

THE COURTS

Title 249—PHILADELPHIA RULES

PHILADELPHIA COUNTY

Appointment of Mitigation Counsel and Adoption of Mitigation Protocol for Court-Appointed Con- flict Capital Cases; Administrative Doc. No. 10 of 2002

Order

And Now, this 24th day of December, 2002, in order to safeguard the rights of indigent defendants charged with a death-penalty qualified offense, and to provide necessary mitigation representation, *It Is Hereby Ordered, Adjudged and Decreed* that:

(1) Lead Counsel appointed pursuant to Phila.R. Crim.P. No. 406-1 (A), shall be responsible for filing, in appropriate cases, a Petition for the appointment of "Mitigation Counsel." Mitigation Counsel shall be responsible for undertaking a complete mitigation investigation, as provided herein, upon consultation with Lead Counsel commencing upon appointment through the sentencing phase. The Petition to Appoint Mitigation Counsel shall be forwarded to the President Judge of the Court of Common Pleas for determination;

(2) Until further order of the Court, Mitigation Counsel shall, at a minimum, meet the qualifications for "Lead Counsel" or "Associate Counsel" as set forth in Phila.R.Crim.P. No. 406-1 (B) and (C);

(3) Mitigation Counsel shall be receive a flat fee of One Thousand (\$1,000.00) Dollars in full compensation for the mitigation representation conducted pursuant to this Order, and shall receive compensation at the rate of Four Hundred (\$400.00) Dollars per diem, for penalty phase in-court testimony;

(4) Mitigation Counsel shall consult the *Mitigation Protocol Manual*, which follows hereto, and which contains additional information and forms, for assistance in complying with this Order. Mitigation Counsel shall, at a minimum, conduct a thorough Client Interview, and shall obtain, if applicable, the following: Juvenile File; DHS file; mental health, medical and drug treatment records; prison records; military service records; employment records; disability records; and family interviews. Mitigation Counsel shall seek leave of court to retain a professional mitigation specialist and/or a psychologist or psychiatrist. Mitigation Counsel shall be reimbursed for sums expended to obtain records identified above, and must specifically petition the Court for authorization to retain a Mitigation Expert or Specialist and/or for the appointment of a psychologist or psychiatrist; and

(5) Lead Counsel's failure to petition for the appointment of Mitigation Counsel when necessary, and Mitigation Counsel's failure to perform a mitigation investigation as set forth herein may result in: the removal of Lead Counsel or Mitigation Counsel from the specific case as well as from the applicable appointment list; denial of compensation; denial of penalty-phase expert; and the imposition of any other applicable sanctions; and

(6) This Order shall become effective on January 6, 2003.

This Administrative Order is issued pursuant to Pa.R.Crim. P. Nos. 105 and 122, and Phila.R.Crim.P. No. 406-1 et seq, and shall be filed with the Prothonotary in a Docket maintained for Administrative Orders issued by the President Judge of the Court of Common Pleas of Philadelphia County, and copies shall be submitted to the Administrative Office of Pennsylvania Courts, the Legislative Reference Bureau, and the Criminal Procedural Rules Committee. Copies of the Order shall also be submitted to American Lawyer Media, *The Legal Intelligencer*, Jenkins Memorial Law Library, and the Law Library for the First Judicial District.

FREDERICA A. MASSIAH-JACKSON,
President Judge

First Judicial District of Pennsylvania and Criminal Justice Section, Philadelphia Bar Association

Mitigation Protocol Manual

First Judicial District of Pennsylvania

On December 24, 2002, President Judge Frederica A. Massiah-Jackson issued an Administrative Order acknowledging that in order to safeguard the rights of indigent defendants represented by conflict counsel, Mitigation Counsel ought to be appointed, in appropriate cases, to conduct a full mitigation investigation. See President Judge Administrative Docket No. 10 of 2002. Although the Board of Judges of the Court of Common Pleas of Philadelphia County is considering Mitigation issues in the conflict counsel homicide representation, a local rule has not yet been adopted.

The Philadelphia Bar Association, with the assistance of the First Judicial District of Pennsylvania, has drafted this Manual addressing Mitigation issues and Protocol to provide assistance and guidance to Court appointed Lead and Mitigation Counsel in conflict court-appointed capital cases, which must be consulted by Lead Counsel and Mitigation Counsel until further notice.

Preliminary Provisions

In appropriate cases, Lead Counsel shall file a Petition for the appointment of "Mitigation Counsel," as provided in the December 24, 2002 Order issued by President Judge Frederica A. Massiah-Jackson. Please see President Judge Administrative Docket No. 10 of 2002.

