

TO: JUDGE DAVID A. ELLWOOD  
FROM: ATTORNEY LEWIS M. TINGLE

CASE NO. 97-CR-63

RE: CLARENCE ROBERTS  
ESTIMATE OF COSTS

DATE: JULY 30, 1997

1. Investigator  
Don Sonney  
Estimate: \$2,500.00\*
2. Psychologist  
Sandra McPherson  
Estimate: \$3,000.00\*
3. Mitigation Specialist  
Patricia Snyder  
Estimate: \$1,500.00

\*SEE ATTACHED

CURT

COPY

IN THE COURT OF COMMON PLEAS  
GUERNSEY COUNTY, OHIO

STATE OF OHIO

CASE NO. 97-CR-63

Plaintiff

vs.

MOTION NUMBER 7

CLARENCE ROBERTS

Defendant

MOTION FOR APPROPRIATION OF  
FUNDS FOR EXPERT ASSISTANCE

Clarence Roberts, through his attorneys, respectfully moves this court for an order authorizing defense expenditures in an amount to be determined to enable Accused to hire experts needed in preparation for the first and second phase of trial. These funds are necessary to protect the Accused's rights to due process, equal protection, effective assistance of counsel and to be free of cruel and unusual punishment as guaranteed by both the State and Federal constitutions.

The defense requests an ex parte hearing on this motion under the authority of Ake v. Oklahoma (1985), 470 U.S. 68, 82: "When the Defendant is able to make an ex parte threshold showing to the trial court \*\*\*. " The need for the ex parte hearing is clear. "[T]he use of ex parte hearings \*\*\* is a well recognized technique available to any party" who is faced with the dilemma of

being "forced to reveal secrets to the trial court and the prosecution" in order to "support" a motion. State v. Smart (S.C. 1982), 299 S.E. 2d 686, 688.

Counsel for the county funding source for expert funds is not entitled to be present at the ex parte hearing. Such a procedure would create unnecessary conflicts of interest; in any event, counsel's presence cannot be permitted because such petitions are entitled to be confidential. Corenevsky v. Supreme Court (Cal. 1984), 204 Cal. Rptr. 165, 172 (en banc).

The reasons in support of this motion are set out in the accompanying memorandum.

#### MEMORANDUM IN SUPPORT

Clarence Roberts is an indigent who stands before this Court charged with Aggravated Murder. In light of the severity of the possible sentence, the State has a substantially increased interest in assuring the reliability of the fact-finding process and the propriety of the sentence to be imposed.

The Accused is charged with the duty of presenting evidence of factors mitigating against imposition of a sentence of death. R.C. 2929.04(C). Defense counsel are obligated to zealously and effectively assist their client. Sixth Amendment, United States Constitution; Section 10, Article I, Ohio Constitution. In order to do so they must explore every avenue in order to establish the existence of potentially mitigating factors. Counsel must consult experts in the investigation for mitigating evidence.

**LEWIS M. TINGLE**

Attorney at Law

138 North Seventh Street  
Cambridge, OH 43725

(614) 439-7745

In Westbrook v. Zant (C.A. 11, 1983), 704 F. 2d 1487, 1496 the Court held:

We interpret Lockett v. Ohio (citation omitted) and Gregg v. Georgia (citation omitted) as vehicles for extending a capital defendant's rights to present evidence in mitigation to the placing of an affirmative duty on the State to provide the funds necessary for production of the evidence. Permitting an indigent capital Defendant to introduce mitigating evidence has little meaning if the funds necessary for compiling the evidence is unavailable.

The Sixth and Fourteenth Amendments to the United States Constitution guarantee the Accused the right to the assistance of counsel as do Sections 10 and 16, Article I of the Ohio Constitution. The United States Supreme Court has recognized that this right to counsel is a right to effective aid of counsel. Powell v. Alabama (1932), 287 U.S. 45; Gideon v. Wainwright (1963), 372 U.S. 335. Further, the Sixth Amendment assures the Defendant the right to compulsory process, which includes the "right to present the Defendant's version of the facts." Washington v. Texas (1967), 388 U.S. 14, 19. In Matlock v. Rose (C.A. 6, 1984), 731 F2d 1236 the Court found that "in order to render to indigents effective counsel, the State may be required to supply experts at its expense."

Additionally, the Accused is entitled to a "fair and adequate opportunity" to defend against expert testimony under the Fourteenth Amendment due process, Chambers v. Mississippi (1973), 410 U.S. 284, 294, 302 and equal protection clauses, Ross v. Moffit (1974), 417 U.S. 600, 616. "Moreover, adequate representation includes thoroughgoing investigation and preparation." United States, ex re. Sanders v. Ohio (1969), 332 F. Supp. 28, 30. The requirement of thorough trial preparation is all

the more urgent in light of the serious nature of the offense with which the Accused is charged. The ability of defense counsel to provide effective legal assistance is highly dependent on the availability of expert assistance in trial preparation.

