

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

UNITED STATES OF AMERICA
PLAINTIFF,

V.

Criminal Action No.

DEFENDANTS,

DEFENDANTS,

ORDER

At the request of the defendants, the Court has revisited the issue of funding for expert services for the capital defendants in this case. To ensure that the defendants' concerns were completely explored, the Court asked Magistrate Judge _____ to hold a status conference in this case. Judge _____ convened a hearing on July 14, 1995 which included all of the defendants remaining in the case and their counsel except [defendant's name], [defendant's name], and their counsel¹ The Court has since communicated with Judge _____ and enters the present order to put into action the proposals which were discussed at the hearing.

The Court notes that with this order it has departed from its usual practice of handling requests for funds for expert services ex parte. The procedures to ensure confidentiality which normally attend funding requests are not necessary in this instance since all discussions were conducted in the open and in the presence of the government's counsel with the agreement of the defendants. Accordingly, this order shall not be placed under seal.

The Court has in its prior ex parte orders established budgets for the funding of mitigation specialists and fact investigators for each defendant who requested such funds. Each budget set by the Court was based upon an estimate provided by the expert whom the

¹ Judge Larsen held a separate hearing with Darrell Vest and his counsel on July 12, 1995. David Wrigley was unable to attend because of health problems and his counsel was unavailable because of scheduling conflict. Judge Larsen held a separate conference with David Wrigley and counsel on July 19, 1995.

defendant sought to do the work. To encourage the efficient management of resources, the Court purposefully set the budgets for all experts below the amounts requested. The Court also indicated that a defendant would not be allowed to exceed his established budgets unless the defendant's expert provided an affidavit demonstrating an unanticipated need.

It appears that the Defendant's have misinterpreted the Court's prior orders. They have expressed concern that their funding for experts would be limited solely to the amount initially set by the Court and that further funds would be forthcoming only in extraordinary circumstances. Defense counsel and their experts have indicated that they have already anticipated what the investigations will cost and they do not regard the current allocation of funds as sufficient. Fearful that adequate funds would not be available, the defendants have refrained from retaining experts until this matter is resolved.

The Court issues the present order to clarify its prior orders, resolve any lingering concerns the defendants may have, and speed the preparation of this case. The Court addresses funding for fact investigators, mitigation specialists, and mental health experts separately.

I. Investigative Services

The capital defendants originally indicated that they could share the services of a fact investigator for certain aspects of the case in addition to having their own separate fact investigators. The Court had hoped that such an arrangement might avoid some duplication of effort. For instance, all of the defendants will need certain basic background and impeachment information about the government's witnesses. At the conference, defense counsel argued that they could not conduct a joint investigation without creating a loyalty conflict for the

investigator or an ethical conflict for defense counsel. The defendants argue that they will not be able to share an investigator as originally proposed and that the funding authorization for their individual investigations must be raised accordingly.

The Court finds that the defendant will need to conduct their own completely separate investigations. The Court will authorize additional funding for the individual investigators, since the amounts originally announced were based on an expectation that much of the work could be done by the joint investigator. The Court recognizes that any estimate made before an investigation is actually commenced will necessarily involve a certain amount of speculation. The Court will bear this in mind as it reviews the requests of each defendant.

A.

Counsel for [defendant 1] have indicated that they need \$10,000 to cover the fees for a fact investigator for their defendant. Defense counsel have made the Court aware that the fees for a fact investigator for [defendant 1] may go as high as \$15,000.00. Bearing in mind that the defendant may later be able to demonstrate the need for as much as \$15,000.00, the Court will authorize [defendant 1] to spend up to \$10,000.00 for fees for a fact investigator.

Counsel for [defendant 2] have indicated that his fact investigation may cost as much as \$15,000.00. They argue that [his] investigation may involve greater expense because of the number and type of crimes with which he is charged. The Court recognizes that [defendant 2's] investigation may reach the proposed amount and defense counsel is authorized to spend up to \$15,000.00 for fees for [defendant 2's] fact investigator.

Counsel for [defendant 3] have indicated that his fact investigation will cost at least \$10,000.00. They point out that this figure is speculative and that the final bill may run as high

as \$15,000.00. Subject to a later showing of additional need, the Court will immediately authorize [defendant 3] to spend up to \$10,000.00 for fees for a fact investigator.

B.