Mitigation Counsel are required to undertake a complete mitigation investigation. Failure to do so will result in the following:

- A) the case will not be "spun out" of the calendar room;
- B) a request for a penalty-phase expert, such as a psychologist, will not be granted, as such an expert cannot perform her/his work properly without the initial investigation that the second chair counsel must perform;
- C) counsel will not be compensated; and
- D) counsel may be removed from the approved second chair list.

Mitigation Counsel's obligation to prepare continues from day of appointment through sentencing. The below steps must be undertaken as a first-phase, or preliminary preparation in order to permit the case to be spun out and in order for a court to consider approving funds for penalty-phase expert assistance.

A) Client interview (interview checklist in enclosed materials);

B) Obtain J-file and all presentence reports (procedure explained in manual). To do this, get the client's police photo number from the Bills of Information; get the client's J number through the prosecutor.

C) Obtain client's DHS file (procedure explained in manual);

D) Obtain client's school records (procedure explained in manual);

E) Obtain client's mental health/medical/drug treatment records (procedure explained in manual);

F) Obtain client's prison records where appropriate (procedure explained in file);

G) Conduct initial round of family interviews; and

H) Upon review of all of the above, determine what additional records are needed, what investigation is needed, what professional evaluation is needed, and commence the same.

The materials which follow provide a basic primer on how to conduct a mitigation investigation. They materials address the meaning of "mitigation" and detail the practice to be utilized in gathering records.

Introduction: What is Mitigation?

We begin this introduction by saying what mitigation is not. Mitigation is not interviewing the defendant's mom the night before the penalty hearing; mitigation is not hiring a psychologist and sending her/him to the prison.

Mitigation is a multi-step process. The first critical step is to gather as many records as possible from your client's (and sometimes your client's family's) past. The reasons to gather records are as follow:

§ Records can provide specifics about the dysfunction and trauma that a defendant has suffered but that a family is reluctant to talk about. Once the records are there, we have details to use in questioning family members and other persons close to the defendant.

§ Records can provide leads to witnesses. It is one thing to have a psychologist or mitigation specialist tell the jury that your client served in Vietnam, or had no shoes to wear to school; a jury finds more credible (and then believes the expert witness more) the testimony of the sergeant from the military or the school teacher who recalls your client coming in with no shoes.

§ Records themselves can be evidence, introduced through a competent witness—a family member or the expert or the custodian of records or the fact witness (e.g., in the example above, the school teacher).

The types of records that are likely sources of data include:

§ Juvenile File;

§ Adult Probation Department Presentence Investigations, Mental Health Reports, and Drug/Alcohol Evaluations;

§ DHS files on the defendant and, after review of the defendant's file, on his/her siblings;

§ All mental hospitalization records;

§ All drug and alcohol treatment center records (which can provide sources of great witnesses);

§ Medical/hospitalization records for any serious trauma suffered by the defendant (including head injuries, high fever, exposure to toxic substances, abuse);

§ Military service records;

§ Employment records (including social security records);

§ Disability records (e.g. if defendant filed for/receives SSD);

§ Letters and other documents showing how the defendant has reached out to his own children, or to other loved ones, while in prison; and

§ Prison records (prison adjustment summaries, GED certificates, and/or prison medical or mental health records).

It is only after records have been gathered that a meaningful investigation can proceed. Federal courts have routinely held that the failure to gather such records is ineffective. *Williams v. Taylor*, U.S., 120 S.Ct. 1495, 1514 (2000):

We are likewise persuaded that the Virginia trial judge correctly applied both components of that standard to Williams' ineffectiveness claim. Although he concluded that counsel competently handled the guilt phase of the trial, he found that their representation during the sentencing phase fell short of professional standards—a judgment barely disputed by the State in its brief to this Court. The record establishes that counsel did not begin to prepare for that phase of the proceeding until a week before the trial. *Id.* at 207, 227. They failed to conduct an investigation that would have uncovered extensive records graphically describing Williams' nightmarish childhood, not because of any strategic calculation but because they incorrectly thought that state law barred access to such records. Had they done so, the jury would have learned that Williams' parents had been imprisoned for the criminal neglect of Williams and his siblings, n19 that Williams had been severely and repeatedly beaten by his father, that he had been committed to the custody of the social services bureau for two years during his parents' incarceration (including one stint in an abusive foster home), and then, after his parents were released from prison, had been returned to his parents' custody.

----- Footnotes -----

n19 Juvenile records contained the following description of his home:

"The home was a complete wreck There were several places on the floor where someone had had a bowel movement. Urine was standing in several places in the bedrooms. There were dirty dishes scattered over the kitchen, and it was impossible to step any place on the kitchen floor where there was no trash The children were all dirty and none of them had on under-pants. Noah and Lula were so intoxicated, they could not find any clothes for the children, nor were they able to put the clothes on them The children had to be put in Winslow Hospital, as four of them, by that time, were definitely under the influence of whiskey." App. 528-529.