Further, equal protection requires that expert assistance be provided in this case. Fourteenth Amendment, United States Constitution; Section 2, Article I, Section 26, Article II, Ohio Constitution. In Britt v. North Carolina (1971), 404 U.S. 226, at 227, the United States Supreme Court reaffirmed the principle established in Griffin v. Illinois (1956), 351 U.S. 12, that:

"\*\*\* the State must, as a matter of equal protection, provide indigent prisoners with the basic tools of an adequate defense or appeal, when those tools are available for a price to other prisoners."

The United States Supreme Court in Ake v. Oklahoma, supra., recognized an indigent accused's constitutional right under the Due Process Clause of the Fourteenth Amendment to have a court-appointed expert assist his defense counsel in the mitigation phase of the capital case.

Independent grounds under Ohio law also demonstrate the need for appointment of experts for the Accused. Section 10, Article I of the Ohio Constitution gives the indigent defendant a State constitutional right to the appointment of experts. This right is again expressed in R.C. 2929.024. This section requires that:

If the court determines that the defendant is indigent and that investigation services, experts or other services are reasonably necessary for the proper representation of a defendant charged with aggravated murder at trial or at the sentencing


hearing, the court shall authorize the defendant's counsel to obtain the necessary services for the defendant, and shall order \*\*\* payment for the fees and expenses for the necessary services. (Emphasis added.)

The Ohio Supreme Court in State v. Jenkins (1984), 15 Ohio St. 3d 164, cited two important factors to be considered where the defense seeks expert assistance under the statute:

- (1) the value of the expert assistance to the defendant's proper representation at either the guilt or sentencing phases of an aggravated murder trial, and
- (2) the availability of alternative devices that would fulfill the same functions as the expert assistance sought.

Counsel for the defense represent to the court that they have probable cause to suspect that utilization of these particular experts and specific tests will produce exculpatory and mitigating evidence. It is the professional judgment of defense counsel that this information is necessary in order to adequately represent Clarence Roberts, and that these steps would most certainly be undertaken in the course of representation provided to a similarly situation client in a retained counsel case.

Respectfully submitted,  
Lewis M. Tingle (0033436) and  
Kent D. Biegler (0012665)  
Attorneys for Defendant

  
LEWIS M. TINGLE (0033436)  
138 North Seventh Street  
Cambridge, OH 43725  
Telephone: (614) 439-7745  
Attorney for Defendant

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing Motion Number 7 was served upon C. Keith Plummer, Attorney for Plaintiff, at 139 Court House Square, Cambridge, OH 43725, by placing the same in the United States Mail this 18 day of July, 1997.

  
LEWIS M. TINGLE  
Attorney for Defendant

FILED

IN THE COURT OF COMMON PLEAS, GUERNSEY COUNTY, OHIO

STATE OF OHIO,

PLAINTIFF,

VS.

CLARENCE "SKIPPY" ROBERTS,

DEFENDANT.

CASE NO. 97 CR 63

**MEMORANDUM IN OPPOSITION TO  
DEFENDANT'S MOTION FOR  
APPROPRIATION OF FUNDS FOR  
EXPERT ASSISTANCE  
(MOTION NUMBER SEVEN)**

Now comes the State of Ohio, by and through C. Keith Plummer, Prosecuting Attorney and hereby states that the Defendant has requested the Court to approve funds for the protection of the rights. The State would object in part and concur in part to the Court expending such funds.

Defendant, by and through counsel, filed a Motion for funds to hire expert witnesses. The defense has not indicated specifically what experts they intend to hire. They simply have made a broad request to the Court for funds to hire an expert. The request was made pursuant to Ohio Revised Code Section 2929.024 and the holding in Ake v. Oklahoma, 470 U.S. 68 (1985).

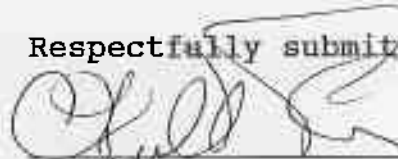
The Ohio Supreme Court looked at this statutory requirement and constitutional guideline in State v. Jenkins, 15 O St.3d 164 (1984). The Court establishes two set processes to determine if expert assistance is required. First, the Court must consider the value of the expert assistance of the Defendant's proper representation at either the guilt or sentencing phase and secondly, the availability of alternative devices that would fulfill the same function as the expert assistance sought.



The Defendant's Motion has failed to meet either prong of the two prong test set forth in Jenkins. Defense has not indicated what type of expert it is requesting and therefore, the Court can not move on to the second prong to determine if alternative devices would fulfill the same function as the expert witness sought.

Until such disclosure is made to the Court, it is respectfully submitted that this Motion must be denied. However, should the Defendant meet the two prong test set forth in the Jenkins, the State would reconsider its objection.

