

Note: Please be sure to review this sample thoroughly to determine what sections apply to your case, remove those that do not, add any others, and remove all bolded, italicized comments, and shepherdize case law.

No. _____

THE STATE OF _____

§
§
§
§
§

VS.

_____ Court

_____ COUNTY, _____

SAMPLE CONTINUANCE MOTION

DEFENDANT, _____ 'S, MOTION FOR CONTINUANCE

Now comes _____, through undersigned counsel, pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and _____ of the _____ (*state*) Constitution, and respectfully moves this Court to continue the trial of this cause and in support thereof states the following:

___ Mr. _____ was indicted by the _____ County grand jury on _____ for the offense(s) of _____.

___ *[Briefly describe procedural history -- include discovery and Brady/Kyles requests and lack of production, motion hearings that have been requested but not held, outstanding motions that have not been ruled on, funding requests for investigation, mitigation and mental health assistance, etc, not granted, mitigation work as yet incomplete (records not yet produced, witnesses not yet interviewed, etc), proximity of trial to time of offense, and anything else that is outstanding.]*

(notes) _____

_____]

____. The defense has received nothing in the way of discovery or notice ***[other than _____]***. As such, counsel cannot proceed effectively as counsel operates under specific expectations and professional guidelines that mandate that certain task be undertaken in preparation for trial. *See, inter alia, ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases §10.10.2 (rev'd ed. 2003) reprinted in 31 HOFSTRA L. REV. 913, 1051 (2003) [hereinafter "ABA Guidelines"]*; *Wiggins v. Smith*, 539 U.S. 510 (2003) (finding that counsel has a constitutional duty to conduct an investigation into the defendant's background, as well as, to gather evidence relating to the defendant's personal moral culpability); *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); ***[and state statute(s) _____, if applicable, pertaining to mitigation]*** (stating *[e.g.] that the defendant is entitled to present any evidence "relevant to sentence, including evidence of the defendant's background or character or the circumstances of the offense that mitigates against the imposition of the death penalty"*).

____. ***[if applicable]*** Despite being reminded as recently as _____[date(s)], by letter, of his failure to provide Mr. _____ with the materials necessary to the preparation of an

adequate defense, (Exhibit A, Letter from _____ [*defense counsel*]), the prosecutor has not responded, and continues to press forward toward trial. Trial is now scheduled to begin on _____ [*date*].

__. Mr. _____ cannot receive effective representation if this Court proceeds as currently scheduled. As outlined below, in addition to the state's failure to provide discovery, critical fact investigation, mitigation investigation, expert consultation and pre-trial litigation remains to be done. Thus, undersigned counsel seeks a continuance of this trial date until such time as Mr. _____ can be adequately represented in this fight for his life. [*if applicable*]
Mr. _____ has sought and received one previous continuance, in _____. [*date*]

**“DEATH IS DIFFERENT”: THE REQUIREMENT OF HEIGHTENED RELIABILITY
IN CAPITAL CASES**

__. Mr. _____ is on trial for his life. The penalty of death is “unique in both its severity and finality.” *Gardner v. Florida*, 430 U.S. 349, 357 (1977). As a result, the Constitution demands “a greater degree of accuracy...than would be true in a noncapital case.” *Gilmore v. Taylor*, 508 U.S. 333, 342 (1993). The United States Supreme court has long recognized that this qualitative difference in the severity of the punishment creates a greater need for reliability in the determination that death is the appropriate punishment in a specific case. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). *See also Gregg v. Georgia*, 428 U.S. 153 (1976); *Ford v. Wainwright*, 477 U.S. 399 (1986); *Harmelin v. Michigan*, 501 U.S. 957 (1991); *Monge v. California*, 524 U.S. 721 (1998).

__. As this is a capital murder case, it is extraordinarily complex and time-consuming. As the ABA has stated:

...death penalty litigation is extraordinarily complex, both for the courts and for the attorneys involved. Not only do the cases incorporate the evidentiary and procedural issues that are associated with virtually every noncapital case, but they also involve a host of issues that are unique to capital cases. These include: Special voir dire of jurors; presentation of evidence going to guilt or innocence and punishment; special penalty procedures, including additional factual findings by the jury ...

* * *

It is well established that representation of an individual in a capital case is an extraordinary responsibility placed on any lawyer...