-----End Footnotes----- [*396]

Counsel failed to introduce available evidence that Williams was "borderline mentally retarded" and did not advance beyond sixth grade in school. *Id.* at 595. They failed to seek prison records recording Williams'

commendations for helping to crack a prison drug ring and for returning a guard's missing wallet, or the testimony of prison officials who described Williams as among the inmates "least likely to act in a violent, dangerous or provocative way." *Id.* at 569, 588. Counsel failed even to return the phone call of a certified public accountant who had offered to testify that he had visited Williams frequently when Williams was incarcerated as part of a prison ministry program, that Williams "seemed to thrive in a more regimented and structured environment," and that Williams was proud of the carpentry degree he earned while in prison. *Id.* at 563-566.

Of course, not all of the additional evidence was favorable to Williams. The juvenile records revealed that he had been thrice committed to the juvenile system—for aiding and abetting larceny when he was 11 years old, for pulling a false fire alarm when he was 12, and for breaking and entering when he was 15. *Id.* at 534-536. But as the Federal District Court correctly observed, the failure to introduce the comparatively voluminous amount of evidence that did speak in Williams' favor was not justified by a tactical decision to focus on Williams' voluntary confession. Whether or not those omissions were sufficiently prejudicial to have affected the outcome of sentencing, they clearly demonstrate that trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background.

Williams does not stand in isolation. Rather, it is part of a compelling line of decisions that declare counsel ineffective when she/he fails to conduct an investigation necessary to discover potential mitigation evidence and, in particular, the records that will shed light on (and corroborate) histories of abuse and dysfunction, the precise type of information that cannot possibly be gleaned from a one-time interview with family members the weekend between verdict and penalty phase. *Visciotti v. Woodford*, 288 F.3d 1097 (9th Cir. 2002); *Jermyn v. Horn*, 266 F.3d 257 (3rd Cir. 2001) (emphasizing counsel's failure to investigate defendant's traumatic childhood and finding counsel ineffective for failing to commence mitigation investigation until night before penalty phase); *Laird v. Horn*, 159 F. Supp. 2d 58 (E.D. Pa. Sept. 5, 2001); *Jacobs v. Horn*, 129 F. Supp. 2d 390 (M.D. Pa. Feb. 20, 2001); *Rompilla v. Horn*, No. 99-737, 2000 WL 964750, 2000 U.S. Dist. LEXIS 9620 (E.D. Pa. July 11, 2000); *Christy v. Horn*, 28 F. Supp. 2d 307 (W.D. Pa. Nov. 10, 1998).

After records have been gathered and fully outlined/digested by counsel, it is time to meet with experts and engage in family/significant other interviews. [While these interviews can start while records are being retrieved, it is only after the records are in that there will be enough information to get a true de-briefing from those closest to the defendant.] In discussing records, it is also important to note that there may be mitigation evidence in the discovery material provided by the Commonwealth—evidence of irrational behavior, evidence of intoxication, evidence of duress, evidence (in a police statement) of an expression of remorse.

The interview process is not confined to a single interview. It takes time to gain the confidence of family members; it takes time for the family to recognize that disclosing 'bad' information, i.e., information about family trauma, abuse, drug use, etc., is actually helpful to the defendant; and it takes time because the family needs re-interviewing after (finally) one family member admits

to some family 'secret', which the other family members must then be confronted with. Because attorneys don't necessarily have social worker/counselor/therapist training, these interviews may best be conducted by a trained mitigation investigator. [A form motion for appointment of such an investigator is included in these materials.]

With the information gathered from records and from informed family interviews, a psychological or neuropsychological expert can then be retained to examine/test/evaluate the defendant. It is important here for the attorney to direct the expert in terms of the type of testing that is desired. A neuropsychological exam, testing for learning disability, may be more helpful than a personality test; testing for IQ may be more beneficial/appropriate than a test for understanding of social proverbs.

There is a category of mitigation evidence not explicitly referenced above—the good deeds of a defendant. Caring for elderly parents or an infirm relative, taking a child to school or otherwise being a good parent, succeeding in sports or the arts. This information is also essential, but it has impact only when contextualized with the devastating childhood/life the defendant has undergone—these are the achievements that show that despite that upbringing, there is good in the defendant and there are reasons he/she should live (and can be productive or a good parent while serving a life sentence).