Respectfully submitted,



C. KEITH PLUMMER  
PROSECUTING ATTORNEY  
SUPREME CT. REG. NO. 0002350  
P. O. BOX 640  
CAMBRIDGE, OHIO 43725-0640  
TELEPHONE: (614) 439-2082  
FACSIMILE: (614) 439-7161  
GUERNSEY COUNTY, OHIO

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that he served a true copy of the foregoing MEMORANDUM IN OPPOSITION (MOTION NUMBER SEVEN) upon counsel for Defendant, Attorney Lewis M. Tingle, 138 N. 7th Street, Cambridge, Ohio 43725, by hand delivery this 30th day of July, 1997.



C. KEITH PLUMMER  
SUPREME CT. REG. NO. 0002350  
PROSECUTING ATTORNEY  
GUERNSEY COUNTY, OHIO



# SONNEY PROFESSIONAL INVESTIGATIONS

COMMITTED TO EXCELLENCE

264 S. LIBERTY, SUITE 200  
POWELL, OHIO 43065  
614-888-4822 FAX 614-888-7533  
1-800-697-5149

EXHIBIT "M"  
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July 30, 1997

Lewis Tingle, ESQ.  
138 N. Seventh St.  
Cambridge, Ohio 43725

Re: Clarence Roberts

Sonney Professional Investigations (SPI) is pleased to submit this proposal which sets forth the investigative steps SPI is prepared to take on your behalf with respect to an investigation focusing particularly on the defense of capitol murder charges filed on Clarence Roberts.

Our proposal is based on information provided by you and SPI's experience in conducting similar projects. It is intended to reflect the priorities indicated in your instructions. The proposal is subject to change as more information becomes available.

## STRATEGY

- A. This investigation involves developing information, locating and interviewing those persons that either have been identified as potential witnesses or have information relevant to this case.
- B. SPI may also be called upon to assist in the examination of evidence that is produced through discovery or developed through the course of our investigation. Including locating and investigating services or individuals with expertise and technical skills required to examine and testify regarding evidence, witnesses or defendants in this case.
- C. SPI, in conjunction with you, will develop a protocol to govern who can and who cannot be interviewed, the specific statements SPI investigators will use to identify themselves, and how our inquiry is to be characterized. If a situation develops which leads us to question whether an individual should be interviewed, the interview will terminate and you will be promptly notified of the situation.
- D. Reports will be generated and will be provided to you as they become available. SPI will notify you promptly of any interviews obtained that reveal "earth shattering" information. SPI will also provide you with a final report summarizing the data collected and recommendations for further investigative assignments or research.
- E. Each Monday, SPI will fax a summary of the previous week's results and the anticipated investigative tasks for the coming week. Reports will include the following:

EXHIBIT "M"  
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- 1) Description of various investigative tasks
- 2) Synopsis of findings
- 3) Subjective analysis of findings as they pertain to your objectives
- 4) Leads developed of future consideration

F. SPI recommends the following tasks:

- 1) Meet with you to discuss your strategy and objectives.
- 2) Review case facts and any witness statements obtained by you so far.
- 3) Interview anticipated witnesses related to the information they possess and plan to present at trial.

BUDGET

- A. SPI's investigators normally bill their time at \$75.00 or \$85.00 per hour. However, in this instance, SPI's investigators will bill their time at \$65.00 per hour. In addition, travel and other related expenses will be billed at cost. We work with our client to define the scope of the investigation and then to work against an agreed upon, not to exceed, budget.

The estimated time to conduct the current case is can be determined by the number of interviews anticipated. SPI usually estimates that one investigator can complete three interviews per day. For example if 10 interviews are anticipate it is anticipated that the case will take about 27 hours of investigative time, plus 4 hours for client conferences. Cost normally average 20 % of the hourly billings. The estimated cost of the above example would be \$2418.00. The time and cost is based on the utilization of one investigators, the information provided and SPI's experience in conducting similar investigations. At the end of the investigation, SPI recommends having a meeting with you to review the results for possible additional investigation.

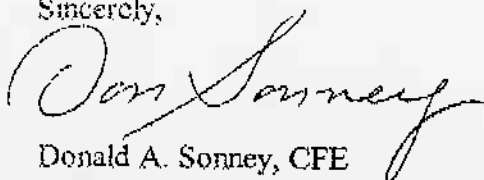
- B. Benefits you can expect from SPI include the following:

- 1) Your objectives met.
- 2) Timeliness and efficiency of the investigation.
- 3) Discreet, confidential operations.
- 4) Cost effective information gathering.
- 5) Unique skills, knowledge, and experience.

Sonney Professional Investigations is eager to work with you on the case. I will call after you have reviewed this proposal. If you have immediate questions, please call.

Thank you for the opportunity.

Sincerely,



Donald A. Sonney, CFE  
President