

## JUSTIFICATION FOR PROFESSIONAL SERVICES FUNDING IN CAPITAL DEFENSE LITIGATION

### 1. The Constitutional Principles: The Fifth, Sixth, Eighth, and Fourteenth Amendments

A. The Fifth Amendment: Guarantees defendants the right to present a defense. In capital cases, this includes the right to present evidence to rebut the State's proof of aggravating circumstances.

B. The Sixth Amendment: Guarantees defendants the right to effective assistance of counsel. In capital cases especially, this includes an affirmative duty on defense counsel to conduct a thorough investigation into *all* plausible avenues of defense and mitigation. Trial strategy is not a defense to ineffective assistance of counsel if counsel has not conducted a thorough investigation into all plausible avenues of defense and mitigation.

C. The Eighth Amendment: Guarantees capital defendants the right to present all evidence that might mitigate against imposition of the death penalty. Any state laws, jury instructions, evidentiary rulings, prosecutorial argument, or ineffective assistance of counsel that is reasonably likely to preclude or hamper a jury's consideration of mitigation is unconstitutional under the Eighth Amendment and grounds for reversal.

D. The Fourteenth Amendment: the due process clause of the Fourteenth Amendment makes all of the above federally guaranteed rights applicable to the States.

### 2. How the constitutional principles apply to funding for professional services in capital defense litigation.

A. A defendant has the right to present a defense, or multiple defenses, to charged crimes and aggravating circumstances. Additionally, "a capital sentencer may not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record, and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Boyd v. Ward*, 179 F.3d 904, 921 (10th Cir.1999) (quotation marks omitted), cert. denied, 528 U.S. 1167, 120 S.Ct. 1188, 145 L.Ed.2d 1093 (2000). Thus, the jury cannot be precluded from considering any "constitutionally relevant mitigating evidence." *Buchanan v. Angelone*, 522 U.S. 269, 276, 118 S.Ct. 757, 139 L.Ed.2d 702 (1998) (citations omitted).

B. Capital defense attorneys are constitutionally required, according to the United States Supreme Court, to thoroughly investigate *all* plausible avenues of mitigation and

defenses. "Strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Strickland v. Washington, 466 U.S. 668, 690 (1984).

C.. Thorough investigation of defenses and mitigation requires expert assistance.

Examples:

M. H. expert  
Auto on future  
Dangerousness

1. Defendant is entitled to mental health expert to rebut continuing threat aggravator if the State puts on any evidence, psychiatric or otherwise, of future dangerousness, so long as the defendant's mental condition would likely have been a significant mitigating factor. See *Liles v. Saffle*, 945 F.2d 333, 341 (10th Cir.1991); *Rogers v. Gibson*, 173 F.3d 1278, 1285 (10th Cir.1999). Oklahoma ultimately adopted this broader view in *Fitzgerald v. State*, 972 P.2d 1157, 1169 (Okla.Crim.App.1998). (Cases reversed);

Brain  
Damage

2. Defense counsel should have investigated possibility of brain damage by having neuropsychological testing and evaluation conducted even though already had Defendant evaluated by another psychologist- *Hooper v. Mullin*, 314 F.3d 1163 (10<sup>th</sup> Cir. (Okla.), 2002)(Case reversed);

Social  
History

3. Defense counsel should have retained appropriate expert to conduct a social history regarding defendant's background even though defendant was evaluated by a psychologist. *Wiggins v. Smith*, 539 U.S. \_\_\_\_, 123 S.Ct. 2527 (2003)(Case reversed)

Diabetes  
Alcoholism

4. Defense should have been given funding to retain appropriate expert to evaluate the effects of alcohol and diabetes on Defendant's mental state, *Fitzgerald v. State*, 972 P.2d 1157, 1169 (Okla.Crim.App.1998)(Case reversed).

Battered  
Woman

5. Defense should have retained expert to explain battered woman syndrome defense to the jury. *Paine v. Massie*, 339 F.3d 1194 (10<sup>th</sup> Cir. (Okla.) 2003); *Bechtel v. State*, 840 P.2d 1 (Okla.Crim.App.1992). (Cases reversed).

D. The only justification for failing to investigate is reasonable professional judgment by defense counsel that investigation is not necessary based on review of all available facts. The reasonableness of defense counsel's judgment is determined by prevailing professional norms.

E. Lack of funds to retain experts necessary to thorough investigation of defenses and mitigation is not legitimate justification for failure to investigate and will result in

reversal of convictions and sentences based on ineffective assistance of counsel, albeit state-induced.

**In a nutshell:** Defense attorneys are constitutionally required to investigate all plausible defenses and lines of mitigation. If an initial investigation reveals that the defendant's background is significant then the defense is required to have a social history conducted. If the investigation reveals that the defendant has neurological problems, then the defense is required to have the defendant evaluated by a neuropsychologist, and possibly have an MRI or PetScan or other testing performed to confirm or deny the indications. If the investigation reveals that the defendant may be mentally ill, then the defense is required to have him evaluated for mental illness. If the investigation reveals that drugs, alcohol, or abuse is a significant factor in defending against the charged crimes or presenting mitigation, then the defense is required to retain an expert to explain the effects of those circumstances on the defendant's state of mind. And so on. The type of experts needed is dictated by the facts uncovered in an initial investigation.

Defense counsel cannot avoid a more thorough investigation that includes use of experts, by not conducting an initial investigation that may reveal the necessity for expert assistance. In *Battenfield v. Gibson*, defense counsel conducted no investigation, and the Tenth Circuit reversed on that basis. Consequently, defense counsel must be provided funding to retain experts to explore defenses and lines of mitigation, regardless of whether they actually use them at trial, or convictions and sentences will not withstand appellate scrutiny.

### **3. Consequences of not providing capital defendants with funding for expert assistance.**

A. Reversal of convictions and sentences. The caselaw is clear that the lynchpin of analysis of many ineffective assistance of counsel claims is whether or not counsel thoroughly investigated defenses and mitigation. If counsel is denied the resources to thoroughly investigate defenses and mitigation, then counsel is ineffective. The remedy is reversal for new trial.

B. Additional expenditure. Failure to provide adequate funding that enables defense counsel to conduct constitutionally required investigation, will result in retrying a case that was not properly tried the first time. Upon reversal, the funding that was originally denied will ultimately be granted so that a thorough investigation can be conducted. In addition to the funding for investigation that was constitutionally required initially, more money will be expended from the coffers of the district attorneys' offices, OIDS, and court funds to retry the old cases. Consequently, the money originally withheld will have to be provided, and the State will incur the additional expense of retrying the case. The result will end up

costing almost twice as much as it would have had the money for expert assistance been provided in the first instance.

C. Lack of Finality, undermined confidence in outcomes, and impaired functioning of criminal justice system. In addition to the increased financial burden of retrying cases, the lack of funding for experts and subsequent retrials that would inevitably follow would undermine public confidence in our criminal justice system. The lack of finality in convictions and sentences, particularly in capital cases, is especially painful for victims' family members and frustrating for communities trying to put specific violent crimes behind them. Additionally, the passage of time that necessarily occurs when cases must be retried after reversal on appeal, results in difficulty locating witnesses and memory loss of people involved for both prosecution and defense. The passage of time can result in an inability for the prosecution or defense to effectively present its case, compromising the effectiveness of the criminal justice process and undermining confidence in its results.