In sum, mitigation is a gathering and presentation of the following:

§ all of the trauma and deprivation suffered by the defendant;

§ an explanation of the impact that can have on 'normal' development;

§ where available and appropriate, evidence of remorse;

§ where available and appropriate, evidence of positive performance in jail or a juvenile "structured setting"; and

§ the good that a defendant has accomplished (and can accomplish in the future).

Remember—when seeking court assistance in obtaining records, or funds for expert assistance, counsel should proceed *ex parte* and *in camera*.

Client Interview for Penalty Preparation

The following questions and categories of information are among those that should be discussed with the client and used to begin identifying potential mitigation evidence, witnesses, and necessary records.

I. CLIENT INTERVIEW

a) educational history:

all schools attended:

achievements and failures:

any extra-curricular activities:

any special school assignments:

any disabilities:

any post-school educational participation/achievements:

any teacher/coach who client stayed in touch with or had a significant relationship with.

b) complete family history:

identity of parents, step-parents:

- role of the above in client's life:
- who raised client:
- significant events in family history—divorce, death, close family member moving away, tragedies:
- any involvement with DHS, adoption agency, foster care, or any other social service/social welfare organization
- c) complete juvenile court record—adjudications, arrests, placements, programs participated in, programs client failed, any personnel at juvenile programs client became attached to or who client stayed in touch with.
- d) complete adult criminal history—all arrests, convictions, success or failure on probation, any programs, all jail placements, any achievements in jail/prison (e.g., obtained GED), any major problems (escape attempts, discipline) any current involvement in programs, work, etc. Any treatment programs, community service [names/addresses of each].
- e) drug/alcohol history:
 - substances used:
 - degree of use:
 - treatment history:
 - drug/alcohol use by parents/spouse or others significant in client's life:
- f) client's role as a parent:
 - name/location of all children parented by client:
 - role in each child's life:
 - witness(es) who can testify to same:
 - contact client has had or will have with child while in jail:
 - letters/drawings to/from child:
 - any noteworthy acts client has performed as a parent (e.g. homework, doctor's visits, special activities).
- g) physical/mental health background:
 - all diagnoses, treatments, medications, problems. Anything current?
- h) employment history—all types, training, durations of employment, etc. Contact persons for the same; any problems at jobs; why terminated.
- i) any community involvement—all extra-curricular activities; names of contact persons.
- j) names/addresses/telephone numbers of close family and friends, and others significant in defendant's life. Counsel must obtain 5 such names/addresses.
- k) military record—service, rank, nature of discharge, places served, any special training/honors, any special assignments.
- l) any information regarding client's mental/physical condition on date of incident that might be relevant to sentencing inquiry.
- m) any incidents where client assisted police, prison officials, prosecutors or other law enforcement entities in the investigation or prosecution of any crime.

Records

The following pages contain forms and instructions for obtaining a client's other records; a form motion for appointment of a mitigation expert; a form motion for appointment of a psychologist; and a form motion for reimbursement for the cost of obtaining these records.

Pre-Sentence Reports

Many defendants have already been the subject of probation department evaluations—PSIs, Mental Health Reports, and Drug/Alcohol Evaluations.

Those reports can be delivered to counsel when so ordered by the calendar room judge. The following document is a form Motion and Order for securing the PSIs and all other Probation Department Reports on an individual defendant. Once the Order is signed and sealed, an original should be mailed to:

Robert Malvestuto
 Co-Chief Probation Officer
 Probation Department
 Court of Common Pleas
 1401 Arch Street
 Philadelphia, Pa. 19102

ORDER

AND NOW, this _____ day of _____, 200X, the Probation Department of the Court of Common Pleas of Philadelphia County is directed to provide to name of Mitigation Counsel all presentence, mental health, drug and alcohol evaluations and other similar reports pertaining to name of defendant, PP XXXXXX, no later than twenty (20) days from the date of this ORDER.

BY THE COURT:

 J.

MOTION TO COMPEL PRODUCTION OF PROBATION DEPARTMENT REPORTS

name of defendant, by his Mitigation Counsel [name of counsel], requests this Court to ORDER the disclosure to defense counsel of all presentence, mental health, psychiatric, drug and alcohol and other similar reports and represents:

1. Defendant name is charged with capital homicide.
2. Counsel for defendant has the ethical and legal obligation to secure all relevant background reports to prepare for mitigation.
3. Defendant name has previously been sentenced by the Philadelphia Court of Common Pleas.
4. Upon reason and belief, the Probation Department of the Court of Common Pleas has records pertinent to name.
5. Said records cannot be disclosed to counsel without court order.
6. Said records are critical to the defense and to the preparation of mitigation evidence.

WHEREFORE, defendant name requests this Court to disclose all presentence reports, psychiatric reports, mental health evaluations, drug and alcohol evaluations, and any and all similar reports for use by his counsel in mitigation preparation.

