NO. _____
(Capital Case)

In the
Supreme Court of the United States

JOHN HUMMEL, Petitioner

v.

LORIE DAVIS, Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

APPENDIX

TABLE OF APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
March 16, 2020
Lyle W. Cayce
Clerk

No. 20-70002

JOHN HUMMEL,

Petitioner - Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent - Appellee

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:16-CV-133

Before HIGGINBOTHAM, JONES, and COSTA, Circuit Judges.

PER CURIAM:*

In December 2009, John Hummel murdered his pregnant wife, Joy Hummel; his daughter, Jodi Hummel; and his father-in-law, Clyde Bedford.[1] Sentenced to death in 2011, his execution date was set on November 19, 2019, for March 18, 2020. On February 3, 2020, with his direct appeal and habeas

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

[1] *Hummel v. State*, 2013 WL 6123283, at *1–4 (Tex. Crim. App. Nov. 20, 2013) (detailing the facts of Hummel's crimes).

proceedings exhausted, he sought $20,000 in funding under 18 U.S.C. § 3599(f) to secure two experts to bolster his petition for clemency. He appeals the district court's partial grant of federal funding for his state clemency proceedings and seeks a stay of execution should our appeal remain pending by March 18. He also files an "Emergency Supplement to the Motion for a Stay of Execution," which is best understood as an additional stay motion related to administrative difficulties caused by the COVID-19 virus.

I.

A court can authorize funding for "investigative, expert, or other services" that are "reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence."[2] Such fees "shall not exceed $7,500 in any case, unless payment in excess of that limit is certified by the court . . . and the amount of the excess payment is approved by the chief judge of the circuit."[3] We review a denial of a funding motion under a highly deferential abuse of discretion standard.[4] "A natural consideration informing the exercise of that discretion is the likelihood that the contemplated services will help the applicant win relief."[5] "Proper application of the 'reasonably necessary' standard thus requires courts to consider the potential merit of the claims that the applicant wants to pursue, the likelihood that the services will generate useful and admissible evidence, and the prospect that the applicant will be able to clear any procedural hurdles standing in the way."[6]

II.

The first of Hummel's requested experts, Dr. William Brown, prepared a

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[2] 18 U.S.C. §3599(f).
[3] *Id.* § 3599(g)(2).
[4] *Crutsinger v. Davis*, 898 F.3d 584, 586 (5th Cir. 2018).
[5] *Ayestas v. Davis*, 138 S.Ct. 1080, 1092 (2018).
[6] *Id.*

sociological report on the influence of the Military Total Institution ("MTI") on Hummel's behavior. This report was submitted to the Texas Board of Pardons and Paroles after the district court found the $4,000 sought for his services "reasonably necessary."

The second requested expert, Dr. Robert Stanulis, is a forensic psychologist and neuropsychologist who would perform a risk assessment of Hummel. Hummel hopes to use Stanulis's work to press the idea that he does not pose a future danger. Hummel sought $16,000 to pay Stanulis, but the district court found Hummel had not adequately explained how Stanulis's testimony would differ from that of Hummel's trial expert, Dr. Antoinette McGarrahan, or whether a local expert who did not require four days of travel expenses was available. Further, the district court viewed this potential evidence as "double-edged." It tended to establish that Hummel, for his PTSD and as a product of MTI, poses a greater risk than would a murderer suffering from the personality disorders the trial expert McGarrahan identified as potential explanations for Hummel's conduct.

In an order entered without prejudice, the district court denied any monies beyond the statutory cap of $7,500 to hire Brown "and a qualified mental health expert of [Hummel's] choosing[,]" explaining that the issue "is not the reasonableness of the proposed mental health services per se; it is rather whether the services of a highly compensated out-of-state expert are reasonably necessary to perform the type of limited-scope risk assessment [Hummel] identifies."

Hummel moved for reconsideration, asserting that he could not find a qualified local expert as the possible candidates have left the state and would offer no cost savings as compared to Stanulis. Hummel urged that Stanulis could perform a narrower version of the risk assessment in fewer hours and could thus incur fewer costs. But in the district court's view, this "new price

tag . . . appears to be within the range of funding previously granted"—meaning the $3,500 portion of the $7,500 award reserved for mental-health services. The court listed several defects in Hummel's motion, including the lack of a specific updated sum needed to complete the requested testing[7] and the uncertain nature of what a "risk assessment entails." Like the original motion, the reconsideration motion was denied without prejudice.

