STATE OF ALABAMA,	)	IN THE CIRCUIT COURT OF
PLAINTIFF,	)	MORGAN COUNTY, ALABAMA
V.	)	
[your defendant]	)	CASE #_____
DEFENDANT.	)	

MOTION TO REQUIRE THE PROSECUTION TO STATE EXACTLY WHICH AGGRAVATING CIRCUMSTANCES UNDER 1975 CODE OF ALABAMA 13A-5-49 IT WILL ATTEMPT TO PROVE IF THERE IS A PENALTY PHASE IN THIS TRIAL

The defendant moves this Honorable Court to order the prosecution to state on the record which of the eight enumerated aggravating circumstances they intend to prove beyond a reasonable doubt in the event of a penalty phase in this trial:

1. 1975 Code of Alabama, 13A-5-49 must be strictly construed Keller v. State, 380 So.2d 926 (1980). The aggravating circumstances listed in the statute are the only ones the jury can consider Berard v. State 402 So.2d 1044 (1981).

2. If there are none of the eight aggravating circumstances listed in the statute present then the prosecution is precluded from seeking the death penalty Ex parte Woodward, 631 So.2d 1065 (1993).

3. Due process requires that this defendant be informed which one or any of the aggravating circumstances the state intends to prove beyond a reasonable doubt just as it requires that he be presented with the indictment.

4. The case of Apprendi v. New Jersey, 147 L Ed.2d 435 (2000) suggests that any element of a crime, i.e. aggravating circumstance, which increases the defendant punishment beyond the maximum penalty should be pleaded and proven to the jury. If there are no aggravating circumstances present, there can be no death penalty, 1975 Code of

Alabama, 13A-5-46 (e) (i). It is the aggravating circumstance set out in 1975 Code of Alabama, 13A-5-49, which increases the punishment of life without benefit of parole to death.

_____
ATTORNEY FOR THE DEFENDANT

STATE OF ALABAMA,	)	IN THE CIRCUIT COURT OF
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MOTION IN THE NATURE OF DISCOVERY AND FOR A BILL OF PARTICULARS AS TO THE AGGRAVATING CIRCUMSTANCE OF ESPECIALLY HEINOUS ATROCIOUS OR CRUEL COMPARED TO OTHER CAPITAL OFFENSES

Comes now the defendant and, the state having stated for the record in this case that they intend to attempt to prove the aggravating circumstance of "especially heinous, atrocious or cruel" beyond a reasonable doubt, if this case enters the penalty phase moves this court as follows:

1. The phrase "especially heinous, atrocious or cruel" is broad in its connotation to the general public and those not trained in the law. However, this phrase has a very narrow legal definition Lindsay v. Thigpen, 875 F.2d 1509 (11th Cir. 1989). Therein lies the grave danger in this aggravating circumstance. The general public (i.e. jurors) believe all murders are "especially heinous, atrocious or cruel".
2. The law defines "especially heinous, atrocious or cruel" as "This aggravating circumstance was intended to apply to only those conscienceless or pitiless homicides, which are unnecessarily tortuous to the victim". Ex parte Kyzer, 399 So.2d 330, 334 (1981); Bradley v. State, 494 So.2d 750, 770 (1985). See also: Ex parte Clark, 730 So.2d 1126 (1998) wherein it was held not to be "especially heinous, atrocious or cruel as compound to other capital offenses "even though the defendant shot the victim three times in the head and three more times in the back, since it was a matter of mere speculation as to whether the victim was conscious and aware after the first shot, and there was no infliction of torture to the victim.

It must be carefully noted that this aggravating circumstance is a term of art in the legal profession and that the terms absolutely do not take on their common ordinary meaning. The problem of legal definition verses juror conception of terms was set out in Ashley v. State, 651 So.2d 1096 (1994).

3. This defendant is entitled to know exactly and specifically what he did that the prosecution will introduce into evidence as:

   A. "Conscienceless" compared to other capital offenses.

   B. "Pitiless" compared to other capital offenses.

   C. "Unnecessarily tortuous to the victim" compared to other capital offenses.

4. A definition for these factors listed above is found in Haney v. State, 603 So.2d 368 (1991). That case gives a single definition for all these terms: "a capital offense in which the brutality exceeds that which is normally present in any capital offense". The case of Johnson v. State, 399 So.2d 859, 869 (1979) defines each term separately:

> . . . heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies – the conscienceless or pitiless crime which is unnecessarily tortuous to the victim. (emphasis added).

5. The burden of proof as to all aggravating circumstances is proof of the circumstance beyond a reasonable doubt. In Re Winship, 25 L.Ed2d 368, 373 (1970) and Holt v. U.S. 54 L.Ed2d 1021, 1030 (1980). See also Williams v. State, 601 So.2d 1062, 1080 (1991).

Because the aggravating circumstance delineated in 1973 Code of Alabama, 13A-5-49 (8) has a narrow legal definition and because the prosecution is required to prove this circumstance by competent evidence beyond a reasonable doubt, this defendant is by due process entitled to

know what specific facts or factors he must rebut if this case enters the penalty phase. This defendant requests an order from this court requiring the state to list with specificity those facts they will rely on to prove the aggravating circumstance of "heinous, atrocious or cruel compared to other capital offenses". Without such notice in specific form he cannot be expected to defend against this circumstance in the event of a penalty phase.

Whether the aggravating circumstance of "heinous, atrocious or cruel" should be presented to the jury should be determined prior to the beginning of the penalty phase and out of the presence of the jury.

_____
ATTORNEY FOR THE DEFENDANT
EAST PODUNK, ALABAMA

STATE OF ALABAMA, PLAINTIFF, V. DEFENDANT.	))))))))	IN THE CIRCUIT COURT OF MORGAN COUNTY, ALABAMA CASE # _____

MOTION FOR THE COURT TO REQUIRE THE PRESENCE OF A COURT REPORTER AT ANY AND ALL HEARINGS, SIDEBARS, DISCUSSIONS IN CHAMBERS WITH THE COURT OR AT ANY DISCUSSIONS WITH THE COURT WHATSOEVER CONCERNING THIS CASE

Comes now the defendant pursuant to Rule 19.4 (a) Alabama Rules of Criminal Procedure and moves this Honorable Court to enter an order requiring that an official court reporter be present with stenographic equipment to take down any and all hearings, bench conferences, sidebars, hearings in chambers, or any discussions with the court whatsoever concerning this case.

The defendant asks the court to enter an order requiring said court reporter to accurately transcribe all things said and done at such meetings.

Further the defendant asks that if said court reporter is unable to fully and completely understand all words spoken at such meetings that reporter shall notify the parties and ask them to repeat their statement and he or she shall not merely mark such statement “unintelligible” in the official record.

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ATTORNEY FOR THE DEFENDANT
EAST PODUNK, ALABAMA

STATE OF ALABAMA,	)	IN THE CIRCUIT COURT OF
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MOTION FOR THE CIRCUIT COURT TO DECLARE AN OPEN FILE POLICY WITH REFERENCE TO DISCOVERY HAD BY THE DEFENDANT

Comes now the defendant, who is charged with a capital offense and moves this court to enter an order allowing the defendant by and through counsel to examine any and all items other than personal notes, theories and memorandums of law possessed by the office of the District Attorney of Morgan County, or any of its agents or subdivisions, and further to declare that said district attorney's office shall have a continuing duty to disclose any and all such material within their file in the above referenced case on the following grounds:

The case of Ex parte Monk 557 So.2d 832 (1989) was a capital case. The issue was the following provision made by the trial court:

1. Subject to the provisions of paragraph 2, the court directs that the district attorney shall maintain an on going "open file" policy in regard to discovery on the part of the defendant in this case. In so doing, the State, upon written request, should allow the defendant's attorney full access to all documents, statements, writing, photographs, recordings, evidence, reports or any other file material in possession of the State, any agency or agency of the State, or any police agency involved in this case, which is known to exist or which with due diligence could be determined to exist, and to allow said attorneys to inspect, test, examine, photograph, or copy the same.

2. This order, however, should not be construed to require the State to disclose any notes, memoranda, writings, or documents prepared by the district attorney or his staff in trial preparation, or to disclose or produce any confidential materials unless the same would be required to be produced by Rule 18, Alabama Rules of Criminal Procedure, or the same would otherwise be discoverable under the dictates of Brady v. Maryland and the cases decided thereunder. Any such items or materials withheld from the defendant by the State shall be presented to the court for an in camera review at a hearing to be specifically set for such purpose, copies of any material not required to be given to the defendant shall be placed in a sealed envelope in the custody of the clerk of the court for preservation

for possible review at a later date by the trial court or any appellate court.

In upholding the court's order the Supreme Court of Alabama stated:

> The capital case is "sufficiently different" from other cases, because there is no other criminal case in which the crime is murder and the possible punishment is death or life without parole. Justice Brennen explained how the justices of the United States Supreme Court view capital cases as follows: "When the penalty is death, we like state court judges, are tempted to strain the evidence and even, in close cases, the law in order to give a doubtfully condemned man another chance". Furman v. Georgia, 33 L. Ed.2d 346 (1972). The hovering death penalty is the special circumstance justifying broader discovery in capital cases.
>
> In addition, because of the nature of the penalty in a capital case, the sentencing process becomes of utmost importance. For this reason our Alabama statutes provide, in a capital case, for a "separate sentence hearing to determine whether the defendant shall be sentenced to life imprisonment without parole or to death". At this hearing, under existing constitutional and statutory law, a convicted capital defendant has the right to introduce and have considered at the sentencing hearing, by way of mitigation, evidence that reflects upon his life, his character and the circumstances of the crime. (Page 836, Col. 2).

The court then concluded:

> It is clear from the record that the additional discovery order entered by Judge Monk was for the purpose of reducing the likelihood of post conviction litigation and reversals on Brady grounds and on the basis of advice and a recommendation of the capital litigation division of the Alabama Attorney General's Office. Many Alabama capital cases have been reversed in State and Federal collateral proceedings for Brady problems. (Page 837, Col. 2).

The defendant hereby requests an order from this court in accordance with that in Monk, *supra*. Further any additional material or information received by the State after entry of this order, the defendant requests that it be made known to his counsel *immediately* even if such information becomes known to the prosecution during trial.

_____
ATTORNEY FOR THE DEFENDANT
EAST PODUNK, ALABAMA

STATE OF ALABAMA,	)	IN THE CIRCUIT COURT OF
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MOTION TO PRODUCE THE RECORD ON ALL JUVENILE COURT PROCEEDINGS INVOLVING ANY PROSECUTION WITNESS

1. The defendant is charged in an indictment with the offense of capital murder and the prosecution has stated that it will seek the death penalty. The defense believes that X_____ and Y_____ will be witnesses called by the prosecution in their presentation of the case. The defendant does not limit this motion to these individuals but only suggests their names so that an individual search can be made of their records. This motion is indeed directed towards all of the prosecution's witnesses who have any juvenile record excepting no one.
2. The Supreme Court of the United States held in Davis v. Alaska, 415 U.S. 308, 319 (1974), that a defendant's right to probe into "the influence of possible bias" of a prosecution witness outweighs the State's interest in protecting the confidentiality of a witnesses juvenile court record.
3. The juvenile court record of a prosecution witness may also be used as a "general attack on the credibility of the witness" Davis v. Alaska, 415 U.S. at 316.
4. This defendant who faces the possible imposition of the death penalty must be given the greatest latitude in attacking the credibility of the witnesses against him. This penalty is different in kind from any other punishment imposed under our system of criminal justice Gregg v. Georgia, 49 L.Ed2d 859, 883 (1976).
5. The defense must see all juvenile court proceedings involving any

prosecution witness in order to adequately prepare for trial, opening statement and cross-examination in accordance with the standards of the 6th Amendment to the United States Constitution.

Wherefore the defendant requests that the record of all juvenile court proceedings involving any prosecution witness be produced by the prosecution pursuant to an order of this court.

ATTORNEY FOR THE DEFENDANT
EAST PODUNK, ALABAMA

STATE OF ALABAMA,	)	IN THE CIRCUIT COURT OF
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MOTION FOR DISCOVERY UNDER RULE 16

ALABAMA RULES OF CRIMINAL PROCEDURE

The defendant makes demand pursuant to Rule 16 Alabama Rules of Criminal Procedure that the office of the District Attorney of Morgan County produce for inspection and copying the following documents, items or things:

1. Permit the defendant to inspect and receive copies of any written, recorded or video recorded statement made by the defendant to any law enforcement officer, official or employee which are within the possession, custody or control of the State the existence of which is known to the State or any of the prosecution's agents or employees. The defendant asks that copies be provided to him free of charge because he is indigent and represented by appointed counsel.
2. Permit the defendant to inspect and receive copies of any written, recorded or video recorded statement made by the defendant to any person not a law enforcement officer but in the presence of a law enforcement officer, official or employee which are within the possession, custody or control of the State the existence of which is known to the State of any of the prosecution's agents or employees. The defendant asks that copies be provided to him free of charge because he is indigent and represented by appointed counsel.
3. Disclose in as exact a form as possible the words and substance of any oral statements made by the defendant before, during or after arrest, to any law enforcement officer, official, or employee or in their presence which the State intends to offer in evidence at the trial.
4. Permit the defendant to inspect and be provided copies of any written, recorded or video recorded statements made by a co-defendant,

accomplice or co-conspirator to any law enforcement officer, official or employee or which were directed to a private citizen but in the presence of any law enforcement officer, official or employee which are within the possession, custody or control of the State the existence of which is known to the prosecutor and which the State intends of offer at the trial.

5. Disclose in as exact a form as possible the words and substance of any oral statements made by any such co-defendant, accomplice or co-conspirator before, during or after arrest to any law enforcement officer, official or employee or within their presence which the State intends to offer in evidence at trial.

6. Permit the defendant to inspect and receive copies of photograph books, papers, documents, photographs, tangible objects, controlled substances, buildings or places, or portions of any of these things, which are within the possession, custody and control of the prosecution and which are:

   A. Material to the preparation of the defendant's defense.

   B. Which are intended for use by the prosecution as evidence at the trial or any aspect of the trial (motions, etc.).

   C. Which were obtained from the defendant (all evidence seized from his person pursuant to a search warrant or consent to search covering any premises under his control or where he was present).

7. The defendant hereby gives formal written notice to the district attorney, his agents and employees that all the evidence described and requested is to be preserved under the authority of Rule 16.1 (C) (3), Alabama Rules of Criminal Procedure.

8. Permit the defendant to inspect and receive copies of any results or reports of physical or mental examinations or scientific tests or experiments made in connection with the case or cases pending against this defendant the same being in the possession, custody or control of the prosecution or its employees or agents the existence of which is known to the prosecution.

9. The defendant places the prosecution on notice that items covered by Rule 16.1, Alabama Rules of Criminal Procedure are subject to a

continuing duty on the part of the State to disclose and that materials covered by this motion subsequent to the initial production must be disclosed Clifton v. State, 454 So.2d 173 (1988) and Rule 16.3 Alabama Rules of Criminal Procedure.

10. If prior to or during trial the state discovers or receives additional evidence, which evidence is subject to discovery under Rule 16 Alabama Rules of Criminal Procedure, the state must promptly notify the court and the defense counsel of the existence of the additional evidence. See: Rule 16.3.

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ATTORNEY FOR THE DEFENDANT
EAST PODUNK, ALABAMA

STATE OF ALABAMA,	)	IN THE CIRCUIT COURT OF
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DEFENDANT'S MEMORANDUM OF LAW IN OPPOSITION TO THE PROSECUTION'S MOTION THAT CERTAIN DISCOVERY OR INSPECTION NOT BE HAD

1. Rule 16 Alabama Rules of Criminal Procedure guarantees only that certain items be produced. It guarantees minimum discovery. The court is free to grant whatever discovery it feels is fair under the facts of the case Killough v. State, 438 So.2d 311 (1982); Curry v. State, 502 So.2d 835, 841 (1986); Clifton v. State, 545 So.2d 173, 177 (1988).
2. Alabama judges have long possessed the authority to order any discovery they deem "fair" under the specific circumstances of the case Wicker v. State, 433 So.2d 1190 (1983); Williams v. State, 451 So.2d 411 (1984).
3. The foregoing well established rule can even enable the defendant to obtain a production order for a witnesses pre-trial statement if the court deems it fair under the specific circumstances of the case at hand Montgomery v. State, 504 So.2d 370, 373 (1987).
4. The special circumstance existent in a capital case allows the court to enter an order requiring the prosecution to maintain an "open file" Ex parte Monk, 557 So.2d 832 (1989). A judge has the power to order an "open file" policy just like Monk in a non-capital case King v. State, 595 So.2d 539 (1991).

Thus it is quire clear that this court can order any discovery order it feels is fair under the factors involved in this case.

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ATTORNEY FOR THE DEFENDANT
EAST PODUNK, ALABAMA

STATE OF ALABAMA,	)	IN THE CIRCUIT COURT OF
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MOTION TO REQUIRE THE DISTRICT ATTORNEY AND ALL LAW ENFORCEMENT AGENCIES TO FILE ALL SEARCH WARRANTS AND RETURNS WITH THE CIRCUIT COURT OF [COUNTY] COUNTY

Comes the defendant and moves this court pursuant to 1975 Code of Alabama, 15-5-12 and 15-5-13 to order the district attorney and all law enforcement agencies involved in this case to file with the Circuit Court Clerk:

1. All affidavits for search warrants, which have been obtained in this case.
2. All search warrants which have been issued in this case.
3. All returns of search warrants which have been issued in this case.

BRIEF

1975 Code of Alabama, 15-5-12 states the search warrant "must be executed and return made within ten (10) days".

1975 Code of Alabama, 15-5-13 states that the officer serving the search warrant "must specify with particularity the property taken, the applicant for the warrant and persons from whose possession the property was taken are entitled to a copy of the return, signed by the judge or magistrate".

4. The defendant wishes to make an examination and/or obtain copies or photographs of the property seized.

BRIEF

The defendant is entitled on motion to examine all items listed on the return of the search warrant Dix v. State, 580 So.2d 81, 83 (1981).

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ATTORNEY FOR THE DEFENDANT
EAST PODUNK, ALABAMA

STATE OF ALABAMA,	)	IN THE CIRCUIT COURT OF
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MOTION FOR A COURT ORDER REQUIRING THE PROSECUTION TO PRODUCE ANY AND ALL MATERIAL INVOLVING POLYGRAPH TESTS ADMINISTERED TO ANY OF ITS WITNESSES OR POTENTIAL WITNESSES IN CONJUNCTION WITH THIS CASE

Comes the defendant and moves this court to enter an order requiring the district attorney to produce for the defendant's inspection and copying the results of any polygraph tests administered to any of the State's witnesses or potential witnesses who have any information whatever regarding this case.

In the case of Carter v. Rafferty, 826 F.2d 1299 (3rd Cir. 1987) it was held that when the prosecution suppresses lie detector test reports that reveal that a prosecution witness was utterly incapable of belief reversal is required.

The theory behind the holding in the above cited case was the fact that a State's witness or potential witness failed a polygraph test concerning the story that he gave law enforcement authorities. The court held this to be clearly Brady material.

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ATTORNEY FOR THE DEFENDANT
EAST PODUNK, ALABAMA

STATE OF ALABAMA,	)	IN THE CIRCUIT COURT OF
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MOTION TO REQUIRE THE STATE OF ALABAMA AND ANY INVESTIGATORS WORKING ON THE ABOVE STYLED CASE AND IN PARTICULAR THE CHIEF INVESTIGATING OFFICER IN THIS CAUSE TO PRODUCE FOR THE DEFENDANT THE NAMES AND INFORMATION CONCERNING ANY PERSON OR PERSONS SUSPECTED OF INVOLVEMENT IN THE DEATH OF THE DECEASED OR WHO HAVE INFORMATION TOUCHING ON SUCH DEATH

The defendant requests the court to enter a specific order directing the District Attorney of Morgan County and Decatur Police Officer _____ chief investigator in this case and any and all police officers involved in the investigation of this case to make the following information available to the defense:

1. The name and information obtained of all persons suspected of the commission of the crime at issue or any involvement whatever as perpetrator, accomplice, co-conspirator, and accessory before or after the fact.
2. The names and location of all eyewitnesses to any facts or actions whose testimony the State will introduce into evidence at the defendant's trial.
3. The names and location and information concerning all persons with information about this case of which the State or any of its agents are aware.

DISCUSSION OF THE LAW

The fact that some other person or persons may have been suspected of involvement in the above offense at issue is clearly exculpatory under Brady v. Maryland, 10 L.Ed2d 215 (1963). Information of that type is clearly discoverable under Alabama law Gresslin v. State, 505 So.2d 1246 (1988) (in a rape case the State failed to produce medical evidence showing that semen samples of the defendant were

negative for venereal disease when the victim had clearly contracted venereal disease from forced intercourse). Also see Renfroe v. State, 551 So.2d 427 (1989) (suppression of an ABI file memo suggesting another person as a suspect in a homicide).

Information that a third person made statements incriminating himself in the crime the defendant was charged with is clearly discoverable Bradley v. State, 494 So.2d 772 (1985).

Even an anonymous telephone call to the police station stating that someone other than the defendant committed the crime is discoverable. In Patton v. State, 530 So.2d 886 (1988) only the investigating officer knew of the anonymous call and did not disclose the information at all before or during the trial. Failure to disclose this to the defense mandated reversal.

The fact that two eyewitnesses to a robbery-murder identified someone other than the defendant requires disclosure to the defense Ex parte Watkins, 504 So.2d 1064 (1984).

In a manslaughter case it was discoverable that when the police arrived at the hospital to investigate two persons present stated that the defendant acted in self-defense and gave details. The State's theory of the case was that the defendant chased after the victim and killed him. The two witnesses' statements required disclosure because they contradicted the prosecution's theory of the case Savage v. State, 600 So.2d 405 (1992). See also Ex parte Robinson, 556 So.2d 664 (1990).

The defendant requests that the court's order be directed to Officer _____ of the Decatur Police Department and all officers involved in the investigation of this case because "the knowledge of government agents working on the case, including a deputy sheriff, as to the existence of exculpatory evidence will be imputed to the prosecutor" Savage v. State, supra at 407 Col. 2. See also Sexton v. State, 529 So.2d 1041, 1045 (1988).

The names and addresses of eyewitnesses to the offense charged in the indictment must be disclosed to the defense even though the government does not intend to call them at trial U.S. v. Cadet, 727 F 2d 1453 (9th Cir 1984). The court held ". . . . to conclude from the fact that the government did not intend to call a witness to

the crime that there was a reasonable probability that such person would be able to provide evidence favorable to the defense". See also Collins v. State, 642 SW 2d 80 (Tex. 1982).

ATTORNEY FOR THE DEFENDANT
EAST PODUNK, ALABAMA

STATE OF ALABAMA,	)	IN THE CIRCUIT COURT OF
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MOTION TO REQUIRE THE PROSECUTION TO MAKE KNOWN ANY INCENTIVES OR AGREEMENTS THEY HAVE MADE WITH ANY WITNESS WHO WILL GIVE TESTIMONY IN THIS CASE

Comes now the defendant and asks this court to require the prosecution to make known the following information about any witness in this case:

1. Any agreement made between the prosecution or any agent of the State to obtain testimony from any witness in this case.
   a. Not prosecuting a case against said witness, which is currently under investigation.
   b. Not instituting proceedings to revoke parole or probation of such witness.
   c. Not prosecuting such witness for acts done in connection with the instant case.
   d. Any leniency in any pending criminal action currently pending against such witness.
   e. Any agreement for leniency of any kind requested by the witness for any friend or family member.
2. Whether any witness expected to be called in this case is:
   a. On probation
   b. On parole
   c. Has pending criminal charges, felony or misdemeanor
   d. Is currently under investigation for any crime such that a witness might reasonably expect leniency in return for their testimony.

DISCUSSION OF THE LAW

Agreements made with prosecution witnesses are discoverable Kilpatrick v.

State, 602 So.2d 45 (1992). They are discoverable because they are material under Brady.

The defendant asks that the persons offering "incentives" for the testimony of any witness be present in open court and state for the record exactly and specifically what "incentive" was offered or negotiated.

ATTORNEY FOR THE DEFENDANT
EAST PODUNK, ALABAMA

STATE OF ALABAMA,	)	IN THE CIRCUIT COURT OF
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MOTION FOR PROSECUTION TO MAKE KNOWN TO THE DEFENDANT AS TO ANY WITNESS WHO HAS IDENTIFIED THE DEFENDANT AS CONNECTED WITH THIS CRIME AT ISSUE WHETHER SUCH WITNESS HAS EVER MADE A PRIOR MISIDENTIFICATION OR WAS PREVIOUSLY HESITANT OR EQUIVOCATING IN THEIR IDENTIFICATION

Comes now the defendant and requests the prosecution and all law enforcement personnel involved in this case to state for the record as to any witness who has identified this defendant as a participant in the crime at issue whether any such witness has:

1. Failed to identify this defendant from any picture or person line up.
2. Identified some person other than this defendant as committing the offense this defendant is charged with.
3. Whether said witness has ever been hesitant in identifying this defendant or in anyway whatever equivocated in their identification (i.e. “this might be the one”, “maybe this is the one”, “I’m not sure but I think this is the one”, etc.).

DISCUSSION OF THE LAW

In McDowell v. Dixon, 858 F.2d 945 (4th Cir. 1988) there was one eyewitness. The defendant was a black man with short hair. It was reversible error for the prosecutor not to inform the defendant that the victim initially described his assailant as white with long hair.

In Crutcher v. State, 481 SW2d 113 (1972) it was reversible error to inform the defendant that a key prosecution witness described a person initially who did not at all fit the defendant’s physical appearance.

Indecisive or equivocating identification are also within the Brady rule and must be made known to the defendant U.S. v. Sheehan, 422 F.Supp 1003 (Mass. 1977) and People v. Wright, 480 NYS2d 859 (1984).

All of this sort of evidence goes to the issue of impeachment under the Brady rule.

ATTORNEY FOR THE DEFENDANT
EAST PODUNK, ALABAMA

STATE OF ALABAMA,	)	IN THE CIRCUIT COURT OF
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MOTION TO REQUIRE THE PROSECUTION TO PRODUCE THE CRIMINAL HISTORY AL ALL WITNESSES WHOM IT EXPECTS TO CALL TO TESTIFY IN THIS CASE AS IMPEACHMENT MATERIAL UNDER BRADY

The defendant moves this court for an order requiring the prosecutor to make known the criminal history of each witness they intend to call at trial.

In the case of Moore v. Kemp, 824 F.2d 847 (11th Cir. 1987) the prosecution produced only a portion of their key witnesses criminal history withholding a part. Reversal was required. See also Donahoo v. State, 552 So.2d 887 (1989) (this case was not reversed only because the witnesses testimony related to uncontested matters).

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ATTORNEY FOR THE DEFENDANT
EAST PODUNK, ALABAMA

STATE OF ALABAMA,	)	IN THE CIRCUIT COURT OF
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MOTION FOR THE PROSECUTION TO MAKE KNOWN ANY SANCTION THREATENED AGAINST ANY WITNESS TO SECURE THEIR TESTIMONY

The defendant moves this court to enter an order requiring the prosecutor to make known any sanction threatened against any witness to secure such witnesses' testimony:

1. Whether any witness not initially disposed to give testimony was induced to do so by threat or sanction from the prosecutor or law enforcement authorities.
2. Whether any witness not initially disposed to give testimony was threatened with sanction from the prosecution or law enforcement authorities and still refuses to testify.

The defendant asks to know the name and last known location of such witness and exactly what sanctions were threatened.

DISCUSSION OF LAW

In the case of Moynahan v. Manson, 419 F.Supp. 1139 (Conn. 1976) it was held to be reversible error when the prosecution failed to disclose that it's witness was the subject of an investigation involving stolen televisions and was threatened with prosecution for that if they failed to testify in the defendant's case.

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ATTORNEY FOR THE DEFENDANT

STATE OF ALABAMA,	)	IN THE CIRCUIT COURT OF
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MOTION TO PERMIT THE DEFENDANT TO VIEW THE SCENE OF THE CRIME WITH HIS COUNSEL

The defendant by and through his counsel, moves this court pursuant to the Sixth, Eight and Fourteenth Amendments to the United States Constitution, and the 1901 Constitution of Alabama, Article, Section 6 for an order requiring that the sheriff of Morgan County transport him with his attorney to view the scene of the death of the deceased and such other areas concerning which testimony will be offered in this case at least six (6) weeks prior to trial and allow this defendant and his counsel to discuss the facts of the case in a manner whereby the law enforcement official cannot hear the discussion. In support hereof the defendant states as follows:

1. The facts of this case are complicated and there is no way this defendant can properly explain to his attorney in a manner whereby they could take photographs, make measurements or otherwise properly investigate the scene of the alleged crime without the defendant's presence.
2. To deny him the right to do so would amount to a denial of due process and effective assistance of counsel as guaranteed by the United States and Alabama Constitutions.
3. To allow this defendant to view the scene of the homicide and other areas about which testimony will be offered will not prejudice the State's case but will only assist the undersigned counsel in presenting the true picture of the events to the jury.
4. If this defendant had a bond like other defendants in other types of criminal's cases he would certainly make said bond and go with his attorney to the scene of the homicide and assist his counsel in preparing his case for trial. Just because this defendant has no bond does not imply that he is entitled to any less preparation or assistance from his lawyer

than if he did. But for having no bond, this defendant would go with counsel to the geographical areas, which will be the subject of testimony in this case and help his attorney understand the facts so that he could better convey them to the court and jury.

The defendant asks this court for an order directed to the sheriff of Morgan County requiring the sheriff to transport him with his counsel to the following geographic areas and that the sheriff is to maintain the custody of the defendant but no so close as to overhear discussions between himself and counsel.

1.

2.

3.

ATTORNEY FOR THE DEFENDANT
EAST PODUNK, ALABAMA

STATE OF ALABAMA,	)	IN THE CIRCUIT COURT OF
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MOTION TO REQUIRE THE STATE OF ALABAMA TO MAKE KNOWN ANY MITIGATING CIRCUMSTANCES AS TO THIS DEFENDANT OF WHICH THE STATE OR ITS AGENTS ARE AWARE

The defendant moves this court to enter an order requiring the District Attorney of Morgan county and/or his assistants or agents to make known in writing any mitigating circumstances of facts concerning this defendant of which it is aware either within their case files, the case files of the investigating officers (including intelligence files), the files of the Morgan County Office of Parole and Probation or within its personal knowledge on the following grounds:

1. Under 1975 Code of Alabama, 13A-5-45 a convicted capital defendant has the right to introduce and have considered at the sentencing hearing, by way of mitigation, evidence that reflects upon his life, his character and the crime itself which mitigates in favor of life without benefit of parole as opposed to death by electrocution. This right is protested by the United States Constitution Locket v. Ohio, 57 L.Ed. 2d 973 (1978); Hitchcock v. Oklahoma, 71 L.Ed. 2d 1 (1982).
2. Further, Alabama case law protects the above delineated right Ex parte Monk 557 So.2d 832 (1989): In a capital case the definition of "favorable evidence" expands at the sentencing stage to far beyond what it is at any stage of any other type of criminal proceeding. The Alabama statute states:

   (d) Any evidence, which has probative value and it relevant to sentence, shall be received at the sentence hearing regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant is afforded a fair opportunity to rebut any hearsay statements.

