

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
SAN ANTONIO DIVISION

_____ ,	§	
	§	
	§	
Petitioner,	§	
	§	
V.	§	CIVIL NO.
	§	
NATHANIEL QUARTERMAN, Director,	§	
Texas Department of Criminal	§	
Justice, Correctional	§	
Institutions Division,	§	
	§	
Respondent.	§	

**ORDER DENYING MOTIONS FOR AUTHORIZATION OF EXPERT ASSISTANCE  
AND LEAVE TO FILE EX PARTE APPLICATION UNDER SEAL**

The matters before this Court are (1) petitioner's motion for authorization of funds for expert assistance, (2) petitioner's motion for leave to file detailed *ex parte* application for funds under seal, and (3) petitioner's *ex parte* application for authorization of funds for a mitigation specialist.

Background

During his state habeas corpus proceeding, petitioner fairly presented and fully, albeit unsuccessfully, litigated claims asserting both (1) petitioner is exempt from execution by virtue of his status as a mental retarded person and the Supreme Court's holding in *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), and (2) his trial counsel rendered

ineffective assistance in connection with the punishment phase of petitioner's capital trial by failing to adequately investigate, develop, and present available mitigating evidence. Petitioner now seeks authorization from this Court to retain the services of a licensed attorney whom petitioner designates in various places in his latest motions as either "an expert," "a mitigation specialist," or a person "fluent in Spanish." Petitioner requests that this Court authorize petitioner's federal habeas counsel to retain the services of the attorney in question and authorize payment to said attorney of an amount in excess of twenty-two thousand dollars for services which this Court can best describe as performing the services of an investigator.

Excess Funding Not Justified

There are numerous problems with petitioner's latest motions, none the least of which is the fact that, absent a showing of exceptional circumstances necessitating additional investigative or expert assistance absent from petitioner's case, the applicable federal statute limits the authority of this Court to authorize the expenditure of federal funds for investigative or expert assistance to the sum of seven thousand, five hundred dollars in a particular case. 18 U.S.C. §3599(g)(2). In an appropriate case, section 3599(g)(2) of Title 18, United States Code, authorizes this Court to *certify* to the chief judge of this circuit or another judicial officer designated by the chief

circuit judge that exceptional circumstances warrant the provision of expert or investigative services above and beyond this \$7,500 figure. However, in order to make such a certification, this Court must first determine such an excess expenditure "is necessary to provide fair compensation for services of an unusual character or duration." Furthermore, this court's certification of excess expenses is not conclusive. The chief circuit judge or the designee of the chief circuit judge must give the final approval for the supplemental funding.

In recent months, this Court has twice certified to the chief circuit judge the need for supplemental funding above and beyond the statutory limit. However, the facts of both those cases are readily distinguishable from petitioner's. In one case, the State of Texas denied a petitioner's request for the assistance of counsel, denied the petitioner's request for an evidentiary hearing, and then summarily rejected on the merits a claim the petitioner was mentally incompetent to be executed under the standard established by the Supreme Court's decision in *Panetti v. Quarterman*, \_\_\_ U.S. \_\_\_, 127 S.Ct. 2842, 168 L.Ed.2d 662 (2007), and its prior decision in *Ford v. Wainwright*, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986). In the other case, a petitioner who, like petitioner herein, asserted a mental retardation claim was likewise denied the assistance of counsel, denied an evidentiary hearing before the state habeas court, and,

thereby, denied a reasonable opportunity to fully litigate his *Atkins* claim before the state courts. In contrast, petitioner was assisted by counsel at all times during his state habeas corpus proceeding and, following a remand from the Texas Court of Criminal Appeals, was afforded an evidentiary hearing for the purpose of presenting the state habeas court with evidence supporting petitioner's *Atkins* claim.

Petitioner presents no fact-specific allegations, much less any evidence, showing any institutional impediment prevented his state habeas counsel from adequately and fully investigating the factual bases underlying petitioner's *Atkins* and ineffective assistance claims during the course of petitioner's state habeas corpus proceeding. On the contrary, the fact that petitioner's federal habeas counsel propose to retain the services of a licensed attorney to undertake investigation into the factual bases underlying both of the claims implicitly suggests the factual information which petitioner now claims should have been developed and presented during petitioner's state habeas corpus proceeding was well within the grasp of a reasonably diligent state habeas counsel.

Unlike recent cases in which this Court has certified the need for supplemental funding for expert assistance, petitioner herein does not allege he was prevented from obtaining an evaluation of his mental health and intelligence level during his

state habeas corpus proceeding. The mere possibility petitioner's state habeas counsel might have been able to locate and develop additional factual information underlying petitioner's mental retardation claim had said counsel undertaken a more vigorous or thorough investigation into petitioner's background does not, standing alone, justify the appointment of an investigator to assist petitioner's federal habeas counsel in such an undertaking. As respondent points out, were petitioner to present this Court with substantial new evidence which casts petitioner's mental retardation and ineffective assistance claims in an entirely new light, there is a probability such new evidence would render petitioner's claims unexhausted.

Nothing in petitioner's motions suggests petitioner was unavailable, due to any mental impairment, to petitioner's trial counsel or petitioner's state habeas counsel during the time periods in which said counsel investigated petitioner's background. There is no fact-specific allegation before this Court establishing petitioner concealed from his trial or state habeas counsel any information relevant to petitioner's defense or to petitioner's claims of ineffective assistance by his trial counsel litigated during petitioner's state habeas corpus proceeding. The mere possibility that additional research and more thorough investigation might have revealed additional, unspecified, information relevant to petitioner's *Atkins* and

ineffective assistance claims does not justify the appointment of an investigator in this cause. There is no allegation before this Court establishing petitioner was unable to furnish his state habeas counsel (or is currently unable to furnish his federal habeas counsel) with detailed information regarding petitioner's own background, including the circumstances surrounding petitioner's escape from a Mexican penal facility.