III.

The State first argues that we lack jurisdiction over this appeal as it seeks review of an order that is not final; that both denials were without prejudice and noted unanswered questions for Hummel to address in subsequent petitions. The State further argues that the appeal is moot because Hummel has already filed his clemency petition, which was due February 26 with supplementation due March 3. The Texas Administrative Code requires that "[a]ll supplemental information not filed with the application . . . must be submitted . . . not later than the fifteenth calendar day before the execution is scheduled."[8]

We find that the order appealed from, viewed in the context of the ultimate imminent finality of death, was final. That the district court framed its ruling as without prejudice here was no more than an unwillingness to foreclose correction of any error in its ruling given the reality of the imminent execution and that appellate review was in fact Hummel's only remaining recourse. We do not trifle with the core strictures of this court's power. Rather we today apply the rules of finality with an open not a blind eye. We need not and do not engage the issues of exhaustion and the State Administrative Code

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[7] In his brief before this panel, Hummel somewhat clarifies his new requested sum. Stanulis will need 20–24 fewer hours than originally requested, so he needs a total of $10,000–11,000, or $6,500–7,500 in excess of the allotted $3,500.

[8] TEX. ADMIN CODE § 143.57 (Commutation of Death Sentence to Lesser Penalty); *id.* § 143.43 (Procedure in Capital Reprieve Cases).

as we find Hummel's assertions of error in the district court's award of funding wholly without merit.

IV.

The district court engaged with Hummel three times: in a show-cause order issued shortly after Hummel filed his motion, in the order denying the motion, and in the order denying the motion for reconsideration. All three reasoned writings noted various deficiencies and unanswered questions in Hummel's requests. Ultimately, the district court granted funding equal to the statutory cap but declined to exceed it.

The district court reasoned that, at trial, Hummel used two experts as part of his mitigation case. One opined that Hummel would receive a relatively lax prison security level. The second, a forensic psychologist, did a full neuropsychological, personality, and emotional evaluation that used the gamut of available documents and interviews. This expert, Dr. McGarrahan, opined that Hummel's crimes came "in a flood of emotional rage" caused by a lifetime of repressed emotions, even though Hummel knew the decision to kill was wrong. She concluded that Hummel had no severe mental disorder but may suffer from several personality disorders. Thus, the district court concluded that Hummel's military record was on full display at trial, as were expert opinions assessing the effect of that service—and of Hummel's other experiences and tendencies—on Hummel's behavior.

Hummel argues McGarrahan's trial testimony "was based entirely on a clinical assessment and did not utilize risk-assessment tools." A risk assessment is especially valuable, he argues, because of Hummel's "exemplary" behavior since his 2009 arrest and his lack of violent history before the crime. It may be that Brown and Stanulis, both of whom are familiar with veterans and capital cases, make a "unique team" with interlacing strengths—Brown is alleged to be the only known MTI expert but cannot make diagnoses, for

example, while Stanulis can. But a showing that two experts complement one another is not a showing that their services are reasonably necessary. Given the broad deference afforded the district court, especially given the effect of the statutory cap and the additional steps required of a district judge who wishes to exceed it, we find no abuse of discretion.

V.

Finally, on March 13, Hummel filed an "Emergency Supplement to the Motion for a Stay of Execution." He contends his execution should be stayed because of COVID-19's effect on the courts and his execution. Hummel acknowledges that this motion violates the rule that all such stay requests must be filed at least seven days before the scheduled execution date.[9] In this case the extent of COVID-19's effect on commerce and daily life was not as clear on March 11, seven days before Hummel's execution date. This situation has evolved rapidly. But we need not address the effect of the rule on this case, as Hummel identifies no roadblock to his execution warranting a stay from this Court.

Hummel speculates that an expected visitor may be unable to visit him, that disruption to various tribunals (like this Court or the Governor's office and the Board of Pardons and Paroles) may deprive him of adequate review, and that absences among the State's execution staff may cause problems. These ills are speculative, and we will not stay the execution based on what might happen. For our part, the virus has not prevented our review of Hummel's appeal. We note also that this stay request is freestanding—it is not tied to any appeal that we would ultimately need to resolve. Construing Hummel's supplement as an additional motion for a stay of execution, that motion is denied.

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[9] *See* TEX. CT. CRIM. APP. MISC. R. 11–003.

VI.