   (g) The defendant shall be allowed to offer any mitigating circumstances defined in 1975 Code of Alabama, Sections 13A-5-51 and 13A-5-52. When the factual existence of an offered mitigating circumstance is in dispute, the defendant shall have the

burden of interjecting the issue but once it is interjected the State shall have the burden of disproving the factual existence of that circumstance by a preponderance of the evidence.

The statutory mandate that the defendant shall be allowed to offer evidence of mitigating circumstances is another reason why broad discovery must be allowed. The prosecutor can not screen the files for potential mitigating evidence to disclose to the defense counsel because, "what one person may view as mitigating, another person may not". Dobbert v. Strickland, 718 F.2d 1518, 1524 (11th Cir 1983, Cert. denied) 83 L.2d 887 (1984).

3. This defendant does not limit his request for information on mitigating circumstances to the following areas but only suggests them as areas for the prosecutor to make a search.

A. 13A-5-51 (2) the capital offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

B. 13A-5-51 (3) the victim was a participant in the defendant's conduct or consent to it.

C. 13A-5-51 (4) the defendant was an accomplice in the capital offense committed by another person and his participation, though intentional, was relatively minor.

D. 13A-5-51 (5) the defendant acted under extreme duress or under the substantial domination of another person.

E. 13A-5-51 (6) the capacity of the defendant to appreciate the criminability of his conduct or to conform his conduct to the requirements of the law was substantially impaired.

F. 13A-5-52 anything about the defendant's character or record or any circumstances of this offense that indicates that life without parole as opposed to death is an appropriate sentence.

_____
ATTORNEY FOR THE DEFENDANT

STATE OF ALABAMA,	)	IN THE CIRCUIT COURT OF
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MOTION TO REQUIRE THE PROSECUTION TO PRODUCE A COPY OF THE AUTOPSY

The defendant requests that the prosecution produce a copy of the full autopsy or post mortem examination of the deceased.

The prosecution is required to produce this evidence under the authority of Mack v. State, 375 So.2d 476, affirmed Ex parte Mack, 375 So.2d 504 (1978).

_____
ATTORNEY FOR THE DEFENDANT
EAST PODUNK, ALABAMA

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MOTION TO REQUIRE THE PROSECUTION TO PRODUCE ALL INFORMATION AVAILABLE ON THE DNA TEST PERFORMED

Comes now the defendant and asks that all information performed on _____ be made available to him and in support states as follows:

1. The defendant requests as to the DNA test performed
   a) Copies of the autorads
   b) Copies of laboratory books containing notations on the test described above
   c) Copies of quality control tests periodically run on the laboratory where the test was performed
   d) Reports by testing laboratory setting forth the method to declare a match or a non-match
   e) Statement setting forth observed contaminants and any other observed defects in the test at issue
   f) Copy of chain of custody documents
   g) Statement setting forth the method used to calculate the allele frequency in the relevant population
   h) Copy of the data pool
   i) Certification that the same rule used to declare a match was used to determine the allege frequency in the population
   j) Copies of the personal notes and calculations of all persons involved in the testing process

2. The foregoing items are required to be produced by the proponent of the evidence in advance of trial Ex parte Perry, 586 So.2d 245 (1991).
3. The introduction of DNA test results require a substantial and exact predicate. This predicate can only be met if the defendant is entitled to examine items used to construct such predicate.
4. If the admissibility of the DNA evidence is challenged this court must conduct a hearing outside the presence of the jury to determine whether such evidence is to be admitted and must thus examine and hear testimony as to each item this defendant has requested to discover.

Without an opportunity to discover such evidence he cannot prepare for such a hearing.

5. This defendant requests an order in sum and substance with that delineated in Ex parte Perry, *supra* at page 255, Col. 1

ATTORNEY FOR THE DEFENDANT
EAST PODUNK, ALABAMA

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MOTION TO REQUIRE THE PROSECUTION TO MAKE AVAILABLE FOR TESTING FOR ACCURACY AND ALTERATION THE SOUND RECORDING EQUIPMENT AND THE AUDIO TAPE PRODUCED BY SAID EQUIPMENT

The defendant requests that all equipment used to record sound evidence in this case and any audio tapes made from such equipment be produced for his testing by competent specified experts to determine (1) the accuracy of the equipment and (2) whether the tapes have been altered in any way. The defendant requests to test that specific audiotape which will be played to the court or jury.

As grounds the defendant states he is entitled to these items as a matter of law under Ex parte Fuller, 620 So.2d 675, 679 (1993).

_____
ATTORNEY FOR THE DEFENDANT
EAST PODUNK, ALABAMA

STATE OF ALABAMA,	)	IN THE CIRCUIT COURT OF
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MOTION FOR COURT TO ORDER THE PRODUCTION OF MEDICAL AND MENTAL RECORDS IN THE POSSESSION OF ANY AGENCY OF THE STATE OF ALABAMA WHICH REFER TO THIS DEFENDANT

The defendant states that in _____ of 20_____ he was examined/treated by _____, an agency of the State of Alabama. Records were generated by this examination/treatment. These records are relevant to the defendant's mental condition and clearly fall within evidence of a mitigating circumstance.

The defendant is indigent and is acting through appointed counsel.

The defendant is entitled to all such records under authority of Welch v. U.S., 404 F.2d 414 (5th Cir, AL 1968).

Therefore the defendant requests the following records from the following sources to be produced free of charge and delivered to his counsel:

1.
2.
3.
4.
5.

_____
ATTORNEY FOR THE DEFENDANT
EAST PODUNK, ALABAMA

STATE OF ALABAMA,	)	IN THE CIRCUIT COURT OF
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MOTION UNDER THE EIGHTH AMENDMENT AND ATKINS V. VIRGINIA TO PREVENT THE IMPOSITION OF THE DEATH PENALTY

Comes now the defendant and requests that this court make a factual finding, that this defendant is mentally retarded, and further to order that the jury who tries this case not be death qualified and to enjoin all persons participating in this trial from mentioning anything about the possibility of a death sentence and lastly to rule that there be no penalty phase in this case. In support of this motion the defendant states as follows:

1. the case of Atkins v. Virginia, 2002 WL 1338045 holds that mentally retarded persons cannot be executed. This case holds such an execution to be a violation of the Eighth Amendment to the U.S. Constitution.
2. Atkins v. Virginia and the American Association of Mental Retardation defines mentally retarded as follows:

> The American Association of Mental Retardation (AAMR) defines mental retardation as follows: Mental retardation refers to substantial limitations in present functioning. It is characterized by significantly sub-average intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care home living, social skills, community use, self-direction, health and safety, functional academics, leisure and work. Mental retardation manifests before age 18.

The defendant clearly meets this definition.

3. Atkins v. Virginia, forbids the execution of those persons who are even "mildly mentally retarded". In that case the appellant's IQ was 59.
4. The defendant asks to put on testimony from experts who will testify that this defendant is mentally retarded. This issue must be determined pre-trial to prevent the death qualification of the jury, as death qualifying them in a case which cannot involve the death penalty would be error.

_____
ATTORNEY FOR THE DEFENDANT

STATE OF ALABAMA,	)	IN THE CIRCUIT COURT OF
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NOTICE OF FILING EX PARTE MOTION IN ACCORDANCE WITH MOODY RULE

Comes now the defendant and states that in strict accordance with the procedures set out in Ex parte Moody, 684 So.2d 114, 122 (1996) that he has filed a motion ex parte with the trial court under seal requesting certain funds be made available for the defense.

A copy of the said motion has not been filed with the district attorney.

_____
ATTORNEY FOR THE DEFENDANT
EAST PODUNK, ALABAMA

STATE OF ALABAMA,	)	IN THE CIRCUIT COURT OF
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MOTION FOR FUNDS FOR THE ASSISTANCE OF A PROFESSIONAL INVESTIGATOR AND FOR EX PARTE HEARING ON THE SHOWING OF NECESSITY

The defendant requests that he be allotted sufficient funds to obtain the assistance of an investigator to assist his appointed counsel in the preparation of his case and as reasons and authority states as follows:

1. The defendant is charged with capital murder and the state has expressed its intention to seek the death penalty in this case.
2. The undersigned counsel has been appointed to represent this defendant due to his indigency.
3. The defendant has been in jail since his arrest and prior to that point in time was generally unemployed.
4. Various law enforcement agencies and personnel participated in the investigation of this case. These agencies were and are available to the prosecution to investigate and interview any witness at any time at the mere request of the district attorney. They are at his beckon call to investigate any aspect of the evidence in this case. Needless to say this defendant has no such resources and cannot assist in the investigation of this case because he is incarcerated.
5. The Decatur Police Department, the Morgan County Sheriff's office and the Alabama Department of Forensic Science took several months and interviewed many witnesses to assist the prosecution in the preparation of this case.
6. Neither the defendant nor his immediate family have the funds to hire an investigator. Were this defendant not indigent he would certainly provide funds for his counsel to obtain the services of an investigator as

reasonable and necessary. Even though this defendant is poor financially he is still entitled to those items and services reasonably necessary to the preparation of his case.

7. The denial of the assistance of an investigator would significantly impact on the fundamental fairness of the adversarial process and would taint the product of that process in this case.

8. The defendant has a specific articulable need for an investigator and further has specific acts he will ask that investigator to perform all of which are absolutely necessary to the preparation of this case. He wishes to make an offer of proof as to those services needed. He asks that he be allowed to place these items on the record in camera. Without an in camera hearing his defendant would be in effect required to make known his theory of the defense and his strategy of trial known to the prosecutor. These two items are squarely within the work product rule and are in no way discoverable.

9. The defendant's counsel has in mind a certain experienced investigator. He charges _____ per hour, which is not excessive. The defendant asks that $ .00 be made as funds for an investigator. If additional funds are necessary the defendant asks for leave to file for additional funds upon a specific showing of the necessity of additional assistance.

BRIEF ON LAW POINT

The right to effective assistance of a counsel includes the right to funds for investigative and expert assistance. Adequate investigation in preparation is an indisposable prerequisite to the effective assistance of counsel Goodwin v. Balkom, 684 F.2d 794 (11th Cir 1982). Investigation is even more essential where the death penalty is sought. Not only is counsel faced with an overwhelming amount of work in preparing for a capital trial, but it is crucial that an investigator interview witnesses so that counsel would not be "placed in the untenable position of either taking the stand to challenge their credibility if their testimony conflicts with the statements previously given or withdrawing from the case".

See Rule 3.7 Alabama Rules of Professional Conduct, which appears to be a blanket prohibition of such testimony because, such testimony does not "relate to an uncontested issue". At any rate the reason behind the rule is very sound. A lawyer cannot be an effective advocate and an effective witness in the case he is trying. If a defense attorney testified and contradicted the testimony of a State's witness he would be subject to cross-examination as to any "interest" he has in the case. It is axiomatic that he has a built in, ipso facto interest by being the defendant's attorney.

If there is a threshold showing of a genuine need for the services of an investigator Alabama law requires that funds be made available for the assistance of a private investigator; Taylor v. State, 666 So.2d 36 (1994).

It has been held in the case of Griffin v. Illinois, 351 U.S. 12-17:

> There can be no equal justice when the kind of trial a man gets depends on the amount of money he has. . . . Plainly the ability to pay cost in advance bears no rational relationship to a defendant's guilt or innocence and could not be used as an excuse to deprive a defendant of a fair trial.

The case of Ake v. Oklahoma, 470 U.S. 68 (1985) decided that an indigent defendant has the right under the due process clause of the Fourteenth Amendment to the United State Constitution to the assistance of a psychiatrist when he demonstrates that his sanity at the time of the offense is "likely to be a significant factor at trial". The court went on to hold:

> This elementary principal, grounded in significant part on the Fourteenth Amendment's due process guarantee of fundamental fairness, derives from the belief that justice cannot be equal where, simply as a result of his poverty a defendant is denied the opportunity to participate meaningfully in a judicial process in which has liberty is at stake. . . .(the court) has often reaffirmed that fundamental fairness entitles indigent to "an adequate opportunity to present their claims fairly within the adversary system" (p. 76).

Additionally the Eighth Amendment to the United States Constitution requires that the defendant in a capital case be permitted to proffer any evidence of mitigation submitted as a basis for receiving a sentence less than death Locket v. Ohio, 438 U.S. 586 (1978). This fundamental right is violated if the defendant is denied any meaningful way in which to gather and properly present such evidence Skipper v. South Carolina, 476 U.S. 1 (1986).

The defendant wishes to make a showing to the court that the services of an investigator are necessary to the preparation of his case and he desires to place on the record exactly what services and tasks he needs from such investigator in strict accordance with the dictates of Hold v. State, 485 So.2d 801, 803 (1986), McLeod v. State, 581 So.2d 1144, 1151 (1990), Nichols v. State, 624 So.2d 1328, 1333 (1992).

Any discussion of the defense strategy in a criminal case must be in camera and ex parte 44 AL Law Rev. 1 (p. 9 footnote 41). This rule finds substantial authority in Grimsley v. State, 632 So.2d 547, 550 (1993). In the words of the court:

> Where a state intrudes into a defendant's attorney-client privilege and learns defense strategy, the dismissal of the indictment may be the only viable remedy.

The prosecution has no right to any knowledge concerning the defense strategy. Under current Alabama law if they learn such strategy and the defendant is thereby prejudiced because of them having such knowledge dismissal of the indictment may be the only remedy Gradick v. State, 408 So.2d 533, 547 (1981) and Grimsley v. State, *supra*.

Wherefore premises considered the defendant asks for the following relief through this motion:

A. $ .00 initial funds approved for an investigator.

B. The right to apply for further funds upon specific articulated request showing their reasonable necessity.

C. An in camera hearing whereby the defendant can state his specific need for an investigator can exactly what the investigator would be specifically asked to do.

D. That this in camera hearing be ex parte with only the defendant, his counsel, the proposed investigator, the court and a court reporter present.

_____
ATTORNEY FOR THE DEFENDANT
EAST PODUNK, ALABAMA

STATE OF ALABAMA,	)	IN THE CIRCUIT COURT OF
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MOTION FOR COURT TO ALLOCATE FUNDS TO RETAIN A MENTAL HEALTH PROFESSIONAL

The defendant requests that funds be allocated to retain a qualified mental health professional to assist him in the penalty phase of this trial, if there is such a phase conducted, with expert testimony and advice as to proof of any mitigating circumstances stemming from this defendants mental condition and states as follows:

1. The defendant is indigent. He has appointed counsel. He has been in jail since his arrest and has earned no funds. Neither he nor his immediate family has any funds to hire a mental health expert in this case.
2. The undersigned counsel is not trained in either psychiatry or psychology. Defendant's counsel badly needs the following specific type of assistance:
   A. Someone to evaluate any of this defendant's mental difficulties and to evaluate them in light of
      i. the testimony of friends and family who will give evidence should there be a penalty phase
      ii. past medical and psychological records from past mental difficulties
   B. Someone to evaluate and synthesize all of the testimony given to the jury in light of all the above.
   C. To assist the undersigned counsel in presenting mental defect mitigating circumstances to the court and jury in a clear, concise and understandable fashion so that the court and jury will have clear and credible evidence on which to base a verdict should there be a penalty phase in the trial.
3. There are in existence records reflecting upon the defendant's mental condition from his school records and juvenile probation records and these must be evaluated.

4. Mental defects, which fall short of legal insanity and mitigating circumstances under current Alabama, law.

BRIEF ON THE LAW

An anti-social personality disorder certainly falls very far short of legal insanity yet it is a mitigating circumstance Clisly v. State, 456 So.2d 99 (1993).

Psychological problems stemming from a difficult family history are mitigating circumstance Eddings v. Oklahoma, 71 L.Ed2d 1, 11 (1971).

Learning disabilities are a mitigating circumstance Ex parte Henderson 616 So.2d 348, 350 (1992).

A very major mitigating circumstance is that the defendant suffers from a psychological problem which is treatable in a prison setting State v. Graseclose, 615 SE 2d 142, 149 (Tenn. 1991); State v. Bobo, 727 SW 2d 945, 951 (Tenn. 1987); State v. Poe 755 SW 2d 1072, 1073 (Fla. 1982); McCampbell v. State, 421 SW 2d 1072, 1073 (Fla. 1982); Miller v. Wainwright, 798 F.2d 426, 430 (11th Cir. 1986); Cooper v. Dugger, 526 So.2d 900, 902 (1988) and Campbell v. State, 571 So.2d 415. An expert is certainly necessary so that the defendant can demonstrate that his psychological problem is treatable in a prison setting. When it comes to the actual treatment of a psychological problem only the testimony of an expert is credible or acceptable. The treatment of mental defects is not a proper subject for lay testimony.

_____
ATTORNEY FOR THE DEFENDANT
EAST PODUNK, ALABAMA

STATE OF ALABAMA,	)	IN THE CIRCUIT COURT OF
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EX PARTE MOTION FOR FUNDS FOR PSYCHOLOGIST TO USE IN THE PENALTY PHASE

1. This motion is filed ex parte because the defendant is required by law to set out his reasons for the necessity of this expert. See: Williams v. State, 795 So.2d 753 (2000); Finch v. State, 715 So.2d 906 (1997). If the law requires the defendant to set these matters out he must hence disclose his theory of mitigation should a penalty phase occur. The state is not, as a matter of law, entitled to discover the defendant's theory of mitigation and the same would be improperly disclosed if the motion were not ex parte. See: Ex parte Moody, 684 So.2d 114 (1996).

2. The defendant's childhood and adolescence was both physically and psychologically abusive. The law recognizes these as mitigating factors. See: Powell v. State, 796 So.2d 404, 433 (1999); Holford v. State, 548 So.2d 547 (1988).

3. Given that each of these instances of abuse are mitigating, they are meaningless unless the jury is permitted to hear how all of them cumulatively bear on the character of the defendant at the time of the homicide. Without this connection proof of childhood and adolescent abuse is irrelevant and must be excluded. See: Stafford v. Staffle, 34 F.3d 1557, 1565 (10th Cir. 1994) holding that physical abuse would have been admissible mitigating evidence but… "the defendant presented no evidence that these events had any continuing effect on

his ability to conform his conduct to non criminal behavior". Such was also the exact holding in Harris v. Vasquez, 949 F.2d 1497, 1502 (9th Cir. 1990). In one case which did not hold this evidence inadmissible it was agreed that a trial judge could give this evidence "slight weight" because ". . . no psychological testimony linked appellant's involvement in a bank robbery and shooting to attitudes of hostility or aggression he acquired as a result of an aggressive childhood". Since this is the main thrust of this defendant's mitigation case he cannot have this evidence excluded or assigned "slight weight" simply because he has no one to testify as to the cumulative and long-range effect of this abuse.

4. 77 N.C. L Rev. 1143, 1186 holds as to expert testimony on the cumulative and long range effect of abuse:

> This testimony alone would have given greater meaning to the mitigating circumstances that the jury found, in a way that might have made the mitigating factors outweigh the aggravating circumstances of the murder.
>
> . . . . .
>
> The clinical psychologist's testimony would have been significant because she located the precipitating cause of the impairment – childhood abuse-outside the control of the defendant.

Without the aid of a psychologist for the defendant's mitigation case this defendant's entire mitigation case will be ineffective. It will be ineffective to the level of a violation of the 14th Amendment to the United States Constitution.

Wherefore, premises considered the defendant requests funds for a psychological expert for the penalty phase of this case in the amount of _____, with leave of court to apply for additional funds upon proper showing and motion.

The defendant also requests that this psychologist be excused form the rule under 615 (3) Alabama Rules of Evidence and Henderson v. State, 583 So.2d 305 (1991) during the penalty phase, should there be one.

_____
ATTORNEY FOR THE DEFENDANT
EAST PODUNK, ALABAMA

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MOTION FOR FUNDS TO OBTAIN EXPERT TESTING OF CERTAIN EVIDENCE

Comes now the defendant in the above styled cause and moves this court to make available funds for scientific testing of certain body fluids staining funds for scientific testing of certain body fluids staining slacks worn by the deceased at the time of death and states as follows:

1. This defendant is completely indigent. He has been incarcerated since his arrest. When he was arrested he was unemployed. His immediate family is also without funds to hire an expert or pay for any scientific test.
2. The defendant denies that he killed _____.
3. On the deceased's trousers is a bloodstain, which is small in diameter and already determined not to be of the deceased's blood type.
4. No DNA test was performed on the above referenced bloodstain to determine if it belonged to this defendant.
5. If a DNA test affirmatively demonstrated that the blood on the deceased's trouser did not come from this defendant then:
   A. such evidence is exculpatory
   B. such evidence supports this defendant's theory of defense which is that he was elsewhere when the deceased met his death
   C. such evidence may well indicate that some person other than this defendant struggled with the deceased and took his property before taking his life.
6. This defendant being indigent and asserting the defense that he was not present when the deceased was killed is entitled to prove this by competent evidence. Were he not indigent he surely expend funds to have this test performed and the evidence presented.

Wherefore premises considered the defendant asks that a DNA test be performed on the deceased's trouser of the small stain described above and

that funds be available for payment of the experts who performed the DNA test to come to court and testify as to the results.

BRIEF ON THE LAW

A defendant is entitled to public funds to hire an expert even if he has a retained counsel provided that the expert is reasonably necessary to present his case and that he has no funds to hire such expert Ex parte Sanders, 612 So.2d 1199 (1993). The defendant has a right to hire his own expert witness to perform a scientific test on evidence already tested by the state if (1) the physical evidence is crucial evidence in the case and (2) if the evidence can be subject to varying positions in the scientific community Ex parte Grayson, 479 So.2d 76 (1985). See also Smith v. State, 623 So.2d 369 (1992).

Funds to hire an expert to test evidence and testify about it should be granted if the results of that test are necessary for the defendant to present his theory of defense Davis v. State, 549 So.2d 577 (1989). The only exception to the rule is if there is "no bona fide doubt" as to the issue the evidence goes to prove. In other words expert funds will not be provided in an attempt to attack a matter not reasonably in dispute Garth v. State, 536 So.2d 176 (1988).

The leading case in this area is Grayson v. State, 479 Do.2d 69 (1984). It states the full rule about State funds for tests and experts more succinctly that any other:

> . . . . before determining whether fundamental fairness requires that an accused be afforded the opportunity to have an expert of his choosing examine a piece of "crucial evidence whose nature is subject to varying expert opinion", it should first be determined that the evidence is "crucial". Evidence is "crucial" for the purpose of the due process clause if it could induce a reasonable doubt in the minds of enough jurors to avoid a conviction when that evidence was developed by skilled counsel and experts. White v. Maggio ,556 F.2d 1352, 1357-58 (5th Cir. 1977) (p.72).

The DNA testing sought by this defendant is (1) crucial (2) possibly exculpatory (3) if the blood on the deceased's trousers was not that of the defendant then there is a reasonable doubt that it was the defendant who assaulted, robbed and killed the deceased (4) the evidence could well support the defendant's contention that he was

not present at the scene of the killing and further endorse as creditable his evidence that he was geographically elsewhere.

ATTORNEY FOR THE DEFENDANT
EAST PODUNK, ALABAMA

STATE OF ALABAMA,	)	IN THE CIRCUIT COURT OF
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MOTION FOR COURT TO GRANT BAIL

1. This defendant is charged with a capital offense.
2. To this offense the defendant intends to enter a plea of not guilty.
3. The only evidence against this defendant is the statement of _____ given to investigators in this case. _____ has a substantial criminal record consisting of _____. Further _____was a participant in the crime itself and thus has quite an interest to minimize his own legal culpability and to blame others for the acts he committed.
4. Rule 7.2 (B), Alabama Rules of Criminal Procedure gives the trial judge discretion to admit a defendant to bail who is charged with a capital offense. Rule 7.2 (b), Alabama Rules of Criminal Procedure lists the factors, which should guide the trial judge in making this decisions.
5. Tracking Rule 7.2 (b) referred to above the defendant offers to prove the following:
    1. That he is young, his age being _____.
    2. That he has a law abiding and supportive family.
    3. That his only prior convictions are misdemeanors.
    4. There have been no threats against the witnesses in this case and defendant will have no contact with any of them.
    5. The defendant has lived his entire life in Morgan County and has no roots or connection with any other community.
    6. The defendant is gainfully employed.
6. The defendant is absolutely willing to accept any conditions placed upon his by this court such as areas or persons to be avoided in order for the court to assure itself that there will be no danger to the public or any

person involved in this case. This court possesses such authority pursuant to Daniels v. State, 597 So.2d 1383 (1991).

7. By authority of Article I Section 16, of the Alabama Constitution of 1901, this defendant has a right to bail if the proof is not evident and the presumption is not great.

8. This defendant requests a hearing on the issue of bail so that he may present evidence and this court can make specific findings if bail is denied. This defendant is entitled to a specific finding from this court if bail is denied under Daniel v. State, *supra* at p. 1384, Col. 2.

9. Article I Section 16 of the Alabama Constitution of 1901, states that a capital defendant is bail-able if the proof is not evident and the presumption not evident and the presumption not strong. The "proof is evident and the presumption strong" is a phrase narrowly defined by case law. This phase has long been defined as "the proof is evident and the presumption strong" that the death penalty will be imposed Ex parte Bynum, 312 So.2d 52 (1975) and Ex parte Carlisle, 326 So.2d 775 (1976). Thus the "evident proof" and "strong presumption" at issue in a bail hearing is not that a capital offense has been committed and that the defendant committed it; the presumption we are dealing with is that the proof is evident and the presumption strong that a death sentence will be imposed.

10. If the presumption is not great that the death penalty will be imposed then bail must be granted in a capital case Coleman v. McDowell, 605 So.2d 380 (1952). See also Pittman v. State, 171 So.2d 292 (1936).

11. If the proof of this defendant's guilt is not evident then the proof is not evident nor the presumption strong that the death penalty will be imposed Adams v. State, 89 So.2d 191 (1956).

12. The jury has not recommended nor the court imposed the death penalty in the following similar cases in this area:

13. The material produced by the prosecution contains the following exculpatory matters:

14. The material produced by the prosecution contains the following mitigating

factors supporting a verdict of life without parole if a guilty verdict is returned:

Wherefore, premises considered the defendant asks for a bail hearing wherein he can produce evidence that the proof is not evident nor the presumption great that a death sentence would be imposed. At the conclusion of such hearing the defendant asks that this court admit him to bail.

ATTORNEY FOR THE DEFENDANT
EAST PODUNK, ALABAMA

STATE OF ALABAMA,	)	IN THE CIRCUIT COURT OF
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DEFENDANT.	)	

MOTION FOR THE DISTRICT ATTORNEY TO MAKE KNOWN FOR THE RECORD THE NUMERICAL VOTE TAKEN BY THE GRAND JURY WITH REFERENCE TO THE INDICTMENT OF THIS DEFENDANT

Comes now the defendant who is under indictment for a capital offense and asks this court to require the prosecutor to make known for the record the numerical vote of the grand jury with reference to the indictment of this defendant.

The defendant has filed a motion to be admitted to bail.

1975 Code of Alabama, 12-16-204 states that at least twelve (12) of the eighteen (18) grand jurors are necessary to return an indictment. If less than 10 persons voted to indict this defendant then the proof is not evident and the presumption was not great that this defendant is guilty of a capital offense. If the guilt of the defendant is in question then clearly the proof is not evident and the presumption is not great that the defendant will receive the death penalty Adams v. State, 89 So.2d 191 (1936).

The vote taken by the grand jury is subject to disclosure is for a legitimate law enforcement purpose or in the public interest 1975 Code of Alabama, 12-16-221.

_____
ATTORNEY FOR THE DEFENDANT
EAST PODUNK, ALABAMA

STATE OF ALABAMA,	)	IN THE CIRCUIT COURT OF
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MOTION FOR THE APPOINTMENT OF A SPECIAL PROCESS SERVER

Comes now the undersigned attorney and requests that _____ be officially appointed by this court as a special process server for serving the papers of this court in the above captioned case.

The said _____ has been investigating this case and interviewing witnesses for the defendant and it would be most convenient to appoint him as a process server.

Authority for this motion is found in Rule 45 (C), of Alabama Rules of Civil Procedure.

_____
ATTORNEY FOR THE DEFENDANT
EAST PODUNK, ALABAMA

STATE OF ALABAMA,	)	IN THE CIRCUIT COURT OF
PLAINTIFF,	)	MORGAN COUNTY, ALABAMA
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DEFENDANT.	)	

MOTION TO REQUIRE ESSENTIAL WITNESS FOR DEFENDANT TO BE REQUIRED TO MAKE BOND

Comes now the defendant pursuant to 1975 Code of Alabama, 14-6-3 (4) and 15-11-12 and asks this court to require that the witness _____ to give sufficient bond to insure his presence at the trial of this case of be incarcerated until the trial of this case. In support of this motion the defendant states as follows:

1. _____ is an essential witness for the defendant in this case. Such witness possesses knowledge and information essential for this court and a jury to have a full hearing of the facts. Indeed this court and any jury impaneled by this court is absolutely entitled to hear from all persons who have knowledge of facts bearing on any issue involved in this case.
2. This witness possesses knowledge of the following type:
3. Yet possessing this unique knowledge this witness has stated that he will not give testimony in this case and that he will not appear. Indeed this witness is usually a resident of the State of _____ which is outside the jurisdiction of this court and is often transient with no fixed place of abode. (See Exhibit A – affidavit of the investigator assigned to assist the defendant in the preparation of his case).
4. The defendant is entitled to compulsory process from this court to ensure the presence of this witness. The right is closely akin to the right to present a defense and is especially critical in capital cases Ex parte Murray, 588 So.2d 924, at 926 (1991).

BRIEF ON LAW

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts

> as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Washington v. Texas, 18 L.Ed2d 1019 (1967).

Currently there are forty-five states which have constitutional provisions or statutes giving trial judges the right to incarcerate reluctant witnesses to ensure their testimony in criminal cases 58 Washington University Law Quarterly 1, Appendix A at 43-51.

The defendant's right to insure compulsory process to obtain the testimony of a witness is "especially crucial in cases . . . . , where the state is seeking to have the death penalty imposed: Ex parte, Murray, 588 So.2d 924, at 926 (1991).

Trial courts have the authority in Alabama to take witnesses into custody if that is necessary to secure their presence at trial Ex parte, Weeks, 456 So.2d 404 (1985).

1975 Code of Alabama, 14-6-3 (4) and 15-11-12 "should be read in pari materia" Ex parte Murray, supra.

The prosecution took the position in Ex parte Murray, *supra* that 1975 Code of Alabama, 14-5-3 (4) and 15-11-12 only referred to witnesses for the state but this position was held to be violative of due process (at 927).

_____
ATTORNEY FOR THE DEFENDANT
EAST PODUNK, ALABAMA

STATE OF ALABAMA,	)	IN THE CIRCUIT COURT OF
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DEFENDANT.	)	

MOTION TO COMPEL THE CONTINUED ATTENDANCE OF THE STATE'S WITNESS

Comes now the defendant pursuant to 1975 Code of Alabama, 12-21-240 and requests that the witness _____ not be excused by this court after testifying. The defendant asks that he be required to attend this court again on _____ 20___ at _____ o'clock to give further evidence.

_____
ATTORNEY FOR THE DEFENDANT
EAST PODUNK, ALABAMA

STATE OF ALABAMA,	)	IN THE CIRCUIT COURT OF
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I am _____. I am a practicing attorney in Alabama (or a private investigator).