To ensure that the funds provided are spent in a responsible manner, the Court will require each defendant's fact investigator to file monthly billing statements justifying his expenses and expenditure of time. Fact investigators may also be reimbursed for out-of-pocket expenses reasonably incurred incident to the rendering of services. The Court recognizes that over the course of their work the defendants' fact investigators may be able to justify expenditures in excess of those currently authorized by the Court. The defendants may seek authorization for additional funding as necessary. Any such requests shall include an affidavit from the investigator indicating what work has already been done and what remains to be done.

II. Mitigation Specialists

The defendants have also asked the Court to review the funding authorization for mitigation specialists. They maintain that the funding requests which their potential mitigation experts submitted to the Court represent the bare minimum necessary to perform this service. To assuage their concerns and those of the mitigation specialists, the Court will accept their estimates for the cost of the mitigation investigations. The Court will also implement procedures for monthly reviews of billing statements and for requests for additional funding if it should become necessary.

A.

[Defendant 1] has indicated that his mitigation investigation will cost at least

\$18,000.00. The Court will accept this figure for the purposes of planning and will authorize the [defendant 1] to spend up to \$18,000.00 for fees for his mitigation specialist.

[Defendant 2] has indicated that his mitigation investigation may cost between \$17,500.00 and \$32,000.00, but that the lowest possible amount for which the job could be done was \$17,500.00. The Court will accept the lower figure for the purpose of current planning and will authorize the defendant to spend up to \$17,500.00 for fees for his mitigation investigation.

[Defendant 3] indicated at the conference that he had already obtained the services of a mitigation investigator from the Missouri Capital Punishment Resource Center. The Court has since received word that funding cuts have eliminated this arrangement. The Court will take up this problem at a more appropriate time when it has been raised in a motion.

B.

Defendants' mitigation specialists shall file ex parte a plan indicating what they intend to do with the money already authorized. They must also submit monthly interim payment vouchers with a detailed accounting and justification for their hours. The mitigation specialists may also be reimbursed for out-of-pocket expenses reasonably incurred incident to the rendering of services. The defendants may submit requests for additional funding if it becomes necessary. Such requests shall be accompanied by an affidavit from the defendant's mitigation specialist indicating what work has been done and what remains to be done.

III. Mental Health Examinations

The capital defendants have also asked the Court to reconsider its approach to the issue of funding for mental health examinations. The Court had originally taken under advisement

all requests for mental health examinations pending an initial investigation of each defendant's background by his mitigation specialist. The Court initially adopted this approach to ensure that each of the defendant's mental health experts had access to all relevant information about the defendant's background. The defendants now argue that their mental health experts will be able to uncover all important historical information through the course of their examinations. The defendants maintain that it is unnecessary to delay their mental health examinations and that preparation of the case would proceed more quickly if these examinations were begun immediately. The Court agrees and finds that, pursuant to 21 U.S.C. § 848(q)(9) and (10), the defendants have demonstrated the need for mental health experts to conduct initial mental health examinations. The Court will establish procedures to monitor costs and handle requests for additional funding if further testing becomes necessary.

A.

[Defendant 1] has indicated that an initial mental health examination will require up to \$3,000.00. However, his counsel have indicated that if the mental health experts find it necessary to run further tests the ultimate cost may run as high as \$10,000.00. The Court recognizes that the defendant may be able to show a need for additional testing which may cost up to \$10,000.00. For now the Court will authorize the defendant to spend up to \$3,000.00 on an initial mental health exam.

[Defendant 2] has indicated that he will require up to \$3,000.00 to obtain an initial mental health exam. [Defendant 2's] counsel have also indicated that if additional testing is warranted the costs of the mental health examinations may ultimately reach \$10,000.00. The Court recognizes the possibility that further testing and further funding may be necessary. At the outset, however, the Court will authorize the defendant to spend up to \$3,000.00 for an initial mental health evaluation.

[Defendant 3] has requested up to \$3,000.00 for an initial mental health exam. His counsel also anticipate that further testing may result in a bill as high as \$10,000.00. Recognizing that the need for further testing may be shown, the Court will authorize the defendant to expend up to \$3,000.00 on an initial mental health examination.

B.

The Court will approve interim payments for the defendant's mental health experts. The Court reminds defense counsel that the experts will be required to justify their time expenditures in the interim payment statements which should be submitted to the Court on a monthly basis.

