

IN THE CIRCUIT COURT OF THE _____ JUDICIAL CIIRCUIT
IN AND FOR COUNTY, STATE OF FLORIDA

STATE OF FLORIDA

v.

CASE NUMBER:

_____ /

DEFENDANT'S MOTION FOR AN ORDER FINDING
DEFENDANT INDIGENT FOR COSTS, THE
APPOINTMENT OF A FORENSIC SOCIAL WORKER
OR SIMILAR EXPERT AND FACT INVESTIGATOR,
AND FOR PREAPPROVAL OF
OTHER NECESSARY DUE PROCESS COSTS

COMES NOW the Defendant, _____, by and through Undersigned Counsel, and respectfully moves this Honorable Court to enter an order finding the Defendant indigent for the purpose of incurring costs for his resentencing hearing that is pending before this Court, and an order appointing the following individuals: legal psychologist, Dr. Brooke Butler, at an hourly rate of \$75 for both work and travel, plus costs; and fact investigator, William Parks, at an hourly rate of \$40 for both work and travel, plus costs. In support of this Motion, the undersigned would show:

The Defendant is before the Court on resentencing pursuant to *Miller v. Alabama*, ___ U.S. ___, 132 S. Ct. 2455 (2012), *Falcon v. State*, 162 So. 3d 954 (Fla. 2015), and *Horsely v. State*, 160 So. 3d 393 (Fla. 2015).

The offense for which the Defendant currently is serving life without parole, was committed on _____.

The Defendant is Indigent and Moves the Court to Find Him Indigent for Costs

The Defendant was originally found indigent by the Court and was going to be represented by the Office of the Public Defender. However, the Undersigned Counsel's office took over representation of the Defendant's case pro bono.

The Defendant has been incarcerated since ____ and does not have any funds to incur costs anticipated in the investigation and preparation of his resentencing hearing pursuant to sections 775.082, 921.1401 and 921.1402, Florida Statutes (2014).

Unless the Court enters an Order adjudging the Defendant insolvent for costs, the Defendant will be deprived of his right to effective assistance of counsel under the law.

A person who is eligible to be represented by a public defender under Section 27.51, Florida Statutes, but who is represented by private counsel not appointed by the court for a reasonable fee as approved by the court, on a pro bono basis, or who is proceeding pro se, may move the court for a determination that he or she is indigent for costs and eligible for the provision of due process services, as prescribed by Section 29.007, Florida Statutes, funded by the State.

An Application for Criminal Indigent Status is attached to the instant motion as Appendix A. The Undersigned has conducted a reasonable investigation into the validity and accuracy of the Defendant's Application and has determined the information to be accurate and truthful.

The Appointment of Experts and a Fact Investigator are Necessary to Protect the Defendant's Sixth, Eighth, and Fourteenth Amendment Rights

We now know, and the Supreme Court has recognized, that adolescents are underdeveloped from a neurobiological standpoint, as well as cognitive and psychosocial standpoints.¹ Mature judgment has been shown to increase appreciably between the ages of 16

¹ Laurence Steinberg and Elizabeth Scott, *Less Guilty By Reason of Adolescence:*

and 19.² Even when an individual reaches a point at which their cognitive maturity is comparable to that of an adult, “adolescent judgment and their actual decisions may differ from that of adults as a result of psychosocial immaturity.”³ Psychosocial factors relating to peer pressure vulnerability, perceptions of risk, ability to imagine the future, and ability to self-manage all hinder an individual’s ability to make good decisions. Adolescents place heavier weight on short-term consequences than adults, are more likely to accept risk, more likely to respond to aggressive impulses and less likely to understand situations from the perspective of others.⁴

The Florida Legislature and the Florida Supreme Court have both recognized and mandated that trial courts consider the aforementioned factors in sentencing individuals for offenses committed when they were juveniles. Based on the statutory requirements of section 921.1401(2) and *Miller*,⁵ counsel must present to the Court evidence that provides a full picture of both the

Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, AMERICAN PSYCHOLOGIST, vol. 58, no. 12 (Dec. 2003), pp. 1009-18 (hereinafter *Less Guilty By Reason of Adolescence*).

² See Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity and Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults*, 18 Behav. Sci. & Law, 741 (2000) (hereinafter *(Im)maturity and Judgment in Adolescence*).

³ *Less Guilty By Reason of Adolescence*, 1009-18.

⁴ *(Im)maturity and Judgment in Adolescence* at 741; Jari-Erik Normi, *How Do Adolescents See Their Future? A Developmental Perspective*, 12 Developmental Rev. 339 (1992).