Respectfully submitted,

Juvenile Files

The "J-file" is an invaluable resource, containing family background, records of placements, leads to individual institutions that may have further records, leads to teachers or counselors who may have important testimony on the defendant's behalf, and a variety of psychological studies.

The "J-file" is obtained through the office of the Administrative Judge of the Family Court. A letter is sent, along with an ORDER requesting that the attorney [or the named investigator] be permitted to go to Family Court and photocopy the file. Once the ORDER is signed, counsel retrieves the same and then gets the file.

On the following pages are the motion and the letter to be sent to the Family Court Administrative Judge.

ORDER

AND NOW, this _____ day of _____, 2002, the custodian of records of the Juvenile Court is directed to permit Mitigation Counsel [name of counsel], Esquire, and/or name of mitigation investigator/specialist, social worker, to review and photocopy the entire J-File of name of defendant, Family No. J-number for defendant (date of birth xx/xx/xxxx) for use in preparing a death penalty defense.

BY THE COURT:

_____ A.J.

MOTION FOR ACCESS TO DEFENDANT'S J-FILE

name of defendant, by his Mitigation Counsel name, hereby moves for access to his J-File and represents:

1. Petitioner is charged with capital murder.
2. Petitioner is indigent.
3. Counsel for petitioner, and a mitigation expert (name) have less than two (2) months to prepare for a death penalty trial and possible penalty hearing.
4. Critical to the preparation of such a defense is access to all records from a defendant's background.
5. The United States Supreme Court has held that the failure of counsel to secure such records constitutes ineffective assistance of counsel. *Williams v. Taylor*, U.S., 120 S.Ct. 1495 (2000).
6. The United States Supreme Court has held that information from such records, in particular about the background and upbringing of a defendant, is critical mitigation evidence. *Williams v. Taylor*, U.S., 120 S.Ct. 1495 (2000).
7. Without these records, it will be impossible for petitioner to properly prepare the case for hearing.
8. Without a court order, petitioner cannot gain access to these records.

WHEREFORE, for the reasons contained herein, petitioner requests this Court to grant the instant Motion and direct the custodian of records to permit access to, and copying of, petitioner's J-file.

Hon.

Administrative Judge
Family Court
1801 Vine Street, Room 314
Philadelphia, Pa. 19103

BY FIRST CLASS MAIL AND BY TELE-FAX@215-686-4157

re: Commonwealth v. name of defendant (capital case)
Request for Access to J-File

Dear Administrative Judge:

I am counsel for name of defendant in a case where I was just appointed (prior counsel was dismissed) and where trial starts in less than two (2) months. Access to

name of defendant's J-File is critical to permit preparation of a penalty-phase defense.

Enclosed is a Motion for access to the J-File for me and for my mitigation expert, name of expert. If it is acceptable, please sign the same and have your staff notify my office, so we can retrieve it and secure access to the file at the earliest opportunity. If any additional information is needed, please advise me at once and it will be provided.

Thank you for your assistance in this matter.

Very truly yours,

Public School Records

Public school records are kept at a central location. Records (for the most part) travel with a student from school to school, so the final school the student attended has the bulk of her/his records. [There are exceptions—some counseling records are not in the central file, and teachers may keep their own records.]

School records should contain: attendance history, grades, teacher comments and possibly more material. They can be gleaned to find evidence of learning disabilities (or achievements); problems in the home (as when a child comes to school without shoes, or unfed); possible psychological assessments; and potential witnesses, particularly teachers who may remember the child quite well.

School records are obtained by presenting a subpoena or a court order to the Custodian Of Records, School District of Philadelphia, 734 Schuylkill Ave, Room 234, Philadelphia, Pa. 19146. They must identify the student by name used in school; date of birth; last school attended; and last year attended (graduation or drop-out. A cover letter should request that the records be mailed to defense counsel.

For further information, call the Custodian of Records at 215-875-3933. The current custodian is Linda Brown, and her fax is 215-875-5780.

On the following page is a draft ORDER for school records. All it requires is a case caption and submission to the calendar room judge.

ORDER

AND NOW, this _____ day of _____, 2002, it is hereby ORDERED and DECREED that the custodian of records for the School District of Philadelphia is to send to (Name and address of counsel) _____ the records for student

(name used in school) _____

(Date of birth) _____

(Last school attended) _____

(Last year at that school) _____

Said records are to be retrieved and provided within thirty (30) days of the entry of this ORDER.

BY THE COURT:

_____ J.

Prison Medical Records

The Philadelphia Prison system contracts for medical and mental health care with PHS (Prison Health Services). To obtain their records you must use their own release form (next page) and pay for the records. A cover letter with the mailing address precede the release form, which the client must sign.