The Court is aware that the initial mental health examinations may indicate problems which require further testing and further funding. Counsel for each defendant have provided the Court with some idea of what the total expenditures for mental health testing might be if their defendant requires a full battery of tests. The Court will approve funds for each additional testing stage upon a showing by the defendant that the additional testing is medically necessary. A defendant may satisfy this showing by presenting an affidavit from the defendant's appointed or proposed mental health expert showing that the results of the initial evaluation warrant further testing.

IV. Attorneys Fees

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The Court has under review the defendants' motion regarding the hourly rate for counsel for the death penalty defendants. An order on that subject will issue within the next week.

V. Conclusion

Accordingly it is ORDERED that:

1. The Court amends its prior order and authorizes [Defendant 1] to spend up to \$10,000.00 for fees for a fact investigator. As soon as practicable, the defendant shall file ex parte a notice with the Court indicating that he has retained a fact investigator and that the investigation has begun. This notice shall include the name and address of the investigator.

2. The Court amends its prior order and authorizes [Defendant 2] to spend up to \$15,000.00 for fees for a fact investigator. As soon as practicable, the defendant shall file ex parte a notice with the Court indicating that he has retained a fact investigator and that the investigation has begun. This notice shall include the name and address of the investigator.

3. The Court amends its prior order and authorizes defendant [Defendant 3] to spend up to \$10,000.00 for fees for a fact investigator. As soon as practicable, the defendant shall file ex parte a notice with the Court indicating that he has retained a fact investigator and that the investigation has begun. This notice shall include the name and address of the investigator.

4. The Court amends its prior order and authorizes defendant [Defendant 1] to spend up to \$18,000.00 in fees for the services of a mitigation specialist.

a. As soon as practicable, the defendant shall file ex parte a notice with the Court indicating that he has retained a mitigation specialist and that the investigation has begun. This notice shall include the name and address of the mitigation specialist.

b. Once retained the mitigation specialist shall file ex parte a plan indicating how the funds authorized will be used.

5. The Court amends its prior order and authorizes defendant [Defendant 2] to spend up to \$17,500.00 in fees for the mitigation specialist.

a. As soon as practicable, the defendant shall file ex parte a notice with the Court indicating that he has retained a mitigation specialist and that the investigation has begun. This notice shall include the name and address of the mitigation specialist.

b. Once retained the mitigation specialist shall file ex parte a plan indicating how the funds authorized will be used

6. [Defendant 3] is authorized to spend up to \$3,000.00 on an initial mental health examination.

a. The defendant authorized to retain his previously named expert, Dr. _____, to conduct the initial mental health examination. If the defendant seeks to name a different expert, he shall file ex parte a notice with the Court providing the name, qualifications, and hourly rate of the defendant's mental health expert.

b. Due to the length of this case, the Court grants interim payments for [Defendant 1's] mental health expert. Counsel for the defendant should consult _____, the CJA financial deputy, to make the necessary arrangements.

7. [Defendant 2] is authorized to spend up to \$3,000.00 on an initial mental health examination.

a. The defendant is authorized to retain his previously named experts, Drs. _____, _____, and _____, as needed, to conduct the initial mental health examination. If the defendant seeks to name a different expert, he shall file ex parte a notice

with the Court providing the name, qualifications, and hourly rate of the defendant's mental health expert.

b. Due to the length of this case, the Court grants interim payments for [Defendant 2's] mental health expert. Counsel for the defendant should consult _____, the CJA financial deputy, to make the necessary arrangements.

8. [Defendant 3] is authorized to retain an expert to conduct an initial mental health examination, and the defendant is authorized to spend up to \$3,000.00 on this examination.

a. Since the defendant [Defendant 3] has not named a specific expert, counsel shall file ex parte a notice with the Court providing the name, qualifications, and hourly rate of the defendant's mental health expert.

b. Due to the length of this case, the Court grants interim payments for [Defendant 3's] mental health expert. Counsel for the defendant should consult _____, the CJA financial deputy, to make the necessary arrangements.

9. [Defendant 2's] ex parte motion for extension of time within which to request mental health examinations and expert funding (Doc. #1340) has been addressed by this order and is DISMISSED AS MOOT.

10. The defendants shall immediately inform the Court of any problem which might delay the preparation of this case by calling the Court's law clerk and filing an appropriate motion.

United States District Court

Dated: July 21, 1995