⁵ In *Falcon*, the Florida Supreme Court held that at future juvenile resentencing proceedings, juvenile defendants should be resentenced in conformance with chapter 2014-220, Laws of Florida (i.e., section 921.1401, Florida Statutes). Section 921.1401 states:

(2) In determining whether life imprisonment or a term of years equal to life imprisonment is an appropriate sentence, the court shall consider factors

adolescent Defendant, and the adult who will be sentenced today. This includes not simply his age and maturity at the time of the offense but also his intellectual capacity; mental and emotional health; family, home, and community environment; and the effect of any immaturity, impetuosity, or failure to appreciate risks and consequences on his participation in the offense, among other things. *See* § 941.1401(2)(c) – (e), Fla. Stat. (2014).

In this way, preparation for a juvenile sentencing hearing is more akin to the penalty phase in a capital case than a run-of-the-mill sentencing for an adult in a non-homicide case, and indeed, the Supreme Court has compared a life without parole sentence for a juvenile (to which the

relevant to the offense and the defendant's youth and attendant circumstances, including, but not limited to:

- (a) The nature and circumstances of the offense committed by the defendant.
- (b) The effect of the crime on the victim's family and on the community.
- (c) The defendant's age, maturity, intellectual capacity, and mental and emotional health at the time of the offense.
- (d) The defendant's background, including his or her family, home, and community environment.
- (e) The effect, if any, of immaturity, impetuosity, or failure to appreciate risks and consequences on the defendant's participation in the offense.
- (f) The extent of the defendant's participation in the offense.
- (g) The effect, if any, of familial pressure or peer pressure on the defendant's actions.
- (h) The nature and extent of the defendant's prior criminal history.
- (i) The effect, if any, of characteristics attributable to the defendant's youth on the defendant's judgment.
- (j) The possibility of rehabilitating the defendant.

Defendant is subject in this matter) to the death sentence of an adult.⁶ It is this comparison that led the Court to conclude an automatic sentence of life without parole for a juvenile is unconstitutional.

Before counsel can make strategic decisions regarding the presentation of mitigation, including the presentation of mental health or other expert witnesses, it will be necessary to conduct a constitutionally adequate investigation into the Defendant's social history. Once this background investigation is complete, the defense expects to seek funding for the appointment of

⁶ The Court stated in *Miller*:

Graham's '[t]reat[ment] [of] juvenile life sentences as analogous to capital punishment,' 560 U.S., at ___, 130 S. Ct., at 2038–2039 (ROBERTS, C.J., concurring in judgment)—makes relevant here a second line of our precedents, demanding individualized sentencing when imposing the death penalty. In *Woodson*, 428 U.S. 280, 96 S. Ct. 2978, 49 L.Ed.2d 944, we held that a statute mandating a death sentence for first-degree murder violated the Eighth Amendment. We thought the mandatory scheme flawed because it gave no significance to 'the character and record of the individual offender or the circumstances' of the offense, and 'exclud[ed] from consideration ... the possibility of compassionate or mitigating factors.' *Id.*, at 304, 96 S. Ct. 2978. Subsequent decisions have elaborated on the requirement that capital defendants have an opportunity to advance, and the judge or jury a chance to assess, any mitigating factors, so that the death penalty is reserved only for the most culpable defendants committing the most serious offenses. See, e.g., *Sumner v. Shuman*, 483 U.S. 66, 74-76, 107 S. Ct. 2716, 97 L.Ed.2d 56 (1987); *Eddings v. Oklahoma*, 455 U.S. 104, 110-112, 102 S. Ct. 869, 71 L.Ed.2d 1 (1982); *Lockett*, 438 U.S., at 597–609, 98 S. Ct. 2954 (plurality opinion).

Of special pertinence here, we insisted in these rulings that a sentencer have the ability to consider the 'mitigating qualities of youth.' *Johnson v. Texas*, 509 U.S. 350, 367, 113 S. Ct. 2658, 125 L.Ed.2d 290 (1993). Everything we said in *Roper* and *Graham* about that stage of life also appears in these decisions. . . . We held: '[J]ust as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered' in assessing his culpability. *Id.*, at 116, 102 S. Ct. 869.

Miller, 132 S. Ct. at 2467.

expert witnesses.

Appointments of Forensic Social Worker or Other Similar Expert
and Fact Investigator

In order to properly present testimony and evidence relating to the factors set forth in section 921.1401(2), undersigned counsel requires the services of a forensic social worker or other similar expert to meet extensively with the Defendant, speak with witnesses, develop a social/psychological/medical history of the Defendant, recommend/meet with experts, and potentially testify.