Counsel must not only be able to deal with the most serious crime - homicide - in the most difficult circumstances, but must also be thoroughly knowledgeable about a complex body of constitutional law and unusual procedures that do not apply in other criminal cases.

American Bar Association, *Toward A More Just And Effective System of Review in State Death Penalty Cases*, at 43, 49, 50 (Oct. 1989).

Preparation for a capital murder trial begins with legal and factual investigation. Capital murder counsel must familiarize themselves with the relevant criminal and eighth amendment law - a difficult task indeed given the rapidity with which criminal law and especially eighth amendment law evolve. Capital murder counsel also must ensure that all avenues of defense and mitigation are thoroughly investigated, and must, inter alia: (i) locate, interview, investigate and prepare numerous prospective fact, forensic and mitigation witnesses, often including family members, friends, educators, clergy, former employers, etc., some of whom may reside out of state;¹ and (ii) gather all possible relevant evidence, including such mitigation evidence as the defendant's medical records, education records, employment records, armed services record, etc. Preparation for the sentencing phase of a capital murder trial, in short, "requires extensive and generally unparalleled investigation into personal and family history." ABA Report, *supra*, at 50.

After ensuring thorough research regarding both the law and facts applicable to their case, capital murder counsel must then, inter alia: (i) draft and file numerous pre-trial motions (many of

¹ "Investigation must often be conducted in several states and, in some cases, in foreign countries." ABA Report, *supra*, at 50.

them concerning arcane Eighth Amendment issues); (ii) prepare all defense witnesses for trial, including highly specialized expert mitigation witnesses; (iii) prepare vigorous cross-examination of all state witnesses, including sentencing phase witnesses; (iv) conduct the guilt-innocence phase; and (v) conduct the unique penalty phase.²

___ . The demands for heightened reliability, in turn, dictate that courts provide capital defendants like Mr. _____ with special accommodations, considerations, and “protections that the Constitution nowhere else provides.” *Harmelin*, 501 U.S., at 994.

MR. _____ CANNOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL IN A CAPITAL TRIAL BEGINNING ON _____ [date]

___ . Counsel cannot provide effective assistance if a continuance is not allowed. *See Evans v. Lewis*, 855 F.2d 631, 637 (9th Cir. 1988) (counsel ineffective where he expressed no interest in judge’s offer of continuance to secure mental health records); *Code v. Montgomery*, 799 F.2d 1481, 1485 (11th Cir. 1986) (“failure to move for a continuance was both professionally deficient and prejudicial, and . . . abridged [appellant’s] sixth amendment rights” to effective counsel).

The Demands Placed Upon Defense Counsel in Capital Cases

___ . The American Bar Association’s *Guidelines for the Appointment and Performance of*

² See also *White v. Board of County Commissioners*, 537 So.2d 1376, 1380 (Fla. 1989) (death penalty cases involve “extraordinary circumstances and unusual representation”) (quoting *Makemson v. Martin County*, 491 So. 2d 1109, 1110 (Fla. 1986)); *State v. Peart*, **Error! Main Document Only.Error! Main Document Only.**621 So.2d 780, 792 (La. 1992) (Dennis, J., dissenting) (representation of a capital murder defendant “requires literally hundreds of hours of the attorney’s time and requires the attorney’s utmost attention and ability”); *Arnold. v. Kemp*, 813 S.W.2d 770 (Ark. 1991); *Irving v. State*, 441 So.2d 846, 856 (Miss. 1983) (death penalty litigation “has become highly specialized... [and] few attorneys have `even a surface familiarity with seemingly innumerable refinements put on *Gregg v. Georgia*, 428 U.S. 153 (1976) and its progeny”); *People v. Bigelow*, 209 Cal. Rptr. 328, 37 Cal. 3d 731, 691 P.2d 994 (1985) (death penalty cases “raise complex additional legal and factual issues beyond those raised in an ordinary felony trial”); Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U.L. Rev. 299, 317 (1983); Gredd, *Washington v. Strickland: Defining Effective Assistance of Counsel at Capital Sentencing*, 83 Colum. L. Rev. 1544 (1983).