On _____, 200__, I want to see _____ who has some information about this case. Indeed this person made statements to agents of the _____ Police Department, which aided in their investigation of this case. Such information led to the arrest of this defendant.

I arrived at their home at _____ o'clock. After I identified myself I was told:

> The district attorney told me not to talk about this case with anyone but him or in court.

or

> The investigator told me not to talk to anyone about this case except him and him alone.

_____
Affiant

STATE OF ALABAMA)
COUNTY OF MORGAN)

Before me personally appeared _____, who is known to me, and after being cautioned to speak the truth, the whole truth and nothing but the truth made the following statement under oath and in my presence affixed his signature thereto.

_____
NOTARY PUBLIC
STATE AT LARGE

STATE OF ALABAMA,	)	IN THE CIRCUIT COURT OF
PLAINTIFF,	)	MORGAN COUNTY, ALABAMA
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DEFENDANT.	)	

MOTION TO PREVENT _____ FROM DIRECTLY INTERFERING WITH THIS DEFENDANT'S RIGHT TO PREPARE HIS CASE FOR TRIAL AND THIS TO BE AFFORDED A FAIR TRIAL UNDER CONSTITUTIONAL STANDARDS

Comes now the defendant in the above styled cause and states as follows:

1. The defendant has been arrested for capital murder and the undersigned has been appointed to represent him.
2. The undersigned takes his obligations as appointed counsel as seriously as if he were retained counsel.
3. The undersigned incorporates into this motion the attached affidavit and the facts set out therein in *pari materia* with this motion.
4. By the facts and actions set out in the affidavit _____, an agent of the State (Prosecution) has effectually prevented the undersigned from carrying out his constitutional duty to his client and further from carrying out the strict dictates of Rule 1.1, Rules of Profession Conduct:

> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonable necessary for the representation.

The Comments to Rule 1.1 state:

> Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem.
> . . . . .

The undersigned desires in every way to meet the standards set by this Rule.

5. There is no power in the law evolving a district attorney (investigator) to tell any witness that they "cannot talk to the accused attorney" (investigator). Ergo the actions of _____ clearly

exceed his or her authority.

6. Canon 39 of the Canons of Professional Ethics of the American Bar Association, provides, in sort, that a lawyer may properly interview for the opposing side in any civil or criminal case without the consent of the opposing party. The action of the district attorney violates this rule. (do not use this paragraph if a police officer is the ??????? party).

7. The purpose of requiring attorney's to be competent and investigate the facts of their cases is to assist in the truth finding process. A trial is ideally a search for the truth. The actions of _____ ???????? the truth finding process.

BRIEF

A common basis for post conviction writs and claims of ineffective assistance of counsel is the defense attorney's failure to adequately investigate the facts of the case. See" ABA Standards, The Defense Function, Standard 4-4.1 (a); Mason v. Balcom, 531 F.2d 717, 724 (5 Cir 1976).

Defense counsel must investigate the facts of the case in general; Hawkman v. Parrot, 661 F 2d 1161 (8 Cir 1981). It is essential that he investigate facts as to possible defenses; Harris v. Tanners, 405 F.Supp 497 (D. Del. 1984); U.S. v. Moore 554 F 2d 1086 (1976); Meeks v. Bergen, 749 F.2d 322 (6 Cir 1984). It is essential that defense counsel investigate facts to prepare for direct and cross-examination; Powell v. Alabama 77 L.Ed 158 (1932).

It is improper for a prosecutor to advise witnesses that they should not talk to the defense. See: Gregory v. U.S., 369 F.2d 185 (1966); U.S. v. Munsey, 457 F.Supp 1 (Tenn. 1978); Schindler v. Superior Court of Madison County. 327 P.2d 68 (1958); State v. Garr, 194 SE2d 6542 (1973). However, a witness who was told "It would be better if you don't talk to the defense counsel . . . ", yet ended the discussion by saying that the witness could not be ordered not to U.S. v. Murdock, 826 F.2d 771 (8 Cir. 1987).

To approach the question of whether or not it is constitutional and illegal for a district attorney to instruct police investigators, or any other witness for that matter, that they cannot discuss the cases they make with defense counsel without their express permission, it is necessary to define the duties and responsibilities of counsel representing one accused of a crime. A defense counsel is first of all obliged to conduct

an investigating of the facts and circumstances of the case and then to discuss with the client the client the appropriate course of action based on those facts Taylor v. State, 287 So.2d 901 (1973). Thus, if a lawyer is hampered in investigating the facts he cannot have a meaningful discussion with his client on an appropriate course of action. In the case of Browning v. State, 326 So.2d 778 (1975) it was held that the appointment of counsel and putting such counsel to trial quite soon when such counsel had not had time to investigate the facts and circumstances of the case was reversible error.

The investigation of the facts and circumstances of the case is indispensable to adequate legal representation of the accused.

Can a district attorney in Alabama order any witness whatever not to talk to defense counsel? This question was answered with an emphatic, no, in the case of Hill v. State, 366 So.2d 296 (1978):

> Certainly the prosecutor may not prevent a witness from giving a statement to a defense attorney. Any defendant has the right to attempt to question any witness prior to trial he so desires in the absence of intimidating influence (Page 312, Co. 2).

Such is the law in every single American jurisdiction both state and federal. In U.S. v. Henny, 527 F.2d 479 (CA 9 Wash) it was held that due processes was violated when a prosecutor advised witnesses not to discuss the case with anyone except in the prosecutor's presence. It has been held to be a violation of due process for a prosecutor to dismiss charges or withdraw a probation revocation against an informant or co-defendant knowing that in doing so the person would flee the jurisdiction and not be available for defense counsel to interview Hernandez v. Nelson, 298 F.Supp. 682 (1969), DC Col.) and Thomas v. State, 243 So.2d 200 (1971), FL App D2). In the case of Wilson v. State, 91 SE2d 201 (1956, GA) it was held to be an abuse of a judges discretion when the judge acceded to the prosecution's rule that the defendant's lawyer could not interview an eye witness who was in penal custody; this was the exact holding in Exleton v. State, 235 P 627 (1925, OK). In the case of State v. Hammler, 312 So.2d 306 (1975, LA) the conviction was reversed because an assistant prosecutor told two state's witnesses no to talk with the defendant's lawyer. In People v. Russell, 209 NW 2d 476 (1973, MI) it was held to be a due process violation for the prosecutor to tell the

victim not to talk to defense counsel. In Lewis v. Court of Common Pleas, 260 A 2d 1984 (1969, PA) it was held that given the FBI local office had a "policy" of not granting pre-trial interviews to defense counsel it was still error for a prosecutor to tell such agents to not discuss the case with defense counsel.

It the police officers involved in this investigation (Detective Walker) had information about the case favorable to the accused being either exculpatory or favorable as to mitigating in sentencing, holding this information from the accused is a violation of Brady v. Maryland, 10 L.Ed2d 215 (1963).

Wherefore, premises considered, the defendant requests this court to enter a formal order issued to _____, personally, that he send a letter to each investigator or witness to the effect that such witness may, If he desires, discuss this case with any lawyer for the defendant or any investigator working in the defendant's behalf and further that the past directive not to discuss this case with defense counsel or any of his investigator is rescinded.

_____
ATTORNEY FOR THE DEFENDANT
EAST PODUNK, ALABAMA

STATE OF ALABAMA,	)	IN THE CIRCUIT COURT OF
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DEFENDANT.	)	

VERIFIED MOTION TO TAKE THE DEPOSITION OF MATERIAL WITNESS

The defendant desires to take the deposition pursuant to 1975 code of Alabama, 12-21-260 (a) of the material witness _____. In support of this motion the defendant states as follows:

1. The witness _____ is _____ years of age and currently in poor health due to age, infirmity and injury/ Two witness is currently located at _____ where they are convalescing.
2. The witness _____ for three years has suffered from emphysema and from the effects of a stroke from two years ago. Their physical infirmaries are further complicated by age. It is most uncertain how long this witness will remain alive.
3. The testimony of this witness is crucial to the defendant. This witness was present at _____ location on the date of the crime at issue. They described for the police a person running from the scene of the homicide who was not of the defendant's physical description nor dressed as this defendant was on _____,20___. However, this witness stated the person seen running from the location of the homicide was carrying the items allegedly taken from _____ the deceased.
4. The facts stated in paragraph three above make the witness, _____, a material witness whose testimony is crucial to this defendant's presentation of a defense.
5. The defendant makes an offer of proof with this motion, should this court require further evidence to produce the witness _____ who is the son of the witness we wish to depose who will state that his

father is gravely ill and has come close to dying from the combined effects of the stroke and emphysema mentioned above at the least once in the past six months. Further the defendant can produce the witness _____, M.D. who is the witnesses' private physician and will testify as to the seriousness of their medical condition.

Subscribed and sworn to this _____ day of _____ 20___ by attorney for the defendant.

_____
ATTORNEY FOR THE DEFENDANT

STATE OF ALABAMA)

COUNTY OF MORGAN)

Before me, the undersigned notary public in and for this state personally appeared _____ _____ who after being duly cautioned to speak the truth stated that the above motion and the allegations of the same were true and took said oath as I administered it before subscribing his name thereto in attestation to its truth this _____ _____ day of _____ 20___.

_____
NOTARY PUBLIC

STATE OF ALABAMA,	)	IN THE CIRCUIT COURT OF
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	)	CASE #_____
DEFENDANT.	)	

MOTION FOR COURT TO APPOINT COMMISSIONER TO TAKE THE DEPOSITION OF DEFENDANT'S WITNESS

The defendant asks the Circuit Court Clerk pursuant to 1975 Code of Alabama, 12-21-260 (b) to appoint _____ commissioner to take the testimony by deposition of the witness _____ at _____ o'clock _____, 20___. _____ is a private citizen. They are not related to the defendant or the victim by blood or marriage. They have no interest pecuniary or otherwise in the outcome of this criminal prosecution.

Said commissioner is requested to take the testimony of _____ by deposition and of no other witness at this time.

_____
ATTORNEY FOR THE DEFENDANT

STATE OF ALABAMA,	)	IN THE CIRCUIT COURT OF
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DEFENDANT.	)	

MOTION TO HAVE THE CONDITIONS OF VOIR DIRE CURRENTLY IN PLACE IN THIS CIRCUIT DECLARED INADEQUATE IN THIS CASE WITH REFERENCE TO VENIRE INFORMATION PROVIDED

This motion is made pursuant to Rules 12 and 18.2, of the Alabama Rules of Criminal Procedure. Under these two rules it is contended that the information which is currently provided on venire lists is inadequate. These two rules and their comments suggest a process whereby more meaningful information is made available to the court, the defense and the prosecution. In support of these contentions the defendant states as follows:

1. The method of providing the court, the defense and the prosecution with biographical information about each juror has been in place in this circuit for at least twenty years and has not changed since the adoption of the Alabama Rules of Criminal Procedure.
2. The method currently in place in this circuit is to provide counsel with a venire list containing the name, address, date of birth and place of employment (which frequently consists of the word “self” or “retired” or “unemployed”).
3. A careful reading of the fourth paragraph of the comments to Rule 18.2 shows that the system in place in this circuit is inadequate as to biographical information made accessible to court and counsel. This comment suggests that the following information be made available:
   (1) Name
   (2) Address
   (3) Occupation
   (4) Age of juror
   (5) Age of juror’s spouse
   (6) Employer’s name

(7) Number of years with employer

(8) Marital status

(9) Number of children

(10) Ages of children

(11) Length of residence in state

(12) Length of residence in county

(13) Whether they own land

(14) Extent of education

(15) Prior experience with law enforcement, if any

(16) Previous service as juror

(17) When, where and what type of case juror served on, if any

4. The comments referred to above state "The advisory Committee recommends that similar information be obtained by local rule whenever possible". It also states such a method would ". . . .speed up the process of juror selection by eliminating the need for tedious solicitation of such information from each juror on voir dire."

5. When the information provided in this circuit is compared to the suggestion in Rule 18.2 we easily see that the system in circuit is quite inadequate.

In view of the foregoing the defendant requests the following relief:

(1) that a hearing on the record be had where the court, the defendant and the prosecution can suggest a more meaningful method of providing counsel information on the venire of a biographical sort.

(2) This court consider a short, non-intrusive questionnaire being sent to veniremen with their summons which only solicits biographical information.

(3) That the policy adopted by the court be applied to subsequent criminal cases in this circuit.

(4) That the court give consideration to the attached exhibits as questions to be propounded.

6. The defendant requests that the information on the venire sought be provided at least (24) hours before trial under the dictates of Dodd v. State, 1 So.2d 670 (1941).

_____
ATTORNEY FOR THE DEFENDANT

STATE OF ALABAMA,	)	IN THE CIRCUIT COURT OF
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DEFENDANT.	)	

NOTICE OF THE TAKING OF ORAL TESTIMONY IN SUPPORT OF THE DEFENDANT'S MOTION FOR COURT TO DECLARE THAT THE INFORMATION WHICH IS CURRENTLY PROVIDED ON VENIRE LISTS IS INADEQUATE AND OFFER OF PROOF

Comes now the defendant in the above styled cause and states that in order to properly present the above captioned motion to this Honorable Court that oral testimony is necessary and states as follows:

1. In order to properly present this defendant's motion grounded in Rule 18.2, Alabama Rules of Criminal Procedure the defendant must call two witnesses:

   _____ Circuit Court Clerk

   _____ Jury Commissioner

2. In support of the defendant's motion he intends to present brief testimony on a narrow issue as to the capability of the Morgan County Jury Commissioner and the Morgan County Circuit Court Clerk to comply administratively with Rule 18.2

Wherefore, premises considered, the defendant moves this court to permit testimony in support of the above referenced motion.

_____
ATTORNEY FOR THE DEFENDANT

STATE OF ALABAMA,	)	IN THE CIRCUIT COURT OF
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MOTION FOR INDIVIDUALLY SEQUESTERED VOIR DIRE

Comes now the defendant in the above style cause pursuant to Rule 18.4 of the Alabama Rules of Criminal Procedure and moves this Honorable Court to allow him to individually voir dire each member of the venire, out of the presence of the other veniremen prior to striking the jury upon the following grounds:

1. Rules 18.4 (c), Alabama Rules of Criminal Procedure gives the court the power to order individually sequestered voir dire for good shown.
2. Individual questioning of prospective jurors out of the presence of the other prospective jurors is often essential to secure full and accurate responses from jurors about sensitive matters. Indeed individually sequestered voir dire may be constitutionally required in certain instances. In Jordan v. Lippman, 763 F.2d 1265 (11th Cir. 1985) the court relying upon the Supreme Court's decisions on Irvin v. Dowd, 366 U.S. 717 (1961) and Patton v. Yount, 467 U.S. 1025 (1984) held that when a significant possibility of prejudice is shown, voir dire must be adequate "to unearth such potential prejudice in the jury pool" 763 F.2d at 1078. In Jordan, *supra* the court vacated the conviction because the voir dire wasn't adequate. See also Coleman v. Kemp, 778 F.2d 1487, 1542 (11th Cir. 1985) which found group voir dire inadequate where there has been a large amount of pretrial publicity. Courts have pointed out the inadequacy of group voir dire in sensitive situations. "First, the juror may be reluctant to admit any bias in front of his peers. . . . second, ... group questioning serves to appraise otherwise ignorant jurors of the prejudicial matter Williams v. Griswald, 743 F.2d 1533, 1540, Note 14 (11 Cir. 1984). In Coleman v. Kemp, supra the court pointed out that in these circumstances the preferable procedure would be those set out in the American Bar Association's standards:

> If there is a substantial possibility that the individual jurors will be ineligible to serve because of exposure to potentially prejudicial material, the examination of each juror with respect to exposure shall take place outside the presence of other chosen and prospective jurors.

An effective voir dire requires that counsel be able to ask jurors open ended questions to determine what they have read or heard about the crime and the person accused, their attitudes on the death penalty, and other sensitive matters. This can not be accomplished in a group setting. Once the juror answers and describes prejudicial material to which he or she has been exposed, it contaminates the entire panel. The danger that potential jurors will be prejudiced by comments made by other potential jurors makes effective questioning an impossible exercise.

3. A group voir dire is also prejudicial because jurors learn the appropriate responses from observing what happens when their fellow jurors answer questions from the court or counsel. Thus, jurors who want to stay on the case or to be excused may be less than candid in responding to inquiries once they know the consequences of their answers.

4. There is a heightened standard of due process and reliability that is required in capital cases. When in doubt, the benefit should go to the defendant on questions of procedure. The inhibiting effect of the presence of a large group of jurors upon the questioning of a prospective juror is well settled in Irvin v. Dowd, 366 U.S. 717 at 728 (1961):

> No doubt each juror was sincere when he said that he would be fair and impartial but the psychological impact of requiring such a declaration before one's fellows is often its father.

Many courts have accepted the proposition that individual voir dire promotes condor and have indicated that it might be required when there has been pretrial publicity. Note the case of Coppedge v. United States, 272 F.2d 504 at 508 (D.C. Cir. 1959):

> It is too much expect of human nature that a juror would volunteer, in open court, before his fellow jurors, that he would be influenced in his verdict by a newspaper story of the trial.

See also U.S. v. Hawkins, 658 F.2d 279 (5th Cir. 1981); U. S. v. Davis, 583 F.2d 190, at 196-98 (5th Cir. 1978); U.S. v. Dellinger, 472 F.2d 340, 374-77 (7th Cir. 1972) Cert., denied 292 U.S. 1022 (1969); Silverthorn v. United States, 400 F.2d 627, at 639 (9th Cir. 1968) Cert. denied 400 U.S. 1022 (1971); U.S. v. Bryant, 471 F.2d 1040 at 1043-45 (D.C. Cir. 1972) Cert. denied 409 U.S. 1112 (1973); U.S. v. Milanovich, 303 F.2d 626, at 629 (4th Cir. 1962) and United States v. Lord, 565 F.2d 831, at 838-39 (2nd Cir. 1977).

5. The imminent Justice Brennen wrote in his opinion concurring in part and dissenting in part in Turner v. Murray, 476 U.S. 28, 42-43:

> A trial . . . . is, at bottom, nothing more than the sum total of a countless number of small discretionary decisions made by each individual who sifts in the jury box. The difference between conviction and acquittal turns on whether key testimony is believed or rejected; on whether an alibi sounds plausible or dubious; on whether a character witness appears trustworthy or unsavory; and on whether the jury concludes that the defendant had a motive, the inclination, or the means available to commit the crime charge. A . . . . . bias juror sits with blurred vision and impaired sensibilities and is incapable of fairly making the myriad decisions that each juror is called upon to make in the course of the trial. To put it simply, he can not judge because he has prejudged.

The law is very clear that trial judges must adopt procedures for voir dire that provide a "reasonable assurance" that prejudice would be discovered if present. U.S. v. Nell, 526 F.2d 1223, at 1229 (5th Cir. 1976); United States v. Holeman, 682 F.2d 1340, at 1344 (11th Cir. 1982) and Berryhill v. Zant, 858 F.2d 633 (11th Cir. 1988). The insistence on individual, sequestered voir dire in those capital cases that have been the subject of extensive pretrial publicity is a necessary and natural outgrowth of the principles laid down by the United States Supreme Court in Irvan v. Dowd, *supra*. Individually sequestered voir dire establishes a specific procedure by which constitutional standards can be established that numerous federal and state courts as well as the judicial conference have recognized. See revised report of the Judicial committee on The Operation of The Jury System on The "Freepress – Fair Trial" issue, 87 F.

R. D. 519 at 532-33 (1980).

6. In a capital case trial by an impartial jury is of a more paramount interest to the defendant and to the court because that jury not only decides the issue of guilt or innocence of the defendant, but if he is found guilty, must also determine whether he should live or die.

ATTORNEY FOR THE DEFENDANT
EAST PODUNK, ALABAMA

STATE OF ALABAMA,) IN THE CIRCUIT COURT OF
PLAINTIFF,) MORGAN COUNTY, ALABAMA
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DEFENDANT.)

MOTION FOR INDIVIDUALLY SEQUESTERED VOIR DIRE OF ANY VENIREMAN WHO CLAIMS ANY PRIOR KNOWLEDGE OF THE FACTS OF THIS CASE

Comes now the defendant pursuant to Rule 18.4 (c), Alabama Rules of Criminal Procedure, and 1975 Code of Alabama, 13A-5-53 (b) (1) and requests that this court grant individually sequestered voir dire as to any potential juror who claims knowledge of the facts of this case.

The defendant intends to question such veniremen thoroughly in three specific areas of such knowledge:

1. How the knowledge was obtained
2. What such prior knowledge consist of
3. How such prior knowledge would influence their deliberations and their view of the testimony elicited from witnesses

The defendant 's counsel is obliged to question such veniremen carefully and thoroughly on these points.

It is a fact that potential jurors are more candid when questioned privately on the record than in open court. Both the court and the litigants want to insure that candid answers are given to sensitive and crucial voir dire questions.

A thorough questioning on the three topics listed above will clearly illicit responses which may prejudice the minds of other panel members. A juror must base their decision on the facts proved in court alone. Questioning a venireman about private knowledge of the facts of the case will certainly introduce extraneous material concerning this case which will not be proved in court. Such questioning gives the venireman questioned the potential to expose clearly illegal and incompetent evidence before other jurors.

If the defendant's counsel fulfills his sacred obligation to this defendant he must

be very thorough and exhaustive in questioning the veniremen who claims knowledge of any facts in this case. His questions must be plain and searching and designed to elicit the maximum of information. Such questions can not be closed ended and leading but must be completely open ended. He certainly can not frame his questions in an obtuse and tangentual fashion in fear that an answer given will prejudice the whole panel.

_____

ATTORNEY FOR THE DEFENDANT
EAST PODUNK, ALABAMA

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PLAINTIFF,	)	MORGAN COUNTY, ALABAMA
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	)	CASE #_____
DEFENDANT.	)	

MOTION FOR VENIRE LIST TO BE MADE AVAILABLE AT LEAST ONE (1) WORKING DAY PRIOR TO COMMENCEMENT OF THE DEFENDANT'S TRIAL

Comes now the defendant pursuant to Rule 18.2 and paragraph 6 to the comments thereof and the case of Dodd v. State, 1 So.2d 670 (1941) and requests this honorable court to enter an order requiring the jury commissioner and the Circuit Court Clerk of Morgan County, Alabama to make available to the defendant's counsel and to the prosecution a copy of the full venire list at least on full working day prior to the venire being assembled.

_____

ATTORNEY FOR THE DEFENDANT
EAST PODUNK, ALABAMA

STATE OF ALABAMA,	) IN THE CIRCUIT COURT OF
PLAINTIFF,	) MORGAN COUNTY, ALABAMA
v.	)
	) CASE # _____
DEFENDANT.	)

MOTION FOR COURT TO PLACE ON THE RECORD ALL EXCUSES GIVEN BY JURORS WHO ASK TO BE EXCUSED FROM SERVICE

Comes now the defendant in the above styled cause and moves this court to require all persons asking to be excused from jury service to state their excuses upon the record of this case on the following grounds:

1. The defendant does not request to hear all the excuses offered by veniremen as to why they do not feel they should be required to serve as juror.
2. However, the defendant does request that all excuses given to this court by any juror be made a part of the record.
3. The case of Steward v. State, 601 So.2d 491 (1992) was a capital case. That case may well have been reversed because of the improper excusal of a juror but the following occurred:
   (a) The defendant objected to the excusal of a certain juror.
   (b) The reason for the excusal was not in the record and thus couldn't be considered by the appellate court. The court reporter marked the excuse "inaudible" (p. 500, Col. 2)
4. If the juror's excuse is not in the record and the defendant objects to the excuse the court's excusal is presumed correct because there is no record Plant v. State, 37 So. 159 (1904) p. 160. The defendant dos not wish to be placed in this position and indeed needs a complete record if appeal becomes necessary.

_____
ATTORNEY FOR THE DEFENDANT
EAST PODUNK, ALABAMA

STATE OF ALABAMA,	) IN THE CIRCUIT COURT OF
PLAINTIFF,	) MORGAN COUNTY, ALABAMA
V.	)
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DEFENDANT.	)

MOTION TO REQUIRE THE DISTRICT ATTORNEY TO DISCLOSE PAST AND PRESENT RELATIONSHIPS AND ASSOCIATIONS WITH PROSPECTIVE JURORS ON THE VENIRE LIST

Comes now the defendant in the above styled cause and moves this court to grant this motion for disclosure and as grounds therefore states as follows:

1. This case involves sensitive, emotional issues of violence which will make selection of impartial jurors difficult. The case has received considerable publicity and the deceased in this case was well known in this community as is his family.
2. This difficulty is compounded by the small size of this community and the fact that the district attorney has personal ties with many of the prospective jurors which will impede the ability to make a fair and impartial determination of the issues.
3. Discovery of religious, social, business, professional, recreational and political associations, and previous employment by or dealing with any prospective juror or juror's family as to the criminal justice system is essential to a thorough voir dire of the jurors and selection of an impartial jury.
4. History and common sense indicate that prospective jurors are often hesitant to reveal such relationships.
5. As a matter of record the district attorney has been active in the Democratic Party in Morgan County. He has been a candidate in at least two Democratic Primaries and has had opposition in one final election. He has therefore of necessity had from amongst the community jurors who both worked in his campaign and contributed financially to it.

Wherefore premises considered the defendant moves this Honorable

Court to grant this motion and enter an order in accordance herewith requiring the district attorney to disclose any religious, social, business, professional, recreational and political associations as well as previous employment (while in private practice) with any prospective juror.

_____
ATTORNEY FOR THE DEFENDANT
EAST PODUNK, ALABAMA

STATE OF ALABAMA,	)	IN THE CIRCUIT COURT OF
PLAINTIFF,	)	MORGAN COUNTY, ALABAMA
V.	)	
	)	CASE #____
DEFENDANT.	)	

MOTION FOR COURT TO "LIFE QUALITY' THE JURY IN THE QUALIFYING PHASE PRIOR TO VOIR DIRE

Comes now the defendant in the above styled cause and moves this court to "life quality" the jury prior to attorney conducted voir dire and as grounds states as follows:

1. For years the law in Alabama placed the burden on defense counsel to "life quality" the jury in the attorney conducted portion of the voir dire.
2. In Henderson v. State, 583 So.2d 276, 283 (1991) the dicta in said case indicated that the trial judge should both life and death quality the jury. Because it was dicta the Alabama law on this point was not unmistakably clear.
3. The United States Supreme Court has made it crystal clear in [County] v. Illinois, 112 S ct 2222, 119 L.Ed2d 492 (1992) which was very recently decided. This case placed squarely on the shoulders of the trial judge the primary responsibility for "life qualifying" the jury panels.
4. The trial judge's question required by [County] v. Illinois, is:
   If you found _____ guilty, would you automatically vote to impose the death penalty no matter what the facts are?

The defendant requests the trial judge to ask the above question in this case prior question in this case prior to attorney conducted voir dire.

_____
ATTORNEY FOR THE DEFENDANT
EAST PODUNK, ALABAMA

STATE OF ALABAMA,	)	IN THE CIRCUIT COURT OF
PLAINTIFF,	)	MORGAN COUNTY, ALABAMA
V.	)	
	)	CASE #_____
DEFENDANT.	)	

MOTION FOR COURT TO GIVE CAUTIONARY INSTRUCTIONS PRIOR TO VOIR DIRE

Comes now the defendant in the above styled cause and moves this court to give the following cautionary instructions to the venire prior to any voir dire as the same as a correct statement of the law:

Proposed Jury Instruction. In Alabama there are two possible penalties for a person who is convicted of capital murder. Those penalties are life imprisonment without possibility of parole or death. Alabama has a two phase trial in those cases in which the death penalty may be imposed. The same jury is used for both phases.

The first phase is called the innocence – guilt phase. In this phase the jury decides whether the State has proven the defendant guilty beyond a reasonable doubt. In making this decision of its verdict or any possible sentence. If the accused is found not guilty of capital murder, the proceedings are ended for the jury. But if the defendant is found guilty of capital murder, the jury is brought back for a second phase of the trial. At that time the jury instructions and arguments of counsel. The jury then decides the penalty of life in prison without parole or death.

In this case _____ has pleaded not guilty and is presumed to be innocent. The State has the burden of proving _____ _____ guilty beyond a reasonable doubt.

As this is a capital one possibility, if guilt is established beyond a reasonable doubt, is that the death penalty could under certain circumstances, be given. Because of that possibility it is proper for counsel and the doubt to ask you at this certain questions about inquiry, however, has absolutely no relationship to whether or not the accused is guilty of the crime for which he is charged. Do not conclude, merely because an attorney or the court itself, asks questions about your attitude about the death penalty that this should be taken as any indication whatever that they believe the accused to be guilty or presuppose that a

finding of guilty will be made.

_____

ATTORNEY FOR DEFENDANT
EAST PODUNK, ALABAMA

STATE OF ALABAMA,) IN THE CIRCUIT COURT OF
PLAINTIFF,) MORGAN COUNTY, ALABAMA
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) CASE #_____
DEFENDANT.)

MOTION FOR SPECIAL CAUTIONARY INSTRUCTIONS

DURING THE VOIR DIRE PROCESS

Comes not the defendant in the above styled cause and moves this Honorable Court as follows:

1. Sequestration of the jury in a capital case is not required until the trial jury is finally selected 1975 Code of Alabama 12-16-9 (a) and Stewart v. State 601 So.2d 491 (1992).

2. This court normally allows voir dire of a capital jury in panels of twelve persons and goes through a sufficient multiple of panels until 54 qualified veniremen are available to strike from.

3. The selection of a capital jury normally takes one day and sometimes two or more days.

4. When a panel has been questioned by both counsel and the court they are allowed to return to the jury room and interact with other veniremen.

5. During this normal interaction with other veniremen things can very easily occur which are prejudicial to the defendant and to the prosecution from this interaction.

6. To issue a fair trial from both the standpoint of the defendant and the prosecution certain cautionary instructions before this social interaction are necessary.

7. The defendant feels the following things are necessary

(a) That the jurors be strictly cautioned not to discuss the facts, rumors or anything they have heard with the other members of the venire involving the case at hand.

(b) That the jurors are not to discuss with other members of the venire what questions were propounded to them in this case by the counsel for defendant, the prosecution or the court.

(c) That all veniremen be cautioned not to engage in any discussion whatever about any aspect of State v. _____, the defendant, the victim of any witness or potential witness.

_____

ATTORNEY FOR DEFENDANT
EAST PODUNK, ALABAMA

STATE OF ALABAMA,	) IN THE CIRCUIT COURT OF
	)
PLAINTIFF,	) MORGAN COUNTY, ALABAMA
	)
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DEFENDANT.	)

TRIAL BRIEF

STATUTORY STRIKES FOR CAUSE

This brief is based on 1975 Code of Alabama, 12-16-150 specifically dealing with challenges for cause in criminal cases. Each reason has a separate listing:

1. That the person has not been a resident householder or freeholder in this county for the last preceding six months.
   A. The six month time frame runs from the date of swearing backward for six months. Stanford v. State, 39 So. 370 (1905) and Maund v. State, 48 So.2d 553 (1950).
   B. "Resident" and "householder" being words denoting an intent to be a resident of the county, a transient with a mere sleeping room and no intent to establish a residence in the county does not qualify as a potential juror. Aron v. State, 37 AL 106 (1861).
2. That the person isn't a citizen of Alabama.
3. That the person has been indicted in the preceding twelve months for a felony or an offense of the same character as that with which the accused is charge.