A qualified forensic social worker or similar expert possesses clinical and information-gathering skills and training that most lawyers simply do not have. *ABA Guideline 4.1, Commentary* (emphasis added). She/he has the training and ability to collect, understand, and evaluate all documentary evidence related to the client's life. *ABA Mitigation Guideline 5.1.* She/he has all the clinical skills to recognize such things as mental/cognitive conditions, emotional stressors and triggers, familial relationships, the possible effects of incarceration, and other factors necessary to this Court's review. The forensic social worker or other similar expert will be instrumental in determining what experts might be needed for the presentation of an effective and reliable sentencing hearing.

The ABA has recently recognized the defense guidelines for *Miller* sentencing hearings established by the Campaign for the Fair Sentencing of Youth, noting that the guidelines "aim to assist counsel representing youth in the adult criminal justice system, to ameliorate the otherwise harsh sentences that youth may face, with recommendations for pretrial investigation, mitigation of guilt or criminal culpability, and post-sentencing responsibilities." JOHN D. "JAY" ELLIOTT, The

State of Criminal Justice 2015, *Chapt. 13, Juvenile Justice*, at 193 (ABA 2015).

The guidelines established by the Campaign for the Fair Sentencing of Youth recommend a team approach which includes a minimum of four members: two attorneys, a mitigation specialist, and an investigator. This team approach is what the Campaign believes is necessary to ensure “zealous, constitutionally effective representation for all children facing a possible life sentence.” HEATHER RENWICK, *Exec. Summ., Trial Defense Guidelines, Representing a Child Client Facing a Possible Life Sentence*, The Campaign for the Fair Sentencing of Youth (Mar. 2015) (available at <http://fairsentencingofyouth.org/wp-content/uploads/2015/03/Guidelines-Executive-Summary.pdf>; complete Guidelines available at <http://fairsentencingofyouth.org/wp-content/uploads/2015/03/Trial-Defense-Guidelines-Representing-a-Child-Client-Facing-a-Possible-Life-Sentence.pdf>).

Dr. Brooke Butler, PH.D., is more than qualified to serve as the forensic social worker or similar expert in this matter. She has been practicing as a Legal Psychologist/Mitigation Specialist since 2000, and has a Master’s degree in Psychology. Dr. Butler also has a Ph.D. in Legal Psychology and Social Psychology. Dr. Butler has served as a mitigation specialist and consultant with Florida Public Defenders in Manatee, Sarasota, and DeSoto counties, and with numerous privately retained attorneys throughout the state. She has previously been qualified to testify as an expert and has testified on the topics of death qualification, jury selection, mitigation, and pretrial publicity in pretrial hearings, sentencing hearings, resentencing, and post conviction evidentiary hearings in the state of Florida. Dr. Butler has testified in both capital and non-capital cases. Dr. Butler currently sits as the Regional Director on the Regional Board of Directors for the

Florida Capital Resource Center. Dr. Butler has held several academic positions from 1997 to the present as assistant and adjunct professors.

Since the decisions in *Graham* and *Miller*, Dr. Butler has served as a social worker or similar expert in approximately 10 juvenile resentencing cases, with a handful of appointments pending. In all of those for which she was hired by private counsel, Florida Public Defenders, or Regional Conflict Counsel around the state, she has been hired at a rate of \$75 or higher. It should be noted that below the Undersigned Counsel requests that the Court appoint a fact investigator to perform duties related to gathering mitigation for which Dr. Butler's expertise are not required, such as records collection, finding witnesses, and serving subpoenas.

Dr. Brooke Butler's curriculum vitae is attached hereto as **Appendix B.**

Thus, the Defendant seeks the appointment of Dr. Brooke Butler, legal psychologist, as a forensic social worker or similar expert in this case for the reasons cited above at a rate of \$75/hr for both travel and work time, with an initial cap of \$7,500, exclusive of costs allowable by statute.

In addition, the Defendant seeks the appointment of fact investigator William Parks at an hourly rate of \$40 for both travel and work time, with an initial cap of \$4,000, exclusive of necessary costs allowable by statute. Mr. Parks has a contract with JAC and is the owner of Priority Investigations, whose investigative services concentrate solely on criminal defense investigations. Mr. Parks previously spent 25 years working as a Federal Agent for Customs/Homeland Security, as well as other task forces across the state, including: the Organized Crime Drug Enforcement Task Force, Miami; Joint Terrorism Task Force, Tampa; and High Intensity Drug Trafficking Area Task Force, Miami. Mr. Parks served as an instructor with the Federal Law Enforcement Training Center and is a member of the Florida Association of Licensed Investigators.

Mr. Park's curriculum vitae is attached hereto as Appendix C.

As stated above, Mr. Parks will be utilized by counsel to fulfill duties for which Dr. Butler's expertise are not required.