Counsel in Death Penalty Cases (February, 2003) (hereinafter “ABA Guidelines”), outline the duties and obligations of undersigned counsel in their representation of Mr. _____. These Guidelines have “long .. [been] referred [to]” by the U.S. Supreme Court “as ‘guides to determining what is reasonable’” *Wiggins v. Smith*, 539 U.S. 510, 123 S. Ct. 2527, 2537 (U.S. 2003); *Strickland v. Washington*, 466 U.S. 668, at 688-89 (1984)(“Prevailing norms of practice as reflected in American Bar Association standards and the like ... are guides to determining what is reasonable”). *See also, Hamblin v. Mitchell*, 354 F.3d 482, 486 (6th. Cir. 2003)(“(T)he *Wiggins* case now stands for the proposition that the ABA standards for counsel in death penalty cases provide the guiding rules and standards to be used in defining the ‘prevailing professional norms’ in ineffective assistance cases.”); *United States v. Karake*, ___F. Supp. 2d___, 2005 WL 1208759 (D.D.C. 2005)(“...the Supreme Court has counseled that the ABA Guidelines for counsel in death penalty cases provide the governing norms.”). [*insert additional applicable caselaw from your state and federal jurisdictions in support of ABA Guidelines – see ABA website for caselists*]

____. These Guidelines “set forth a national standard of practice for the defense of capital cases in order to ensure high quality legal representation for all persons facing the possible imposition or execution of a death sentence by any jurisdiction.” Guideline 1.1. The Commentary to Guideline 1.1 emphasizes that “these Guidelines are not aspirational. Instead, they embody the current consensus about what is required to provide effective defense representation in capital cases.” *ABA Guidelines* at p. 2.

____. [*if applicable*] These standards have been adopted by the State Bar of _____. *See*

**The Prosecutor’s Refusal to Provide Discovery Prevents Counsel
From Being Able to Adequately Litigate Pre-Trial Issues**

___ . In addition to counsel’s Sixth Amendment duty to render effective assistance of counsel, counsel also have a Fifth Amendment duty to ensure that Mr. _____ receives a fair trial, which encompasses additional rights under the Fifth, Sixth, Eighth and Fourteenth Amendments, [*add corresponding state law*] including but not limited to the right to present a defense, to confront and cross-examine witnesses and to avoid cruel and unusual punishment.

___ . The admissibility of various pieces of evidence must be litigated prior to the presentation of evidence to the jury, and prior to the selection of the jury where this Court’s rulings may impact the theory of the defense. The State’s refusal to provide discovery or to give notice as to what evidence of “bad acts” may be proffered at any potential penalty phase has, thus far, prevented the defense from being able to raise these issues.

___ . For example, the defense must know whether any witnesses have become unavailable and whether the state intends to offer their evidence through previous testimony.

___ . The defense also needs to know what scientific evidence is going to be offered, and the defense may need to retain experts to assess and test such evidence and file motions to challenge such evidence under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993) and [*state*] Rules of Evidence _____.

___ . [*Add detail of other discovery-related issues that remain outstanding*]

___ . Counsel cannot know if such motions will be necessary until the state answers pending discovery requests.

(notes) _____

The State Has Not Yet Provided Discovery

Necessary to Guilt/Innocence Phase Investigation

___ The state has provided undersigned counsel with virtually no discovery whatsoever. Clearly, the defense cannot investigate allegations or facts that have not been provided. Once discovery is provided, the time-consuming process of an independent investigation will take much longer than what has been allotted under the current schedule.

___ *[Insert details of alleged crime, emphasizing what needs to be done and the time afforded so far]*

(notes) _____

___ Under the Sixth Amendment, counsel has the responsibility to conduct an adequate and independent investigation. Indeed, a thorough pretrial investigation is "[o]ne of the primary duties defense counsel owes to his client." *Magill v. Dugger*, 824 F.2d 879, 886 (11th Cir. 1987). For that reason, "[i]t should be beyond cavil that an attorney who fails altogether to make any preparations for the penalty phase of a capital murder trial deprives his client of reasonably effective assistance of counsel by any objective standard of reasonableness." *Osborn v. Shillinger*, 861 F.2d 612, 627 (10th Cir. 1988)(quoting *Blake v. Kemp*, 758 F.2d at 533 (11th Cir. 1985)). Unless counsel undertakes "a reasonably substantial, independent investigation into the circumstances and the law from which potential defenses may be derived," he cannot provide effective assistance. *Baldwin v. Maggio*, 704 F.2d 1325, 1332-33 (5th Cir. 1983).. ***[replace with/add citations from local jurisdiction, if any]***