   Assault with intent to murder is an offense of similar character to capital murder Charleston v. State, 32 So.2d 259 (1902).
4. The person is connected by blood relationship within the ninth degree or by marriage within the fifth degree computed according to the rules of civil law with either the defendant, the prosecutor or the victim.
   A. This strike for cause exists in conjunction with Article I Section 6 of the 1901 Constitution or Alabama, guaranteeing a fair and impartial

trial Vaughn v. State, 395 So.2d 95 (1979).

B. Such a relationship within the forbidden degree with a witness does not trigger this provision. Tucker v. State, 454 So.2d 541 (1983).

C. This kinship provision is an absolute bar to service regardless of whether a party wishes to challenge the venireman. Little v. State, 339 So.2d 1073 (1976).

D. When you raise this issue as to a potential juror the court then has the duty to determine the precise degree of kinship. Mock v. State, 375 So.2d 476 (1978).

E. If a venireman is related within the prohibited degree to the defendant's co-defendant this is also a bar to jury service Thomas v. State, 32 So. 250 (1902).

F. This rule applies to the defendant, the co-defendant, the victim or the prosecutor. It doesn't apply to defense counsel Logan v. State. 37 So.2d 753 (1948).

5. That the person has a felony conviction.

6. That the person has an interest in the conviction or the acquittal of the defendant or has made any promise or given any assurance that they will convict or acquit the defendant.

The financial interest of the person must be clear and direct. The fact that such person is in a similar business as the defendant and would stand to gain financially if the defendant went to prison by gaining his customers is not sufficient to disqualify Ledbetter v. State. 422 So.2d 909 (1982).

If the prospective juror is an employee of the victim of the theft, which was a large business organization, this is not a sufficient financial interest to disqualify the person Little v. State, 399 So.2d 1071 (1976).

A police officer of the city where the offense was committee is disqualified because they have a duty to enforce the laws of that municipality Shapiro v. City of Birmingham, 10 So.2d 38 (1942). This case also by its holding probably disqualifies county deputies and state

troopers as having an "interest" in the case made by their agency.

The above rule is not correct if the potential juror is a city policeman and the state made the case without the assistance of that person's department Nettles v. State, 435 So.2d 151 (1983).

7. The person has a fixed opinion as to the guilt or innocence of the accused.

A. The mind of a juror should be in such a state of freedom that they are capable of giving to the accused the weight of the presumption of innocence and the benefit of a reasonable doubt. Long v. State, 5 So. 443 (1889); Mathis v. State, 296 So.2d 760 (1973).

B. A "fixed opinion" is: The mere formation of an opinion, founded on rumor or hearsay, which is subject to change on hearing the evidence, and leaves the mind of the juror free to impartially consider the whole evidence, without giving undue credence to that which tends to prove the facts as heard, and to apply to the evidence the law as pronounced by the court, is not sufficient to disqualify. But an opinion, whether founded on rumor or conversations with witnesses, or an observation, which is conviction, a prejudgment, disqualifying the juror to impartiality consider the whole evidence – that which tends to prove the facts as heard, as well as that which contradicts or explains, - and to apply free from bias the law as given in charge by the court, is a fixed opinion which will bias the verdict . . . . That light impressions, which may fairly be supposed to yield to the testimony that may be offered, which may leave the mind open to a fair consideration of the testimony, constitute no sufficient objection to a juror, but those strong an deep impressions, which will close the mind against the testimony that may be offered in opposition to them, which will combat that testimony and resist its force, do constitute sufficient objection to him. Stewart v. State, 405 So.2d 402, 407 (1981).

C. It is sufficient if a potential juror can lay aside their impression or opinion and render a verdict based on the evidence presented in

court Marthis v. State, 296 So.2d 760 (1973).

D. To disqualify the opinion must be so fixed as to bias the verdict Black v. State, 596 So.2d 40 (1991). Juror must be able to eliminate the prejudice and bias and render a judgment according to the evidence Marshall v. State, 598 So.2d 14 (1991).

E. Bias or prejudice against a certain defense is embraced within this section of the statue (insanity) Thomas v. State, 539 So.2d 375 (1988).

F. If a clear prejudicial attitude is initially indicated the correct way to rehabilitate the person is to commit them to follow the law as given by the judge in his charge Pierce v. State, 576 So.2d 236 (1990). Quote the law to the potential juror or better yet, read the charge on the point at issue and get the juror to commit to it.

8. The person is under 19 years of age.

9. The person is of unsound mind.

10. The person is a witness in the case.

_____
ATTORNEY FOR THE DEFENDANT
EAST PODUNK, ALABAMA

STATE OF ALABAMA,	)	IN THE CIRCUIT COURT OF
PLAINTIFF,	)	MORGAN COUNTY, ALABAMA
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TRIAL BRIEF ON THE ISSUE OF GROUNDS FOR COMMON LAW CHALLENGES

FOR CAUSE

Common law challenges for cause are non-statutory challenges for cause. Their basis is found in case law and the broad general language of Rule 18.4 (e) Alabama Rules of Criminal Procedure and the comments to that rule.

1. A juror may be challenged for cause on a ground no specifically enumerated in 12-16-150 but recognize at common law Nobis v. State, 401 So.2d 191, 197 (1981).

2. The common law challenges for cause are enumerated in Braner v. Walreston, 121 So. 404, 406 (1928). The common law recognized specifically a "challenge to the favor" which was a "matter which imparts absolute bias or favor" which as a "matter which imparts absolute bias or favor, and leaves nothing to the discretion of the court." Alabama courts have not been so very strict as to require "absolute" bias or favor.

3. The current rule in Alabama is best stated as, "Probable prejudice for any reason disqualifies a juror." Grandquest v. Williams, 135 So.2d 391 (1961).

4. It was reversible error for the trial court not to excuse a potential juror who stated that he was friends with the defendant and that this friendship "might embarrass him: in returning the true and proper verdict". Grandquest v. Williams, 135 So.2d 391, 393 (1961).

5. A potential juror who had a friendship with the plaintiff's attorneys and as a result stated that "he would give the plaintiff's attorneys and as a result stated that "he would give the plaintiff the benefit of any doubt" should be excused for cause. His opinion would influence his verdict. Grandquest v. Williams, *supra* p. 395.

6. The fact that a potential juror resides in the home of the plaintiff imputes a prejudice without any response to questioning. Grandquest v. Williams, *supra* p. 395.

7. It is reversible error to deny to deny a challenge for cause as to a venireman who was the brother of a material witness for the state regardless of their responses to voir dire. Ex parte Tucker, 454 So.2d 552 (1984).

8. A venireman who expresses some doubt as to whether they could remain impartial because of her social acquaintance with one of the defendant's witnesses should be removed for cause (even though neither party challenged her). Lacy v. State, 629 So.2d 688 (1993).

9. If a potential juror volunteers a predisposition as opposed to revealing it in response to questioning this predisposition carries quite a bit more force in the law. When predisposition is admitted voluntarily and not in response to a question a strike for cause should generally be granted. See Hunter v. State, 585 So.2d 220 (1991):

> Once a juror makes an initial statement that is vague, ambiguous, equivocal, uncertain, or unclear or that shows confusion, it is the trial judge's function to question the juror further, so as to ascertain whether the juror can be impartial. However, once a juror indicates initially that he or she is biased or prejudiced or has deep seated impressions, so as to show that he or she can not be neutral, objective or impartial, the challenge for cause must be granted. This is particularly true when a juror volunteers her doubts. (emphasis added) (at p. 222).

10. Probable prejudice for any reason disqualifies a prospective juror Alabama Power Company v. Henderson, 342 So.2d 323 (1976); Motes v. State, 356 So.2d 712 (1978). If a venireman is reluctant or hesitant about laying aside their predisposition, what is the acid test, how strong must the opinion be to disqualify them? The test is defined in Carter v. State, 420 So.2d 292, 295 (1982) and is "inability to decide the case on the evidence alone".

11. How strong must a predisposition be to disqualify a venireman for service by requiring a strike for cause? This question is answered in three cases Fisher v. State, 587 So.2d 1027 (1991):

> A prospective juror's opinion is so fixed that he or she could not ignore it and try the case fairly and impartially according to the law and the evidence (p. 1034). (emphasis added).

See also Perryman v. State, 558 So.2d 972 (1989):

> Thus, even though a prospective juror admits to a potential bias, if further voir dire examination reveals that the juror in question can will base his decision on the evidence alone, then the trial judge's refusal to grant a motion to strike for cause is not error (p.977). (emphasis added)

This phrase "on the evidence alone" became the standard in Stringfellow v. State, 485 So.2d 1238, 1241 (1986). We clearly see that the true test is, "can the juror ignore their predisposition and render a verdict on the evidence and the law alone?" Anything less than this standard should be a common law strike for cause. This standard using the word "ignore" is found in England v. State, 601 So.2d 1108, 1109 (1992).

12 When is the result of a venireman indicating predisposition toward the law and/or facts who upon further questioning states that they can put the opinion aside and "ignore" the predisposition? Is their naked assertion of their ability to do that adequate to qualify them as jurors? These questions are asked and answered in Williams v. State, 601 So.2d 1062, 1069 (1991):

> In reaching its decision to exclude a juror for cause, the trial court need not determine whether this impairment has been demonstrated with unmistakable clarity. It is sufficient if the trial court, after taking into consideration the venireman's answers and demeanor, is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law.

The trial judge is not bound by the response alone. Also to be considered are the "manner of speech, demeanor, body language, tone and appearance of the juror responding Brownlee v.State, 595 So. 2d 151, 159 (1988). These impressions are hard to get into the record and would only have merit if (1) the venireman indicated a clear prejudice about the facts or law (2) under further voir dire they indicated that they could set the prejudices aside (3) the court did not accept their assurances and excused them (4) the defendant objected to the strike for cause.

13. If a venireman equivocates in any way as to whether or not they can put

their preconceived opinion out of their minds and base their verdict solely on the facts and the law as given to them by the trial judge they are subject to a common law strike for cause. By equivocating I mean responses along the line of "I hope I can put it aside", "I will really try to forget that factor when I make my decision", "I think I can forget that but I feel a little awkward".

In Ford v. State, 628 So.2d 1068 (1993) a potential juror responded he would feel "a little awkward" about serving on this jury because he knew the defendant's wife "real well". A strike for cause was mandated because the answer equivocated (p. 1071).

In Dinkins v. State, 584 So.2d 732 (1991) the trial court did not abuse its discretion in excusing for cause a juror who said knowing the accused and his family "would make it difficult for him to serve". The answer was equivocating (p. 933).

In Woods v. State, 568 So.2d 331 (1990) the potential juror stated that he had once dated the defendant's sister and "would rather not serve". Excusing the person for cause was not an abuse of discretion (p. 332).

In England v. State, 602 So.2d 1108 (1992) the defendant was convicted of the murder of a new born infant. During the voir dire process a potential juror stated that because she herself had a new baby at home, "It would be hard for me to be fair, I think". The trial court was put in error for failing to grant the challenge for cause (p. 1108).

In Hunter v. State, 585 So.2d 229 (1989) the defendant was convicted of child abuse. After stating that she was an emotional person "when it comes to children being abused" when she was asked by the trial judge if she could listen to the evidence and make a decision based on the evidence in the case she replied "I don't know". The trial court committed reversible error in not granting the challenge for cause (p. 221).

In Knop v. State, 561 So.2d 229 (1989) the trial court was put in error for failing to grant a challenge for cause as to a venireman who stated she "probably" could be "fair and impartial" to the plaintiff although there was "some doubt" (p. 232).

In Lacy v. State, 629 So.2d 688 (1993) it was not an abuse of

discretion for the court to excuse for cause a venireman who had a social relationship with one of the defendant's witnesses. When asked if the relationship would cause him any bias he responded, "I guess not. I wouldn't think so". The trial judge questioned the potential juror further telling him ". . . .I need to know whether you have doubt or hesitation" (about whether he could serve on this jury). To which the person responded, "maybe I better not" (serve) (p. 690).

All of the foregoing cases lead us to conclude that the answer to the question "can you put aside your opinion in that matter and decide this case on the facts and the law alone?" must be an unequivocal "yes". Less than a clear "yes" mandates a strike for cause.

14. What authority is there for granting a common law strike for cause if the response to the foregoing question is less than a clear "yes"? In Word v. Woodham, 561 So.2d 224, 227 (1989) a venireman who responded "she would do her best to make a decision only on the evidence" gave an equivocal answer and should have been striken for cause. In Motes v. State, 356 So. 2d 712, 718 (1978) a venireman who responded ". ... its a possibility" that he could listen to the evidence objectively and render a fair verdict should be striken for cause.

15. What if the court listens to the responses of a potential juror and is unsure of whether to grant the defendant's strike for cause or not? If there is a question in the mind of the court in a criminal case as to whether or not a potential juror should be striken for cause, the doubt should be resolved in favor of the defendant striking the juror. Stinson v. State, 135 So. 571 (1931); Wilson v. State, 8 So.2d 422 (1942).

16. When we refer to a bias or predisposition in the mind of a potential juror, what sort of bias or predisposition are we referring to - bias or predisposition toward what? A potential juror who will not be governed by the established rules as to the weight and effect of evidence is incompetent to serve and should be striken for cause Mason v. State, 546 So.2d 127 (1988);Johnson v. State, 534 So.2d 686 (1988).

17. Bias toward a certain kind of evidence is the manifestation of a predisposition-

against guilt or innocence because of a reason extrinsic in the evidence Watwood v. State, 389 So.2d 549 (1980). A common area that this occurs in is if a venireman would give more weight to the testimony of a law enforcement officer simply on the fact that the witness was a law enforcement officer Johnson v. State, 536 So.2d 127 (1988); Uptain v. State, 534 So.2d 686, 687 (1988). This issue of course should be raised if the venireman has this sort of preconceived opinion as to evidence coming from any sort of witness (ministers, DHR workers, FBI agents, etc.).

18. A juror is subject to a common law challenge for cause if they indicate that they could sit on a jury and listen to the facts but would place a greater burden of persuasion on a party as to that party's proof than the law permits. In Fordham v. State, 513 So.2d 21 (1986) the court was not put in error for granting a common law strike for cause of a venireman who stated he "wouldn't find the defendant guilty unless they were 100% convinced of his guilt". In this case the trial court based its decision on the fact that the juror said he would in effect apply his own burden of proof (p. 34). In Knap v. McCain, 561 So.2d 229, 232 (1989) the trial court was reversed for failing to grant a challenge for cause on a venireman who stated in a medical malpractice case that ". . . . the evidence would have to be overwhelming for your client before I would give her money".

19. Suppose that a juror disagrees with the law to be applied in the case. Assume that they indicate that they personally feel that the law should be other than as it is and would apply it differently than the way the court would instruct them in cases of the nature as the one on trial. This is a prejudice and predisposition towards the law in point in the case. This is a common law strike for cause Carter v. Beasley, 228 So.2d 770 (1969) (Venireman stated he would hold a will from a husband to a wife valid under all circumstances where no children were living). This objection should be carefully laid. If you are in trial you should have prepared the major portion of your requested jury charges. To begin this sort of inquiry read the charge to the venireman in the wording you feel the trial court will use.

20. Knowledge of the facts of the case on trial does not normally give rise to a strike for cause yet, if the knowledge of the facts was gained from an actual party to the case or someone purporting to have direct knowledge of the facts gained through a face to face discussion with the venireman then a strike for cause is mandated United States Rolling Stock Company v. Weir, 11 So. 436 (1892).

21. The court must consider the entire colloquy with the venireman as if the answers as a whole show a bias then a strike for cause is mandated Dixon v. Hardy, 591 So.2d 37 (1989).

22. The case of Dixon v. Hardy, 391 So.2d 3 (1989) intimated that a privileged or fiduciary relationship existing between the venireman and a party to the case is *prima facie* bias without further questioning or proof (p. 7). This issue should be raised as to any fiduciary relationship (a member or employee of a law firm that represents the defendant, their CPA, their minister, their psychologist, banker or investment adviser, etc.)

23. Forcing the defendant to use even- one preemptory strike to remove a potential juror who should have been striken for cause is reversible error without a showing of any prejudice Swain v. Alabama, 13 L. Ed 2d 759 (1965); Mason v. State, 536 So.2d 127, 129 (1988).

_____
ATTORNEY FOR DEFENDANT
East Podunk, Alabama

STATE OF ALABAMA,	)	IN THE CIRCUIT COURT OF
PLAINTIFF,	)	MORGAN COUNTY, ALABAMA
V.	)	
	)	CASE #_____
DEFENDANT.	)	

MOTION FOR COURT TO EXCLUDE ALL POTENTIAL WITNESSES PRIOR TO INSTITUTING THE VOIRE DIRE

Comes now the defendant in the above referenced action pursuant to Rule 9.3 (a), Alabama Rules of Criminal Procedure and asks that the court order that all potential witnesses be excluded from the courtroom prior to the initiation of voir dire.

The right of a defendant to request "The Rule" attaches "prior to or during any proceeding". The defendant asks that it be done prior to the initiation of voir dire.

_____
ATTORNEY FOR DEFENDANT
East Podunk, Alabama

STATE OF ALABAMA,	)	IN THE CIRCUIT COURT OF
PLAINTIFF,	)	MORGAN COUNTY, ALABAMA
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DEFENDANT.	)	

MOTION TO DISQUALIFY ALL POTENTIAL JURORS WHO KNEW THE DECEASED OR WERE ACQUAINTED WITH THEIR IMMEDIATE FAMILY

The defendant asks this court to disqualify all potential jurors who were acquainted with the victim or who know the victim's immediate family and for authority and substance of this motion states as follows:

1. 1975 Code of Alabama, 13A-5-53 (b) (1) requires a finding from an appellate court that the verdict of the jury was not rendered ". . . . under the influence of passion, prejudice, or any other arbitrary factors".
2. Dating back to Blackstone's Commentaries On The English Common Law, our ancestors relinquished the practice of selecting jurors who knew beforehand the parties and the witnesses 3 W. Blackstone, Commentaries 359. The reasoning behind this relinquishment was because " . . . . jurors coming out of the immediate neighborhood, would be apt to intermix their prejudices and partialities in the trial of right". For this reason for centuries now jurors are selected from the county at large rather than from the neighborhood where the offense occurred.
3. All defendants are guaranteed a trial by an impartial jury Irvin v. Dowd, 366 U.S. 717, 722 (1961). This right is preserved in Article I, Section 6 of the 1901 Constitution of Alabama.
4. In the trial of a capital case there is a bifurcated trial. The jurors may be called upon to decide whether the defendant should receive death or life without parole as punishment. The relative wealth of the victim or their standing in the community is of no consideration in determining whether a death sentence is appropriate or not Dill v. State, 600 So.2d 343, 364 (1991). See also Booth v. Maryland, 96 L. Ed 2d (1987). A venireman who knew the victim or is acquainted with his immediate family is certainly aware of the

deceased's standing and reputation in the community.

8. A person who knew the deceased and is acquainted with their immediate family is also aware of the grief felt by the surviving family members. Grief over the death of a family member is an emotional and passionate issue. It would be a rare family member who did not grieve over such a loss.

9. Even in the guilt phase of a capital trial it is still the law that the decision of guilty or not guilty can not be entrusted to a jury ". . . . deliberately slanted for the purpose of making the imposition of the death penalty more likely". Lockhart v. McCree, 90 L.Ed. 2d 137, 151 (1986).

10. In Turner v. Louisiana, 13 L.Ed. 2d 424, 429 (1965) it held:

> The requirement that a jury's verdict "must be based on the evidence developed at the trial" goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury. The jury is our essential instrumentality – an appendage – of the court, the body ordained to pass your guilt or innocence. Exercise of calm and informed judgment by its members is essential to proper enforcement of law.

This is still the law. The only factors a jury is permitted to use in determining whether this defendant should live or die or (1) the evidence in the case developed in the guilt phase and presented in the penalty phase (2) the court's instructions as to the law to be applied. There are no other factors upon which a juror can base their verdict.

8. A venireman who was acquainted with the deceased or who knows the immediate family is aware of items which may not be developed in the evidence. The knowledge possessed by this sort of venireman is not capable of being subjected to any of the procedures necessary to guarantee a fair trial and this defendant is accordingly deprived of fundamental protections. See Turner v. Louisiana, *supra* at 929:

> In the constitutional since, trial by jury in a criminal case necessarily implies at the very least that the "evidence developed" against the defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, and cross-examination, and of

counsel.

9. In the jury selection process the defendant is constitutionally guaranteed the right to select jurors from a pool of persons who will base the life or death decision solely on the character of the defendant as demonstrated through the evidence presented and the character of the offense as demonstrated in the same way Zandt v. Stephens, 77 L.Ed.2d 235, 251 (1993).

_____
ATTORNEY FOR DEFENDANT
East Podunk, Alabama

STATE OF ALABAMA,) IN THE CIRCUIT COURT OF
PLAINTIFF,) MORGAN COUNTY, ALABAMA
V.)
) CASE #_____
DEFENDANT.)

TRIAL BRIEF ON THE ISSUE OF HOW STRONG A VENIREMAN'S VIEWS AGAINST CAPITAL PUNISHMENT MUST BE TO AUTHORIZE A CHALLENGE FOR CAUSE UNDER WAINWRIGHT v. WITT

1. Wainwright v. Witt, 83 L. Ed. 2d 841 (1985) states:

> That standard is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. (p. 851).

We note that a reluctance to impose the death penalty must prevent or substantially impair the performance of his duties in accordance with the instructions and the oath as a juror. The problem with the death penalty opinion must be confined to these two factors to make the venireman excludable for cause.

2. The court's opinion in Wainwright v. Witt, supra stated definite reasons for "clarifying" Witherspoon:

> This is because determinations of juror bias can not be reduced to question-and-answer sessions which obtain results in the manner of a catechism. What common sense has realized experience has proved: many a venireman simply cannot be asked enough questions to reach the point "where their bias has been made "unmistakably clear", these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide

> their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. (p. 852).

By stating the reasoning behind it's holding it is easy to see that the court certainly did not intend by it's holding to remove for cause all jurors who would have a reluctance to impose a death sentence. This reasoning was adopted and granted in Ex Parte Whisehant, 555 So.2d 234, 241 (1989).

3. The venireman in Ex Part Whisenhant, 555 So.2d 235 (1989) was excludable for being somewhat more than equivocating as to the death penalty. In response to a question from the district attorney "You would not even consider death by electrocution?" The juror responded "Well, I'm not sure. Myself, I don't believe that I should go up there and tell them to kill him, but he did do it to someone else. I mean, you know, I'm not sure." When asked by the prosecutor again if the judge charged on both life without parole and death by electrocution if he could consider death by electrocution he answered "I don't know what I would do. I hope 1 don't have to be in that situation, I'll tell you now." (p. 240).

Please note that when asked if they could consider death as a penalty if the court charged on it being a possibility and how they should make the decision on punishment the venireman said "I don't know". "I don't know (if I can follow the law)" was the sole reason for excluding the potential juror. Ex Parte

Whisenhant, *supra* can not be used as authority to excuse a juror for cause who states that they can follow the law as given to them by the trial judge.

This was exactly the holding in Martin v. State, 548 So.2d 488 (1988) in which a venireman was excused for cause because although they believed that the death penalty is appropriate in some cases they stated that "they did not know if they could impose it". Again, the juror implicitly said "I don't know if I can follow the judge's instructions or not".

4. Even if the venireman's initial responses to voir dire about the death penalty indicate strong opinions, if they state that they will follow the court's instructions and the law and consider both death and life without parole in light of the court's instruction they can not be challenged for cause Parker v. State 587 So.2d 1072 (1991).

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ATTORNEY FOR DEFENDANT
East Podunk, Alabama

STATE OF ALABAMA,	)	IN THE CIRCUIT COURT OF
PLAINTIFF,	)	MORGAN COUNTY, ALABAMA
V.	)	
	)	CASE #_____
DEFENDANT.	)	

MOTION FOR COURT TO EXCLUDE FOR CAUSE ALL VENIREMEN WHO WOULD VOTE FOR THE DEATH PENALTY AUTOMATICALLY IF THEY FOUND THE DEFENDANT GUILTY OF CAPITAL MURDER OR IF A CERTAIN AGGRAVATING CIRCUMSTANCE OR FACTOR WERE PROVED

The defendant asks this court to exclude for cause the following three categories of veniremen for cause should any fit into one or more of these categories:

A. All persons who would automatically vote to impose the death penalty if they found this defendant guilty of capital murder.

B. All persons who would automatically vote to impose the death penalty if a certain aggravating circumstance were proven to their satisfaction. C. All persons who would automatically vote to impose the death penalty if they felt a certain circumstance in the case were proved to their satisfaction.

BRIEF

1. Persons who would automatically vote to impose the death penalty if they found the defendant guilty of capital murder are excludable for cause: Harvey-v.- State, 603 So.2d 368, 392 (1,991); Martin v. State, 548 So. 2d 488 (1988); U.S. v. Chandler, 996 F.2d 1073 modified on rehearing 5 F. 3d 1501 (1993).

2. Persons who would automatically vote to impose the death penalty if a certain specified aggravating circumstance were proven must be excused for cause U.S. v. Chandler, 996 F.2d 1073 modified on rehearing 5 F. 3d 1501 (11th Cir. 1993). The exact reason for the holding was stated to be that the venireman would not consider and weigh the mitigating and aggravating circumstances as given to them by the court in the penalty phase charge.

_____
ATTORNEY FOR DEFENDANT
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STATE OF ALABAMA,	)	IN THE CIRCUIT COURT OF
PLAINTIFF,	)	MORGAN COUNTY, ALABAMA
V.	)	
	)	CASE #_____
DEFENDANT.	)	

MOTION TO EXCUSE FOR CAUSE ANY VENIREMAN WHOSE VIEWS IN FAVOR OF CAPITAL PUNISHMENT ARE SUCH AS WOULD PREVENT OR SUBSTANTIALLY IMPAIR THEIR CONSIDERATION OF LIFE WITHOUT POSSIBILITY OF PAROLE AS A POSSIBLE SENTENCE

The defendant asks this court to excuse for cause all potential jurors who fit into the following category:

A. Those jurors whose views in favor of capital punishment would;

(a) prevent or substantially impair

(b) their consideration of the facts in the case and

(c) the law as given by the court covering the weighing of mitigating and aggravating circumstance and considering the sentence of life without parole as well as death in light of those instructions.

BRIEF

Wainwright v. Witt, 83 L. Ed. 2d 841 (1985) is a two edged sword. It also excludes persons who favor capital punishment if their beliefs would prevent or substantially impair the performance of their duties as a juror in accordance with the court's instructions and their oath to follow the law (p. 849). Alabama has

specifically held that this ruling in Witt cuts in both directions Harvey v.State, 603 So.2d 368, 392 (1991).

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ATTORNEY FOR DEFENDANT
East Podunk, Alabama

STATE OF ALABAMA,	)	IN THE CIRCUIT COURT OF
PLAINTIFF,	)	MORGAN COUNTY, ALABAMA
V.	)	
	)	CASE #_____
DEFENDANT.	)	

TRIAL BRIEF ON THE ISSUE OF THE DEFENDANT'S ABSOLUTE RIGHT TO VOIR DIRE ANY VENIREMAN WHO INDICATES OPPOSITION TO THE DEATH PENALTY TO ANY DEGREE

The defendant possesses an absolute right and obligation to engage in further voir dire on the issue of capital punishment with any and all veniremen who voice opposition to the death penalty to any degree, no matter how strong and unyielding those opinions might initially be.

The defendant states the following as authority for this position:

1. This defendant has a right to question further any potential juror who expresses any opposition to the death penalty. This is one of the reasons behind the holding in Wainwright v. Witt, 83 L. Ed. 2d 841, 856 (1985).

2. A court's refusal to permit the defendant to engage in further voir dire on the issue of the death penalty under the circumstances made the subject of this brief is reversible error O'Connell v. State, 480 So.2d 1284 (Fla. 1986).

3. The potential juror's views must be fully developed before excusal under Witt is proper Fuselier v. State, 468 So.2d 45 (Miss. 1985).

4. Alabama recognizes the absolute right, upon request by the defendant, for further voir dire of death scrupled jurors Harvey v. State 603 So.2d 368, 392 (1991).

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ATTORNEY FOR DEFENDANT
East Podunk, Alabama

STATE OF ALABAMA,	)	IN THE CIRCUIT COURT OF
PLAINTIFF,	)	MORGAN COUNTY, ALABAMA
V.	)	
	)	CASE #_____
DEFENDANT.	)	

MOTION FOR SPECIAL CAUTIONARY INSTRUCTIONS TO BE GIVEN

BEFORE THE VOIR DIRE PROCESS BEGINS

Comes now the defendant in the above styled cause and moves this court as follows:

1. Sequestration of the jury in a capital case is not required until the trial jury is finally selected 1975 Code of Alabama, 12-16-9 (a) and Stewart v. State, 601 So.2d 491 (1992).

2. This court normally allows voir dire of a capital jury in panels of twelve persons and goes through a sufficient multiple of panels until 54 qualified veniremen are available to strike from.

3. The selection of a capital jury normally takes more than one day and is usually two or more days.

4. When a panel has been questioned by both counsel and the court they are allowed to return to the jury assembly area to interact with other veniremen who have not been subjected to the voir dire process.

5. During this normal interaction with other veniremen things can very easily occur which are prejudicial to the defendant and prosecution from this.. interaction. 6. To insure a fair trial from both the standpoint of the defendant and the prosecutor certain cautionary instructions about this social interaction are necessary.

The defendant requests that all veniremen who are to be voir dired be given the following instructions prior to any voir dire beginning:

(a) That the potential jurors are strictly cautioned not to discuss the facts, rumors or anything they have heard with the other members of the venire involving the case of State of Alabama v._____.

(b) That the potential jurors are not to discuss with other members of the venire what questions were asked of them in this case by counsel for the defendant, counsel for the prosecution, or the court nor any answers they or others gave to such questions.

(c) That all veniremen be cautioned not to engage in any discussion whatever about any aspect of State of Alabama v. _____, the accused, the deceased or potential witness in the case.

_____
ATTORNEY FOR DEFENDANT
East Podunk, Alabama

STATE OF ALABAMA,	)	IN THE CIRCUIT COURT OF
PLAINTIFF,	)	MORGAN COUNTY, ALABAMA
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DEFENDANT.	)	

MOTION FOR COURT TO PERMIT CASE SPECIFIC JUROR QUESTIONNAIRE

Comes now the defendant and moves this court to permit him to have the venire fill out a short questionnaire in the jury room prior to being summoned before the Circuit Court for qualification. In support of this motion the defendant states as follows:

1. The defendant is charged with capital murder and the prosecution has expressed its intention to seek the death penalty.
2. The questionnaire is intended to elicit as much case specific information as possible within a reasonable time revealing factual information that sheds light on any bias, prejudice, sympathy or personal experience without embarrassing the juror before the court, public or other perspective jurors. The privacy of a questionnaire encourages people who may be embarrassed by public responses to be more candid and self revealing in discussing sensitive subjects such as religious views, race and other issues about the death penalty. From the written responses the litigants can decide in advance how far to question the venireman in each case. Tools For The Ultimate Trial II, Ed. 3 1992. Capital Resource Center of Tennessee, Nashville, Tennessee.
3. The ABA Standards Relating To Juror Use And Management, (1983) Commentary to Standard 7 recommends the use of questionnaires in cases where more extensive information is necessary.

