client's life history; identifies the need for expert assistance; assists in locating appropriate experts; provides social history information to experts to enable them to conduct competent and reliable evaluations; and works with the defense team and experts to develop a comprehensive and cohesive case in mitigation.

The mitigation specialist often plays an important role as well in maintaining close contact with the client and his family while the case is pending. The rapport developed in this process can be the key to persuading a client to accept a plea to a sentence less than death.

For all of these reasons the use of mitigation specialists has become "part of the existing 'standard of care"' in capital cases, ensuring "high quality investigation and preparation of the penalty phase."

ABA Guideline 4.1-The Defense Team And Supporting Services (B) The Mitigation Specialist.

1. Although social history is a critical component of mitigation, it is by no means the only component. Mitigation investigation must also explore prior offenses, mental state at the time of the current offense, and competency *(i.e.,* what is the practical effect of Fetal Alcohol Syndrome, Post Traumatic Stress Disorder, depression, major mental disorders, learning disabilities, compromised intellectual functioning, on the client's ability to aid and assist counsel, keep pace with courtroom proceedings, understand discovery, process information, act in his own

self interest, and tolerate the conditions of confinement). Mitigation investigation often involves in-depth analysis of jail/prison conditions, reliability of confessions, relationships with co­ defendants, community demographics and history. And not least important, mitigation investigation must explore aggravation, including but not limited to prior convictions and alleged

uncharged misconduct.

1. In Wiggins v. Smith, 539 U.S. 510 (2003), the United States Supreme Court used the ABA's death penalty guidelines to conclude that counsel's limited search for mitigating evidence

constituted a failure to provide effective representation. Id. at 524 ("Counsel's conduct fell ... short of the standards for capital defense work articulated by the American Bar Association (ABA) standards to which we long have referred as 'guides to determining what is reasonable"') (quotation omitted). Specifically, the Court held that counsel was ineffective for failing to discover evidence of "petitioner's bleak life history" subsequently uncovered by post-conviction counsel's mitigation

investigators. Id. at 516-17, 534-35. See also Williams v. Taylor, 529 U.S. 362, 415 (2000)(stating that counsel has a duty to conduct a requisite, diligent investigation into his client's background);

Rompilla v. Beard, 545 U.S. 374 (2005) (holding that even when a capital defendant and his family

members have suggested that no mitigating evidence is available, defense counsel is bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably

rely on as evidence of aggravation at the trial's sentencing phase); Hamblin v. Mitchell, 354 F.3d 482 (6th Cir. 2003) (relying on ABA standards, court holds that counsel was ineffective in penalty phase in failing to perform mitigation investigation and error not harmless).

1. As one court has stated: "[i]n light of recent Supreme Court decisions in this area, when a defendant subject to the death sentence requests a mitigation specialist, trial courts should give such

requests careful consideration in view of relevant capital litigation precedent...." United States v.

Kruetzer, 61 M.J. 293, 298-99, n.7 (C.A.A.F. 2005) (military lower court committed constitutional error by denying capital defendant's request for mitigation specialist and state failed to prove error

harmless beyond a reasonable doubt), citing Wiggins. See also Cooley, *Mapping the Monster's*

*Mental Health and Social History: Why Capital Defense Attorneys and Public Defender Death Penalty Units Require the Services of Mitigation Specialists,* 30 Okla. City U.L. Rev. 23 (Spring 2005).

1. Defendant's proposed expert is an experienced mitigation specialist. Ms.

 'saffidavit is annexed hereto. **Ms.** charges $\_ per hour, and she anticipates that her mitigation investigation in this case will cost approximately$ This estimate

is preliminary because, as the United States Supreme Court has repeatedly held, a mitigation investigation can only cease when "reasonable professional judgments support the limitations on investigation." Wiggins, 539 U.S. at 528 (citations omitted).