___ "At the heart of effective representation is the independent duty to investigate and prepare." *Goodwin v. Balkcom*, 684 F.2d 794, 805 (11th Cir. 1982); accord *Porter v.*

Wainwright, 805 F.2d 930, 933 (11th Cir. 1986); *Tyler v. Kemp*, 755 F.2d 741 (11th Cir. 1985); *Douglas v. Wainwright*, 714 F.2d 1532 (11th Cir. 1983), *vacated*, 104 S. Ct. 3575, 82 L. Ed. 2d 874 (1984), *adhered to*, 739 F.2d 531 (1984). As the Court held in *Wade v. Armontrout*, 798 F.2d 304 (8th Cir. 1986):

Investigation is an essential component of the adversary process. “Because [the adversarial] testing process generally will not function properly unless counsel has done some investigation into the prosecution’s case and into various defense strategies . . . ‘counsel has a duty to make reasonable investigations. . . .’”

Id. at 307 (quoting *Kimmelman v. Morrison*, 477 U.S. 365, 106 S. Ct. 2574, 2589, 91 L. Ed. 2d 305 (1986) (quoting *Strickland v. Washington*, 466 U.S. 668, 691, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984))). [*insert alternative/additional citations?*]

___ ABA Guideline 10.7(A) provides that “Counsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty,” and that “[t]he investigation regarding guilt should be conducted regardless of any admission or statement by the client concerning the facts of the alleged crime, or overwhelming evidence of guilt, or any statement by the client that evidence bearing upon guilt is not to be collected or presented.” ABA Guideline 10.7(A)(1).

___ The ABA Standards for Criminal Justice similarly emphasize this fundamental duty:

(a) Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused’s admissions or statements to defense counsel of facts constituting guilt or the accused’s stated desire to plead guilty.

ABA Standards for Criminal Justice (3d ed. 1993); Standard 4 - 4.1, The Defense Function.

___ The Commentary to ABA Guideline 10.7 sets out the following standard for culpability phase investigation:

Guilt/Innocence

2. Potential Witnesses:

a. Barring exceptional circumstances, counsel should seek out and interview potential witnesses, including, but not limited to:

- (1) eyewitnesses or other witnesses having purported knowledge of events surrounding the alleged offense itself;
- (2) potential alibi witnesses;
- (3) witnesses familiar with aspects of the client's life history that might affect the likelihood that the client committed the charged offense(s), and the degree of culpability for the offense, including:
 - (a) members of the client's immediate and extended family
 - (b) neighbors, friends and acquaintances who knew the client or his family
 - (c) former teachers, clergy, employers, co-workers, social service providers, and doctors
 - (d) correctional, probation, or parole officers;
- (4) members of the victim's family.

b. . . .Counsel should investigate all sources of possible impeachment of defense and prosecution witnesses.

Commentary to ABA Guideline 10.7(A)(1).

___ . The State's refusal to provide discovery has made the job of Mr. _____'s defense investigator significantly more difficult. The defense has not yet been able to identify, much less locate, several crucial witnesses, [*including alleged co-perpetrators and eyewitnesses*].

Necessary Forensic Examination and/or Testing Has Not Been Completed/Evidence Required for Necessary Forensic Testing Has Not Been Provide to the Defense

(insert text here -- and elsewhere in lists of outstanding tasks remaining) possible issues include: hair analysis, blood analysis, DNA analysis (blood/semen), gunshot residue/ballistics analysis, fingerprint analysis, arson investigation)

(notes) _____

Because the State Has Failed to Give the Required Notice, the Defense is Unprepared to Meet Evidence of Aggravation in a Potential Penalty Phase

___ . Despite repeated requests, the State has not provided notice of any prior bad acts or extraneous offenses it intends to allege against Mr. _____ should there be a penalty phase. Once notice of these allegations is received, minimally adequate representation will require a full investigation of each event.