4. The following arguments have been persuasive in allowing case specific juror questionnaires. Jurywork, 2nd Ed. 1994, National Jury Project, Clark Boardman Callaghan, Webster, New York (p. 2-60):

A. A supplementary questionnaire saves valuable court time by eliminating the need to repeat the same question to each juror.

B. Follow-up questions can be specifically tailored to suit each prospective juror's background as indicated on the completed questionnaire.

C. Jurors might hesitate in the public setting of the courtroom to reveal private information relevant to their jury service are more likely to be candid in filling out a private questionnaire.

D. Where the court is not convinced that juror awareness of the case is sufficiently widespread to require individual, sequestered voir dire, juror .responses to a supplementary questionnaire can provide data demonstrating the actual level of juror awareness of the case.

E. Intelligent exercise of the primary challenges is enhanced since the parties are able to obtain relatively complete background information on each potentive juror.

4. A case specific juror questionnaire was used in the capital case of Thomas v. State, 622 So.2d 415, 418 (1992).

5. Since this is a capital prosecution exacting standards must be met to assume that it is fair. "Fair" requires that all jurors who sit in this case will give this defendant a fair trial and who do not harbor deep seeded attitudes and opinions which will prevent this. The fundamental respect for human life underlying the Eighth Amendment to the United States Constitution'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 at 584 (1988) (Quoting Gardiner v. Florida, 430 U.S. 349 at 363 (1977).

6. If the defendant is to receive a fair trial it is villa! that the information available to the prosecution and the.-defense concerning potential jurors be accurate and thorough Coleman v. Kemp,778 F. 2d 1487 at 1542 (5th Cir. 1985) Cert. denied 476 U.S. 1164 (1986).

7. Moreover, because of the exceptional and irrevocable nature of the death penalty, the Supreme Court held in Turner v. Murray, 476 U.S. 28 (1986) that voir dire must be especially careful and that the court's refusal to allow certain voir dire questions required reversal of the death sentence. This case is cited to demonstrate that the law clearly recognizes the greatly increased value of adequate voir dire in capital cases.

8. Attached to this motion is a proposed juror questionnaire that will elicit background information as to this case in particular that will be relevant to challenges for cause as well as to the informed and effective use of preemptory challenges of both litigants in this case. The questionnaire will provide the court and both parties with responses that may alert them to possible relationships, associations or experiences that may be a cause of bias or prejudice and necessitate cause excusals under 1975 Code of Alabama, 12-16-150 as well as common law strikes for cause. It will provide information necessary, to insure that no improper bias or prejudgment undermines the defendant's right to a fair trial or otherwise results in arbitrary or prejudicial imposition of the death penalty in direct violation of 1975 Code of Alabama, 13A-5-53.

9. The filling out of the attached juror questionnaire would take the average venireman 15 to 30 minutes to complete. They could be completed in the jury assembly room. They could then be made available to the court, the defense and the prosecution as each panel of 12 potential jurors is brought into the court for qualification and/or voir dire. At the conclusion of the striking of the jury the court could then order these responses sealed only to be opened by court order or by an appropriate appellate court of this state should appeal be necessary.

10. In the case of Ex parte Bruner, 681 So.2d 173, 191 (1996), Justice Maddox in his concurring opinion attached a suggested juror questionnaire.

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ATTORNEY FOR DEFENDANT
East Podunk, Alabama

JUROR QUESTIONNAIRE

_____ is accused of capital murder. The accusation is that he took the life of _____ by shooting him with a pistol in order to steal his automobile.

1. State your name _____
2. State your age _____
3. Give your address_____
4. What is your place of employment _____. Your job title _____

   Your duties _____

   How long have you worked there? _____

   Where did you work before?_____

   What were your duties there?_____

5. Do you have any legal or law enforcement training_____
6. Have you ever wanted to go into law enforcement_____ If *so,* specify _____
7. Have you or a relative or a close friend ever been involved in a criminal case, either as a victim _____, defendant_____, Witness_____ or attended criminal court for any reason_____. If so, explain, (you need not give any name _____
8. Have you or any close friend or relative ever been involved in a civil case as a plaintiff (person suing) , defendant (person sued) _____ witness _____ or

attended civil court for any reason ____. If so, explain (you need not give any names)_____

_____

_____

9. What church do you attend? _____

Are you a member?_____ In a month's time how often do you attend services or meetings?_____. Do you hold or have you ever held any church office or position?_____ If so, what?_____

10. To what social clubs or civic groups do you belong? _____

Have you ever held office in any of them_____

If so, what?_____

11. Name three people in history that you admire the most _____

_____

12. What are your hobbies and if none, how do you spend your free time? _____

_____

13. Have you, your relatives, or any close friends had any contact with any law enforcement officials which might cause you to favor law enforcement witnesses or law enforcement testimony?_____. If so, explain (you need not give any names)_____

14. Do your children attend public or private school? _____ What school does each attend? _____

15. Give a brief description of your neighborhood _____

_____

16. Is there a crime prevention group in your neighborhood or a "crime watch? _____.

If your answer is "yes" do you participate in it? _____

17. Do you believe courts deal with criminals too severely or not severely enough?_____.Why?_____

_____

18. Have you ever filed a complaint with the police against anyone?_____. If so, explain (you need not give any names)_____

_____

19. Do you own or keep any weapons? _____ Are the weapons for protection? _____, collecting ?_____, hunting? _____, necessary in your work?_____

20. If you could get a free subscription to any three magazines what would they be?_____

21. What are your three favorite television programs?

_____

Why?_____

22. If you were in a group of people you didn't know very well would you be a leader^ or a follower? _____

23. What is the first thing that comes to your mind when you think of a lawyer who represents an accused criminal? _____

24. Do you have any specific problems at your job or at home or in your personal life that might make it difficult for you to give your full attention to this trial? _____. If yes, explain (you need not give any names) _____

_____

25. What is your usual source of news and current events? _____

26. Do you recall hearing or reading anything in the news about this case? _____ If so, what have you read or heard? _____

_____

27. Have you formed any opinion about this case from what you have read or heard?_____. What is the opinion that you formed from what you have read and heard? _____

_____

_____

28. What do you feel is the major cause of crime in America today_____

_____

29. Has anyone in your family or a close friend ever suffered from any mental, problem? _____. If so, what was the problem (you need not give a name) _____

_____

30. Did the person seek treatment? _____. What treatment did they receive?_____

How did this person's mental problem effect their relationship with others?

_____

31. What does the phrase "The accused is presumed to be innocent unless proven guilty by the prosecution beyond a reasonable doubt and to a moral certainty mean to you? _____

Do you agree with that rule? _____ Why? _____

32. Do you feel the death penalty is used too often? ____ Too seldom? _____, randomly? _____. Please explain _____

33. What purpose, if any, does the death penalty serve? _____

_____

34. Our law provides that if an accused is convicted of capital murder only two penalties are possible, death in the electric chair and life in prison without possibility of parole. Do you view life without possibility of parole as a severe penalty? _____ Please explain _____

35. If you are chosen as a juror in a capital murder trial is there anything that you feel the accused's lawyer or the prosecution should know about you?_____

_____

STATE OF ALABAMA,	)	IN THE CIRCUIT COURT OF
PLAINTIFF,	)	MORGAN COUNTY, ALABAMA
V.	)	
	)	CASE #_____
DEFENDANT.	)	

DEFENDANT'S NOTICE THAT HE INTENDS TO ENGAGE IN INDIVIDUAL VOIR DIRE OF ANY POTENTIAL JUROR WHO POSSESSES ANY PRIOR KNOWLEDGE OF THE FACTS OF THIS CASE

Comes now the defendant and states his full intention to engage in individual voir dire with each and every, any and all veniremen who possess or claim to possess any prior knowledge of the facts of this case.

The defendant claims his absolute right to such voir dire as to (1) the supposed facts the person claims to possess knowledge of (2) how such knowledge was acquired (3) how such knowledge will affect their deliberations.

For authority as to this notice and absolute right specifically claimed by the defendant he cites Cox v.State, 602 So.2d 484, 485 (1992); Coral v. State, 599 So.2d 1253, 1257 (1992); Ex Parte Johnson, 620 So.2d 679, 706 (1992) Cert Law 114 S. Ct. 285; Nicholas v. State 624 So.2d 1328, 1330 (1992).

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ATTORNEY FOR DEFENDANT

STATE OF ALABAMA,	)	IN THE CIRCUIT COURT OF
PLAINTIFF,	)	MORGAN COUNTY, ALABAMA
V.	)	
	)	CASE #_____
DEFENDANT.	)	

TRIAL BRIEF ON THE ISSUE OF THE DISCRIMINATORY USE OF

PRE-EMPTORY STRIKES

1. The prosecution need only give reasons for its pre-emptory strikes of a racial group when the defendant establishes a *prima facie* case of discrimination Jackson v. State, 623 So.2d 411 (1993); Edwards v. State, 628 So.2d 1021, 1024 (1993); Stokes v. State 648 So.2d 1179 (1994); Rutledge v. State, 680 So.2d 991 (1996).

2. The general formula for reaching the threshold question of discrimination so as to then require the prosecution to explain its strikes is to compare the percentage of blacks on the venire to the percentage of blacks remaining on the jury after striking. If the jury has a lower percentage than the venire you have made your showing. This is the formula in Jackson v. State, 623 So.2d 411 (1993). In that case the venire had 38 citizens. Six were black or 15.8%. The state struck three blacks and three remained on the jury. There was no threshold showing because the jury was 25% black in composition. This was not discrimination because the percentage of blacks on the jury exceeded the percentage on the venire. .If the percentage of blacks on the jury is equal to or greater than the percentage on the venire then no discrimination is shown to meet the threshold issue Davis v. State, 620 So.2d 136 (1993); Raspberry v. State, 615 So.2d 657 (1992); Guthrie v. State, 616 So.2d 913, 914 (1992);

Howell v. State 571 So.2d 1270 (1990); Merriweather v. State, 629 So.2d 77 (1993); Cox v. State, 629 So.2d 670 (1993).

There is a second type of formula which can be used to reach the threshold showing. Take the percentage of strikes as against the percentage of blacks removed. This formula was allowed in Guthrie v. State, 616 So.2d 913 (1992). In that case the state used seven (7) of its eighteen (18) strikes 39% to remove 7 of the 9 blacks on the venire or 78%. The defendant struck one black and one black remained on the jury (p. 914). Guthrie, *supra* claimed to use the same formula as Ex Parte Branch, 526 So.2d 609, 622 (1991).

The bottom line is that generally those cases which meet the threshold in the second formula also meet it by the first formula except in one type of case. Suppose you have a venire of 36 persons and there is one Jew, two Asians, one Hispanic and one Native American. If the state strikes the one Hispanic the one Native American and the one Jew they will have used a small percentage of their pre-emptory strikes to remove 100% of the representation of that social group. Batson applies to all social groups Williams v. State, 634 So.2d 1034, 1037 (1993).

3. A white defendant has standing to contest the discriminatory striking of black veniremen from their jury. Powers v. Ohio, 113 L. Ed. 2d 411 (1991); Freeman v. State, 586 So.2d 1013 (1991); Guthrie v.State, 616 So. 2d 913 (1992); Williams v. State, 634 So.2d 1034 (1993).

4. Batson applies to striking Asians Wilsher v. State, 611 So.2d 1175, 1184 (1992).

5. Batson applies to striking Hispanic or Latino veniremen Hernandez v. New York, 114 L. Ed. 2d 395 (1991); U.S. v. Bucci, 839 F.2d 825, 833 (1 Cir. 1988).

6. Batson applies to striking Native Americans U.S. v. Chalan, 812 F.2d 1302 (10 Cir. 1987).

7. Batson applies if white jurors are striken on account of their race Williams v. State 634 So.2d 1034, 1038 (1993) citing as its reasoning Government of Virgin Islands v. Forte, 865 F.2d 59 (3 Cir. 1989) and Romanv. Abrams, 822 F.2d 214 (2 Cir. 1987).

8. Batson applies if jurors are striken on account of their sex. JEB v. Alabama, 128 L. Ed 2d 89 on remand 641 So.2d 821 (1994).

9. Batson applies to strikes exercised by the defendant as well as to those exercised by the state. Georgia v. McCullom, 120 L. Ed. 2d 33 (1992); Lemlev v. State, 599 So. 2d 64 (1992); Wilsher v. State, 611 So.2d 1175, 1183 (1992).

10. The trial judge ***ex*** *more motu* may conduct a Batson hearing if they see evidence that either the prosecution or the defense is using racially motivated strikes Lemlev v. State, 599 So.2d 64 (1992).

11. The information the state relies on for its strikes must appear in the record. Knight v. State, 621 So.2d 394, 395 (1993); Williams v. State, 620 So.2d 82 (1992); Ex Parte Yelder, 630 So.2d 107, 109 (1992).

12. The prosecution's reasons for the strike of a black venireman, after the defendant has made a threshold showing, when given to the court must be clear and specific as well as race neutral. Sims v. State, 587 So.2d 1271, 1276 (1991).

13. When a defendant (1) makes a timely Batson motion and 2) makes a prima facie showing of discrimination in the exercise of pre-emptory challenges then the burden shifts to the challenged party to produce race (gender) neutral reasons

for each challenged strike. Whitley v. State, 607 So.2d 354, 356 (1992); Avery v. State, 545So.2d 123 (1988).

14. A Batson motion must be made before the jury is sworn Stubbs v. State, 522 So.2d 317 (1987); White v.State, 549 So.2d 524 (1989); Swain v. State, 504 So.2d 347 (1986); Williams v. State, 530 So.2d 881 (1988); Calhoun v. State, .530 So.2d 259 (1988).

Caveat: If the jury is sworn before it is struck then the motion must be made as soon as possible after the striking as "not to unduly delay the trial" White. *supra* at 525. If this situation occurs and the defendant doesn't make the Batson motion until the striking is concluded and the jury is chosen and seated to begin the trial it comes too late.

15. Failure to provide a race (gender) neutral reason for striking even one venireman requires reversal. Ex Parte Bird, 594 So. 2d 676, 683 (1991); Taylor v. State, 612 So. 2d 1312 (1992); Roberts v. State 627 So.2d 1114 (1993).

16. The past conduct of a prosecutor or the district attorney's office in engaging in discriminatory strikes is an "important factor" to be considered in determining if discriminatory striking occurred in the case at hand. Harrel v. State, 571 So.2d 1270, 1272 (1990).

17. If the prosecutor gives a race neutral reason for a strike and it is suspected that the reason given is not his "true reason" the trial court's determination of the validity of the reason carries very great weight Scales v. State, 539 So.2d 1074, 1075 (1985). This case allows a court to inquire further into the reason or reasons given by the prosecutor.

18. The prosecutor's reason(s) for the strike must be vested firmly in terms of .the case on trial, its facts and the applicable law Avery v. State, 545 So.2d 123 (1988); Huntley v. State, 627 So.2d 1011 (1991).

Caveat: Striking a venireman on account of some nebulous reason like, age, marital status, debts owed, educational level attained, may be valid reasons in some cases and clearly not valid reasons in other types of cases. The issue always is, "Does the reason clearly apply to the facts and law applied in the case on trial?"

19. If a valid race (gender) neutral reason for a strike is given together with an invalid race neutral reason then the strike will be upheld (Example: criminal conviction plus "young age, male, long hair, etc." when age, sex and long hair have nothing to do with the trial at hand). Bang v. State, 620 So.2d 106, 107 (1993); Williams v. State 620 So.2d 82, 85 (1992); Zumbado v. State, 615 So.2d 1223, 1231 (1993); Powell v. State, 608 So.2d 411, 414 (1992).

20. If the prosecutor strikes a number of black jurors and has valid race neutral reasons for striking all but one and for that one has a "suspicious reason or reasons (i.e. single, unemployed and young in age, etc.) the valid strikes weigh on the side of the suspicious strike being a valid one. Sumlin v. State, 615 So.2d 1301 (1993).

21. If an offended party makes a Batson motion which is denied by the trial court and the court overrules it without requiring the other party to explain the reason(s) for the strike(s); if the threshold showing of discrimination was made out, the case must be remanded for the striking party to explain the reason(s) for the strike(s). Leveret v. State, 512 So.2d 790, 796 (1987).

22. Once a valid race neutral reason is established from a venireman (meaning "I have a little hearing problem") the party striking the venireman need not

inquire further as to the extent of the problem. Bang v.State, 620 So.2d 106, 109 (1993).

23. In order to prove that the prosecutor's reason to strike a juror was a pretext for a non-race neutral strike, the defendant cannot cross-examine the striken potential juror Smith v. State, 590 So.2d 388, 390 (1991).

24. Failure to make a Batson motion for a criminal defendant when *prima facie* discrimination in the striking process is preset can constitute ineffective assistance of counsel. Taylor v. State, 598 So.2d 1056 (1992); Watkins v. State, 632 So.2d 555 (1992).

25. If a Batson violation occurs in a capital case and was not objected to by defense counsel it can be raised for the first time on appeal under the plain error doctrine. Walker v. State, 580 So.2d 49 (1991).

26. The proof offered by a defendant that the prosecutor's strikes were the product of prejudice must stick to the record and raise any one of the following six issues:

1. The reason(s) for the prosecution's strike is not related to the facts of this case.
2. There was a lack of any meaningful questioning of the challenged juror during voir dire.
3. Black and white jurors were treated differently in that black jurors were striken for the reason stated but white jurors to whom the same reason applied were not stricken.

1. Disparate examination showed during voir dire that black jurors were examined in such a way as to indicate an intent to challenge them before any race neutral reason to challenge them appeared in their answers.

2. The sheer number of blacks removed by the prosecutor.

3. A group bias assumed by the prosecutor against certain categories of jurors which was not supported by anything in the record (an example of this would be striking a black school teacher because school teachers generally don't favor the death penalty; striking a black nurse and stating that nurses are "compassionate" and don't favor the death penalty,). Smith v. State, 590 So.2d 388 (1991), Ex Parte Branch, 526 So.2d 605, 623 (1986).

Make careful note of reason four above. There is an old wives tale about, "If you ask the venireman you want off the jury enough questions you can get something that will allow a pre-emptory challenge". This isn't true and it isn't a way to circum-convolute Batson. Just raise the issue that black jurors were engaged in an exhaustive voir dire and non-blacks weren't. Just show unequal treatment and you can prevail even if race neutral reasons for pre-emptory challenges were unearthed eventually.

27. If one suspicious reason for a strike is given then doubt is cast on the balance of the strikes of black (gender) jurors. Ex Parte Bird, 594 So.2d 676 (1991).

28. If the prosecutor gives a highly suspect reason for a strike, such as "because he is single" yet all single persons black and white were striken; this can overcome the presumption of prejudicial striking. Kelly v. State, 602 So 2d 473, 476 (1992); Avery v. State, 545 So. 2d 146 (1988); Shelton v. State, 521 So.2d 1035, 1037 (1987); Christianson v. State, 601 So.2d 512 (1992); Pritchell v. State, 548 So.2d 509 (1988); Harris v. State, 545 So.2d 146 (1988);

McGahee v. State 554 So.2d 454, 462 (1989); Matthews v. State, 534 So. 2d 1129 (1988); Punches v. State 518 So.2d 781, 783 (1987); Bedford v. State, 548 So.2d 1097, 1098 (1989).

Caveat: See Hundley v. State, 627 So.2d 1011 (1991) for the rule that even if all veniremen are striken, both black and white, the issue of being single must in some way relate to the case on trial or it simply isn't a valid race neutral reason.

29. Even a valid race neutral reason for a strike can become an invalid reason if that standard isn't applied to black and white jurors alike (meaning: striking a black juror who had a prior misdemeanor conviction but not white jurors with the same characteristic). Powell v. State. 548 So. 2d 590, 593 (1988); Kvnord v. State. 631 So.2d 257 (1993); Cormick v. State. 580 So.2d 31 (1990).

30. Failure to engage a black juror in voir dire or any but "desultory voir dire" is a factor supporting race biased striking. Parker v. State. 568 So.2d 335, 337 (1990); Sims v. State. 587 So.2d 1271, 1277 (1991); Smith v. State. 620 So.2d 732, 733 (1992); Hemphill v. State. 610 So.2d 413 (1992); Avery v. State. 545 So.2d 123, 127 (1988).

31. If the prosecution relies on matters outside the record of voir dire such as facial expressions and body language (1) the reasons should be clear and specific (2) the reasons should be clearly scrutinized by the trial court because of the great potential for abuse inherent in this type of strike. The actions of the venireman should be explicitly described so that the appellate court will have a record to examine. Avery v. State, 545 So.2d 123, 127 (1988).

32. Removal of all blacks or persons of a single ethnic background or gender is a *prima facie* indication of discriminatory striking. Avery v. State, 545 So.2d 123 (1988); Jackson v. State, 516 So.2d 768 (1986); Anderson v. State, 510 So.2d

578 (1987); Henderson v. State, 622 So.2d 426 (1992); Darin v. State, 555 So.2d 309 (1989).

The Following Are Considered Valid Race Neutral Reason For Pre-emptory Strikes.

1. The juror knows either the defendant or their family. Brown v. State 623 So.2d 416, 419 (1993); Knight v. State 622 So.2d 426 (1992); U. S. v. Alston, 895 F. 2d 1362 (llth Cir. 1990); Strother v. State, 587 So. 2d 1243 (1991); Ex Parte Lvnn, 543 So.2d 709, 711 (1988); Harris v. State, 545 So.2d 146 (1988).
2. The juror previously served on a jury where the defendant was found not guilty. Brown v. State, 623 So. 2d 416, 419 (1993); McLeod v. State, 581 So.2d 1095 (1990); Childers v. State, 607 So.2d 350 (1992); Heard v. State, 584 So.2d 556 (1991); Andrews v.State, 624 So.2d 1095.
3. The juror is evasive, hostile, impatient or ambiguous when answering questions on voir dire. Brown v. State, 622 So.2d 416, 419 (1993); Stephens v. State, 580 So.2d 11 (1990); Mitchell v. State, 579 So.2d 45 (1991).
4. Being late for court is a "strong" race neutral reason to strike a potential juror. Brown v. State, 623 So.2d 416, 419 (1993); Jones v. State, 615 So.2d 1293, 1296 (1993); Robinson v. State, 560 So. 2d 1130 (1989).
5. The fact that the venireman has been previously charged with issuing a worthless check is a race neutral reason. Andrews v. State, 624 So. 2d 1095, 1098 (1993).

Rule: A previous connection with any criminal conduct is a race neutral reason to strike. Wilsher v. State, 611 So.2d 1175 (1992); Ward v.State, 539 So.2d 407, 408 (1988); Bang v. State, 620 So. 2d 106, 107 (1993); Wagoner v. State, 555 So.2d 1141 (1989); Yeller v. State, 596 So.2d 598 (1991); Powell v. State, 548 So.2d 590, 592 (1989); Averv v. State, 545 So.2d 123 (1988); Jones v. State, 615 So. 2d 1293 (1993); Alien v. State, 555 So.2d 1185 (1989) ; Thomas v. State, 625 So.2d 1174 (1993).

6. A reasonable and well founded suspicion that a potential juror's family is suspected of criminal activity is a race neutral reason to strike. Henderson v. State, 584 So.2d 841 (1988); Alien v. State, 555 So. 2d 1185 (1989); Davis v. State, 555 So.2d 309 (1989). In Davis *supra*- note how clearly those "well founded suspicions" are placed in the record and how the trial judge forced the prosecutor to be very specific when he articulated his "suspicions" (p. 314).

7. A pending criminal charge against a juror is a race neutral reason to strike. Moss v. City of Montgomery, 588 So. 2d 520 (1991); Wilshire v. State, 611 So.2d 1175 (1992); Knight v. State, 622 So.2d 426, 428 (1992).

8. A venireman stating a reluctance to serve on the jury is a valid race neutral reason. This is the "rather not sit" juror. Knight v. State, 622 So.2d 426, 428 (1992); U. S. v. Ruiq, 894 F.2d 501 (2 Cir. 1990); Wood v. State, 490 So.2d 24, 29 (1986). But: See Roger v. State, 593 So.2d 141 (1991) for the contrary view.

9. A potential juror stating that they have been a witness to a criminal act (i.e. saw a woman give birth to a child later found in a dumpster) is

"suspicious" as a reason but can be a valid race neutral reason as was held in Knight v. State, 622 So.2d 429 (1992).

10. Juror's hearing or health problems are valid reasons to strike. They almost relate to challenges for cause. Bang v. State, 620 So.2d 106, 107 (1993); Hernandez v. New York ,114 L. Ed. 2d 395 (1991); Williams v.State, 634 So.2d 1034 (1993).

11. That a venireman's family member has been prosecuted in the past for a crime is.. a race neutral reason for a pre-emptory strike. Moss v. City of Montgomery, 588 So. 2d 520 (1991); Davis v. State, 555 So.2d 309 (1989); Zumbado v. State, 615 So.2d 1223 (1993); Williams v. State, 620 So.2d 89 (1992); Powell v.State, 548 So.2d 590 (1988).

12. If a prospective juror knows a witness in the case, this is a race neutral reason to strike. Williams v.State, 620 So. 2d 82, 85 (1992); Davis v. State 555 So. 2d 309 (1989); Wilshire v. State, 611 So.2d 1175 (1992).

13. If a prospective juror returned a verdict for the defendant in a civil case this is a race neutral reason to strike. Sumlin v. State, 615 So.2d 1301 (1993).

14. An untidy appearance is a race neutral reason to strike if the untidy appearance is well documented in the record Sumlin v. State, 615 So. 2d 1301 (1993); Hernandez v. State, 808 S.W. 2d 536 (1991) Rule: Strikes founded on the type of clothing worn to court and the way the clothing is worn are usually race neutral reasons to strike. Mitchell v. State, 579 So.2d 45, 46 (1991) upheld the striking of a male juror who wore an earring - no other reason to strike was stated Sumlin v. State,

supra upheld a strike simply because the venireman wore his shirt outside of his trousers. See also Holton v. State, 590 So.2d 914 (1990).

15. It is a valid reason to-strike a venireman because he had taken a criminal justice course Sumlin v. State, 615 So.2d 1301 (1993).

16. It is a race neutral reason to strike a potential juror in a sexual abuse case who responds to a voir dire question that he doesn't " consider the thigh an intimate part of a woman's body". Jones v. State, 615 So.2d 1293, 1296 (1993).

17. The prosecution can strike a black potential juror who has previously testified for a defendant in a criminal case. Jones v. State, 615 So.2d 1293, 1296 (1993).

18. A bored facial expression and general inattentive attitude displayed during voir dire gives rise to a race neutral reason to strike. Strong v. State, 538 So. 2d 815 (1988); Mitchell v. State, 579 So.2d 45 (1991); Williams v. State 634 So.2d 1035 (1993); Zumbado v. State, 615 So.2d 1223 (1993); Kelly v.State, 602 So.2d 473 (1992); Smith v. State, 531 So.2d 1245 (1987); Baker v. State 555 So.2d 273 (1989). Note: Horton v. State, 590 So.2d 914 (1990) strongly suggests that those factors should be considered with other reasons and should not be taken as the sole reason for the strike.

19. Striking a venireman because they had been interviewed as an alibi witness for a defendant in an unrelated case is permissible Zumbado v. State, 615 So.2d 1223(1993).

20. It is a valid race neutral reason to strike a potential juror whom the district attorney's investigator has informed him is suspected of

several burglaries. Zumbado v. State, 613 So.2d 1223 (1993); Stephens v. State, 580 So.2d 11, 19 (1990).

Note: This case is quite distinguishable from Williams v. State, which invalidated such strikes because it was much more specifically spelled out in the record Zumbado v. State, supra, at 1232.

21. A normally non-race neutral strike can be transformed into a valid race neutral strike under the facts of a specific case. In Zumbado v. State, 615 So.2d 1223, 1232 (1993) in a forgery case the prosecution struck a black clerk at a financial institution and stated in the record that such persons normally notarize signatures for persons they don't know. This was held to be race neutral under the facts of the case on trial. This would normally be an invalid reason for a strike.

22. A potential juror having an ill family member which could interfere with being sequestered is a strong race neutral reason Pierce v. State, 612 So.2d 514 (1992)

23. A potential juror's "possible" dissatisfaction with the way the district attorney's office handled her child claim is a valid race neutral reason to strike Piercey. State, 612 So.2d 514 (1992).

24. The fact that a venireman likes to watch "soap operas" is highly suspicious but has been held to be a valid case neutral reason. Christianson v. State, 501 So.2d 512, 514 (1992).

25. A "somewhat hostile" attitude toward law enforcement is a valid case neutral reason. Yelder v. State, 596 So.2d 598 (1991).

26. The fact that a potential juror's nephew has a "drug problem" is a race neutral reason to strike. Powel v. State, 608 So.2d 411.

27. Giving the prosecutor a "dirty look" while the defense attorney was discussing "justice and equality" is a valid race neutral reason if coupled with a few other semi-valid, somewhat questionable reasons. Powell v. State, 608 So 2d 411 (1992); Wagoner v. State, 555 So.2d 11, 19 (1991).

28. Previous service on a jury which couldn't reach a verdict is a valid reason to strike. Whittlesey v.State, 586 So.2d 31 (1991); Watkins v. State, 551 So.2d 421 (1988).

29. The fact that a potential juror had a co-worker who was prosecuted by the same district attorney as the one trying the case at hand is a valid reason to strike. Whitley v. State, 607 So.2d 354, 357 (1992); Stephens v. State, 580 So.2d 11 (1990); Fisher v. State, 587 So. 2d 1027 (1992); Scott v. State, 599 So.2d 1222 (1992).

30. The fact that a venireman or a member of their family has been represented by-, the defense counsel trying the case is a valid reason to strike. Lyde v. State, 605 So. 2d 1255, 1257 (1992); Ward v. State, 539 So.2d 407 (1988).

31. If a number of black potential jurors are striken pursuant to some highly suspicious reason but the prosecutor uses a "race neutral rating system" which he explains in detail to the trial court - if the system itself is truly race neutral then the strikes are valid. Christianson v. State, 601 So.2d 512, 515 (1992).

32. Striking a potential juror who expresses dissatisfaction with the way the local police conduct investigations would be race neutral. Powell v.State, 548 So.2d 590 (1988).

33. Striking a potential juror who had an uncle who was falsely accused of a crime is race neutral. Powell v. State, 548 So.2d 590 (1988).

34. Striking a potential juror whom the prosecutor had an occasion to file a civil suit against them and another family member is race neutral Baker v. State, 555 So.2d 273 (1989).

35. It is a race neutral reason to strike a juror who paid more attention and was more responsive to questions from the defense than from the state. Baker v. State, 555 So. 2d 273 (1989). This would appear to be a difficult reason for which to find supporting facts unless the record were very well made by the striking party.

36. It is a race neutral reason to strike a potential juror if they had a child who (1) operated a business cited for violations of the law (2) left the sheriff's office under less than honorable conditions. Davis v. State, 555 So.2d 309 (1989).