The judgment of the district court is affirmed and the petitions for stay of execution are denied.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
March 16, 2020
Lyle W. Cayce
Clerk

No. 20-70002

D.C. Docket No. 4:16-CV-133

JOHN HUMMEL,

Petitioner - Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent - Appellee

Appeal from the United States District Court for the Northern District of Texas

Before HIGGINBOTHAM, JONES, and COSTA, Circuit Judges.

J U D G M E N T

This cause was considered on the record on appeal and the briefs on file.

It is ordered and adjudged that the judgment of the District Court is affirmed.

Certified as a true copy and issued as the mandate on Mar 16, 2020

Attest: Lyle W. Cayce

Clerk, U.S. Court of Appeals, Fifth Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

JOHN WILLIAM HUMMEL,	§	
	§	
Petitioner,	§	
	§	
v.	§	
	§	No. 4:16-CV-133-O
LORIE DAVIS, Director, Texas Department of Criminal Justice, Correctional Institutions Division,	§	
	§	
Respondent.	§	

ORDER GRANTING IN PART MOTION FOR CLEMENCY FUNDING

Petitioner filed an amended motion on February 4, 2020 (ECF No. 48), seeking twenty thousand dollars in funding for separate sociological and neuropsychological evaluations of Petitioner for use in Petitioner's forthcoming clemency proceeding. For the reasons discussed below, this Court will grant a portion of the funding requested but requires considerably more detailed information before it can certify the reasonable necessity of any amount above the statutory figure set forth in 18 U.S.C. § 3599(g)(2).

As explained in this Court's opinion denying Petitioner's petition for federal habeas corpus relief, *Hummel v.* Davis, 4:16-CV-133-O, 2018 WL 276331 (N.D. Tex. Jan. 3, 2018), Petitioner fatally stabbed his pregnant wife more than thirty times and beat her with a baseball bat after contemplating whether to do so for half an hour. He then fatally beat his five-year-old daughter and father-in-law with the baseball bat. He set their house on fire and disposed of the murder weapons. He returned to the crime scene later and repeatedly asked law enforcement personnel if anyone had made it out of the house. Two days after giving law enforcement officials a statement in which he denied any involvement in the murders, Petitioner was apprehended in

California as he entered the United States from Mexico. Petitioner subsequently gave a recorded statement in which he confessed to committing the murders and setting the house on fire.

At the punishment phase of Petitioner's capital murder trial, Petitioner's trial counsel presented extensive testimony about Petitioner's childhood and passage into early adulthood, including Petitioner's four-year service as a Marine lance corporal and intelligence officer. Dr. Antoinette McGarrahan, a forensic psychologist, testified for the defense. She stated that her neuropsychological evaluation revealed Petitioner is in the average to above-average intelligence range, Petitioner did not suffer from any severe mental disorder, but he may suffer from a combination of personality disorders including narcissistic, anti-social, schizoid, and borderline, which she attributed to Petitioner's mother's failure as his primary caregiver. Dr. McGarrahan concluded that even though Petitioner knew his decision to kill was wrong, he acted on pure emotion without thinking in a burst of explosive rage after ruminating on all the wrongs done to him over his lifetime. She concluded, however, that Petitioner had done fairly well in a structured environment and had acknowledged that he was wrong in committing the murders.

Petitioner's eleventh-hour request for expert funding in connection with his proposed state clemency application proposes to offer the Texas Board of Pardons and Paroles a new explanation for his murderous rampage on December 17-18, 2009. Dr. McGarrahan testified at trial, without contradiction, that Petitioner committed his capital offense after Petitioner ruminated extensively over all the perceived wrongs done to him in the past and that he simply snapped. Petitioner now proposes to offer the Texas Board of Pardons and Paroles expert opinions from a sociologist and a mental health expert who will opine that Petitioner's murderous rampage also resulted from a reaction to Military Total Institution and post-traumatic stress disorder.

Section 3599(a) authorizes federal funding for petitioners who face the prospect of death and are "financially unable to obtain adequate representation to investigative, expert, or other reasonably necessary services." *Crutsinger v. Davis*, 898 F.3d 584, 586 (5th Cir. 2018), *cert. denied*, 139 S. Ct. 801 (2019). A natural consideration informing the district court's exercise of discretion under § 3599 is the likelihood that the contemplated services will help the applicant win relief and proper application of the "reasonably necessary" standard requires courts to consider the potential merit of the claims that the applicant wants to pursue. *Ayestas v. Davis*, 138 S. Ct. 1080, 1094 (2018). The touchstone of the inquiry is the likely utility of the services requested; § 3599 cannot be read to guarantee that an applicant will have enough money to turn over every stone. *Id.*; *Crutsinger*, 898 F.3d at 586. An applicant must articulate specific reasons why the services are warranted, which includes demonstrating the underlying claim is at least plausible. *Ayestas*, 138 S. Ct. at 1094; *Crutsinger*, 898 F.3d at 587.