1. In her affidavit, Ms. states:

I have reviewed various records pertaining to [TIIB DEFENDANT]. There is strong evidence in these materials that [THE DEFENDANT] was seriously neglected as a child, that he was exposed to violence at an early age, that he lacked a male role model, that he had low self-esteem and that his childhood was severely impoverished. There is a strong possibility that these facts, if true, adversely affected his social development and are strong mitigating factors.

1. Under the law, the powerful mitigating force of childhood maltreatment is well­ established. "[T]here can be no doubt that evidence of a turbulent family history, of beatings by a harsh father, and of severe emotional disturbance is particularly relevant [mitigating evidence]."

Eddings v. Oklahom!!, 455 U.S. 104, 115 (1982). Indeed, the United States Supreme Court has reversed a death sentence because the defendant was not permitted to have his sentencer consider as mitigation the fact that he "had been one of seven children in a poor family that earned its living by

picking cotton [and] that his father had died of cancer." Hitchcock v. Dugger, 481 U.S. 393,397, (1987).

1. Thus, it cannot be denied that the defendant's maltreatment as a child almost certainly

will be an extraordinarily significant factor at his possible sentencing phase. The defendant's childhood maltreatment relates directly to the question of whether Defendant' ability to conform his

conduct to the law and to appreciate the criminality of his conduct were substantially impaired. See Miss. Code Ann. Section 99-19-101(6)(f). His maltreatment as a child also might have resulted in Defendant being under the influence of extreme emotional and mental disturbance at the time of the

killing. See Miss. Code Ann. Section 99-19-10 I(6)(b). Defendant's childhood maltreatment also is relevant to the existence of extra-statutory mitigating circumstances.

1. "[M]ost murderers were abused children." Logan, Deana Dorman, "From Abused Child to Killer: Positing Links in the Chain," The Advocate 20, February 1993. Therefore, it is critical in a

capital sentencing trial to establish "[t]he links from abused child to killer...." Id. See also Haney,

*The Social Context of Capital Murder: Social Histories and the Logic of Mitigation,* 35 Santa Clara

L. Rev. 547, 580 (1995) ("nexus between poverty, childhood abuse and neglect, social and emotional dysfunction, alcohol and drug abuse, and crime is so tight in the lives of many capital defendants as to form a kind of social historical 'profile"'); Pincus, *Base Instincts: What Makes Killers Kill?* (Norton 2002) (demonstrating combustible interrelationship among child abuse, brain damage and paranoia in leading to murder).

12 The United States Supreme Court has "long recognized that when a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense," including his mitigation defense.

Ake v. Oklahom!!, 470 U.S. 68, 76, 83-84 (1985) ("[w]e have repeatedly recognized the defendant's

compelling interest in fair adjudication at the sentencing phase of a capital case"); id. at 87 (Burger, C.J., concurring) (capital murder defendant who makes threshold showing that his mental condition

will be significant factor at sentencing phase entitled to expert). The Mississippi Supreme Court has

embraced the Ake decision. See, e.g., Harrison v. State, 635 So.2d 894 (Miss. 1994).

1. In addition to due process considerations, the constitutional guarantees of equal protection and effective assistance of counsel require that a defendant be provided with investigative and expert assistance reasonably necessary to his defense, including a mitigation specialist. As the Supreme Court has observed, "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has." Griffin v. Illinois, 351 U.S. 12, 17-19 (1956).
2. To prepare adequately for his sentencing trial, defendant needs the services of a

mitigation specialist to perform a complete and integrated social history of the defendant, among the other tasks identified in this motion. The defendant, being indigent, cannot afford to pay for such an expert. Thus, defendant moves herein for county funds to retain such an expert.

WHEREFORE, the defendant respectfully requests that this Court grant him the funds necessary to retain Ms. , asmitigation specialist for the defense.

Respectfully submitted,

***IMPORTANT NOTE:*** If necessary, after the initial funding is exhausted, counsel should return to court with a detailed presentation of: (1) what the preliminary investigation has uncovered; (2) what additional investigation must be conducted; (3) the reasons additional investigation is necessary; and (4) a description of the costs of the additional investigation.