37. The fact that a potential juror is the same age as the defendant is a race neutral reason to strike. Wagoner v. State, 555 So.2d 1141 (1989); Harrell v. State, 555 So.2d 263 (1989).

Note: Generally age is a "highly suspect" reason for a strike Owens v. State 531 So.2d 22, 26 (1987). Question: Are the reasons other black potential jurors were striken "highly suspect"? Were white jurors of the same age as the defendant striken?

38. It is a valid reason to strike a venireman in a criminal case if they have a general "bad reputation in the community" and this is clearly documented in the record. Alien v. State, 555 So. 2d 1185 (1989);Holton v. State, 590 So.2d 914 (1990).

39. A potential juror stating that they would require an identification of the defendant from at least two witnesses to vote for conviction is a race neutral reason to strike. It is tantamount to failing to follow the law given by the court. Davis v. State, 596 So.2d 626 (1991).

40. That a potential juror knew the victim is a valid race neutral reason to strike Yelder v. State, 596 So.2d 596 (1991).

41. The fact that a potential juror signed a petition in a dispute between the police and black citizens of the community is a valid race neutral reason to strike. Yelder v. State, 596 So.2d 596 (1991).

42. If a prosecutor gives a "highly suspicious" reason for a strike (age, single, etc.) yet intended to strike all persons of all races in that category but makes an error of striking a white juror he believes to be in that category but who isn't, if the prosecutor honestly believes the potential juror was within that category even though they weren't, this would be a race neutral strike. Thomas v. State, 625 So.2d 1179 (1993); Gamble v. State, 357 S.E. 2d (1987); Smith v. State, 590 So.2d 388, 390 (1991).

43. If a black person and a white person who have impaired hearing are on a jury venire and the white juror acknowledges her difficulty and states she will raise her hand if she cannot hear and the black potential juror is striken because they will not acknowledge an obvious hearing impairment by admitting it exists this is a race neutral reason to strike the black juror. Bang v. State, 620 So.2d 106, 109 (1993).

The Following Reasons For Striking Are Considered Pretexts For Race Neutral Reasons And Are Not Sanctioned In Law.

1. It is not a race-neutral pre-emptory challenge if the prosecutor believed "but was not sure" if venireman's husband was the father of a man who had been convicted in the same court four or five times. Andrews v.State, 624 So.2d 1095, 1098 (1993).

Rule: If the prosecutor believed the foregoing suspicion was true he could have engaged in meaningful voir dire to find out if his hunch was true Ex Parte Bird, 594 So. 2d 676, 683 (1991); Ex Parte Branch, 526 So.2d 609, 623 (1987).

Rule: Mere "suspicion" of a relationship is an insufficient reason Floyd v. State, 539 So.2d 357, 363 (1987); State v. Aragon, 784 P. 2d 16, 17 1989);Carrol v. State, 639 So.2d 574, 576 (1994).

Rule: "A simple question would dispel all doubt" Walker v. State 611 So.2d 1133 (1992).

2. Striking black potential jurors because they were (1) connected with the medical field (2) because they had employers whose departments also did some medical research when the only relevance of this profession to the case at hand was that the co-defendant was employed in the medical technology field was too suspect of a reason to be tolerated. Smith v. State, 620 So.2d 732, 733 (1992).

Rule: The prosecution must show the relevance of the co-defendant's profession to the case at issue so that it might in some way impact on a potential juror. Ex Parte Bird, 594 So.2d 676 (1991).

3. If a venireman gives the prosecutor no race neutral reason during voir dire to strike them and the prosecutor gives as his reason for the strike that a

local narcotics officer told him that, "He knew the person through his investigation of narcotics in the area" this isn't race neutral. Williams v. State, 620 So.2d 82, 84 (1993).

Rule: Perhaps the prosecutor could have asked enough questions of the venireman to verify some of the information from the narcotics officer Walker v.State, 611 So.2d 1133, 1142 (1992).

Rule: This type of strike is susceptible to abuse because it is "based exclusively on information not in any way verifiable on the record before us". Williams v. State, 620 So.2d 82, 85 (1993). This rule was the reason the case was remanded Williams v. State, supra at 86.

Rule; The appellate court suggested that when this sort of problem arises an in camera hearing on the issue should be had to at least give an appellate court some record because as it stood all the higher court had was the naked assertion from the prosecutor as to what a police officer had told him Williams v. State, supra at 86. The court then recommended the procedure delineated in King v. State, 612 So.2d 1333 (1992). No in camera hearing coupled with no voir dire on the subject equals a non-race neutral strike Williams v.State, supra at 86 citing Ex Parte Bird, 594 So.2d 676 (1991).

4. Stating that a black venireman was struck because, "He vacillated back and forth when questioned by defense counsel and the prosecutor" must be clearly demonstrated in the record or the strike is not race neutral. Neal v. State, 612 So.2d 1347, 1349 (1992).

5. Stating that a black venireman "had difficulty understanding concepts that the State had asked him about" was not borne out in the record. The prosecution didn't delve into the potential juror's concept of issues presented by the state as no specific questions were asked of the venireman; they were only asked of the panel as a whole (the venireman was struck supposedly because he did not understand the concept of an insanity defense - he was only asked personally about his church affiliation and his view on capital punishment) Neal v. State, 612 So. 2d 1347, 1350(1992); Parker v. State, 568 So.2d 335, 337 (1990).

Rule : Always question vague generalities such as, "The venireman cannot grasp the complicated nature of this case" when (1) there is little voir dire of that indicated in the record itself. Neal v. State, *supra* at 1352.

6. A venireman's mere residence near the crime scene, without questioning the potential juror as to any possible knowledge of the crime is not a race neutral reason to strike. Duncan v. State, 612 So.2d 1304 (1992).

7. The fact that a venireman has problems paying child support is not a race neutral reason to strike if this issue doesn't relate to any issue in the case on trial. The case on trial involved a defendant in (1) financial difficulty and (2) who had several failed marriages. Problems in paying child support simply didn't relate to the case at hand Duncan v. State, 612 So.2d 1304 (1992).

However see: Heard v. State, 584 So.2d 556, 560 (1991) for the rule that child support proceedings instituted against a venireman is a valid race neutral reason.

8. The fact that a black venireman is "separated" from his wife is not a valid race neutral reason to strike. Duncan v. State, 612 So.2d 1304 (1992).

9. A mere "suspicion" that venireman had relations with criminal records when specific questions on voir dire would have confirmed or dispelled the "suspicions" and none were asked beyond the general question to the whole panel which no "suspected" venireman responded to at all is not race neutral. Walker v. State, 611 So.2d 1133 (1992).

10. Striking a venireman who failed to answer a voir dire question "truthfully" when there was nothing on the record to show that the answers were untruthful except the prosecutor stating some "hearsay" he had heard about the venireman second and third hand is not a race neutral reason to strike. Walker v. State, 611 So.2d 1133, 1140 (1992); Acres v. State, 548 So.2d 459 (1987); Jackson v. State, 557 So.2d 855, 856 (1990); Guthrie v. State, 598 So.2d 1013 (1991); Harrel v.State, 571 So.2d 1270, 1272 (1990).

11. The prosecutor cannot presuppose, with nothing in the record that because a venireman is the wife of a minister that she opposes the death penalty. This is not race neutral Walker v. State, 611 So.2d 1133 (1992).

Rule: An explanation for a strike based on a group bias where that group trait is not shown to apply to the striken venireman is evidence that the reason is a "sham and pretext" to strike a black juror Ex Parte Branch, 526 So. 2d 609, 624 (1987). So, you cannot strike a black nurse in a capital case and simply state that nurses "are compassionate and don't favor the death penalty". Perhaps you can strike the regional chairman of Amnesty International for that reason.

12. Striking a school teacher in a capital case simply because the prosecutor feels personally that teachers don't favor death sentences for young defendants is not race neutral if there is nothing in the record indicating the venireman

holds such an opinion. Slappy v. State, 503 So.2d 350 (1987); Powell v. State, 548 So.2d 590 (1988).

13. Striking a venireman in a capital case because the potential juror is "very religious" or a member of a faith many of whose adherents oppose the death penalty without the person saying anything at all indicating opposition to the death penalty during voir dire is not a race neutral strike. Walker v. State, 611 So.2d 1133, 1141 (1992).

Rule: The court held that Batson and Ex Parte Jackson, 516 So. 2d 768 (1986) "severely limit stereotyping in particular criminal cases" during the striking process. However see: Bass v. State, 585 So.2d 225, 237 (1991) which allowed the striking of a minister because of his particular clothing. He wore a giant cross around his neck.

14. The fact that a venireman is a nurse and the prosecutor feels as such she would be "sympathetic" and "compassionate" towards the defendant when there is nothing in the record that she responded to which would support that conclusion makes the strike improper. Powell v. State, 608 So.2d 411 (1992); Jackson v.State, 557 So.2d 855 (1990); Bass v. State, 585 So.2d 225 (1991).

15. Striking because of age-of a venireman when age isn't a factor related to the case is not race neutral Ex Parte Bird, 594 So.2d 676 (1991).

Rule: Age can be a valid strike if it can be made an issue peculiar to the case at hand Joyce v. State, 605 So. 2d 1243, 1254 (1992). In that case the prosecutor struck a potential juror who was twenty-nine because "that was the same age as the defendant". This was ruled to be race neutral. If age cannot be specifically related to the case on trial then it is not a race neutral reason to strike Richamond v.State, 590 So.2d 384, 385 (1991); Owens v. State, 531

So.2d 22, 26 (1987); Batson v. Kentucky, 90 L. Ed. 2d 69 (1986) (Justice Marshall's concurring opinion).

16. Striking a potential juror because she was a "sales clerk" is not race neutral. Stereotype strikes aren't race neutral strikes. Carter v. State, 603 So.2d 1137, 1139 (1992).

Rule: Black jurors who are striken because of employment, position in society, age or place of residence raises a "strong" inference of prejudicial pre-emptory striking. Williams v. State, 548 So.2d 501, 508 (1988); Harris v. State, 602 So.2d 502 (1992).

17. That a juror is unemployed is a highly suspect reason to strike but it can be a valid reason if placed in the context and issues in the case at hand. Carter v.State, 603 So.2d 1137 (1992-).

Rule: A strike for this reason is highly suspect because it is subject to abuse Williams v. State, 548 So. 2d 501 (1988). If it isn't placed in the context of being relevant to the case on trial it simply isn't a race neutral reason Stephens v. State 580 So.2d 26 (1991). In Cowen v. State, 579 So.2d 13 (1990) it was held to be a race neutral reason because the defendant himself was unemployed.

18. The fact that a venireman lives in a high crime area is not a race neutral reason to strike them. CEJ v. State, 788 S.W. 2d 849, 857 (1990); Ex Parte Bird, 594 So. 2d 676, 682 (1991); Williams v. State, 548 So.2d 501, 506 (1988); Sims v. State 587 So.2d 1271, 1277 (1991); Hemphill v. State, 610 So.2d 411 (1992).

19. The courts generally will not declare a strike improper for reasons of how a black venireman is dressed but if the mode of dress isn't particularly unusual it can be an improper strike. Sims v. State, 587 So.2d 1271 (1991).

20. The fact that a potential juror was chewing gum isn't a sufficient race neutral reason to strike. Sims v.State, 587 So.2d 1271 (1991).

21. A prosecutor cannot strike a black juror because of a "gut reaction" that they would be favorable to the defendant if the prosecution cannot articulate a clear reason for his "gut reaction". Mere "hunches" are improper strikes because-they are very susceptible to abuse. U.S. v. Horsley, 864 F. 2d 1543 (1989); Henderson v. State, 549 So.2d 105 (1987); Ex Parte Bird, 594 So.2d 676 (1991); Bankhead v. State, 625 So.2d 1146, 1148 (1991).

22. Striking a potential juror because the district attorney's assistant marked them "unfavorable" on the venire list is not a race neutral reason to strike. Henderson v. State, 549 So.2d 105 (1987).

23. Striking the wife of a black police officer because the prosecutor asserted that in the city police department there existed a "conflict between white and black police officers" which was a mere assertion and not demonstrated at all in the record was not a race neutral reason to strike. It was in the record that all of the prosecution's witnesses were white police officers. Yet naked totally unsupported conclusions are not race neutral reasons to strike. Richmond v. State, 590 So.2d 384, 385 (1991).

24. Striking a potential juror simply because she is single when the issue about being single cannot be reasonably related to the case at hand is not a race neutral reason to strike. Richmond v. State, 590 So.2d 384 (1991); Hundley v. State, 627 So.2d 1011 (1991).

25. Striking a black potential juror "because she did not have good communication skills" when the only thing she was ever asked was where she worked and whether she was married to which she gave an appropriate response is not a race neutral reason. This was true because the record did not support the state's asserted conclusiory statement. Moss v. City of Montgomery, 588 So.2d 520 (1991); Ex Parte Yelder, 630 So.2d 107 (1992).

26. Striking all single black females because they might be sympathetic toward the defendant who was a single black male but striking no single white females at all is not race neutral. Moss v. City of Montgomery, 588 So.2d 520, 525 (1991).

Rule: Striking a potential juror because they are single is not automatically a valid race neutral reason. A major point the court must look to is if all single jurors, black and white, were struck to determine if the strike was race neutral Matthews v.State, 534 So.2d 1129 (1988).

27. The prosecutor struck a venireman because he knew the person lived close to the scene of the alleged crime. Yet he did not voir dire about living in that area in that he never defined by his questions the exact area he was referring to. The prosecutor only asked the general question of the panel about living near the crime scene without defining the address or area for the panel. Striking a black juror who failed to respond to the general question about the crime scene was not race neutral. It .would have been if the crime scene had been clearly 'delineated and the potential juror had failed to respond Moss v. City of Montgomery, 588 So.2d 520, 526 (1991). Apply this rule to the scenario when the prosecutor asks "How many of you live near the area where the crime occurred?" and never tells the jury the location of the "area".

Rule: At any rate, living in an area where the crime occurred is not a race neutral reason to strike without further voir dire to at least impute some probable prejudice on the part of the venireman Williams v.State, 548 So. 2d 501 (1988). By this the court intended that by living in the area of the crime the record should show that the venireman had some prior knowledge of the case. Just living in the area by itself alone is not enough to have a race neutral reason to strike.

28. Striking a potential juror because she was black and had bleached blond hair, if given without other reasons, is not a race neutral reason. Davis v.State, 590 So.2d 625, 629 (1991).

29 Striking a potential juror because they live close to and had only a speaking acquaintance with a person currently subject to an extradition proceeding in an unrelated case is not a race neutral reason to strike. Johnson v. State, 594 So.2d 1289 (1991).

30 Striking a potential juror because they worked at a place with a number of employees, some of whom had been arrested and prosecuted in unrelated cases, when (1) there was nothing on the record that she ever knew any of the employees who were arrested and prosecuted (2) or that she herself was connected with the activity prosecuted was not a race neutral reason to strike. Jackson v. State, 594 So.2d 1289 (1991).

31 It is not a race neutral reason to strike a potential juror that such person knew defense counsel if the prosecution only guesses that the venireman knows defense counsel and there is nothing in the record to show that they knew defense counsel. Hemphill v.State, 610 So.2d 413 (1992).

32 Striking a black juror because the prosecutor was "just looking" for "strikes" is not valid. Siler v. State, 629 So.2d 33 (1993).

33 Striking two potential jurors "because he did not appear to be highly educated" and another because "he used two verb-less sentences" is not race neutral. See: Millett v. O'Neal Steel, Inc,., 613 So.2d 1225 (1992). In support of these two reasons counsel said "that it was important to this case that the jurors be older and understand documents and their modifications". These reasons plus the foregoing explanations sound sufficient, but they are not:

A significant consideration in the Court's conclusion was the abuse of evidence that O'Neal had introduced the first two veniremen's educational levels on anything but their current employment status. Similarly the record demonstrated that the trial venireman was employed by the Jefferson County Board of Education.

_____
Attorney for Defendant
East Podunk, Alabama

STATE OF ALABAMA,	)	IN THE CIRCUIT COURT OF
PLAINTIFF,	)	MORGAN COUNTY, ALABAMA
V.	)	
	)	CASE #_____
DEFENDANT.	)	

MOTION IN LIMINE TO PREVENT THE PROSECUTION FROM ARGUING

ILLEGAL ISSUES DURING HIS OPENING STATEMENT

Comes now the defendant in the above styled cause and moves this honorable court to enter an order directing the prosecution not to resort to any of the below listed arguments during opening statement:

1. The defendant asks that the prosecution be prohibited from making any argument in opening statement concerning the deterrent effect of the death penalty as the opening statement is not the proper place to make such an argument. State v. Irick, 722 SW 2d 121, 1^9-130 (1988). Cert. denied 489 U.S. 1072 (1989); State v. Henley, 774 SW 2d 903, 913 (1989); State v. Bates, 804 SW 2d 868, 881 (1991). Cert. denied by U.S. Supreme Court 10791; People v. Holman, 469 NE 2d 119 (1989); People v. Bell, 44 Cal 3d 137, 164 (1987); People v. Brisbon, 479 NE 2d 402 (1985).
2. The defendant requests that the prosecution be prohibited from arguing to the jury in opening statement or any other time throughout the case the impact of the crime upon the family of _____. Rogers v. State, 157 So.2d 13 (1963); Fisher v. State, 129 So. 2d 303 (1930); Arthur v. State, 575 So.2d 1165 (1990).

3. The defendant requests that the prosecution be prohibited from vouching for any witness' veracity or credibility in opening statement, closing argument or at any other point in the trial. U.S. -v. Young, 84 L. Ed. 2d 1 (1985); U. S. v. DiLoreto, 888 F. 2d 966, 998-99 (3rd Cir. 1989); United States v. Wiley, 534 F.2d 659, 664-65 (6th Cir. Cert. denied 425 U.S. 795 (1976)).

4. The defendant asks that the prosecution be enjoined by this court from arguing anything whatever to the jury at any time that diminishes the grave responsibility for deciding whether or not to impose the death penalty, **v/** Caldwell v. Mississippi, 86 L. Ed. 2d 231 (1985); Ex Parte Tomlin, 540 So.2d 668, 669-70 (1988); Mann v. Dugger, 844 F.2d 1445, 1446 (11th Cir. 1988. Cert. Denied, 109 Supreme Court 1353 (1989).

5. The defendant requests that this court enjoin the prosecution from arguing to the jury that others have already made the decision in favor of a death penalty i.e. the legislature, police, grand jury and/or the prosecutor. Sparks v. State, 563 SW 2d 564 (1978); State v. Sloan, 298 SE 2d 92 1982.

8. The defendant asks the court to enjoin the prosecution from arguing in opening statement or closing argument or at any part of the trial that the State's evidence is "uncontroverted". Stain v. State, 494 So.2d 816, 817 (1986); Ex Parte Williams, 461 So.2d 852, 853 (1984); Vickery v.State, 408 So.2d 182 (1981).

9. The defendant requests the prosecution be ordered not to argue or infer that there is a "drug problem" in this jurisdiction. Brown v. State, 557 SW 2d 962 (1977).

8. The defendant asks that the prosecution be enjoined from making any attempt to reduce the State's burden of proving guilt to a standard of less than beyond a reasonable doubt. Ledford v. State, 568 SW 2d 113, 11 7-118 (1978).

9. The defendant asks that the prosecution be prohibited in opening statement or at any other time from giving his personal opinion as to the reliability or credibility of the accused's testimony. United States v. Young, 84 L. Ed. 2d 1 (1985); Berger v. U.S., 79 L. Ed. 1314 (1935); Wilson v. State 371 So.2d 126, 128 (1978); ABA Standards Relating to Prosecution Function and Defense Functions, 5.8 (b).

10. The defendant asks that the prosecution be enjoined in opening statement, closing argument or at any other point in the trial from giving his personal opinion as to the guilt or innocence of the accused. United States v. Young, 84 L. Ed. 2d 1 (1985); U.S. v. Dinitz, 47 L. Ed. 2d 267 (1976); Berger v. United, States 79 L. Ed. 1314 (1935).

11. The defendant asks that the prosecution be enjoined from giving his personal opinion as to the punishment this accused should receive. Payne v. Tennessee, 115 L. Ed. 2d 720 (1991); United States v. Young, 84 L. Ed. 2d 1 (1985).

12. The defendant requests that the prosecution be prohibited from arguing what he would do if someone committed the crime at bar on someone the prosecutor knew, e.g. .... his family member. Lauterback v. State, 179 SW 2d 130, 131 (1915).

13. The defendant requests the prosecution be prohibited from arguing that the accused is an "animal" or the like. Darden v. Wainwright, 91 L. Ed. 2d 144 (1986); State v. Tyson, 603 SW 2d 748, 754-55 (1980) (Calling the

defendant a "rat"). State v. Bates, 504 SW 2d 868, 881 (1991). Cert. denied 10/7/91 (Calling the defendant a "rabid dog").

14. The defendant requests that the prosecutor be enjoined in opening statement, closing argument or at any other part in the trial from acting out or pantomiming the accused's actions or the killer's actions in taking the life of _____.

State v. Paine, 91 SW 2d 10 (1990). (This was a death case where the defendant was convicted of stabbing a mother and child to death. The prosecutor demonstrated "what he did to them" by approaching a diagram of the body of a child and stabbing a hole through it with a murder weapon, a butcher knife).

15. The defendant asks the court to enjoin the prosecution from referring to accused's prior criminal behavior or implying that the same exists unless and until the point in the trial that the same is introduced into evidence. Ex Parte Whisenchant, 482 So.2d 1247 (1984).

16. The defendant moves that the prosecution be prohibited from discussing whether or not the jails are run properly, have adequate security, allow multiple escapes or that the accused would be a danger to other inmates, guards or their families. Hance v. Zant, 696 F.2d 940, 952-53 (11th Cir. Cert. denied 460 U.S. 1210 (1983)); Shafer v. South Carolina, 121 S.Ct. 1263 (2001); Kelly v. South Carolina, 127 S.Ct. 726 (2002).

17. The defendant requests the prosecution be enjoined from arguing that unless the accused is convicted, it will be impossible to maintain "law and order" in the juror's community. United States v. Barker, 553 F. 2d 1013, 1025 (6th Cir. 1977); Wilson v. Kemp, 777 F.2d 621, 624-25 (11th Cir. 1985);

Hance v. Zant, 696 F.2d 940, 952-53 (11th Cir. 1983); Tucker v. Zant 724 F.2d 882, 888 (11th Cir. 1984); Code of Professional Responsibility. Cannon 7, DR 7-106 (C) (1).

18. The defendant requests the prosecution be prohibited from arguing: safety in the streets as a general theme or inferring that jurors might be victims of street crime. Greog v. Georgia, 49 L. Ed. 2d 859 (1976) (Jury which deliberates upon questions of life or death must focus on individualized nature of crime and particularized characteristics of the accused rather than the amorphous distractions such as crime in the streets).

19. The defendant requests that the prosecution be prohibited from arguing that jurors show criminals by a not guilty verdict that they "can get away with it". United States v. Wiley, 534 F.2d 569, 565 (6th Circuit. (Here the prosecution argued .

. "if this man goes free you have chalked up one point for the criminals"). Cert. denied 425 U.S. 995 (1976); Hooks v. State, 416 A. 2d 189, 204 (1980); Commonwealth v. Cherry, 378 A. 2d 800, 805 (1970).

20. The defendant requests that the prosecution be enjoined from arguing that it is the juror's "civic duty" to convict the defendant. Hance v, Zant, 696 F. 2d 940, 952-53 (11th Cir.) (In a death penalty case the prosecution made an analogy with war time and asked jurors to be soldiers to kill in defense of their country); Tucker v. Zant, 724 F.2d 882, 888 (11th Cir. 1984) (Calling it reversible error for the district attorney to argue that he is the representative of the government, comparing fighting crime to waging war

and calling for the jury to protect the American people from crime, calling upon the jury to "do their duty" by returning a conviction).

21. The defendant asks that the prosecution be absolutely enjoined from making any argument or statement to the jury in any way, shape, form or fashion informing the jury of the cost of incarcerating someone for life without parole. Brooks v. Kemp, 762 F.2d 1383, 1412 (11th Cir. 1985); Tucker v. Zant, 724 F.2d 882, 890 (11th Cir. 1984).

22. The defendant requests that the prosecution be prohibited from referring to another case or to compare another case to the one at bar where there is nothing in the record to support such an argument. An example of this prohibited type of argument would be referring to this case as like the Charles Manson case or like the Leopold Loeb case or some other gruesome murder case. Davis v. State, 28 SW 2d 993, 997 (1930); Drake v. Kemp, 727 F. 2d 990, 995-996 (11th Cir. 1984); United States v. Wiley, 534 F.2d 659, 664-65 (6th Cir.) (Referring to the defendant's case as being like that of Gary Gilmore, a famous Florida serial killer).

23. The defendant requests that the prosecution be enjoined from indicating that they will not be permitted to present some evidence that they would like to present. Berger v. United States, 79 L. Ed. 2d 1314 (1935).

24. The defendant requests that the prosecution be prohibited from arguing that the accused should be "given the same justice that he gave to the victim in this case". People v. Jackymiak, 46 NE 2d 50, 54-55 (1956).

25. The defendant requests that the prosecution be absolutely enjoined from arguing its expertise in selecting the case for prosecution, i.e., that this particular case is most deserving, the most atrocious, or the best suited

for capital punishment, or give its assessment of this case compared to any other. Cooks v. State, 534 So.2d 329, 354-55 (1987). (In this case it was error for the prosecution to argue that this was the crudest and worse crime that he had seen and that he was inflamed by what the defendant had done. Prosecutors may not argue their practice in seeking death and the frequency or infrequency with which they have sought it); Brooks v. Kemp, 762 F. 2d 1383, 1410 (11th Cir. 1985); Ex Parte Tomlin, 540 So.2d 668, 669-70 (1988).

26. The defendant requests that the prosecution be absolutely prohibited from stating to the jury in any way the number of death penalties sought in any jurisdiction, county or state in this nation. State v. Harries, 656 SW 2d 414, 421 (1983); Tucker v. Zant, 724 F.2d 882, 889 (11th Cir. 1984).

27. The defendant requests the prosecution be prohibited from arguing that the prosecutor is impartial while the defenses' only duty is to get the accused off. Moore v. State, 17 SW 2d 30 (1929); Bell v. State, 614 SW 2d 122 (1981).

28. The defendant requests that the prosecution be enjoined, unless there is specific evidentuary basis for the same, from arguing to the jury that the defendant lacked remorse. Lesko v. Lehman, 925 F.2d 1527 (3rd Cir. 1991); Colina v. State, 570 So. 2d 929, 932 (1990); State v. Brown, 347 SE 2d 882, 886-887 (1986).

29. The defendant requests the prosecution be prohibited from arguing anything to the jury that diminishes the jury's responsibility to consider all mitigation, specifically including any non-statutory mitigation supported by the evidence introduced at either the guilt/innocence or sentencing

phase. Hitchcock v. Dugger, 95 L. Ed2d 327 (1987); Eddings v. Oklahoma, 71 L. Ed 2d 1 (1982); Locket v. Ohio, 57 L. Ed 2d 973 (1978).

30. The defendant requests that the prosecution be prohibited from arguing to the jury anything which limits the jury's consideration of sympathy for the accused based on the evidence presented. California v. Brown, 93 L. Ed 2d 934 (1987); Buttram v. Black, 721 F. Supp. 1268, 1318 (1989);Wilson v. Kemp, 777 F.2d 621, 625-26 (11th Cir. 1985).

_____
ATTORNEY FOR DEFENDANT

STATE OF ALABAMA,	)	IN THE CIRCUIT COURT OF
PLAINTIFF,	)	MORGAN COUNTY, ALABAMA
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DEFENDANT.	)	

TRIAL BRIEF ON THE ISSUE OF USING EXPERT TESTIMONY ON THE ISSUE OF DEFENDANT'S SUSCEPTIBILITY TO SUGGESTION IN ORDER TO ASSIST THE JURY IN DETERMINING THE PROPER WEIGHT TO PLACE UPON HIS SECOND STATEMENT TO THE DECATUR POLICE DEPARTMENT

Comes now the defendant pursuant to 702 and 703 Alabama Rules of Evidence to admit the testimony of Dr. _____in the following areas:

A. Welcher Adult Intelligence Scale (IQ)

B. Welcher Memory Scale (IQ)

A. Minnesota Multiphasic Personality

B. Millon Clinical Multiaxial

C. Invortary III (MCMI-III) Vulnerability to Persuasion

D. Questionnaire/Clinical Interview

Relevance: The issue of vulnerability to persuasion deals with the most important issue in the trial. The defendant contends that the first statement he gave to the police in sum and substance is correct. However, he contends that the second written statement he gave to the police is not true. He contends that any and all references to the sexual abuse _____ or any other person are completely untrue. In effect the defendant contends that he is guilty of manslaughter and not capital murder.

To succeed he must demonstrate to the jury that the second statement to the police is unreliable and hence untrue. The trial in this case is upon the issue of whether the defendant is guilty of capital murder or manslaughter. If the second statement is considered true by the jury a capital murder conviction could very well be the outcome.

Brief: The defendant contends that the evidence sought to be admitted is admissible under 702 and 703 Alabama Rules of Evidence.

Rule 702 states:

> If scientific, technical, or other specialized knowledge will assist the tier of fact to understand the evidence or determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise.

Under 703 Alabama Rules of Evidence, the facts and data upon which the expert bases his opinion can be perceived and made known to him during his own testing and clinical interviews of the accused. He is not required to rely upon facts proved in court prior to his testimony.

The validity of the second written statement supposedly given by the accused to the police is, based on the accused's theory of defense, the central "fact in issue" in this case.

If the second statement at issue is admitted into evidence the accused has an absolute right to challenge the circumstances under which it was given Lewis v. State, 329 So.2d 599 (1976); Ex Parte Singleton, 465 So.2d 443 (1985). When the accused seeks to take advantage of this right his intelligence becomes an issue; Davis v. North Carolina, 16 L Ed 2d 895 (1966); as does his mental condition at the time Blackburn v. Alabama, 41 L Ed 2d 242 (1980).

The accused's susceptibility to suggestion is an issue concerning his intelligence and mental condition at the time the second statement was allegedly made.

Evidence of the accused's susceptibility to suggestion has long been admitted in cases across the country. One of the earliest cases admitting this sort of evidence is United States v. Benveniste, (564 F 2d 335) (9th Cir. 1977). In this case the appellant was convicted of possession of cocaine and conspiracy to distribute cocaine. His defense was entrapment. The trial court refused to admit expert testimony from a psychiatrist that the appellant had an unusually high susceptibility to the suggestions of others. The appellate court reversed stating that this ruling deprived the appellant of essential evidence necessary to his defense because a review of the transcript indicated that the prosecutions evidence on the predisposition issue was not strong. The appellant court held that this evidence of susceptibility to suggestion may have tipped the scales of justice in appellants favor by raising a reasonable doubt as to his pre-disposition.

Comparing the theory in United States v. Benveniste, *supra* to the instant case there exists virtually no evidence that this accused sexually abused Charity Unique Long except the second statement he supposedly to the Decatur Police Department. Hence the evidence needed by the prosecution to prove

capital murder, i.e., sexual abuse, is far from clear and convincing. Denying the proffered evidence of Dr. _____ will effectively rob this defendant of the right to present credible evidence creating a reasonable doubt as to a specific element of the offense with which he is charged.