There is no constitutional entitlement to clemency. *Conn. Bd. Of Pardons v. Dumschat*, 452 U.S. 458, 464 (1981) "[A]n inmate has 'no constitutional or inherent right' to commutation of his sentence.") (quoting *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 7 (1979)); *Garcia v. Jones*, 910 F.3d 188, 190 (5th Cir. 2018), *cert. denied*, 139 S. Ct. 626 (2018). The heart of executive clemency is "to grant clemency as a matter of grace, thus allowing the executive to consider a wide range of factors not comprehended by earlier judicial proceedings and sentencing determinations." *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 280-81 (1998). A petition for clemency, much like an appeal for an affirmative answer to the Texas capital sentencing statute's mitigation special issue, is an appeal for mercy as a matter of grace. *See Ohio Adult Parole Authority v. Woodard*, 523 U.S. at 282 ("A death row inmate's petition for clemency is also a 'unilateral hope.' The defendant in effect accepts the finality of the death

sentence for purposes of *adjudication*, and appeals for clemency as a matter of grace."); *Hernandez v. Davis*, 2017 WL 2271495, *28 (W.D. Tex. May 23, 2017) ("the Texas capital sentencing scheme's 'mitigation' Special Issue serves not to render the defendant eligible for the death penalty or to 'select' the defendant for execution; rather, it allows the capital sentencing jury unfettered discretion to dispense an act of grace to the otherwise condemned defendant."), *CoA denied*, 750 F. App'x 378 (5th Cir. Oct. 29, 2018), *cert. denied*, 140 S. Ct. 136 (2019).

Clemency is a prerogative granted to executive authorities to help ensure that justice is tempered with mercy; it is not for the Judicial Branch to determine the standards for this discretion. *Cavasoz v. Smith*, 565 U.S. 1, 8-9 (2011); *Young v. Gutierrez*, 895 F.3d 829, 832 (5th Cir. 2018) (clemency decisions are predicated on purely subjective evaluations and predictions of future behavior). Extra flexibility is required when the criminal process has reached an end and a highly individualized and merciful decision like executive clemency is at issue. *Faulder v. Tex. Bd. Of Pardons & Paroles*, 178 F.3d 343, 344 (5th Cir. 1999) (pardon and commutation decisions are not traditionally the business of courts and are subject to the ultimate discretion of the executive power). "But petitioners cannot invoke clemency to end-run *Ayestas*'s emphasis on the 'utility' of further investigation and expert involvement. Doing so would directly thwart *Ayestas*'s admonition against 'fishing expeditions.'" *Crutisnger v. Davis*. 898 F.3d at 587.

As explained in this Court's Show Cause Order issued February 4, Petitioner's amended motion for expert funding did not explain why a pair of out-of-state experts are necessary to perform the requested evaluations. In his Response, Petitioner argues that his sociologist, Nevada-based Dr. William Brown, himself a military veteran, will furnish new mitigating evidence explaining "the military sociocultural influences and experiences Hummel experienced along with the other acute stress that caused him to 'snap' one night." Essentially, Petitioner proposes to

employ Dr. Brown's theory of "Military Total Institution" ("MTI") to explain Petitioner's murderous rampage within the context of "the posttraumatic stress disorder Hummel suffered." Petitioner represents that Dr. Brown is the only expert located who is well-versed in MTI. Petitioner proposes that Dr. Brown can complete his work for four thousand dollars. Dr. Brown has furnished a declaration establishing his familiarity with MTI and ability to explain same to the Texas Board of Pardons and Paroles. The retention of Dr. Brown's services appears reasonably necessary in this case – especially in view of Petitioner's representation that Dr. Brown will not need to travel to Texas to complete his work for Petitioner.

Petitioner proposes to use the report of Oregon-based forensic psychologist and neuropsychologist Dr. Robert Stanulis to address the issue of Petitioner's future dangerousness. In his Response to this Court's Show Cause Order, Petitioner informs that he does not propose to have Dr. Stanulis perform a new neuropsychological evaluation on Petitioner. Instead, Petitioner proposes to have Dr. Stanulis perform a "risk assessment" on Petitioner and educate the Texas Board of Pardons and Paroles on the historically low risk of recidivism and generally low accuracy of jury predictions of future dangerousness among those convicted of capital murder. Petitioner requests sixteen thousand dollars for Dr. Stanulis for travel, document review, a four-day trip to perform ill-defined services (which do not apparently include a neuropsychological evaluation), and preparation of a report. Petitioner has not yet explained how the contents of Dr. Stanulis's report will differ significantly from the report or testimony furnished at trial by Dr. McGarrahan.

Petitioner has not yet explained that a local mental health expert is unavailable to conduct the type of limited-scope risk assessment Petitioner proposes Dr. Stanulis undertake. Petitioner has failed to explain in any rational manner why sixteen thousand dollars is necessary at this juncture to perform a risk assessment on Petitioner of the type Petitioner now proposes. That Dr.

Stanulis recently testified successfully for another Texas capital murder defendant (at trial) does not make him the *only*, or even the most convenient, mental health expert available to perform the services in question. That Dr. Stanulis is willing to offer a discount on his usual two hundred fifty dollar an hour rate does not mean his professional services are not fungible.

Petitioner has not yet explained why a local mental health expert, i.e., one who would not require four days of travel to conduct a "non-neuropsychological" evaluation of Petitioner, is unavailable to perform the limited range of professional services Petitioner proposes Dr. Stanulis perform in this case. Petitioner's contentions that Dr. McGarrahan failed to perform a risk assessment or to fully advise Petitioner's jury about possible future dangerous factors rings hollow in the absence of a copy of her report or other documentation establishing that she actually failed to perform a risk assessment on Petitioner as part of her pre-trial mental health evaluation. Dr. McGarrahan performed a thorough mental health evaluation of Petitioner and testified extensively concerning Petitioner's background and mental health. The burden is on Petitioner to show that a new risk assessment of the nature described in Petitioner's Response to this Court's Show Cause Order is reasonably necessary at this juncture. Thus far, Petitioner has failed to carry this burden.

Moreover, as best this Court can discern from Petitioner's motion and reply to this Court's Show Cause Order, the new evidence Petitioner proposes to present through Dr. Stanulis is inherently double-edged in nature, in that it tends to establish Petitioner (as the product of MTI and post-traumatic stress disorder), will pose more of a risk of future violence than a convicted capital murderer suffering from the personality disorders Dr. McGarrahan identified during her trial testimony. Significantly, Petitioner alleges no facts suggesting there was any inaccuracy in Dr. McGarrahan's trial testimony or that Petitioner's mental health status has changed since the time Dr. McGarrahan performed her extensive mental health evaluation. Thus, Petitioner has

failed to establish the reasonable utility of a sixteen-thousand-dollar non-neuropsychological evaluation of Petitioner by a neuropsychologist.

The Court will grant Petitioner the statutory cap of seven-thousand five-hundred dollars to secure the services of Dr. Brown and a qualified mental health expert of Petitioner's choosing. Petitioner may retain the services of Dr. Brown to perform the services identified in Petitioner's Response to this Court's Show Cause Order. Petitioner has not yet explained why Dr. Stanulis's professional services, as opposed to those of myriad locally available (and much less expensive) mental health experts, are reasonably necessary in this case. Petitioner has not alleged that a Texas-based neuropsychologist is unavailable to perform the narrow risk assessment he proposes Dr. Stanulis perform in connection with Petitioner's clemency proceeding. Nor has Petitioner furnished this Court with sufficient hard data explaining why a narrow risk assessment of the type proposed by Petitioner requires the expenditure of sixteen thousand dollars. The issue remaining before this Court is not the reasonableness of the proposed professional mental health services per se; it is rather whether the services of a highly compensated out-of-state expert are reasonably necessary to perform the type of limited-scope risk assessment Petitioner identifies.

Finally, given the fact that on November 19, 2019, the Texas trial court scheduled Petitioner's execution date and Petitioner waited until February 3, 2020 to file his original motion requesting funding for investigative and expert expenses to be incurred in connection with his clemency proceeding, this Court questions Petitioner's diligence. The United States Supreme Court denied certiorari in Petitioner's case on October 7, 2019. The time for the type of clemency investigation Petitioner now proposes Dr. Stanulis and Dr. Brown undertake began at that time, not in February 2020.

Accordingly, it is hereby ORDERED that:

1. Petitioner's amended motion for authorization of funding and appointment of experts to assist in clemency proceedings, filed February 4, 2020 (ECF No. 48), is GRANTED IN PART as follows: Petitioner is authorized to incur the sum of seven thousand five hundred dollars ($7,500.00) in conformity with 18 U.S.C. § 3599(g)(2) for the purposes of securing the services of (a) Dr. Brown to perform the services described in Petitioner's Response to this Court's Show Cause Order and (b) a qualified mental health professional to obtain the risk assessment described in Petitioner's Response to this Court's Show Cause Order.

2. Petitioner's request for an additional twelve thousand, five hundred dollars in expert mental health funding is DENIED without prejudice to Petitioner right to seek additional funding for the services of a qualified mental health professional to perform the limited scope risk assessment described in Petitioner's Response to this Court's Show Cause Order.

3. Petitioner original motion for funding, filed February 3, 2020 (ECF No. 47), is DISMISSED AS MOOT.

SIGNED February 11, 2020.

Reed O'Connor
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

JOHN WILLIAM HUMMEL,	§	
	§	
Petitioner,	§	
	§	
v.	§	
	§	No. 4:16-CV-133-O
LORIE DAVIS, Director, Texas Department of Criminal Justice, Correctional Institutions Division,	§	
	§	
Respondent.	§	

ORDER DENYING WITHOUT PREJUDICE MOTION TO RECONSIDER PARTIAL GRANT OF FUNDING FOR CLEMENCY FUNDING

Petitioner filed an amended motion on February 4, 2020 (ECF No. 48), seeking twenty thousand dollars in funding for separate sociological and neuropsychological evaluations of Petitioner for use in Petitioner's forthcoming clemency proceeding. In an Order issued February 11, 2020 (ECF No. 51), this Court granted Petitioner's motion in part. Specifically, the Court granted Petitioner four thousand dollars to retain the services of Dr. William Brown and three thousand five hundred dollars to retain the services of a qualified mental health expert to conduct a risk assessment on Petitioner. Petitioner has filed a motion asking this Court to reconsider its earlier order (ECF No. 52).

Petitioner now explains that Dr. Robert Stanulis, the Oregon-based mental health expert whose services Petitioner still proposes to retain, can now complete a streamlined version of the services Petitioner originally proposed within 4 to 8 hours. Given the fact this Court authorized Petitioner to incur up to $3,500 in expenses for retaining the services of a qualified mental health expert, the new price tag on Dr. Stanulis's services appears to be within the range of the amount of funding previously granted in connection with Petitioner's clemency proceeding. Petitioner

does not allege any facts showing that any additional professional mental health services will be necessary from Dr. Stanulis beyond the amount of funding previously authorized.

Petitioner has still not explained in any reasonable detail exactly what type of evaluation he intends Dr. Stanulis to conduct on Petitioner beyond calling the evaluation a "risk assessment." Nor does Petitioner explain why four days of travel from Oregon to Texas and back are reasonably necessary for Dr. Stanulis to conduct what Petitioner represents will be a "four-to-eight-hour" mental health evaluation of Petitioner. This representation is a bit misleading considering that Dr. Stanulis's declaration accompanying Petitioner's latest motion states that he will also require an unspecified number of additional hours to evaluate a rather vaguely defined category of additional documentation (presumably relating to Petitioner's background). Petitioner has not identified with any reasonable degree of specificity what other documentation he proposes to have Dr. Stanulis review as part of his evaluation of Petitioner.

Insofar as Petitioner states that he can utilize the services of Toni Knox (as a substitute for Dr. Brown) to conduct the testing necessary for Dr. Brown's evaluations, Petitioner has not identified with any reasonable degree of specificity the amount of funding necessary to pay for Ms. Knox's travel expenses and professional services. Ms. Knox was not mentioned as a provider of services in Petitioner's original motion requesting expert and investigative funding for his clemency proceeding. This Court has not yet reviewed any request for investigative funding for Ms. Knox's professional services in connection with Petitioner's clemency proceeding.

There are several other defects in Petitioner's latest motion. First, it is not accompanied by a proposed order specifying exactly how much more taxpayer money (beyond the $7,500 already authorized) Petitioner requires to complete his clemency investigation. Petitioner's latest motion appears to imply that even more than the twenty thousand dollars Petitioner initially

requested may now be necessary to cover all of Petitioner's investigative and expert services and associated travel. More importantly, Petitioner does not accompany his latest motion with a proposed budget explaining how he plans to spend any of the money thus far authorized for investigative and expert expenses or any additional funds.