Since the advent of the AEDPA, it has not been the role of federal habeas corpus courts to second-guess the factual or legal determinations of state habeas courts made after a full and fair opportunity to litigate the merits of a particular federal constitutional claim. See *Hernandez v. Johnson*, 108 F.3d 554, 558 & n.4 (5th Cir. 1997)(holding that, under the AEDPA, the proper forum for the making of all factual determinations in habeas cases will shift to the state courts "where it belongs" and recognizing the AEDPA clearly places the burden on the federal habeas petitioner "to raise and litigate as fully as possible his potential federal claims in state court"), *cert. denied*, 522 U.S. 984 (1997). Given the facts and circumstances of petitioner's case, this Court is not a proper forum for re-litigating petitioner's *Atkins* and ineffective assistance claims *de novo*.

#### Ex parte Proceedings Not Justified

Section 3599(f) of Title 18, United States Code, provides in pertinent part that no *ex parte* proceeding or communication may

be considered by the Court unless "a proper showing is made concerning the need for confidentiality." Petitioner has failed to satisfy this standard. At this juncture, there is nothing to be gained by concealing from respondent petitioner's desire to more fully investigate the factual bases underlying petitioner's potential *Atkins* and ineffective assistance claims. Nothing in petitioner's recent motions discloses any confidential communication between petitioner and his counsel. Nor do petitioner's latest motions reveal any information protected by the attorney work product doctrine. Nor is there any other fact revealed in petitioner's motions which is entitled to be protected from public revelation under any other cognizable theory of confidentiality. Neither the hourly rates for the proposed services of petitioner's mitigation specialist nor petitioner's federal habeas counsel's estimation of the total number of hours of work necessary to more fully investigate petitioner's background fall within any cognizable category of confidential information. Accordingly, petitioner has failed to satisfy the showing of a need for confidentiality. This Court will direct the Clerk to unseal petitioner's sealed, *ex parte*, motion.

Petitioner may yet be able to justify the submission of an *ex parte* motion in this cause. Nothing in his latest motions, however, satisfies the required showing of a need for

confidentiality. It is no secret petitioner claims he is mentally retarded. It is likewise no secret petitioner complains his trial counsel could and should have developed additional mitigating evidence and presented same during the punishment phase of petitioner's capital trial. Petitioner fairly presented and fully litigated both those claims during his state habeas corpus proceeding. The possibility further investigation by petitioner's state habeas counsel might have revealed additional information relevant to those claims is hardly a basis for making *ex parte* communications to this Court. The same could be said of almost every claim for relief ever presented to a federal habeas court.

#### No Showing of Need for Excess Fees for an Investigator

The person whom petitioner requests be appointed as "an expert" to assist petitioner's federal habeas counsel is a licensed attorney who possesses experience in the investigation of a capital murder defendant's background in anticipation of presenting a case in mitigation at the punishment phase of a capital trial. As such, it is inappropriate to consider such a person "an expert" within the meaning of that term as used in §3599(g)(2). Rather, the services to be provided by such a person are more accurately categorized as "investigative" in nature. Petitioner has furnished no rational justification for

paying such an investigator more than the \$7,500 which this Court is statutorily permitted to authorize.

In the event petitioner wishes to retain the services of the mitigation specialist in question at a level of expenditure within the range this Court is permitted to authorize, petitioner may file a new motion requesting appointment of an investigator or "mitigation specialist" who will perform services within the appropriate fee range. However, petitioner should accompany any such motion with both (1) a detailed explanation of precisely why such investigative expenses are necessary in this cause and (2) a proposed budget designed to intelligently outline the specific types of investigative services petitioner proposes his investigator will undertake. The allegation that "an adequate social history has never been conducted" will not, standing alone, justify further investigation into petitioner's background above and beyond the type of investigation which petitioner's current federal habeas counsel are fully capable of conducting. Additional investigation into a criminal defendant's background will, almost always, reveal additional information about the defendant not previously developed. The question before this Court is whether the type of investigation necessary to discover that additional information exceeds the capabilities of the attorneys appointed to represent the petitioner in a federal habeas proceeding. This Court appointed petitioner's current

counsel based on representations said counsel possessed more than ordinary expertise and experience in capital litigation.

If petitioner's current federal habeas counsel require the assistance of an interpreter to complete their own investigation into petitioner's background, a request for funding for an interpreter may be appropriate. However, at this juncture, petitioner has not justified the appointment of a third attorney in this cause simply because the third attorney is fluent in Spanish.

Accordingly, it is hereby **ORDERED** that:

1. Petitioner's motion for authorization of funds for expert is **DENIED** without prejudice.

2. Petitioner's motion for leave to file detailed *ex parte* application for funds under seal is **DENIED**.

3. The Clerk shall unseal and file among the pleadings, motions, and other documents in this cause petitioner's application for authorization of funds for a mitigation specialist.

4. Petitioner's *ex parte* application for authorization of funds for a mitigation specialist is **DENIED** without prejudice.

**SIGNED** this \_\_\_\_\_ day of \_\_\_\_\_, 2009.

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**United States District Judge**