**Ex. 12**

\*\*\*\*\*\*\*\*\*TO BE FILED UNDER SEAL\*\*\*\*\*\*\*\*\*

IN THE CIRCUIT COURT OF COUNTY, ALABAMA

- JUDICIAL CIRCUIT CRIMINAL DIVISION

STATE OF ALABAMA, )

)

Plaintiff, )

)

v. ) CC0--

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XXXX )

)

Defendant. )

EX PARTE PLEADING – TO BE PLACED UNDER SEAL

EX PARTE PLEADING – TO BE FILED UNDER SEAL

PURSUANT TO THE ORDER OF THIS COURT, THIS DOCUMENT REMAINS PRIVILEGED AND CONFIDENTIAL AND MUST NOT BE DISCLOSED OR INSPECTED BY ANYONE IN ACCORD WITH THE ATTORNEY-CLIENT PRIVILEGE, AKE V. OKLAHOMA, 470 U.S. 68, 83 (1985); UNITED STATES V. NOBLES, 422 U.S. 225 (1975), AMENDMENTS FIVE, SIX, EIGHT AND FOURTEEN OF THE CONSTITUTION OF THE UNITED STATES.

**EX PARTE MOTION R**

IN THE CIRCUIT COURT OF COUNTY, ALABAMA JUDICIAL CIRCUIT

CRIMINAL DIVISION

STATE OF ALABAMA, )

)

PLAINTIFF, )

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1. ) CC 0

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XXXX, )

)

DEFENDANT. )

EX PARTE MOTION FOR FUNDS TO RETAIN A FORENSIC PATHOLOGIST

COMES NOW Defendant XXXX, by and through his attorneys, and hereby petitions this Honorable Court for funds sufficient to allow him to retain forensic pathologist James R., M.D. in the preparation of his capital trial and, as grounds thereof, states the following:

* 1. XXXX is an indigent Defendant charged by complaint with Capital Murder, to wit: 13A-5-40(a)(5). Upon information and belief, the State will seek the death penalty.
	2. The State alleges that on ----, 200-, XXXX intentionally killed Officer V by shooting him multiple times with a pistol while both were in the parking lot of a restaurant located on Lane in , Alabama.
	3. The Defendant, XXXX, is currently incarcerated in the--------

County Jail in ------ Alabama, and is indigent and without funds to hire experts that are critically necessary to his constitutional right to a fair trial and the effective assistance of

counsel pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

* 1. The Defendant respectfully submits that *Ake v. Oklahoma*, 470 U.S. 68 (1985), and its progeny hold that where critically necessary, the denial of necessary expenses deprives the Defendant of the effective assistance of counsel and other constitutional guarantees of a fair trial under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.
	2. The State has indicated that it will attempt to prove beyond a reasonable doubt that the “offense was especially heinous, atrocious, or cruel compared to other capital offenses.” Ala. Code § 13A-5-49(8) (1975) (hereinafter, “HAC”.) . Whether or not the State can prove this aggravating circumstance will likely be the difference between whether the Defendant lives or dies.
	3. In this case, the conduct of the Defendant and the events leading to the victim’s death lasted for only a very few seconds. This is objectively known because the audio of the alleged ‘shoot-out’ between Off. V and the Defendant is recorded. While the defense would argue that it is not relevant to the issue of HAC because the Defendant’s conduct in relation to the victim had ceased, it should also be noted that Off. Vwas shot twice in the head with a .38 caliber revolver and while life-saving intervention was attempted at no point is there any indication in any police reports or hospital records that Off.V was conscious after the shooting ended. As such, it is the position of the defense that the HAC aggravator does not and can not apply to these facts. However, given the insistence of the State that HAC is potentially applicable, it can only be assumed that the State may contend, or try to leave open the possibility,

that the Defendant’s conduct led the victim to experience pain for an extended period of time and that those circumstances amounted to torture.

* 1. Because the State can not prove the HAC aggravator through any other means, it important for the defense to be prepared to rebut any suggestion, but that Off. V was unconscious and not experiencing pain after the ‘shoot-out.’
	2. In Ex parte Deardorff, -- So. 2d --, WL 54805 (Ala. 2008) decided on January 4th, 2008 the Alabama Supreme Court addressed the applicability of the HAC aggravating circumstance and stated as follows:

“This Court discussed the meaning of the words “especially heinous, atrocious or cruel,” as used in § 13A-5-49(8), Ala.Code 1975, in *Ex parte Clark* as follows:

“We cannot depart from the established meaning of the words enacted by the Legislature-‘especially heinous, atrocious or cruel’-and apply those words to include murders *that do not involve the infliction of torture on the victim*. Such a departure would abandon the essential characteristic that made our previous applications of § 13A-5-49(8) compatible with the Eighth Amendment. We are bound to retain the interpretation of ‘especially heinous, atrocious or cruel’ that has provided a consistent and principled distinction between those murders for which the death penalty sentence is appropriate and those for which it is not. See *[Maynard v.] Cartwright,* 486 U.S. [356] at 363, 108 S.Ct. 1853, 100 L.Ed.2d 372

[ (1988) ]; *Godfrey [v. Georgia],* 446 U.S. [420] at 433, 100 S.Ct. 1759, 64

L.Ed.2d 398 [ (1980) ].”