The leading case in the country dealing with the right of a defendant to present expert testimony as to his abnormal susceptibility to inducement and suggestion is United States v. Hill, (655 F 2d 512) (3rd Cir. 1981). This appellant's conviction for

distribution of heroin was reversed. The exclusion of expert testimony under Rule 702 on this issue was the sole basis of reversal. It held:

> An expert's opinion, based on observation, psychological profiles, intelligence tests, and other assorted data, may aid the jury in its determination of the crucial issues of inducement and predisposition. This is the purpose ascribed to expert testimony of Federal Rules of Evidence 702, and it appears most applicable to the instant case. A jury may not be able to properly evaluated the effect of appellant's subnormal intelligence and psychological characteristics on the existence of inducement or predisposition without the considered opinion of an expert.
>
> Accordingly, if the expert can reach a conclusion, based on an adequate factual foundation, that the appellant, because of his alleged sub-normal intelligence and psychological profile, is more susceptible and easily influenced by the urgings and inducements of other persons, such testimony must be admitted as relevant to the issues of inducement and predisposition. (Emphasis added p. 516)

In the instant case the susceptibility of the accused to the desires. prodding, leading and suggestions of the Decatur Police Department when the second statement was taken is a crucial issue. All psychological tests confirm his subnormal intellect.

Another leading case in this area is United States v. Newman, 849 F 2d 156 (5th Cir. 1988). In this case the defendant was convicted of conspiracy to distribute cocaine. It held:

> However, he (expert) may testify that the defendant's mental disease, defect on subnormal intelligence made him more susceptible than the usual person to persuasion by government agents or rendered him incapable of forming the specific state of mind required for the offense. (p. 165)

A relatively recent case on the issue under discussion is State v. Shuck, 953 S. W. 2d 662 (1997). This case involved the reversal of appellant's conviction for conspiracy to commit capital murder and conspiracy to commit who sought to introduce

the testimony of a neuro-psychologist that he suffered from a cognitive decline and sufficient deterioration of his cognitive abilities which rendered him more susceptible to inducement than the average person. Refusal by the trial judge to admit this evidence was the central issue on appeal. The court held that most jurisdictions which had considered the issue had held that expert testimony on the defendant's psychological susceptibility to inducement was admissible under Rule 702 (p. 667) The court began its discussion by adopting the holding in United States v. Hill, *supra*. The court then concluded that if the susceptibly to suggestion is an issue in the case or it makes more or less probable an issue in the case and the testimony would assist the tier of fact in determining the issue then the evidence should be admitted, (p.668)

Susceptibility to suggestion evidence has not been admitted solely in cases where entrapment was an issue. The case of State v. Hall, 958 S. W. 2d 679 (1997) admitted the evidence on the issue on whither the appellant had the requisite *mens rea* to commit a premeditated murder, (p. 688)

_____
Attorney for Defendant
East Podunk, Alabama

STATE OF ALABAMA,	)	IN THE CIRCUIT COURT OF
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DEFENDANT.	)	

RULE 403 MOTION TO PREVENT STATE FROM READING THE RAPE/SODOMY COUNTS OF THE INDICTMENT TO THE JURY

Comes now the defendant pursuant to Rule 403 Alabama Rules of Evidence and asks this court to forbid the state from reading to this jury the rape/sodomy counts of the indictment on the following grounds:

1. The information made the factual basis of this motion was not learned for positive until 10:15 A.M., August 14, 1998. Hence the late filing of this motion.
2. On August 14, 1998, the undersigned _____of the Morgan County District Attorney's office traveled to Birmingham to meet with the physician who performed the autopsy on _____. He made his presentation and then invited questions from the defense and the state. His autopsy was performed with the issue clearly in mind that rape/sodomy/sexual abuse had possibly occurred. His autopsy was geared to a search for evidence of any of these acts.
3. After a thorough search for said evidence he found no evidence of rape or sodomy or sexual intercourse of any sort. He could not rule out digital penetration as expressed in the defendant's second statement, although he found no evidence of it, but rape and sodomy are ruled out.
1. Hence the state knows full well that there will be no evidence of rape or sodomy proven in court.

2. Hence we will have matters presented to the jury which not only cannot be proven, but are grossly prejudicial.

3. This being a death penalty case, it is like no other criminal case in one respect. This court must make a specific finding that the verdict, if death, was not based on passion or prejudice,??? created by unfounded, un-provable allegations in the indictment.

4. Rule 403, Alabama Rules of Evidence, excludes evidence whose probative value is exceeded by its prejudicial effect. It causes unfair prejudice and is misleading.

_____
Attorney for Defendant
East Podunk, Alabama

STATE OF ALABAMA,	)	IN THE CIRCUIT COURT OF
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Requested Charge to the Jury at the Commencement of Trial

In Alabama there are two possible penalties for a person who the jury convict of capital murder. These penalties are imprisonment for the defendant's natural life with no possibility of parole, and death. In the event that the accused is convicted of capital murder, and only in that event, there will be a second phase of this trial called the penalty phase. If the accused is convicted of capital murder, the same jury is used in both phases.

The first phase of the trial is the guilt-innocence phase. In this phase, the jury decides whether the state has proven the defendant guilty of capital murder or some other offense, beyond a reasonable doubt, or whether the defendant is not guilty of any crime. In making the guilt-innocence decision, the jury cannot consider any possible sentence. At that stage you will only consider whether the accused has been proven guilty of capital murder or some other offense beyond a reasonable doubt. Any decision in your mind, expressed or unexpressed, concerning the possible penalties at that point is very improper and simply must not occur.

Only in the event that the accused has been proven guilty of capital murder beyond a reasonable doubt will there be a sentencing phase of this trial. Only at that time, at its conclusion, and after I have charged you on the law concerning your determination and how it shall be made are you to discuss an appropriate sentence or even form an opinion about an appropriate sentence.

Statistics tell us that many jurors make up their minds about the appropriate sentence during the guilt – innocence phase of the trial. I am instructing you now that this is highly improper and violates the law and the instructions of this court.

_____
GIVEN

_____
REFUSED

AUTHORITY: This is an extremely important charge requested by the defendant and a fair trial cannot be had unless it is given, or one substantially the same is given.

STATE OF ALABAMA,	)	IN THE CIRCUIT COURT OF
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MOTION FOR TRIAL COURT TO GIVE CAUTIONARY INSTRUCTIONS PRIOR TO CERTAIN PHOTOGRAPHS BEING IDENTIFIED TO THE JURY

Comes now the defendant in the above styled cause and asks this court that prior to the state identifying certain bloody and gory photographs to the jury, before the same are ever shown to the jury, that the following cautionary instructions be by this court:

> Ladies and gentlemen, you are about to view certain photographs. Some persons might consider these pictures to be gruesome. The purpose of permitting you to view these photographs is not to inflame you. Photographs are admitted into evidence in the trial of a case to prove or disprove some disputed or material issue. They are admitted to illustrate or elucidate some other relevant fact or evidence offered, or to be offered. The fact that a photograph is gruesome is not grounds to exclude it from you a long as the picture sheds light on the issues being tried.
>
> In letting you view these photographs it is not intended that they merely inflame your mind. Indeed, you may not return a verdict based upon passion. The sole purpose of admitting these photographs into evidence is to assist you in determining the facts and issues in this case.

Authority: Ex Parte Bankhead, 585 So.2d 112, 118 (1991). Also, in any capital case the court must determine that the resulting sentence was not based on "passion, prejudice, or any other arbitrary factor" 1975 Code of Alabama, 13A-5-53(b) 1. This finding is, of course, not necessary in any non-capital case.

_____
Attorney for Defendant
East Podunk, Alabama

STATE OF ALABAMA,	)	IN THE CIRCUIT COURT OF
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MOTION FOR TRIAL COURT TO GIVE CAUTIONARY INSTRUCTIONS PRIOR TO IDENTIFYING THE DECEASED'S CLOTHING

Comes now the defendant and asks this court that prior to the state identifying certain bloody clothing to the jury, before same are ever shown to the jury, that the following cautionary instruction be given by this court:

Ladies and gentlemen you are about to view certain clothing. Some persons might consider this clothing to be gruesome. The purpose of permitting you to view this clothing is not to inflame you. The purpose of jurors viewing it is that it may tend to corroborate or elucidate other evidence in this case. They may shed light on some material issue in this case. The fact that the clothing is gruesome is not grounds to excluder it from you as long as it sheds light on the issues being tried.

In letting you view this clothing it is not intended that it merely inflame your mind. Indeed you may not return a verdict based upon passion. The sole purpose of admitting these articles of clothing into evidence is to assist you in determining the facts and issues in this case.

Authority: Flannigan v. State, 266 So, 2d 637 (1972);

Washington v. State, 112 So.2d 179 (1959).

_____

ATTORNEY FOR DEFENDANT

STATE OF ALABAMA,	)	IN THE CIRCUIT COURT OF
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MOTION FOR CAUTIONARY INSTRUCTIONS IN THE EVENT THAT THE DEFENDANT'S STATEMENT IS INTRODUCED INTO EVIDENCE

Comes now the defendant in the above styled cause and moves this Honorable Court in the event that the statement attributed to the defendant taken by the _____Police Department in connection with this case is introduced into evidence, the defendant requests that the following cautionary instruction be immediately given to the jury before the reading into evidence of said statement:

> Evidence will be introduced that the defendant made statements to the police about the crime charged. You should weigh that evidence with caution and carefully consider all the circumstances surrounding the making of the statement. Do this in deciding whether the defendant made the statement and in what weight to give it, along with all the other evidence surrounding it.
>
> If you decide that the defendant did make the statement in examining the circumstances surrounding the statement, you may consider whether the defendant made it freely and voluntarily with an understanding of what he was saying. You may consider whether he made it without fear, threats, coercion, or force, either-physical or psychological, and without promise of reward. You may consider the

conversation, if any, between the police and the defendant. For example you may consider whether the police warned him of his rights; where and when the statement was given; the time of day that police questioned him; who was present; the physical and mental condition of the defendant. You may consider the age, disposition, education, experience, character, and intelligence of the defendant. Considering all the circumstances, you should give his statement such weight as you think it deserves.

The defendant is entitled to a cautionary instruction contemporaneously with the admission of the statement into evidence. United States v. Dabish, 708 F.2d 240 (6th Cir. 1983). This is almost verbatim the instructions suggested in Criminal Jury Instructions For The District of Columbia, Instruction No. 2.48, Statements of the Defendant – Substantive Evidence (Barbara E. Bergman, Ed., 4th Ed. (1983).

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ATTORNEY FOR DEFENDANT

STATE OF ALABAMA,	)	IN THE CIRCUIT COURT OF
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MOTION TO EXCLUDE THE DEFENDANT'S PARENTS FROM THE RULE

The defendant requests that his parents be excused from the rule on the following grounds and authority:

1. The mother of the deceased, although a material witness in this case, is permitted by statute to remain in court at the prosecution's table 1975 Code of Alabama, 15-14-56 (1975).
2. The Rule has been invoked yet this court is fully empowered to make any exceptions to the rule that it deems fair and equitable Smith v. State, 43 So.2d 821 (1950); McDowell v. State, 189 So. 183 (1939); Kuenzel v. State, 577 So.2d 474 (1990).

1. This defendant is facing a capital murder charge that could cost his life and he is upset emotionally and psychologically. He is afraid and confused.
2. The defendant asks that his mother and father be excused from the rule. Their presence is necessary for him to withstand the pressures of this trial.
3. The undersigned counsel needs the presence of defendant's parents so that the defendant will maintain his composure and can adequately assist counsel in his defense.

4. The defendant's parents will testify at the penalty phase should this trial reach that stage, yet presence in this courtroom as spectators during the guilt phase, as a matter of law, does not exclude them from being penalty phase witnesses, Dutton v. Brown, 812 F.2d 593 (10th Cir. 1987).

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ATTORNEY FOR DEFENDANT

East Podunk, Alabama

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MOTION TO EXCUSE THE DEFENDANT'S INVESTIGATOR FROM THE RULE

The defendant asks this court to excuse his investigator from The Rule and as grounds and authority states as follows:

1. The chief investigator for the prosecution is permitted to remain at the table with the prosecutor throughout trial. Unquestionably the investigator will be a witness. Being the primary investigator in this case such investigator is fully aware of all the evidence to be introduced and the statements given by witnesses who will be called. The defendant has no such person at his table who has this capability. The defendant's investigator is not *ipso facto* excused from The Rule.
2. In the case of Ex Part Lawhorn, 581 So.2d 1179 (1991) the trial court was not put in error for allowing the district attorney's secretary and his trial coordinator to remain in the courtroom during the trial. The secretary was a witness in the case but testified only to the fact that the confession was in working order and she was also a chain of custody witnesses. These two persons were present in the court room during the whole capital trial in addition to an investigator from the sheriff's office.

3. The trial court may excuse any witness from the rule whom it deems fair and appropriate under the circumstances presented. Ex Parte Faircloth, 471 So.2d 493 (1985); Elrod v. State, 202 So.2d 539 (1967).

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ATTORNEY FOR DEFENDANT
East Podunk, Alabama

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MOTION TO EXCLUDE THE DEFENDANT'S PSYCHIATRIST FROM THE RULE

DURING THE TIME THE STATE'S AND DEFENSE'S

PSYCHOLOGISTS GIVE TESTIMONY

The defendant requests that his psychiatrist be excused from The Rule during such time as the state and defense psychologists offer testimony and during no other time. As grounds and authority the defendant states:

1. One state psychologist completed an Intelligence Quota Test on the defendant.
2. One defense psychologist completed an MMPI test on the defendant.
3. In the opinion rendered by the defendant's psychiatrist he will use as supporting facts the test results of the Intelligence Quota Test and the MMPI.
4. This court can excuse any witness from The Rule it deems fair and equitable under the circumstances of the case Hall v. State, 500 So.2d 1282, 1291 (1986); Chesson v. State, 435 So.2d 177, 179 (1983); Young v. State, 416 So 2d 1109, 1111 (1982).
5. An expert may always base their conclusion upon facts testified to by other experts who have or have not testified, Jackson v. State, 378 So.2d 1164, 1170 (1979).

6. The law of Alabama gives this defendant two distinct ways for his psychiatrist to give a conclusion. The defendant may ask hypothetical questions based on assumed facts. The defendant can also have his expert present in the courtroom while the other experts give their testimony, Henderson v. State, 583 So.2d 276, 291 (1990).

7. The defendant elects to use the method delineated in Henderson v. State, *supra,* of allowing his psychiatrist to be present in court during the testimony of the state and defense psychologists.

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ATTORNEY FOR DEFENDANT
East Podunk, Alabama

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TRIAL BRIEF ON THE ISSUE OF WHEN THE DEFENDANT

MAY LEAD HIS OWN WITNESS

1. There is a sort of "catch all" statute which gives the trial court the discretion to allow a party to ask leading questions of their own witness:

> …the court may exercise discretion in granting the right to the party calling the witness and in refusing it to the opposite party when, from the conduct of the witness or other reason, justice requires it. 1975 Code of Alabama, 12-21-138.

This rule is also in line with 611 (C), Alabama Rules of Evidence:

> Leading questions should not be used on the direct examination of a witness, except when justice requires that they be allowed. …When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

2. It is proper to lead a witness in the examination in chief on (1) preliminary general inquiry, and (2) enquiries as to matters which are not in dispute or are not issues in the case, Cloud v. Moon, 273 So.2d 196 (1973).
3. A witness who shows by his answers and his tone of voice that he is "hostile" to the party calling him may be asked leading questions, Cloud v. Moon, 273 So.2d 196 (1973).
4. A witness whose interests are clearly adverse to those of the party calling him may be asked leading questions. McElroy's Alabama Evidence, 4th Edition 121.05(7).

5. A witness who testifies differently from the way the calling party expects then to may be asked leading questions. This is not automatic. The party calling such witness must have good reason to believe the witness would have testified differently and that witness's actual testimony must in some way hurt the calling party's case. This is called leading due to "surprise" and a predicate must be established before leading questions are propounded. Campbell v. Davis, 150 So.2d 187 (1995).
6. Leading questions may be asked by a party calling a witness who is forgetful due to age or infirmity. Trammell v. State, 298 So.2d 666 (1974); Jones v. State, 182 So. 402 (1937).
7. Leading questions may be asked of an impeaching witness by the party calling them. This can be done only if the witness sought to be impeached was first asked and then denied the words or conduct sought to be proven. Terry v. State, 78 So. 460 (1918). An example of this would be if you asked a prosecution witness if during the month of March last year at Joe's Bar in Decatur, Alabama, you told John Doe you didn't see the killer's face. If the witness says he did not say that to John Doe in Joe's Bar, even you can then, and only then, call John Doe to testify that such witness did indeed make that remark at that place and time. When you seek that information, you may lead.
8. Leading questions may be asked of a witness called by a party when such witness does not answer the non-leading questions put to them. Lawhorn v. State, 581 So.2d 1159 (1990).
9. Leading questions may be asked of a child; Peebles v. State, 282 So.2d 65 (1973) (child of 12).

10. Leading questions may be asked of a person who is identified with an adverse party. See: U.S. v. Hicks, 748 F.2d 854, 859 (4th Cir. 1984). In that case, the prosecution asked leading questions of the defendant's girlfriend. The converse would also be true; the defendant could ask leading questions of the defendant's family or close friends.

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ATTORNEY FOR DEFENDANT
East Podunk, Alabama

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TRIAL BRIEF ON THE ISSUE OF THE DEFENDANT'S RIGHT TO FULLY DEVELOP THE MITIGATING EVIDENCE OF HIS CHILDHOOD AND UPBRINGING

The defendant will prove to this court and to this tryer of fact that he suffered physical and psychological abuse as a child which directly caused the problems in his life that culminated in this homicide.

1. Proof of these factors are mitigating circumstances. Proof of neglect as a child is mitigating; Powell v. State, 796 So.2d 404, 433 (1999). Proof that the defendant was deprived of security in his early childhood as a result of family turmoil and instability are mitigating factors; Powell v. State, 796 So.2d 404, 433, (1999). Any negative influences in the defendant's upbringing are mitigating factors: Williams v. State, 795 So.2d 753, 784 (2000). Any failures in the things that this defendant tried to accomplish in his life are mitigating factors, Williams v. State, 795 So. 753, 785 (2000). Sexual abuse of the defendant is a relevant mitigating factor; Holford v. State 548 So.2d 547 (1988). These are mitigating factors as a matter of law.
2. All of these factors must be fully developed. Each one is a piece of the puzzle of this defendant's life which made him the person he was at the

time of the homicide. Each piece shaped his psyche and his attitudes and perceptions which existed at that point in time. None of these issues is isolated but each is a point of the whole make-up of this defendant. All of the circumstances combined to make this defendant what he was at the time of the homicide. See: Cord v. Dugger, 911 F.2d 1494, 1511 (11th Cir. 1990); 77 N. C. L Rev. 1143, 1157:

> Without a detailed presentation of the defendant's experience and a cogent explanation of its long-term repercussions a juror's assumptions about childhood abuse may skew her understand of its significance. It is necessary therefore for the jury to know the kind, duration, and severity of abuse me defendant suffered and to understand how this abuse, in consent with other factors, affected the defendant.

See also: The dissent of Justice Renquist in Santosky v. Kramer, 455 U.S. 745 (1982)at 788:

> A stable, loving home life is essential to a child's physical, emotional and spiritual well-being. It requires no citation of authority to assert that children who are abused in their youth generally face extraordinary problems developing into responsible, productive citizens.

The defendant must put his complete unfortunate and abusive childhood and adolescence before this jury in order that they fully understand how all of it acted cumulatively to bring this defendant to the point he was at the time of the homicide. See: 77 N.C. L. Rev. 1143, 1184:

> The crucial point of the defense case for mitigation is explaining how and why the defendant's history of abuse caused long term cognitive, behavioral, and volitional impairments that relate to the murder he committed. Without testimony making this connection jurors probably will not comprehend the significance of the defendant's background to their sentencing decision.

Wherefore, premises considered it is hoped that this court will permit this defendant to lay out the full history of his childhood and adolescence so that they might fully comprehend who and what this defendant was at the time of the homicide. It sheds

light on this defendant's character and must be admitted under Lockett v. Ohio, 438 U.S. 586 (1978). It is by proof of each instance of abuse that the defendant's psychologist can testify as to the total result. Each act of physical and psychological abuse certainly did not occur in a vacuum. It is therefore hoped that this court will grant this defendant leeway to prove the multiple instances of abuse.

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ATTORNEY FOR DEFENDANT
EAST PODUNK, ALABAMA

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MOTION IN LIMINE TO PREVENT THE PROSECUTION FROM INTRODUCING IRRELEVANT EVIDENCE FROM THE DECEASED'S FAMILY AND FRIENDS AS TO THEIR PERSONAL OPINION OF WHAT THE JURY'S PENALTY PHASE SHOULD BE

Comes now the defendant at the penalty phase of this trial and requests the court to order the prosecutor not to question or elicit any response from any of their witnesses whether family and friends of the deceased or not as to what they would suggest the jury's recommendation to the court be and states as follows:

1. Evidence from family and friends of the deceased as to what they personally feel that the recommendation of the jury to the sentencing authority should be is not proper evidence. It:

    A. invades the province of the jury

    B. irrelevant under 401 Alabama Rules of Evidence

    C. irrelevant under 402 Alabama Rules of Evidence

    D. prejudicial under 403 Alabama Rules of Evidence

2. Case law has held such evidence irrelevant as a matter of law

Robinson v. Mavnara, 943 F.2d 1213,1217 (10th Cir.) cert. den., 116 L. Ed.2d 463; Robinson v. Mavnara, 829 F.2d 1501,1504-05 (10th Cir. 1987); Taylor v.State, 666 So.2d 36. 51 (1994).

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ATTORNEY FOR THE DEFENDANT
EAST PODUNK, ALABAMA

STATE OF ALABAMA,	)	IN THE CIRCUIT COURT OF
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Motion In Limine To Prevent The State From Introducing Illegal, Irrelevant, And Non-Probative Evidence During The Penalty Phase Through The Deceased's Family And Friends

1. The state has called _____ as its witness during the penalty phase of this trial.
2. The purpose of the evidence taken in the penalty phase of a capital case is to prove statutory aggravating circumstances under 1975 Code of Alabama, 13A-5-49, and mitigating circumstances under 1975 Code of Alabama, 13A-5-51, and 13A-5-52. Only relevant and probative evidence as to these statutes is admissible under 13A-5-45(d). Absolutely, positively no non-statutory aggravating circumstances can be proven. They are thus irrelevant, non-probative, and illegal. See: Beard v. State, 402 So.2d 1044, 1050 (1981); Stewart v. State, 659 So.2d 122 (1993); Keller v. State, 380 So.2d 926 (1979); Tomlin v. State, 443 So.2d 47 (1979).
3. In Jackson v. State, 791 So.2d 979, 1010 (2000), the state introduced in the guilt phase the fact that the victim:
    A. had two children
    B. the names and ages of the two children
    C. the victims was a "caring and sweet" person whom everybody knew

D. the victim "was always helping people in the community by extending store credit to those who did not have the money to pay for groceries.

The evidence came in from the victim's husband. It was held inadmissible but harmless due to other evidence in the case. The evidence certainly wouldn't have been tolerated in the penalty phase without causing reversal.

4. The character and reputation of the deceased is most certainly an irrelevant point because the law does not distinguish between those who kill a saint or a sinner when it comes to the punishment of the murderer. See: Bankston v. State, 358 So.2d 1040 (1978). The fact that the deceased was a "peaceful" person and never offended anyone was irrelevant and reversible error. See: Caylor v. State, 353 So.2d 8 (1977).

5. It has long been considered irrelevant in any murder case to put on testimony of how much the deceased is missed by his family and friends. See: Rogers v. State, 157 So.2d 13 (1963); Thomas v. State, 90 So. 878 (1921). This is so held because this is an irrelevant point in a murder case. It is purely an appeal to sympathy and an attempt to inflame the jury. See: Lawman v. State, 91 So.2d 697 (1956). This same rule was clearly extended to capital murder cases in Arthur v. State, 575 So.2d 1165 (1990).

6. There is simply nothing that this witness could testify to concerning a statutory aggravating circumstance of 1975 Code of Alabama, 13A-5-49, or to rebut or attenuate the mitigating circumstances of 1975 Code of Alabama, 13A-5-51 and 13A-5-52.

7. In a capital case the Court of Criminal Appeals must make a specific finding that:

> …the sentence of death was not imposed under the influence of passion, prejudice or any other arbitrary factor.

See: 1975 Code of Alabama, 13A-5-53(b) (1). See also: Ex parte Bryant, 2002 WL 1353362, to demonstrate that appeals to passion and prejudice may be cumulative and have caused reversal.

WHEREFORE, premises considered, the defendant requests that the Court instruct the State not to use this witness for any purpose than proving statutory aggravating circumstances or disproving a attenuating mitigating circumstance.

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ATTORNEY FOR DEFENDANT
EAST PODUNK, ALABAMA

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Motion To Prevent The Prosecution From Urging The Jury To Sanction This Defendant For His Religious Views

Comes now the Defendant pursuant to the First Amendment to the U.S. Constitution and Article I, Section 3 of the 1901 Constitution of Alabama, to request this court to prevent the prosecution from asking the jury to sanction the defendant in any way based upon his religious views or his religious conversion, both of which have been entered into evidence as mitigating circumstances in the penalty phase of this case under 13A-5-52. As grounds therefore the defendant states as follows:

1. The Supreme Court in Zant v. Stephens, 462 U.S. 862 (1983), stated the proposition that the state cannot treat a factor as an aggravating circumstance if it is "constitutionally impermissible or totally irrelevant to the sentencing process, such as for example, the race, religion or political affiliation of the defendant. See: Zant, *supra* at 885; Baldwin v. Alabama, 472 U.S. 372, 382 (1985) granting Zant.
2. The "free exercise" clause of the First Amendment sharply limits the state's ability to turn the defendant's religion into an aggravating circumstance. Needless to say, it is not an aggravating circumstance and the state cannot call it one. Alabama recognizes no non-statutory aggravating circumstances; Ponder v. State, 688 So.2d 280 (1996). There are no aggravating

circumstances not set out in 1975 Code of Alabama, 13A-5-49. However, to poke fun at their religion, or to urge the jury to hold it in any way against the defendant, does through the back door what the law will not allow to be done through the front door.

3. The prosecutor is an arm of the state, and so indeed is the jury. The jury certainly acts pursuant to a delegation of authority from the state. While serving, they are paid employees of the state, and the U.S. Supreme Court has called them a "governmental body". Edmonson v. Lusville Concrete Co., 500 U.S. 614 (1991). The state can neither endorse a religious or religion in general, nor forbid religious exercise.
4. The defendant has introduced evidence under 1975 Code of Alabama,13A-5-52 of his religious conversion while being held for trial in this case. This is certainly a recognized mitigating factor in Alabama; McGahee v. State, 632 So.2d 976, 981 (1993). This is the rule everywhere in the United States: Lawe v. State, 650 So.2d 969, 976 (Fla. 1994); State v. Wingo, 457 So.2d 1159, 1164 (La. 1984); Bolder v. State, 769 SW2d 84, 87 (Mo. 1989); State v. Burke, 526 N.E.2d 274, 289 (Ohio 1988); People v. Whitt, 798 P.2d 849, 856 (Col. 1990); State v. Hill, 319 SE2d 163, 168 (NC 1984).
5. Arguments about religion and its influence on the jury in determination of the sentence in a capital case are simply not allowed in must jurisdictions. See: People v. Sandoval, 841 P.2d 862, 883 (Col. 1992), as holding that it is inappropriate to "invoke higher or other laws as a consideration in the jury's sentencing determination". This is also the rule in Tennessee; State v. Middlebrooks, 995 SW2d 550, 559 (1999). For a strong case supporting this view, see Commonwealth v. Chambers, 599 at 630, 644 (Pa. 1991):

> … reliance in any manner upon the Bible or any other religious writing in support of the imposition of the penalty of death is reversible error per se and may subject violators to disciplinary action.

Some state call it error but harmless due to the non-religious tone of the balance of the closing in a capital case. See: People v. Wash, 861 P.2d 1107, 1136 (Col. 1993) but they still condemned the line of argument, clearly calling it improper.

6. By making an improper religious argument in his closing, the prosecutor is engaging the state action. This sends a message of government endorsement of religion or the lack thereof. It is a veiled suggestion that the Bible or religion should have some sort of independent decision making factor alone, beyond or beside the law, if given to the jury by the trial judge. Any argument that the Bible or religion indorses or condones state law is purely an argument that the state endorses religion.
7. Cross-examination of the defendant concerning his religious convictions is absolutely proper. But, extolling a jury to make a death decision on religious grounds or to sanction this defendant because of his religion is highly improper.

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ATTORNEY FOR DEFENDANT
EAST PODUNK, ALABAMA

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Motion To Permit Juror Sentencing In The Penalty Phase And To Prevent The Trial Judge From Passing Final Sentence

Comes now the defendant in light of the case of Apprendi v. New Jersey, 147 L.Ed. 435 (2000), and Ring v. Arizona, 2002 WL 1357257, calling into serious question Alabama's capital sentencing system, and in the event the defendant is found guilty of a capital crime and thus enters into the penalty phase of the trial, that the jury pass sentence and not the court. It is asked that the jury's "advisory verdict" be the final verdict in this case and that this court not "re-weigh the mitigating and circumstantial evidence" and hence be the final voice on sentencing. In support of this motion, the defendant states as follows:

1. Apprendi v. New Jersey, 147 L.Ed.2d 435 (2000), involved a defendant who was convicted under a New Jersey statute for (1) possession of a firearm for an illegal purpose, and (2) unlawful possession of a prohibited weapon. The basis of his appeal was that he received more that the statutory maximum sentence because of the application of the New Jersey "hate crimes enhancement" applied to him at sentencing.
2. As in Alabama, the New Jersey judge determined the existence of certain factors at the sentence hearing. In Apprendi, the judge determined the "hate crimes" motive existed and enhanced the punishment accordingly. In most circumstances the existence of a "hate crimes" motive is (1) a factual question, and (2) a contested issue. The motivation for a defendant's crime has for

centuries been squarely within the exclusive province of the jury." Apprendi declared the New Jersey system a due process violation.

3. The entire purpose of the sentencing hearing is to determine the existence of aggravating and mitigating circumstances, and then to weigh them to determine if death or life without parole is an appropriate sentence. Like the issues in Apprendi, the aggravating and mitigating circumstances are entirely and exclusively factual determinations. The defendant has the burden of proving any mitigating circumstances.

4. What is absolutely unconstitutional about the current Alabama statute is that it reduces the jury's time honored role as a fact finder to "advisor" to the trial judge. The trial judge, absent any standards, gets to "re-weigh the aggravating and mitigating circumstances". This system permits the trial judge in his "re-weighing", to ignore the "advise of the jury". This is a gross violation of Apprendi.

> Other that the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.
>
> ********
>
> It is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed.

5. It is conceded that Apprendi refers to punishment of the "statutory maximum", yet in capital cases we speak of death in the electric chair. What greater punishment can be imposed than that unless we turn the clock back to times when capital punishment covered also drawing and quartering with burial in unconsecrated ground (outside of a churchyard).