Miscellaneous Costs

In addition to the costs addressed by the foregoing requests (i.e., travel costs), the Defendant seeks the Court's approval to collect all necessary records for the Defendant's defense with an initial cap of \$2,500. These shall include, but are not limited to medical, psychological and psychiatric, school, employment, jail, and Department of Corrections' records. Counsel will seek pre-approval of any transcripts before ordering them, as required by JAC policy.

As to travel costs, the Defendant seeks preapproval for mileage or costs reimbursement for members of the defense team to visit the Defendant in prison or jail, regardless of the distance, to attend court hearings, and to visit witnesses. Counsel will seek specific preapproval from the Court before conducting any out-of-state travel.

As always, the Court retains its power to approve or deny, on an interim basis and/or at the end of the case, all specific fees and costs ultimately invoiced that are not covered by this motion.

WHEREFORE, the Defendant requests that this motion be granted and that the Court order the following:

1. The Defendant, _____, be found indigent for the purpose of incurring costs for purposes of his resentencing hearing that is pending before this court.
2. Appointment of forensic social worker or similar expert, _____ at a rate of \$75 per hour (for both work and travel time) with an initial fee cap of \$7,500 (100 hours), exclusive of costs. The Defendant also seeks reimbursement or payment of all necessary costs

associated with _____ mitigation investigation and/or other duties encompassed by her appointment, including costs for travel to visit the client, regardless of the distance.

3. Appointment of investigator _____ at a rate of \$40 per hour (for both work and travel time), with an initial fee cap of \$4,000, to conduct all investigative/mitigation duties required for the defense for which _____ expertise are not required. The Defendant also seeks reimbursement or payment for all necessary costs associated with these duties. The investigator will *not* be required to interview mitigation witnesses or the client, work with experts, testify at trial, or evaluate/review records, all duties that require _____ expertise. The investigator *will* be responsible for records collection, locating witnesses, interviewing witnesses related to the Defendant's culpability, serving out-of-county subpoenas and summonses, and any other duties for which his expertise are sufficient.

4. Preapproval of necessary costs incurred by the defense team, including: travel, records (with an initial cap of \$2,500), and any additional costs permitted by statute required to represent Mr. Bailey.

Respectfully submitted,

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was electronically filed with the Clerk of Court, emailed to the Office of the State Attorney, and emailed to the Justice Administrative Commission at pleadings@justiceadmin.org on this the 29th day of October 2015.

IN THE CIRCUIT COURT OF THE _____ JUDICIAL CIIRCUIT
IN AND FOR _____ COUNTY, STATE OF FLORIDA
FELONY DIVISION

STATE OF FLORIDA

v.

CASE NUMBER:

Defendant.

_____ /

ORDER

THIS CAUSE came before the Court upon Defendant's Motion to be Found Indigent for Costs and Incur Due Process Costs for the Appointment of a Forensic Social Worker or Similar Expert and Fact Investigator and for Pre—approval of Defense Related Costs. The Court held a hearing on the motion on _____.

Upon consideration, it is ORDERED AND ADJUDGED that Defendant's motion for appointment and preapproval of various costs is GRANTED as follows:

1. Defendant _____ is declared indigent for costs for the purposes of his resentencing hearing pending before this Court.
2. Dr. Brooke Butler, Legal Psychologist, is appointed as a social worker or similar expert to assist with the defense by preparing an expert analysis pursuant to section 921.1401, Florida Statutes, including gathering mitigation evidence when her expertise is required, reviewing records, consulting with experts, interviewing witnesses, developing a social history, testifying on behalf of the defense, and conducting other duties necessary to assist defense counsel for sentencing at a rate

of \$75 per hour with an initial fee cap of \$7,500, exclusive of costs. This hourly rate will also apply to Dr. Butler's travel time.

3. William Park, is appointed as a fact investigator at a rate of \$40 per hour for work and travel time, with an initial fee cap of \$4,000, exclusive of costs. The investigator will assist Dr. Brooke Butler in collecting and presenting mitigation. The investigator's role shall be limited to tasks that do not require the expertise of Dr. Butler, such as finding and interviewing witnesses, collecting records, and serving subpoenas. The determination of whether a specific task requires Dr. Butler's expertise shall be made by trial counsel, not JAC, but shall be subject to approval by the Court upon submission of any motions for fees for William Park.
4. Per JAC policy, counsel for the Defendant shall file motions for preapproval before requesting production of any transcripts or having any member of the defense team travel outside Florida. The defense team is otherwise permitted to collect necessary records with an initial cap of \$2,500 and bill for all costs associated with travel by members of the defense team, including costs to visit Mr. Bailey, regardless of the distance.
5. Following approval by this Court, costs are to be paid by JAC to vendors and/or counsel with properly executed JAC contracts following submission of a specific motion for payment and invoices by the Defendant.

DONE AND ORDERED in _____ County, Florida, this ____ day of

_____.

Copies furnished to: