

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
TYLER DIVISION

JOHN DOE, #10101010

*Petitioner,*

v.

DIRECTOR, TDCJ-CID,

*Respondent.*

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Civil Action No. 6:14cvXXX

\*SEALED\*(EXEMPLAR)

**SEALED EX PARTE FILING PURSUANT TO COURT ORDER**

Pursuant to the Court’s Sealed *Ex Parte* Order re Submission of Budget (docket entry #6), Petitioner hereby submits his budget proposal. Undersigned counsel has generally followed the advice propounded by the Judicial Council of the United States<sup>1</sup> in compiling this proposed budget. As more fully detailed below, Petitioner seeks approval and authorization of \$42,380 for attorney fees and \$7,500 for expert and investigative assistance, for a total of \$49,500. Petitioner’s case was tried in 2009, was affirmed on direct appeal to the Twelfth Court of Appeals and the Texas Court of Criminal Appeals, and was subsequently the subject of a Texas State habeas corpus writ to the Texas Court of Criminal Appeals, which was denied with written order. It is now presented to this court by petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The budget sought herein exceeds the \$35,000 presumptive cap for attorney fees established in The Judicial Council of the Fifth Circuit Special Procedures for Reviewing Attorney

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<sup>1</sup> See “Explanatory Memorandum for Case Budgeting in a Federal Capital Habeas Corpus Panel Attorney Representation Arising Out of a State Court Death Sentence,” available on the website of the Eastern District of Texas, [www.txed.uscourts.gov](http://www.txed.uscourts.gov).

Compensation Request in Death Penalty Cases, as amended February 1, 2005.<sup>2</sup> However, the request for expert and investigative assistance funding is within the maximum amount that may be approved by the district court.<sup>3</sup>

**[NOTE: IF THE BUDGET SUBMISSION EXCEEDS TEN PAGES, INSERT A TABLE OF CONTENTS AND, IF APPROPRIATE, A TABLE OF AUTHORITIES AFTER THE PREAMBLE PARAGRAPH.]**

## **I. BRIEF FACTUAL AND PROCEDURAL HISTORY**

Petitioner was convicted and sentenced to death on April 1, 2010, in the XXXth District Court of Smith County, Texas, in Cause No. 12-345, for the 2008 capital murder of his wife, Jane Doe. Petitioner filed a direct appeal<sup>4</sup> to the Twelfth Court of Appeals in Tyler, which affirmed the conviction on June 30, 2011. *Doe v. State*, 2006 WL 987654 (Tex. App. – Tyler June 30, 2011, pet. ref'd). He filed a petition for discretionary review to the Texas Court of Criminal Appeals, which refused the petition on January 15, 2012. He did not file a petition for writ of *certiorari* to the United States Supreme Court. While his direct appeal was pending, however, he filed by counsel a state application for writ of habeas corpus<sup>5</sup> pursuant to Tex. Code Crim. Proc. art. 11.071. Several months later, Petitioner followed this application with a *pro se* petition for relief. The trial court conducted an evidentiary hearing on Petitioner's claims and issued findings

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<sup>2</sup> “In 28 U.S.C. § 2254 or § 2255 cases – any request for compensation in excess of \$35,000 at the district court level or \$15,000 at the appellate level is presumptively excessive.”

<sup>3</sup> See 18 U.S.C. § 3599(g)(2).

<sup>4</sup> Petitioner challenged his conviction on direct appeal with claims for insufficiency of the evidence and that he was mentally incompetent to stand trial.

<sup>5</sup> Petitioner's grounds for relief included an **Error! Main Document Only.** *Atkins v. Virginia*, 536 U.S. 304 (2002) claim of mental retardation; ineffective assistance of trial counsel for failure to object to the prosecution's misconduct; ineffective assistance of appellate counsel for failure to raise on appeal the trial counsel's failure to object to the prosecution's misconduct; and the trial court's improper denial of Petitioner's motion for a new trial.

of fact and conclusions of law. On December 20, 2013, the Texas Court of Criminal Appeals denied Petitioner's state habeas petition with a written order, adopting the trial court's findings of fact and conclusions of law. Pursuant to Tex. Code Crim. Proc. art. 11.071, § 2, and 18 U.S.C. § 3599, on January 3, 2014, state habeas counsel moved in this court for appointment of federal habeas counsel. This court appointed the undersigned as federal habeas counsel on January 10, 2014, and on January 20, 2014, issued its Sealed *Ex Parte* Order re Submission of Budget, to which Petitioner now replies.

**[NOTE: IF COUNSEL WISHES TO BRIEFLY RESTATE THE PERTINENT PORTIONS OF THE CASE HISTORY OR PROCEDURAL HISTORY IN THE STATE COURTS THAT SUPPORT THE SUBMITTED BUDGET PROPOSAL, IT SHOULD BE DONE HERE. HOWEVER, A RESTATEMENT OF HISTORY CONTAINED IN THE PETITION OR SUPPORTING MEMORANDA OF POINTS AND AUTHORITIES IS NEITHER REQUIRED NOR DESIRED AND SHOULD BE AVOIDED. IF CITATIONS TO THE RECORD ARE INCLUDED IN SUPPORT OF THE BUDGET SUBMISSION, BUT THE RECORD HAS NOT BEEN FILED WITH THE COURT, COUNSEL SHALL ATTACH THE PERTINENT PAGES FOR THE COURT'S REVIEW]**

## **II. ATTORNEY FEES AND EXPENSES ESTIMATE**

In preparing for submission of this budget input and the petition, undersigned counsel has conducted the following pre-petition review and investigation. The investigation is not complete; the following list constitutes the minimum required to sufficiently identify the broad scope of representation for funding purposes.

- A. preliminary review of the trial and state habeas records;
- B. preliminary review of trial and state habeas counsel's records (to the extent provided);
- C. initial interviews with trial and state habeas counsel;

- D. initial interviews with Petitioner’s family; and
- E. a search for appropriate, qualified expert and investigative assistance.

Other investigation is likely to be required, including interviews with witnesses and with select jurors from the trial in support of Petitioner’s *Batson* claim, which was raised before the state court and will be re-raised in the federal petition.

In addition to the claims that will require funding for investigatory and expert purposes outlined in section III below, Petitioner intends to re-raise a number of claims that were raised and adjudicated on the merits in the state courts, and which are therefore exhausted. While these exhausted claims will not generally require additional funding for investigatory purposes (with one exception for Petitioner’s *Atkins* claim, discussed below), undersigned counsel will research and supplement argument, which is included in the calculation of projected attorney fees.

Counsel’s computations for attorney time are estimated as follows. The pre-sequestration per-hour rate allowed under the Criminal Justice Act (“CJA”) was \$178. The current per-hour rate as reduced in 2013 under sequestration is \$163. Accordingly, the attorney fee cost estimates are based on a sequester-modified rate of \$163/hour. It is requested that if the allowable CJA rate returns to a properly-adjusted hourly rate taking into account actual inflation and Consumer Price Index increases that the Court will adjust the amount approved accordingly:

<u>Attorney Work</u>	<u>Hours</u>	<u>Cost</u>
Interviews	25	4,075
Review Trial and State Habeas Records	45	7,335
Research and Briefs	110	17,930
Travel	20	3,260
Other	60	9,780
<b>Total</b>	<b>260</b>	<b>\$42,380</b>

Counsel will submit appropriate, annotated CJA 30 requests for interim payment for services rendered in stages, following the completion of record-based research and interviews; following submission of the petition; following review of the Respondent's Response and submission of any Reply; and at the conclusion of representation.

### **III. ANTICIPATED FEDERAL PETITION CLAIMS REQUIRING EXPERT AND INVESTIGATIVE ASSISTANCE AND FUNDING**

This section identifies the specific claims that Petitioner currently intends to file in his federal petition that he reasonably anticipates will require funding for expert and/or investigative assistance. At this time, has begun and includes the steps outlined in section II above, but is incomplete. If in the course of such investigation it is determined that a claim or claims should be added, or deleted, from this anticipatory input, a supplemental budget request input will be made.

#### Unexhausted New Claims

The following non-exclusive list of ineffective assistance of trial counsel claims will be brought, under the prejudice-and-cause basis that state habeas counsel was ineffective for having failed to raise them in the state habeas application. *Martinez v. Ryan*, 132 S. Ct. 1309 (2012); *Trevino v. Thaler*, 133 S. Ct. 1911 (2013).

**A. *Wiggins*<sup>6</sup> Claim (Trial Counsel's Failure to Investigate Background & Life History)**

**B. Petitioner's Confession was Involuntary**

These preliminary claims have been developed on undersigned counsel's initial review of the records and initial interviews listed in section II above. Petitioner will assert that trial counsel failed to conduct a reasonable investigation of his background and life history, along with other

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<sup>6</sup> *Wiggins v. Smith*, 539 U. S. 510 (2003).

mitigating factors, that must be conducted in the course of defending a death penalty case.

Undersigned counsel's preliminary review has revealed childhood and adult psychiatric records revealing psychological problems beyond the simple *Atkins* claim of mental retardation that trial and appellate counsel raised and which was presented in Petitioner's state habeas application. These records reveal a history of sleepwalking, including the performance of unusual physical actions while unconscious; a history of pronounced withdrawn behavior; the likelihood of bipolar disorder, which has not been fully developed; and periodic episodes of bizarre behavior in Petitioner's childhood and adult life. These partially documented, but uninvestigated, events demonstrate the need for a documented background and life history investigation and a comprehensive mental health evaluation addressing these issues and further developing the *Atkins* claim of mental retardation. With the exception of the *Atkins* mental retardation issue, these claims have not been presented to the state courts. Accordingly, they are unexhausted and potentially subject to a procedural bar under Tex. Code Crim. Proc. art. 11.071. However, they are nonetheless subject to *de novo* review by the federal court under *Martinez v. Ryan*, 132 S. Ct. 1309 (2012) and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), which provide an exception to procedural bar for review of claims of ineffective assistance of trial counsel in certain instances where such claims should have been raised in an initial-review collateral proceeding, if there was either no counsel representing the petitioner at such a proceeding or counsel was ineffective. Petitioner will assert that trial counsel was ineffective for failing to investigate these issues and state habeas counsel was ineffective for failing to raise them as claims in Petitioner's state habeas application; to the extent that Petitioner filed a second, *pro se* state habeas supplement, it still falls under *Martinez* as an unrepresented effort. These claims will be fully

developed and argued in Petitioner's federal petition, after proper expert investigation and development.

Putatively Exhausted Claim

In addition to the unexhausted claims described above, Petitioner seeks funding for investigation and expert development of his claim of **mental retardation pursuant to *Atkins v. Virginia*, 536 U.S. 304 (2002)**. As mentioned above, Petitioner raised this claim at trial, on direct appeal and in his state habeas application. However, Petitioner's position is that this claim was not "fairly presented" to the state courts. *Mercadel v. Cain*, 179 F.3d 271, 275 (5th Cir. 1999). That is because, at best, only a "weak case" for mental retardation was presented to the state courts and Petitioner intends to present material additional evidentiary support in his federal petition that was not presented to the state court, creating a "strong case" not presented before the state courts. *Anderson v. Johnson*, 338 F.3d 382, 386 (5th Cir. 2003); *Graham v. Johnson*, 94 F.3d 958, 969 (5th Cir. 1996). Therefore, though it is putatively "exhausted" under the AEDPA, it is in fact unexhausted and procedurally barred due to the "strong" argument that will be presented here with the addition of the material new evidentiary matter. Accordingly, further evidentiary development is not foreclosed by *Cullen v. Pinholster*, 131 S. Ct. 1388, 1400 (2011), and the federal court may conduct a *de novo* review of the mental retardation issue pursuant to *Martinez/Trevino, supra*.

In support of developing these claims, Petitioner requests funding for investigatory/expert support as follows:

Mitigation Investigator

Undersigned counsel has interviewed and identified the required services of a mitigation

investigator for development of background and life history, with emphasis on childhood and adult emotional development. Attached as Exhibit 1 is the *curriculum vitae* of experienced mitigation investigator Joe Roe, MSW. Mr. Roe is located in Angelina County, Texas, and is therefore able to conduct his investigations both in the area of the death of Mrs. Doe in Smith County, Texas, and will be able to visit Petitioner in prison at the Polunsky Unit on death row, while minimizing both travel time and expenses. Mr. Roe has estimated that he can complete his investigation in 100 hours or less of record review and contact time (including travel, where necessary) at a rate of \$75/hour. Therefore, Petitioner requests funding for these necessary mitigation investigation services up to (and possibly less than) \$7,500, which is within the amount the District Court may authorize pursuant to 18 U.S.C. § 3599(g)(2).

#### Forensic Psychological Expert

As indicated above, undersigned counsel has identified broad areas relating to Petitioner's claim of mental retardation that must be developed in an expert manner and which was left uninvestigated by Petitioner's counsel before the state courts. It will be necessary to obtain the services of a qualified forensic psychologist to complete this investigation and development. However, it is first necessary to complete the background and life history investigation to be undertaken by the mitigation investigator identified above, before undersigned counsel may interview and select an appropriate psychologist. Experience indicates that the cost of such a forensic psychologist for the purpose of this representation will total approximately an additional \$7,500. Petitioner hereby requests that the Court reserve funding in that amount, or recommend that funding be approved by the Chief Judge of the Fifth Circuit pursuant to 18 U.S.C. § 3599(g)(2), to be applied upon completion of the mitigation expert's efforts.

Upon completion of the mitigation investigator and forensic psychologist investigations, undersigned counsel will submit an appropriate, annotated CJA 31 request for payment for services rendered.

#### **IV. CONCLUSION**

Based on the budget projections and calculations provided herein, it is hereby requested that the Court approve in advance the amount of \$42,380 in attorney fees and \$7,500 in mitigation investigator services at this time; and reserve an additional \$7,500 in forensic psychological expert services for future use following completion of mitigation investigation.