6. In Ring v. Arizona, 2002 WL 1357257, the defendant could not receive a death sentence unless the trial judge made a factual finding that one or more

aggravating circumstance existed." Quoting the opinion in Apprendi, *supra,* the court first held:

> … the Sixth Amendment does not permit a defendant to be exposed to a penalty including the maximum he would receive if punished according to the facts reflected in the jury verdict alone.

The sentencing scheme in Ring, was much like 1975 Code of Alabama, 13A-5-47, where the trial judge after a recommendation from the jury:

A. Receives a pre-sentence report not made available to the jury.

B. Hears arguments not heard by the jury from the defendant and prosecution.

C. Makes his personal written findings of each aggravating and mitigating circumstance present with no assistance of any jury finding on either.

D. Does his own weighing of the aggravating and mitigating circumstances to determine whether he thinks the aggravating circumstances outweigh the mitigating circumstances.

E. He then passes sentence of life imprisonment without parole, or death.

This is almost like Ariz. Rev. Stat. Ann. 13-703(c):

> The hearing shall be conducted before the Court alone. The Court alone shall make all factual determinations required by this section or the Constitution of the United State or this state.

These "factual determinations" under the unconstitutional Arizona statute are:

1. Determining each aggravating circumstance;

2. Determining each mitigating circumstance;

3. Weighing these two sets of facts;

4. Passing a sentence based on that weighing process.

There is little difference between the unconstitutional Arizona system and Alabama's.

7. In the opinion the court in Ring accepted, the dissent by Justice Stevens in Walton v. Arizona, 111 L.Ed2d 511, which Ring specifically overruled:

> "… the English jury's role in determining critical facts in homicide cases was entrenched. As fact-finder, the jury has the power to determine not only whether the defendant was guilty of the homicide but also the degree of the offense. Moreover, the jury's role in finding facts that would determine a defendant's eligibility for capital punishment was particularly well established. Throughout its history, the jury determined which homicide defendants would be subject to capital punishment by making factual determinations, many of which related to difficult assessments of the defendant's state of mind. By the time the Bill of Rights was adopted, the jury's right to make those determinations was unquestioned.

8. Ring already forbids Alabama's capital sentencing system under 1975 Code of Alabama, 13A-5-47, and the "jury recommendation" found in 13A-5-46:

> If a state makes an increase in a defendant's authorized punishment contingent on a finding of fact, that fact – no matter how the state labels it – must be found by a jury.

The jury's initial verdict of guilt of capital murder only carries the sentence of life without parole, 13A-5-46 (e)(1); the finding if one or more aggravating factors elevates it to the penalty of death.

9. Apprendi, 530 U.S. at 498, held that the system of letting the judge make findings of facts and passing sentence thereon was repugnant to constitutional principles:

> The families of the American Republic were not prepared to loose it to the State, which is why the jury trial guarantee was one of the least controversial provisions of the Bill of Rights. It has never been efficient, but it has always been free.

10. Ring specifically calls into question Alabama's sentencing system 1975 Code of Alabama, 13A-5-46 and 13A-5-47. See: Footnote 6.

11. Ring concludes with an attack allowing trial judges to make the ultimate decision in capital cases:

> "The guarantee of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced

> and justice administered…If a defendant preferred the common-sense judgment of a jury to the more tutored but less sympathetic reaction of a single judge, he was to have it." Duncan v. Louisiana, 391 U.S. 145, 155 (1968).
>
> The right to a trial by jury guaranteed by the Sixth Amendment would be seriously diminished if it incorporated the fact finding necessary to increase a defendant's sentence by two years but not the fact finding necessary to put him to death.

12. The concurring opinion authored by Justice Scalie certainly condemns Alabama's sentencing system in capital cases:

> I believe that the fundamental meaning of the jury-trial guaranteed by the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives – whether statute calls them elements of the offense, sentencing factors, or Mary Jane – must be found by a jury beyond a reasonable doubt.[1]

12. The concurring opinion of Justice ??? in Ring, most strongly condemns the Alabama system:

> Even in jurisdictions where judges are selected directly by the people the jury remains uniquely capable of determining whether, given the community's views, capital punishment in the particular case at hand.
>
> …the danger of unwarranted imposition of the penalty cannot be avoided unless "the decision to impose the death penalty is made by a jury rather than by a single government official".

_____
ATTORNEY FOR DEFENDANT
EAST PODUNK, ALABAMA

Since the defendant challenges the constitutionally of 1975 Code of Alabama, 13A-5-46 and 13A-5-47, the defendant has sent a copy of this motion, postage pre-paid, to the Attorney General of Alabama this __ day of _____, 200___, at his last known address.

_____
ATTORNEY FOR DEFENDANT
EAST PODUNK, ALABAMA

Intent as Applied to Capital Murder

1. If you believe that the accused did not intend to take the life of _____, the deceased, then you cannot find him guilty of capital murder.

GIVEN:_____ REFUSED:_____

Authority: Russow v. State, 572 So.2d 1288 (1990); Waldrip v. State, 462 So.2d 1021 (1984); Ex parte Raines, 429 So.2d 111(1982); Womac v. State, 435 So.2d 1021 (1984) Watkins v. State, 495 So.2d 92 (1986).

2. Intention in regard to murder could mean that a person acted intentionally, with respect to a particular result, that is, death.

GIVEN:_____ REFUSED:_____

Authority: Russeau v. State, 572 So.2d 1288 (1990).

3. The defendant must intentionally, as opposed to negligently, accidentally, or recklessly, cause the death of the deceased in order to invoke the capital murder statute. The fact that someone dies or is killed during the course of a robbery does not automatically prove that intent. The intent to kill must be real and specific in order to invoke the capital murder statute.

GIVEN:_____ REFUSED:_____

Authority: Russeau v. State, 572 So.2d 1288 (1990).

4. An accused is not guilty of capital murder/robbery where the intent to rob was formed only after the victim was killed.

GIVEN:_____ REFUSED:_____

Authority: Connally v. State, 500 So.2d 57 (1985); Smelley v. State, 564 So.2d 74 (1990)

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[1] These factors are both aggravating and mitigating factors and the weighing of the same.

5. To sustain a conviction under the murder/robbery portion of the capital murder statute, both the intentional killing and the robbery must be proven and such proof must constitute a single offense.

GIVEN:_____ REFUSED:_____

Authority: Coleman v. Jones, 909 F.2d 447 (11th Cir. 1990)

6. The fact that the deceased was dead when the property was taken would not prevent a finding of robbery necessary to sustain a conviction of capital murder, if the murder and taking of property formed a continuous chain of logically related events.

GIVEN:_____ REFUSED:_____

Authority: Ex parte Johnson, 620 So.2d 709 (1993).

7. The capital crime of murder/robbery when the deceased is intentionally killed is a single offense beginning with the robbing or attempting to rob and culminating in the act of intentionally killing the deceased; intentional murder must occur during the course of the robbery in question, but taking of the property of the deceased need not occur prior to the killing.

GIVEN:_____ REFUSED:_____

Authority: Jenkins v. State, 627 So.2d 1034 (1994).

NonTrigger – Non Accomplice/Felony Murder

8. If you believe that the accused committed the crime of robbery but was not a knowing accomplice to the intentional killing itself, you cannot find him guilty of capital murder. His crime in this case would be murder.

GIVEN:_____ REFUSED:_____

Authority: Lewis v. State, 456 So.2d 413 (1984) Beck v. State, 396 So.2d 645(1981) Ritter v. State, 375 So.2d 270 (1979).

9. The accomplice liability doctrine may be used to convict a non-killing accomplice, if, and only if, the defendant was an accomplice in the intentional killing as opposed to being an accomplice mere in the underlying _____(robbery, etc.).

GIVEN:_____ REFUSED:_____

10. If you find that the accused was merely present at the scene of the crime and failed to raise a cry for help, this would not make the accused an accomplice to the intentional killing or the underlying _____(robbery, etc.)

GIVEN:_____ REFUSED:_____

Authority: Lewis v. State, 456 So.2d 413 (1984) Allen v. State 414 So.2d 989(1981)

11. In order to find the accused guilty of capital murder in which the deceased is killed while in a swelling by a deadly weapon fired from outside the dwelling you must be satisfied beyond a reasonable doubt that the specific purpose of firing the weapon into the building was to kill an occupant of the house.

GIVEN:_____ REFUSED:_____

Authority: 1975 Code of Alabama, 13A-5-40 (16).

12. In order to find the accused guilty of capital murder in which the deceased is killed by a deadly weapon fired from a motor vehicle, you must be satisfied beyond a reasonable doubt that the purpose of firing the weapon from the motor vehicle was to take a life.

GIVEN:_____ REFUSED:_____

Authority: 1975 Code of Alabama ,13A-5-40(18).

13. If you believe that the accused had no specific intent to kill anyone in the dwelling, you cannot find him guilty of capital murder.

GIVEN:_____ REFUSED:_____

Authority: 1975 Code of Alabama 13A-5-4(16)

Walkins v. State, 495 So.2d 92(1986) Waldrip v. State, 462 So.2d 1021 (1984)

Womak v. State, 435 So.2d 754 (1983) Rosseau v. State, 572 So.2d 1288 (1990)

Universal Malice In Non-Capital Murder

14. Encompassed within the crime of murder (non-capital murder), is the concept of what is referred to as "universal malice". To establish the crime of murder under the theory of universal malice, the prosecution must prove beyond a reasonable doubt that the act of the killer was imminently dangerous and that it presented a very high risk of death to others and that it was committed under circumstances which evidenced or manifested extreme indifference to human life.

GIVEN:_____ REFUSED:_____

Authority: 1975 Code of Alabama 13A-5-41;

King v. State, 505 So.2d 403 (1987), p. 407;

Brief On The Issue Of The Issue Of The Court Charging On Universal Malice

The concept of "universal malice" is found in 1975 Code of Alabama, 13A-6-2(2). There is authority that "universal malice" is not a lesser included offense of capital murder, and the defendant agrees with that concept as being the current law. Washington v. State, 488 So.2d 404 (1984); and Walker v. State, 523 So.2d 528 (1988).

Yet this defendant doesn't ask for the charge on the issue of "universal malice" as a lesser included offense but on the issue that such a charge clearly fits into one possible theory of criminal liability in this case as proved by the prosecution. The defendant clearly doesn't concede this theory is correct but there is evidence supporting it.

The universal malice concept is shown by facts supporting the following propositions:

A. The theory that the persons involved did not intend to kill the victim by shooting into the house but only to frighten him.

B. The theory that the persons involved intended only to "shoot up the house" where the intended victim lived.

Again, the defendant doesn't consider these theories to be correct but they are most certainly supported by evidence in this case.

In the'*case of King v. State, 505 So.2d 403 (1987) it was held to be universal malice when a person shot at a pickup truck traveling on an interstate highway intending only to scare the occupants by shooting out their rear tires. Two shots hit the rear tire and one hit and killed the passenger. As to these facts the court stated:

> The firing at the vehicle under the circumstances created a very great risk of death to Dunaway, the driver, as well as his passenger, Reeves, and anyone else who might have been using that portion of the interstate highway on that occasion.
>
> The evidence strongly supports the conclusion that appellant was bent on mischief and acted with a "don't give a damn attitude" in total disregard of public safety (page 408).

In the case of Gautney v. State, 222 So.2d 175 (1969) a defendant claimed that he shot a pistol in the direction of a person claiming that his intention was not to kill the person but to frighten him. The court stated:

> The intentional doing of an act so greatly dangerous to human life may supply all the legal elements of intent, however free the action may be from actual purpose to kill. (Page 182).

The case turned completely on the theory of universal malice.

The leading case in Alabama on the concept of universal malice is Napier v. State, 357 So.2d 1001 (1971). It held:

> Typical illustrations of universal malice are willfully riding an unruly horse into a crowd, and throwing a timber from a roof into a crowded street Moore v. State, 18 Ala 532 (1851). Other examples are shooting a firearm into a crowd or into a train, dwelling house or automobile containing occupants (page 1007).

There is an abundance of evidence in this case to demonstrate the concept of universal malice and thus the charge should be given.

General charges

15. You cannot convict the accused of capital murder in the event that you believe from the evidence that he intended to steal the deceased's property or actually participated in the theft of such property yet in doing so possessed no intention to take his life.

Given: ____ Refused: ____
Authority:
Ex Parte Ritter — Hardley v. State
375 So.2d 270 (1979) — 79 So. 362 (1918)

16. If you believe from the evidence that the accused assisted in the plan or scheme to take the deceased's property and/or actually participated in taking it yet did not take the deceased's life or intend that his life be taken in the course of the theft then he would be guilty of murder and not of capital murder.

Given: ____ Refused: ____
Authority:
Ex Parte Ritter — 15 Houston Law Rev. 356
375 So.2d 270 (1979)

17. To warrant a conviction for a crime on "circumstantial evidence" alone the circumstances taken together should be of a conclusive nature and lead on a whole, to a satisfactory conclusion and pointing to a moral certainty that the accused committed the offense charged, and such circumstances must be shown as are consistent with each other and consistent with the guilt of

the accused and such can not by reasonable theory be true and the party charged be innocent.

Given: ____ Refused: ____

18. The test of the sufficiency of circumstantial evidence is whether the circumstances, as proved, produce a moral conviction, to the exclusion of all reasonable doubt of the guilt of the accused. There should not be a conviction upon circumstantial unless, to a moral certainty it excludes every other reasonable hypothesis than that of the guilt of the accused. No matter how strong may be the circumstances, if they can be reconciled with the theory that the accused is innocent then the guilt of the accused is not shown by the full measure of proof the law requires, and the defendant must be found not guilty.

Given____ Refused; ____
Authority:
Alabama Jury Instructions-Criminal
Alabama Bar Institute For Continuing Legal Education Page 111 E9

19. When the evidence relied on for a conviction is circumstantial, the chain of circumstances must be complete and of such character as to convince beyond a reasonable doubt; and, if the circumstances as proven fail to convince you beyond a reasonable doubt that the defendant is guilty, then you must return a verdict of not guilty.

Given: ____ Refused: ____
Authority:
Exact charge proved in James v. State 113 So. 648 (1927).

20. A conviction can not be based on circumstantial evidence alone, unless the prosecution has proved defendant's guilt from the evidence, beyond a reasonable doubt, by facts and circumstances all of which are consistent

with each other and with his guilt, and absolutely inconsistent with any reasonable theory of innocence.

Given: ____ Refused: ____

21. Before you can convict the accused in this case, the hypothesis of guilt should flow naturally from the facts proved and be consistent with all of them.

Given: ____ Refused: ____

Authority:

Jones v. State
101 So. 67 (1924)

Baker v. State
97 So. 901 (1923)

22. If any of the prosecution's witnesses have exhibited anger or prejudice against this accused and satisfied you that they have not testified truly, and are not worthy of belief, and you think their testimony should be disregarded, you may disregard it altogether.

Given: ____ Refused: ____

23. You are the sole judges of the credibility of witnesses. The credibility and weight to be given the testimony is for determination of the jury. The court has nothing to do with that. You may judge the credibility of a witness by the manner in which he or she gives his or her testimony, his or her demeanor on the witness stand, the reasonableness or unreasonableness of his or her testimony, the means of knowledge as to any fact about which he or she testifies, any interest displayed in the case, the feeling that he or she may have for or against the accused, or any circumstances which may shed light

upon the truth or falsity of such testimony. And it is for you to say what weight you will give to the testimony of any or all of the witnesses.

Given: ____ Refused: ____

24. If you believe a witness is willfully swearing falsely to any material fact, you are at liberty to disbelieve the testimony of that witness in whole or in part, taking into consideration all the facts and circumstances of this case. In judging the quality of the testimony, you must take into consideration the manner and bearing of the witness, their readiness to answer the questions, their hesitancy or apparent failure of memory, whether it be genuine or resorted to as subterfuge, their relation if any, whether mutual, friendly or hostile to the prosecution or defense, their capacity and opportunity for knowledge or observation of the event or occurrence about which they testify and all things else about them which convey in your mind any indicia of trust or falsehood.

Given: ____ Refused: ____

25. In order to discredit a witness by reason of bias or prejudice, it is proper to show an attempt to threaten or to corruptly influence another witness in this case. This attempt to corruptly influence another witness can include suggestions to another that they deliberately gave false testimony.

Given: ____ Refused: ____

Authority:
81 AM. Jur. 2d 560 Roll v. Dockery, 122 So. 630 (1929)
American Life Insurance Company v. Anderson, 21 So.2d 791 (1941)
Slicer v. State, 65 So.2d 972 (1914, page 979)

26. In a criminal case such as this, the burden of proof always rests on the prosecution. They must prove every essential element of the crime beyond a

reasonable doubt. This burden of proof on the prosecution to establish the accused's guilt beyond a reasonable doubt never shifts. The accused is under no obligation to prove his innocence, nor is he under an obligation to prove anything.

Given: ____ Refused: ____

27. The term "reasonable doubt" is expressed very easily but it is sometimes difficult to define. It is such a doubt as reasonable men and women may entertain after a careful and honest review and consideration of all the evidence in the case. It must be founded in reason. It must survive the test of reasoning or the mental processes of a reasonable examination. It must be such a doubt that arises from some question from the evidence and it must be such a doubt that a reasonable man or woman would entertain after examining all the evidence.

Given: ____ Refused: ____

28. The rule which requires proof beyond a reasonable doubt is applicable to every single element necessary to constitute the crime charged, so that if you are not satisfied beyond a reasonable doubt on a single element of the crime, you must find the accused not guilty.

Given: ____ Refused: ____

28. The indictment is a written accusation charging the accused with the commission of a crime, in this case capital murder. The indictment is without probative force and carries with it no implication of guilt. The fact that the Grand Jury of Morgan County returned an indictment is in no way evidence against the accused and no adverse inference can be drawn against the accused from the finding of an indictment.

Given: ____ Refused: ____

30. In this case certain statements made by the accused while in custody have been admitted into evidence. In determining what weight to give these statements you may consider the personal characteristics of the defendant and his mentality in determining what weight and credibility to give the accused's statements.

Given: ____ Refused: ____

Authority:

Turner v. Pennsylvania Haley v. Heil

338 U.S. 62 332 U.S. 586

31. A statement by a person arrested is not voluntary if it is the product of either physical or psychological coercion.

Given: ____ Refused: ____

32. In determining what weight to give the accused's statement one factor you may consider is the length of time he was subject to interrogation.

Given: ____ Refused: ____

Authority;

Davis v. North Carolina Beck v. Pate

16 L. Ed. 2d 895 (1961) 6 L. Ed. 2d 948 (1961)

Fikes v. Alabama Chambers v. Florida

1 L. Ed. 2d 246 (1957) 48 L. Ed. 2d 1716 (1980)

33. In order to find the accused guilty of capital murder or any other offense you must be unanimous in your decision.

Given: ____ Refused: ____
Authority:

1975 Code of Alabama 13A-8-41

Ex Parte Curry 471 So.2d 476 (1984)

34. Each juryman must be separately satisfied beyond a reasonable doubt and to a moral certainty that the accused committed the crime at issue in order to return a verdict of guilty.

Given: ____ Refused: ____
Grimes v. State Carter v. State
17 So. 184 (1894) 15 So. 193 (1983)

35. You should weigh all the evidence and reconcile it, if possible; but if there be irreconcilable conflicts in the evidence you ought to take that evidence which you think worthy of credit and give it just such weight as you think it is entitled.

Given: ____ Refused: ____

Authority:
Bondurant v. State 27 So. 775 (1900)

36. The law presumes that the accused has testified truthfully in this case, and it is your duty to reconcile his testimony and the testimony of all the other witnesses in this case with the presumption that he is innocent if you can reasonably do so.

Given: ____ Refused: ____

Authority:

Crisp v. State

109 So. 282 (1926)

37. The accused has testified in his own behalf. He has a right to do that. The law says that he may or may not, but he has elected in this case to testify.

You are authorized to weigh the accused's testimony in the light of his interest in this case. Of course, he is interested because he is the accused, but it does not follow necessarily that because he is the accused, he is not willing to tell the truth. But, if you can not reconcile his testimony and make it speak the truth then you are authorized to weigh that testimony in the light of his interest in the case.

Given: ____ Refused: ____

Authority:

Gray v. State	Scruggs v. State
108 So. 658 (1926)	140 So. 405 (1932)
Glover v. State	Lightfoot –v.- State
104 So. 48 (1925)	107 So. 734 (1926)
Wright v. State	Williams v. State
42 So. 745 (1945)	93 So. 57 (1922)
Ferauson v. State	Kirkland v. State
105 So. 435	108 So. 262 (1926)
Knight v. State	Crews v. State
117 So. 804 (1928)	117 So. 108 (1928)

38. You are the sole, exclusive judges of the facts. You are charged with the responsibility of finding the truth by applying your common sense, your every day experience, your practical insight about people and life to whatever you have heard in this court room.

Given: ____ Refused: ____ .

39. Under the law the accused is a competent witness in his own behalf. You shouldn't discredit his testimony merely because he is charged with a crime. His testimony should be weighed like the testimony of any other witness, considerations of interest, appearance, manner and other matters bearing upon credibility apply to the accused the same way they do to all of the witnesses in this case.

Given: ____ Refused: ____

40. The law presumes that the accused has testified truthfully in this case, and it is your duty to reconcile his testimony with the testimony of all the other witnesses in the case with the presumption that he is innocent, if you can reasonably do so.

Given:_____ Refused:_____
Authority:

Crisp v. State, 109 So.2d 282 (1926)

41. You are to be governed in this case by the instructions of law which I shall give you from the bench and from the statements of witnesses furnished you from the stand. You are not to be governed by any demonstration of feeling which you may see on the part of anybody or by your own personal inclinations of feelings.

Given:_____ Refused:_____

Authority:

Riley v. State

Before submitting the bulk of your jury charges to the court, examine your case carefully and determine what lesser offenses might apply. Remember that the issue is not whether a certain offense is a lesser included offense of capital murder. The issue is, is there any evidence in the case which would support a charge on that offense. A few examples of possible lesser offenses to request charges on are:

1. Intentional murder
2. Felony murder
3. Murder by universal malice
4. Manslaughter
5. Criminally negligent homicide

You have submitted your jury charges before the charge conference. When the court tells you what it will charge on, make notes of what is left out using your proposed charges as a guide. Remember, when you make any objection to the jury charge you must be specific. The objection, "Judge, I object to your failure to give charge number ten, it's a correct statement of the law", will not preserve any error unless the error is of constitutional proportions and results in a manifestly unfair trial. To object, tell the trial judge:

1. I object to the court's failure to give charge number____.
2. I object to this because the court failed to charge on the issue of ____.
3. The evidence clearly demonstrates that ____ is a valid issue in this case, and a jury question.

Penalty Phase Jury Instructions

Request this charge:

1. This Court's prior instruction, during the guilt phase, that you were not to be swayed by mercy in deciding whether _____ was guilty of capital murder, does not apply in this penalty phase. You may decide to sentence _____ to life imprisonment without benefit of parole simply because, based on the evidence introduced at either the guilt phase or the penalty phase of this trial, you find it appropriate to exercise mercy.

Given:_____ Refused:_____
Authority:
State v. Taylor, 771 SW2d 387, 396 (Tenn. 1989)
California v. Brown, 479 U.S. 538 (1987)

The jury has just found your client guilty of capital murder. Perhaps the crime was brutal. The jury is completely repulsed by your client's conduct. They also may feel he is a liar; they have rejected his defense.

The issue that they may find he is a liar as well as a murderer must be dealt with. See if at the outset of the penalty phase you can get the court to give this instruction:

2. The defendant's testimony in the guilt phase of this trial denying any involvement in the capital murder for which this penalty phase of the trial is being held is not relevant to the sentencing proceeding and should not be considered by you. It concerns neither an aggravating nor any mitigating factors or circumstances.

Given:_____ Refused:_____
Authority:
McMillian v. State, 594 So.2d 1253 (Al. 1991).

The following charges are suggested for the penalty phase:

Mitigation Defined:

1. A mitigating circumstance is not a justification or excuse for the offense. A mitigating circumstance is a fact about the offense, or about the defendant, which in

fairness, sympathy, compassion, or mercy, may be considered in extending or reducing the degree of moral culpability, or which justifies a sentence of less than death, although it does not justify or excuse the offense for which you have already found this defendant guilty.

Standard of Proof:

2. In order to find the existence of a mitigating fact or circumstance, it does not have to be proven beyond a reasonable doubt. You must find the existence of a mitigating fact or circumstance if there is any evidence introduced to support it.

Given:_____ Refused:_____
Authority:
State v. Thompson, 768 SW2d 239 (Tenn. 1989)
Williams v. State, 386 So.2d 538 (Fla. 1980)

Sympathy

3. Your exercise of sentencing discretion may be influenced by a sympathetic response to mitigating evidence. You may consider mitigating evidence related to _____'s character and background, whether or not related to the offense for which he is on trial precisely because that evidence may arouse sympathy or compassion for the defendant.

Given:_____ Refused:_____
Authority:
State v. Taylor, 771 SW2d 387, 396 (Tenn. 1989)
People v. Brown, 709 P.2d 440455 (Cal. 1985)
Woodson v. North Carolina, 428 U.E. 280, 304 (1976)

Compassion and Mercy

4. An appeal to the sympathy or passions of a jury is inappropriate at the guilt phase of a trial. However, at the penalty phase, you may consider sympathy, pity, compassion, or mercy for _____, that has been raised by any evidence that you have heard or seen. You are not to be governed by

conjecture, prejudice, public opinion, or public feeling. You may decide that the sentence of life imprisonment is appropriate for _____ based on the sympathy, pity, compassion, and mercy you feel as a result of the evidence introduced at either the guilt-innocence phase or the penalty phase of the trial.

Given:_____ Refused:_____
Authority:
State v. Taylor, 771 SW2d 387, 396 (Tenn. 1989)
People v. Lauphear, 680 P.2d 1081, 1082 (Cal. 1984)
People v. Brown, 709 P.2d 440, 455 (Cal. 1985)
California v. Brown, 479 U.S. 538, 542 (1987)

Mitigation – Reason for a Sentence Less Than Death

5. Any aspect of the offense or _____'s character or background that you consider mitigating can be the basis for rejecting the death penalty, even though it does not lessen legal culpability for the present offense

Given:_____ Refused:_____
Authority:
Skipper v. South Carolina 476 U.S. 1,3-5 (1986)
Westbrook v. Zant, 704 F.2d 1487, 1501-03 (11th Cir. 1983)
Spring v. Zant, 661 F.2d 464, 471 (5th Cir. 1981)
People v. Lauphear, 680 P.2d 1081, 1082-83 (1984)

6. Even if you find one or more aggravating circumstances beyond a reasonable doubt, you may impose a sentence of life in prison for any reason based on the evidence. You do not have to find a specific mitigating circumstance in order to impose a sentence of life in prison without benefit of parole. Nothing in the law forbids you from extending mercy out of compassion on your belief that life imprisonment without benefit of parole is sufficient punishment under all the circumstances and based upon your consideration of the evidence.

Given:_____ Refused:_____
Authority:
Moore v. Kings, 809 F.2d 702, 731 (11th Cir. 1987)
Goodwin v. Balkcom, 684 F.2d 794, 801-2 (11th Cir. 1982)
Blystone v. Pennsylvania, 494 U.S. 370 (1990).

7, The fact that you found _____ guilty beyond a reasonable doubt of the crime is not an aggravating circumstance.

Just because the prosecution has alleged that an aggravating circumstance exists, that does not mean that an aggravating circumstance does in fact exist. The allegation does not mean that the existence of an aggravating circumstance is more likely or probable. The allegation is not evidence. It should have no bearing on your consideration in view of the evidence.

You are to determine, based on all of the evidence, whether the prosecution has proved one or more aggravating circumstances beyond a reasonable doubt.

Given____ Refused_____

AUTHORITY:
U. S. Constitution Amendments 8 and 14;
Proffitt v. Florida 428 U.S. 242, 248 (1976);
Taylor v. Kentucky 436 U. S. 478 (1978);
State v. Dixon 283 So.2d 1 (1973)

8. The defendant enters this phase of the trial within the presumption that there are no aggravating circumstances that would warrant a sentence of death. This presumption may be overcome only if the prosecution convinces you beyond a reasonable doubt that one or more of the particular specified aggravating circumstances exists.

AUTHORITY:
Taylor v. Kentucky 436 U. S. 478 (1978)

9. If you do find that an alleged aggravating circumstance was proved, that does not automatically or necessarily mean that you should sentence _____ to death by electrocution. Instead, such a finding only means that you must consider other factors more specifically, mitigating circumstances before deciding whether a sentence of life in prison by electrocution is appropriate.

A mitigating circumstance is anything about _____ or the crime which, in fairness and mercy, should be taken into account in deciding punishment. Even where there is no excuse or justification for the crime, our law requires consideration of more than just the bare facts of the crime; therefore, a mitigating circumstance may stem from any of the diverse frailties of human kind.

Mitigating circumstances are any factors relating to _____'s age, character, education, environment, mentality, life, or background, or any aspect of the crime itself which may be considered extenuating or reducing his moral culpability, or making him less deserving of the extreme punishment of death. You may consider as a mitigating circumstance any evidence which tends to justify the penalty of life imprisonment.

You must consider all evidence of mitigation. The weight which you give to a particular mitigating circumstance is a matter for your moral, factual, and legal judgment. However, you may not refuse to consider any evidence of mitigation, and thereby give it no weight.

Given____ Refused____
AUTHORITY:
U.S. Constitution Amendments 8 and 14
Woodson v. North Carolina, 428 U.S. 280 (1976)
Locket v. Ohio, 438 U.S. 586 (1978)
Eddings v. Oklahoma, 455 U.S. 104 (1982)
Chenault v. Stynchecombe, 581 F.2d 444 (5th Cir. 1978)
Spivey v. Zant, 661 F.2d 464 (5th Cir. 1981)

Goodwin v. Balkcom, 684 F.2d 794 (11th Cir. 1982)

10. Mitigating circumstances also differ from aggravating ones because you are not required to be convinced beyond a reasonable doubt that a mitigating circumstance exists before you must take that circumstance into account as you deliberate this case. You must consider a mitigating circumstance if you believe that there is any evidence to support it.

Given____ Refused_____
AUTHORITY:
U.S. Constitution Amendments 8 and 14
Locket v. Ohio, 438 U.S. 586 (1978)
Spivey v. Zant, 661 F.2d 464 (5th Cir. 1981)
Smith v. Wainwright, 741 F.2d 1248 (11th Cir. 1983)
Smith v. Balkcom, 660 F.2d 573 (5th Cir. 1981)
United States v. Goss, 650 F.2d 1336 (5th Cir. 1981)

Life Without Parole – Meaning

11. There are two possible penalties in the case; life imprisonment without possibility of parole, and death. If you decide upon the penalty of life imprisonment without possibility of parole, your sentence will have the effect that the defendant will be sent to prison for the rest of his natural life. He will never be paroled and his sentence will never be shortened. He will suffer imprisonment for the remainder of his life. He will not be eligible for work release, or any other non-custodial release of his sentence. Your sentence will mean incarceration until his death.

Given____ Refused_____
AUTHORITY:
Kelly v. South Carolina, 122 S.Ct. 726 (2002), holds that it is reversible error not to give this charge or one substantially similar. See also: Shafer v. South Carolina, 121 S.Ct. 1263 (2001).