Director
Regional Medical Records Department
Prison Health Services, Inc.
HOC-MOD II
8001 State Road
Philadelphia, PA 19136

Re: Medical Records of Inmate
PP #
DOB

Dear Director:

Enclosed please find a PHS Medical Authorization form for release of medical records signed by.

Please take the necessary steps to have the records of _____ from _____ through _____ forwarded to [name of attorney] at the above address as soon as possible.

Your assistance is greatly appreciated.

Sincerely,

PRISON HEALTH SERVICES, INC.

Identifying Information Must be Completed to Process Request

AUTHORIZATION FOR RELEASE OF MEDICAL RECORDS

PP#

Intake #(s) or dates of treatment _____

Any Known Alias(es) _____

Date of Birth _____

I, _____, hereby authorize (Name of Patient—Print)

Prison Health Services, Inc. (PHS) to release all medical records and all information related to my treatment to:

This authorization extends to all records in the possession of PHS, including those which it has received from other providers, and including, if they exist, those relating to treatment for drug or alcohol abuse, mental health treatment, testing as to HIV status, treatment for HIV or Acquired Immune Deficiency Syndrome (AIDS), or other diseases or conditions.

This authorization is effective immediately and shall remain in effect for ninety (90) days.

I agree to hold harmless PHS and its agents from any actions and from all liability regarding the release of these records. I agree to pay reasonable charges of \$.25 (25 cents) per page for copies of the requested records with a minimum charge of not less than \$10.00. PHS will contact me or the above referenced party at (Phone No) _____ with the exact charges and those charges will be paid by certified check or money order before the records are released.

Name (Print)

Signature of Patient
(or Legal Guardian if appropriate)

Date

Date

Witness (Print)

Witness (Print)

IF THIS FORM IS NOT FULLY COMPLETED, IT WILL BE CONSIDERED INVALID AND WILL BE RETURNED

STANDARD RECORD/MEDICAL RELEASE

When initially interviewing a client, have him/her sign numerous blank release forms. These can then be used to obtain medical records, drug treatment records, private school records, etc.

The following two forms (one medical, one non-medical) should be copied onto a document with the attorney's letterhead.

AUTHORIZATION TO RELEASE RECORDS

I, _____, date of birth _____, hereby authorize _____ [name of entity from which records are sought] To release copies of all records pertaining to me and my _____ [relationship to entity] _____ to my attorney,

[name and address of counsel]

The purpose for this release is for use in legal representation.

The information to be released shall include _____ [specify ALL records or the portions thereof that are sought] _____ .

(Signature of Client)

Date

AUTHORIZATION TO RELEASE MEDICAL RECORDS/INFORMATION

I, _____, date of birth _____, hereby authorize _____ [name of entity from which records are sought] To release copies of all records pertaining to me and my _____ relationship to entity] _____ to my attorney,

[name and address of counsel]

The purpose for this release is for use in legal representation.

The information to be released shall include _____ [specify ALL records or the portions thereof that are sought] _____ .

THE INFORMATION WHICH MAY BE RELEASED INCLUDES: _____

_____ .

I UNDERSTAND THAT MY RECORDS ARE PROTECTED UNDER THE FEDERAL PRIVACY ACT, P. L. 93-575, THE FEDERAL ALCOHOL AND DRUG ACT, P. L. 92-282, THE PENNSYLVANIA MENTAL HEALTH PROCEDURES ACT, 1976, AND THE PENNSYLVANIA CONFIDENTIALITY OF HIV ACT, 35 P. S. SECTION 7601, ET SEQ. AND THEREFORE, CANNOT BE DISCLOSED WITHOUT MY WRITTEN CONSENT UNLESS OTHERWISE PROVIDED FOR IN THE REGULATIONS.

UNDER THE MENTAL HEALTH ACT, THIS AUTHORIZATION EXPIRES ONE (1) MONTH FROM THE DATE OF MY SIGNATURE. UNDER THE FEDERAL ALCOHOL AND DRUG ABUSE ACT, THIS AUTHORIZATION SHALL BECOME VOID NINETY (90) DAYS FROM THE DATE OF MY SIGNATURE. IN ADDITION, I UNDERSTAND THAT I MAY REVOKE THIS AUTHORIZATION (EXCEPT TO THE EXTENT THAT ACTION HAS BEEN TAKEN IN RELIANCE THEREON) AT ANY TIME BY WRITTEN, DATED COMMUNICATION TO THE MEDICAL RECORD DEPARTMENT.