(notes) _____

___ . Depending upon the allegations, once the state does provide notice of the bad acts it seeks to proffer, significant pretrial litigation may be involved. The Supreme Court has held that “[t]he fundamental respect for humanity underlying the Eighth Amendment’s prohibition against cruel and unusual punishment gives rise to a special need for reliability in the determination that death is the appropriate punishment in any capital case.” *Johnson v. Mississippi*, 486 U.S. 578, 584 (1988). Accordingly, while there is no “perfect procedure for deciding in which cases governmental authority should be used to impose death,” the Court “[has] made it clear that such decisions cannot be predicated [on] factors that are constitutionally impermissible or totally irrelevant to the sentencing process.” *Id.* In that case, a unanimous Court concluded that the Eighth Amendment’s requirement of “heightened reliability” in capital cases mandated reversal of the defendant’s death sentence based upon the admission of unreliable prior offenses.

___ . Thus, after receiving notice from the state and conducting an independent investigation, Mr. _____’s defense counsel may have a duty to challenge the proffered evidence in aggravation on any of several grounds, including, but not limited to: an improper plea, *Boykin v Alabama* 395 U.S. 238, 243 (1969), a constitutional defect in a prior conviction, *Johnson v. Mississippi*, 486 U.S. 578, 584 (1988), the use of prison disciplinary charges *Cooper*

v. Sheriff, 929 F.2d 1078 (5th Cir. Tex. 1991); *Pembroke v. Wood County*, 981 F.2d 225 (5th Cir. Tex. 1993); *Mitchell v. Sheriff Dept.*, 995 F.2d 60 (5th Cir. Tex. 1993) [*insert additional/alternative citations?*]. Similarly, the proffer of any statement purportedly made by Mr. _____ will require a pre-trial evidentiary hearing as to its voluntariness, particularly if it is an uncounseled statement purportedly made while in custody.

____. The state’s apparent goals in ambushing defense counsel with allegations of bad acts on the eve of trial render the so-called “science” of making future dangerousness predictions³ constitutionally unreliable. *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977); *Townsend v. Burke*, 334 U.S. 736 (1948) (due process requires resentencing where “materially untrue” allegations form part of the basis for the defendant's sentence); *United States v. Tucker*, 404 U.S. 443 (1972); *Roussell v. Jeane*, 842 F.2d 1512, 1524 (5th Cir. 1988) (where “the sentencing authority relies on incorrect or unsupported assumptions [and] such reliance is manifest in the record due process requires that the defendant be resentenced,” citing *Tucker*); *Bourgeois v. Whitley*, 784 F.2d 718, 721 (5th Cir. 1986) (due process entitles defendant to resentencing if court is “unable to find that the invalid [prior] convictions did not influence” the sentence imposed for a subsequent offence, citing *Tucker*) [*insert alternative citations?*].

The Defense Must Consider Consultation with Forensic Experts

____. The State’s failure to provide notice of what forensic evidence it will seek to introduce, or any extraneous offenses it may offer at penalty phase, along with the numerous and complex challenges presented by the investigation of mitigation in this case, have denied the defense the opportunity to determine what kind of experts it may need to consult.

(notes) _____

3 *Deadly Speculation: Misleading Texas Capital Juries with False Predictions of Future*

___ . Once again, the actions of the state thwart the development of a constitutionally adequate defense and force counsel to seek additional time. Undersigned counsel would be ineffective for proceeding to trial without proper consultation with defense experts. *See Elledge v. Dugger*, 823 F.2d 1439, 1444-45 (11th Cir. 1987) (“counsel’s failure at least . . . to seek out an expert witness was outside the range of competent assistance”); *Blake v. Kemp*, 758 F.2d 523, 529 (11th Cir. 1985) (“courts have ‘long recognized a particularly critical relation between expert psychiatric assistance and minimally effective assistance of counsel’”); *Profitt v. Waldron*, 831 F.2d 1245, 1248 (5th Cir. 1987) (“[f]ailure to investigate . . . mental history constitutes an impermissible deficiency in rendering effective assistance”); *see also Jones v. Thigpen*, 788 F.2d 1101 (5th Cir. 1986); *Petty v. McCotter*, 779 F.2d 299, 301-02 (5th Cir. 1986); *Johnson v. Estelle*, 704 F.2d 232 (5th Cir. 1983); *Young v. Zant*, 677 F.2d 792, 798 (11th Cir. 1982); *Evans v. Lewis*, 855 F.2d 631, 637 (9th Cir. 1988). [*insert alternative citations?*]

**Mr. _____ is Entitled to the Assistance of a Mitigation Specialist,
A Crucial Team Member**

___ . On _____, Judge _____ denied Mr. _____’s motion for appointment of a mitigation specialist [*or refused to approve additional funds for a mitigation specialist*; Motion _____ is hereby incorporated by reference and all claims and information therein is reiterated by reference].