728 So.2d at 1140-41. This Court in *Ex parte Clark* refused to expand the definition of “especially heinous, atrocious or cruel” to include murder not involving torture:

“*The State urges us to hold that the ‘execution-style’ murder in this case, for which the record does not reflect torture of the victim, is nonetheless ‘especially heinous, atrocious or cruel.’ Such an expansion of the aggravating circumstance set out in § 13A-5-49(8) to encompass a murder not involving torture, merely because the State labels the murder an ‘execution-style’ slaying would abandon the very interpretation that the Eleventh Circuit held critical to the constitutional application of that aggravating circumstance. Indeed, the Supreme Court of the United States has held that a state supreme court's failure*

*to apply its previously recognized limiting construction of an aggravating circumstance, which required a finding of torture or aggravated battery of the victim, rendered the application of the aggravating circumstance unconstitutional*. *Godfrey [v. Georgia],* 446 U.S. [420,] 429, 432, 100 S.Ct. 1759,

64 L.Ed.2d 398 [ (1980) ].”

728 So.2d at 1140.

1. [2] When considering whether a particular capital offense is especially heinous, atrocious, or cruel, the Court of Criminal Appeals adheres to the standard set out in *Ex parte Kyzer,* 399 So.2d 330, 334 (Ala.1981), namely, that the particular offense must be one of those “ ‘conscienceless or pitiless homicides *which are unnecessarily torturous to the victim*.” ’ *Duke v. State,* 889 So.2d 1, 36 (Ala.Crim.App.2002).

“One factor this Court has considered particularly indicative that a murder is ‘especially heinous, atrocious or cruel’ is the infliction of psychological torture. Psychological torture can be inflicted where the victim is in intense fear and is aware of, but helpless to prevent, impending death. *Such torture ‘must have been present for an appreciable lapse of time, sufficient enough to cause prolonged or appreciable suffering*.’ *Norris v. State,* 793 So.2d 847, 861 (Ala.Crim.App.1999).” (*emphasis added*.)

* 1. Establishing through scientific means that Off. Golden was unconscious after the ‘shoot-out’ would be valuable evidence in and sentencing phases of this case to rebut any inference that HAC can properly be applied to the facts of this case. Counsel for the Defendant has been in touch with Dr. E, the Medical Examiner who performed the autopsy on Off. Vn. Her responses to our inquiries were suggestive of someone who was unwilling to commit to any conclusion about Off. V’s consciousness, especially those that might be helpful to the defense.
	2. “Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants ‘a meaningful opportunity to present a complete defense.’” Holmes v. South Carolina, --- S.Ct , 2006 WL

1131853 (2006), quoting, *California v. Trombetta,* 467 U.S. 479, 485, 104 S.Ct. 2528,

81 L.Ed.2d 413 (1984). See also, Chambers v. Mississippi, 410 U.S. 284, 294

(1973)("The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations.”)

* 1. The defense has contacted James l M.D. [1](#_bookmark0), a Board Certified Forensic

Pathologist who served as the Chief Medical Examiner for the Alabama Department of Forensic Sciences in Montgomery, Alabama from 2005 to 2006. Dr. L has agreed to assist the defense in analyzing the autopsy, the autopsy photos, CAT scans from the ------

-- Hospital and any X-rays taken by the Department of Forensics in an attempt to establish from the evidence whether, within a reasonable degree of scientific certainty, Off V was conscious or experiencing pain after the ‘shoot-out.’ It is expected that such a determination can be made relatively quickly and inexpensively. Further, while Dr. L would be ‘on-call’ should his report or our examination of Dr. E lead to the inescapable conclusion that Off. V was in fact unconscious, the Defendant would have no reason to expend resources to have our expert brought to court to testify.

WHEREFORE, PREMISES CONSIDERED, this Honorable Court is respectfully requested to grant $5,000 for fees and expenses in order to continue to retain Dr. L to perform the analysis described which is critically necessary, without which the Defendant will be deprived of the effective assistance of counsel as well as the constitutional guarantees of a fair trial under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

RESPECTFULLY SUBMITTED,

1 See, Curriculum Vitae of James R. L, M.D., attached.

RICHARD S. JAFFE

J. DEREK DRENNAN

BRUCE GARDNER

OF COUNSEL:

JAFFE, STRICKLAND & DRENNAN, P.C.

The Alexander House 2320 Arlington Avenue

Birmingham, AL 35205

(205) 930-9800

BRUCE GARDNER

P.O. Box 18636

Huntsville, AL 35804-8636

(256) 533-5756

*THIS MOTION IS NOT BEING SERVED ON OPPOSING PARTY*