(Signature of _____) (Date) _____

(Signature of Client) _____

Date

Prison Adjustment Records

A defendant's prior (or current) adjustment to prison is recognized, under the U.S. Constitution, as compelling mitigation evidence. It removes the spectre of future dangerousness, even when that is not argued as a reason for the death penalty; it shows that, off of the streets, the defendant is not violent or non-productive, therefore supporting a contention that it was the environment that dragged the defendant down; and it may provide the jury with proof of conduct (religious training, attending AA meetings, etc.) that in itself is a reason sufficient to vote against the death penalty.

In *Skipper v. South Carolina*, U.S., 106 S.Ct. 1669 (1986), the United States Supreme Court explained why prison adjustment evidence was admissible, and potentially critical, in a capital proceeding:

Although it is true that any such inferences would not relate specifically to petitioner's culpability for the crime he committed, there is no question but that such inferences would be "mitigating" in the sense that they might serve "as a basis for a sentence less than death." Consideration of a defendant's past conduct as indicative of his probable future behavior is an inevitable and not undesirable element of criminal sentencing: "any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose[.]" . . . [E]vidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating . . . [S]uch evidence may not be excluded from the sentencer's consideration.

106 S.Ct. at 1771 (citations omitted) (footnote omitted).

Prison officials often will provide, upon receipt of a court order, an adjustment report. In the form of a letter, it details how the prison performed (or is currently performing) during incarceration—were there write-ups, did the prisoner have a job, was there participation in any work-release or drug/alcohol program, and was there any educational training/advance.

Only request such records after first determining, from the client, whether they would be helpful. The client can tell counsel whether he/she had a prison job or was in the hole; whether she/he completed educational programs or received numerous write-ups.

Following is an ORDER for such a report. The ORDER can be focused to request a report on all or some of the categories. Once obtained, a certified/sealed copy of the order should be mailed to the county jail warden or the

prison superintendent for each appropriate institution in which the defendant was housed. A separate ORDER will be needed for each institution. The ORDER must make clear that the report is to be sent only to defense counsel, and this should be repeated in the cover letter accompanying the ORDER to the prison official(s).

Note: If a defendant participated in a psychological treatment regimen or a drug treatment program, it is more appropriate to obtain the complete records, which may be done by securing a release from your client. If the institution will not honor a release, draft a separate ORDER for signature and service.

[caption]

ORDER

AND NOW, this _____ day of _____, 2002, upon application of Mitigation Counsel [name of counsel] _____, Esquire, it is hereby ORDERED and DECREED that the Warden of the [name of county jail] _____ is directed to prepare, or have a social worker or other designee prepare, an Institutional Adjustment Report or other report on inmate [inmate name] _____, PP [police photo number] _____, including information pertinent to

- a) his adjustment at prison;
- b) any disciplinary infractions;
- c) any involvement in work;
- d) any involvement in educational programs;
- e) any involvement in religious or other programs; and
- f) and any other relevant information,

and deliver the same to [name and address of counsel] _____ no later than [date] _____.

BY THE COURT:

J.

DHS Records

If your client or his/her family has ever been subject to DHS supervision, there will be an abundance of potential mitigation material available.

The steps to obtain the defendant's DHS files are as follow:

1. Get all identifying information from client—date of birth, parents' name, names of sibling(s);
2. Send a letter to Charlotte Nichols, Chief Deputy City Solicitor. Law Department, 1515 Arch Street, 16th Floor, Philadelphia, Pa. 19102.
3. In the letter, identify yourself as counsel for the individual named, and explain that you need a copy of the entire DHS record of this client for preparation for a death penalty case.
4. Ms. Nichols will ensure that the file is made available to you.

The steps to obtain the DHS file of a defendant's sibling is:

1. Deliver a subpoena duces tecum to Records Custodian, DHS, 1515 Arch Street, 16th Floor, Philadelphia, Pa. 19102. The subpoena should request the DHS file of the family member(s) at issue.
2. Send a copy of the subpoena, with a cover letter, to Ms. Nichols.

3. This issue may have to be litigated before the calendar judge, if DHS elects to challenge the subpoena.

MILITARY RECORDS

As a general rule, military records are obtained by writing to

National Personnel Records
Attention: Military Personnel Records
9700 Page Blvd.
St. Louis, Missouri 63132-5200

Records are obtained by sending a records release (form provided above in these materials) signed by the client and dated. The form should include years of service, branch of the military, and as much other identifying information as is possible.

For more information, check the following website:
http://www.archives.gov/facilities/mo/st_louis.html.