(notes) _____

___ . As best described in the ABA Guidelines, the defense cannot proceed without a mitigation specialist:

A mitigation specialist is also 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.

___ . [*Excerpt details from motion for mitigation specialist or motion for additional funds*]

(notes) _____

**Mr. _____’s Mitigation Presentation Cannot Be Ready
in Time for Trial as Currently Scheduled**

___ . The United States Supreme Court has repeatedly emphasized that the Sixth Amendment right to effective representation demands, in a capital case, the thorough investigation and development of mitigating circumstances. *See Williams v. Taylor*, 529 U.S. 362, 396 (2000) (finding that trial counsel has an “obligation to conduct a thorough [mitigation] investigation of the defendant’s background.”); *Wiggins v. Smith*, 539 U.S. 510 (2003) (failure of trial attorney to investigate defendant’s background and present mitigating evidence violated Sixth Amendment right to effective assistance of counsel); *Kenley v. Armontrout*, 937 F.2d 1298, 1309 (8th Cir. 1991) (counsel ineffective for not producing non-statutory mitigation “[g]iven the sympathetic light in which Kenley’s past behavior could have been presented, in the context of his family . . . background”); *see also Lewis v. Dretke*, 355 F.3d 364, at 368 (5th Cir. 2003) (“It is axiomatic – particularly since *Wiggins* – that [the decision not to present mitigating evidence] cannot be credited as calculated tactics or strategy unless it is grounded in sufficient facts, resulting in turn from an investigation that is at least adequate for that purpose.”) and most recently *Rompilla v. Beard*, 545 U.S. ___, (2005).

___ . Should Mr. _____ be convicted, his sentence “ultimately will turn on mitigating evidence and on the advocate’s ability to marshal and present that evidence.” Goodpaster, The Adversary System, Advocacy, and Effective Assistance of Counsel in Criminal Cases, 14 N.Y.U. Rev. L. & Social Change 59, 83-85 (1986). “Without adequate time to prepare and present mitigating evidence, the procedural safeguards developed to protect the defendant’s constitutional rights in a capital sentencing hearing are meaningless.” Note, A Capital Defendant’s Right to

a Continuance Between the Two Phases of a Death Penalty Trial, 64 N.Y.U. L. Rev. 579, 582 (1989).

___ Courts have found prejudicial error in cases where compelling mitigating evidence bearing on mental capacity existed but was not addressed at trial. *See, e.g., Battenfield v. Gibson*, 236 F.3d 1215, 1226 (10th Cir. 2001) (counsel ineffective in capital sentencing for failing to adequately investigate and present mitigating evidence of, *inter alia*, the defendant’s “involvement in a serious car accident at age 18, during which he sustained a serious head injury and after which he heavily used alcohol and drugs”); *Bloom v. Calderon*, 132 F.3d 1267 (9th Cir. 1997), *cert. denied*, 523 U.S. 1145 (1998); *Middleton v. Dugger*, 849 F.2d 491 (11th Cir. 1988) (failure to conduct investigation into petitioner’s background, to uncover mitigating, psychiatric, IQ, and childhood information, and to present that information at penalty phase of death penalty case ineffective); *Stephens v. Kemp*, 846 F.2d 642 (11th Cir. 1988) (counsel ineffective for failing to investigate, present, and argue to jury at sentencing evidence of defendant’s mental history and condition); *Commonwealth v. Alvarez*, 740 N.E.2d 610 (Mass. 2000) (counsel ineffective in a murder case where failure to provide expert with all relevant medical records left expert unable to testify credibly about defendant’s organic brain damage and subjected him to devastating cross-examination).

___ The American Bar Association’s *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (February, 2003), which are relied upon by state and federal courts to define the standards for representation capital cases, require that capital counsel conduct “thorough and independent investigations relating to the issues of both guilt and penalty”. *Wiggins v. Smith*, 123 S.Ct. 2527 (2003); *Lewis v. Dretke*, WL22998819 (5th Cir. 2003); *Roberts v. Dretke*, No. 02-51339 (5th Cir. January 9, 2004); *Hamblin v. Mitchell*, No. 95-

02046 (6th Cir. December 29, 2003), *Rompilla v. Beard*, 545 U.S. ___, (2005).

___ . The following areas have been identified which require further investigation in order to gain a full understanding of Mr. _____'s background, character, and those circumstances of the offense that justify a sentence less than death:

Life History Witnesses

___ . Mr. _____'s family is very large and geographically-diverse, increasing the amount of time and resources needed to locate and interview them. Several potential witnesses are deceased. As a result, the defense team have been forced to seek the critical information through alternate, and often more time-consuming, routes.

(notes) _____

___ . Without access to these sources of life history information, significant gaps in Mr. _____'s life history continue to exist. _____, the mitigation specialist hired [*proposed?*] to assist in the representation of Mr. _____, has provided an affidavit outlining the work that remains to be done to fully develop Mr. _____'s social history. See Exhibit ___, Affidavit of _____.

Records Collection

___ . At this time, defense counsel have obtained a total of approximately _____[#] separate sets of records relevant to the mitigation investigation. However, more than _____[#] records requests remain outstanding and yet to be made, and new information continues to generate new records requests.

(notes) _____

__. The approximately ____ pages of records already obtained and the more than ____ pages of records expected must be reviewed and followed-up on, with additional witness interviews and records collection, necessitating significant additional time.

Necessary Mental Health Testing and Investigation Has Not Been Completed
(insert text here -- and elsewhere in lists of outstanding tasks remaining)

(notes) _____

Investigation and Development of Necessary Mental Health Defenses Has Not Been Done
(insert text here -- and elsewhere in lists of outstanding tasks remaining)

(notes) _____

Effective Jury Selection Cannot Be Conducted Until Investigation and Preparation of the Case have Been Completed

__. The ABA Guidelines emphasize two overriding principles in the *voir dire* portion of capital jury selection. The first is that *voir dire* must be case-specific, and the second is that counsel must be trained in the “intricate processes” of “death qualification.” ABA Guideline 10.10.2 and Commentary.

decide whether to include or delete [__. *As explained in the attached affidavit of nationally renown capital voir dire expert David Wymore, a “basic tenant of effective jury selection is that it must be based upon a specific theory of the case developed from a thorough understanding of the fact expected to be presented at trial.” See Exhibit ____, Affidavit of David*

Wymore.

___ Mr. Wymore, a capital trial attorney who designed a most effective method of capital voir dire and has taught it to capitally-certified lawyers around the country, states that “a bedrock principle of capital jury selection that counsel must develop a case-specific strategy.” See Exhibit ___.]

___ According to the Guidelines, undersigned counsel is obliged to prepare “**a case-specific set of voir dire questions,**” and to plan a strategy for selecting a jury “**most favorable to the theories of mitigation that will be presented.**” Commentary to ABA Guideline 10.10.2 (emphasis added). Commentary to ABA Guideline 10.10.2. Without access to all of the relevant mitigating evidence, however, defense counsel cannot meet this obligation.

___ Undersigned counsel cannot, therefore, comply with the obligations placed upon them until able to formulate a case theory. Unfortunately, counsel have not yet been able to formulate such a theory for either phase of the trial for the reasons set forth herein, including, but not limited to: the state’s failure to provide discovery, the state’s failure to provide notice of whatever prior bad acts or extraneous offenses it intends to offer, the challenges facing the mitigation specialist and fact investigator, the fact that the defense cannot have prepared all of the necessary motions or identified all of the necessary experts until receiving proper discovery and notification from the state.

This Request is Not an Delaying Tactic

___ This continuance is sought [*pursuant to applicable state rule of criminal procedure* ___, (*if applicable*)] for good cause shown, to allow for adequate preparation and not for purposes of delay.

___ The state has been working on this case since the date of the offense, _____.

The defense could not begin its preparation until counsel was appointed and a defense team assembled on or about the _____ (*if applicable*), (*# months/years later*). A constitutionally-proper defense team has not been assembled to date, given the Court’s failure to provide funding for a mitigation specialist, etc). In striking a balance between the interests of the state and those of the defendant, given the need for reliability in the determination of whether death is the appropriate punishment in a specific case, *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976), it is generally necessary to protect more carefully the rights of a defendant who is charged with a capital crime. *Powell v. Alabama*, 287 U.S. 45 (1932). *See also* “Death is Different” section above.