Motion for Mitigation Specialist/ Motion for Psychologist/Psychiatrist

This section references two discrete Motions—one seeking a mitigation expert and a separate one for a psychological or psychiatric expert. The form of the motions is similar, so we have submitted a model for the mitigation expert. If, after the mitigation expert is involved, it is determined that a psychologist or psychiatrist is needed for testing, a second motion, seeking those services, must be submitted. These motions are to be submitted and litigated ex parte.

To file the Motion for funds for a mitigation expert, counsel must first speak with an accomplished mitigation expert and receive an estimate of the fee for his/her services. Counsel must also obtain the expert's resume and append the same as an Exhibit to the Motion.

This Motion is separate from a motion seeking funds for a psychological or psychiatric assessment. The Mitigation Expert may be the person able to identify the type of examination needed by the client after all records are obtained and interviews are conducted.

[caption]

ORDER

AND NOW, this _____ day of _____, 2002 it is hereby ORDERED and DECREED that defendant _____ [name], by his Mitigation Counsel _____ [name], is granted ex parte approval to expend up to \$ _____ [expert's fee] for capital defense mitigation services. Upon presentation of proof of an invoice for said services, the office of Court Finance is directed to pay for the work in this matter.

By The Court:

_____ J.

APPLICATION FOR PRE-APPROVAL FOR EXPERT WITNESS FEE FOR MITIGATION PREPARATION

TO THE HONORABLE JUDGES OF THE SAID COURT:

_____ [name of defendant], petitioner, by his Mitigation Counsel _____ [name of counsel], moves for pre-approval of funds for a mitigation specialist in the instant matter and represents:

1. Petitioner stands charged with capital murder, in a case involving a seven year old homicide.

2. Petitioner is indigent.

3. Counsel for Petition has sought the services of a mitigation specialist to conduct the necessary preparation and investigation.

4. Counsel has secured a proposal for services from _____ [name of mitigation expert] (copy attached).

5. The services sought by petitioner are those guaranteed to other indigents faced with capital homicide when those indigents are represented by the Defender Association of Philadelphia.

6. Petitioner is entitled to reasonable compensation for necessary assistance in the preparation of his case. *Ake v. Oklahoma*, U.S., 105 S.Ct. 1087 (1985).

7. Decisional law confirms that costs of mitigation in other states can run to \$100,000 to \$150,000. *State v. Bocharski*, 22 P.3d 43 (Arizona, 2001).

WHEREFORE, petitioner requests this Court to enter an ORDER approving payment up to \$ _____ to permit _____ [name of expert] to commence preparation. [Petitioner does note that if said expert determines the need for additional forensic testing, such as a psychiatric, psychological or neuropsychological examination, he will then file a Motion seeking funds for the same.]

Respectfully submitted,

MOTION FOR REIMBURSEMENT

Mitigation Counsel who pays for obtaining records should keep all receipts and then file a single motion with the calendar judge, with the receipts attached, seeking an ORDER directing that counsel be reimbursed for those out-of-pocket expenses.

MOTION FOR REIMBURSEMENT

name of Mitigation Counsel, petitioner herein, seeks reimbursement for funds expended in preparing the within case for capital penalty phase proceedings, and represents:

1. Counsel was appointed to represent name of defendant, an indigent charged with capital murder.

2. As part of his/her mitigation investigation, counsel was required to obtain the following records:

a. Name records

b. Name records

3. Counsel had to pay for the copying and mailing of said records. The total amount expended was \$ _____, and the receipts for the same are attached hereto.

4. Counsel was required to obtain said records in order to properly defend the accused.

5. Counsel is entitled to be compensated for all out-of-pocket expenses incurred in representing this defendant.

WHEREFORE, counsel requests this Court to direct the Office of Court Finance to reimburse counsel in the amount of \$ _____ for the above-delinea

[Pa.B. Doc. No. 03-136. Filed for public inspection January 24, 2003, 9:00 a.m.]

Title 255—LOCAL COURT RULES

DAUPHIN COUNTY

Promulgation of Local Rules; No. 1793 S 1989; No.
1-1991

Order

And Now, this 2nd day of January, 2003, Dauphin County Local Rule of the Orphans' Court Division 6.10.1 is amended as follows:

Rule 6.10.1 Filing and Service

(a) Objections to an account or to the statement of proposed distribution, or both, must be filed in writing with the Clerk not later than [9:00 a.m. (prevailing time)] the close of business on the Tuesday immediately preceding the date fixed for the presentation of accounts by the Clerk for audit. A copy of the objections shall be served on the accountant or the accountant's attorney forthwith.

This rule shall be effective 30 days after publication in the *Pennsylvania Bulletin*.

By the Court

JOSEPH H. KLEINFELTER,
President Judge

[Pa.B. Doc. No. 03-137. Filed for public inspection January 24, 2003, 9:00 a.m.]