__. The defense has made every effort to meet this Court’s proposed trial schedule. Unfortunately, these efforts could not overcome the difficulties presented by, among other things, the failure of the state to provide timely discovery and notice, of the Court to appoint sufficient funds for a mitigation specialist, a crucial defense team member, and of certain institutions to respond to our records requests as detailed herein. Thus, additional time is required to permit defense counsel to provide effective assistance of counsel.

Denial of a Continuance Would Irreparably Harm Mr. _____

__. To begin selecting a jury on _____, while substantial investigation and preparation remains to be done in a case that is neither factually nor legally simple or straightforward would deny Mr. _____ the “basic tools of an adequate defense. . . .” *Britt v. North Carolina*, 404 U.S. 226, 227 (1971); see also *Mason v. Arizona*, 1345, 1351 (9th Cir. 1974) (constitutional right to investigative assistance), in violation of his most fundamental rights under the 5th, 6th, 8th and 14th Amendments to the United States Constitution and Article _____, sections _____ of the _____ Constitution.

___ . The “denial of a motion for continuance is fundamentally unfair when it results in a denial of a defendant’s constitutional rights.” *Wade v. Armontrout*, 798 F.2d 304, 307 (8th Cir. 1986); *Ungar v. Sarafite*, 376 U.S. 575, 589, 84 S. Ct. 841, 11 L. Ed. 2d 921 (1964); *accord United States ex rel. Martinez v. Thomas*, 526 F.2d 750, 755 (2d Cir. 1975).

There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied. *Nilva v. United States*, 352 U.S. 385, 77 S. Ct. 431, 1 L. Ed. 2d 415 [1957].

Ungar v. Sarafite, 376 U.S. 575, 589, 84 S. Ct. 841, 11 L. Ed. 2d 921 (1964); *accord United States ex rel. Martinez v. Thomas*, 526 F.2d 750, 755 (2d Cir. 1975).

___ . Under the circumstances here, to force Mr. _____ to begin defending his life before his case has been adequately investigated is a “myopic insistence on expeditiousness” that would “render [his] right to defense with counsel an empty formality.” *Chandler v. Fretag*, 348 U.S. 3, 75 S. Ct. 1, 99 L. Ed. 4 [1954].

___ . Undersigned counsel represents to the Court that, for the reasons that are set out above, counsel is not prepared to provide effective assistance of counsel to Mr. _____ on the date that this case is set for trial, and Mr. _____ will be prejudiced by this inadequate preparation time.

___ . The denial of a continuance would also deny Mr. _____ the right to compulsory process, to retain the assistance of experts, and to due process of law. *Ungar v. Sarafite*, 376 U.S. 575, 589, 84 S. Ct. 841, 849, 11 L. Ed. 2d 921 (1964); *Hicks v. Wainwright*, 633 F.2d 1146 (5th Cir. 1981) (holding that denial of continuance which prevented defense counsel from calling an expert psychiatrist violated the defendant’s right to present a crucial defense witness and to due process of law.).

The Supreme Court has recognized that the right to offer the testimony of witnesses and compel their attendance is constitutionally protected. Failure to grant a continuance to enable a defendant to exercise that right is, under certain circumstances, a denial of due process. The Court has recognized, in the context of a defendant's assertion of his sixth amendment right to counsel, that the constitutionality of a trial judge's refusal to grant a continuance depends on the circumstances of each particular case, evaluated in the light of the judge's traditional discretion to grant or deny such motions.

Bennett v. Scroggy, 793 F.2d 772, 774 (6th Cir. 1986) citing, *inter alia*, *Washington v. Texas*, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967) (relying on the sixth amendment and due process of law); *Ungar v. Sarafite*, 376 U.S. 575, 589, 11 L. Ed. 2d 921, 84 S. Ct. 841 (1964).

Conclusion and Prayer

In this Court's sound discretion, this trial setting should be continued. A new date to begin trial should be set no sooner than _____, to allow for adequate preparation as set forth herein.

WHEREFORE, Mr. _____ prays that the trial of this case be continued and that he have such other or further relief to which he may be entitled.

Respectfully submitted,

(SUGGESTED) EXHIBITS

Exhibit ___ – Letter(s) from (*defense counsel*) to (*prosecutor*), (*date*).

Exhibit ___ – Affidavit of David Wymore

Exhibit ___ -- Affidavit of current or proposed mitigation specialist or national mitigation specialist to describe tasks to be undertaken