Petitioner argues there are only three mental health experts available who can furnish the type of risk assessment Petitioner desires from Dr. Stanulis. The suggestion that the type of "risk assessment" Petitioner wishes to receive from Dr. Stanulis is so specialized that it is not routinely available from mental health experts raises serious questions as to the scientific efficacy of the procedure Petitioner requests under the standard set forth by the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The Court acknowledges that the Texas Board of Parsons and Paroles is not limited to scientific concerns when it evaluates Petitioner's clemency application. Still, establishing the reasonable necessity of Dr. Stanulis's services in this case requires more than vague assertions that he and Dr. Brown "are a unique team." The fact that Dr. Brown and Dr. Stanulis convinced a jury to grant a life sentence in a different case does not, standing alone, render them the only two experts in their respective fields who can offer the Texas Board of Pardons and Paroles information relevant to Petitioner's request for clemency.

Petitioner asserts that travel expenses will be necessary despite the fact that the Nevada-based Dr. Brown will no longer be required to travel to Texas to conduct testing on Petitioner. However, Petitioner does not indicate how much money will be needed for travel expenses, from where the person traveling will be going, or even the location of the person who will be traveling. Assuming Toni Knox will travel in lieu of Dr. Brown, Petitioner has not specified Ms. Knox's travel expenses. Petitioner has not furnished a budget for Oregon-based Dr. Stanulis's travel

expenses nor even a reasonably specific estimate of his travel expenses or the rate at which Petitioner wishes to have Dr. Stanulis's travel expenses reimbursed. Nor has Petitioner alleged any facts showing whether his funding request is based upon an assumption that Dr. Stanulis will be working (possibly doing document review) while he is also traveling.

As discussed in the February 11, 2020 order, this Court's ability to authorize expert and investigative funding is limited by statute. Any additional funding authorized in this case must satisfy the standard set forth in 18 U.S.C. § 3599(g)(2). Petitioner has not carried his burden to furnish this Court with detailed information justifying expert and investigative expenses above Section 3599(g)(2)'s statutory cap.

Accordingly, it is hereby ORDERED that all relief requested in Petitioner's motion for rehearing, filed February 19, 2020 (ECF No. 52) is DENIED WITHOUT PREJUDICE.

SIGNED February 20, 2020.

Reed O'Connor
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

John Hummel

v.

Lorie Davis

4-16-CV-00133-O

Death Penalty Case

Execution Date:
March 18, 2020

Hummel's Notice of Appeal and Statement of Appellate Jurisdiction

Petitioner John Hummel files this Notice of Appeal to the United States Court of Appeals for the Fifth Circuit and Statement of Appellate Jurisdiction:

I. Notice of Appeal

Hummel appeals from the *ORDER GRANTING IN PART MOTION FOR CLEMENCY FUNDING* (signed February 11, 2020) (ECF-51) and the *ORDER DENYING WITHOUT PREJUDICE MOTION TO RECONSIDER PARTIAL GRANT OF FUNDING FOR CLEMENCY FUNDING* (signed February 20, 2020) (ECF-53).

The *ORDER GRANTING IN PART MOTION FOR CLEMENCY FUNDING* (ECF-51) is appealed **only** to the extent that the request for funding was denied beyond the $7,500.00 per 18 U.S.C. § 3599(g)(2). Specifically, Hummel does **not**

appeal this paragraph that contains the command language granting funding of up to $7,500.00 (ECF-51, page 8):

> "1. Petitioner's amended motion for authorization of funding and appointment of experts to assist in clemency proceedings, filed February 4, 2020 (ECF No. 48), is GRANTED IN PART as follows: Petitioner is authorized to incur the sum of seven thousand five hundred dollars ($7,500.00) in conformity with 18 U.S.C. § 3599(g)(2) for the purposes of securing the services of (a) Dr. Brown to perform the services described in Petitioner's Response to this Court's Show Cause Order and (b) a qualified mental health professional to obtain the risk assessment described in Petitioner's Response to this Court's Show Cause Order."

However, Hummel **appeals** this paragraph that contains the command language **denying** the requested funding beyond $7,500.00 (ECF-51, page 8):

> "2. Petitioner's request for an additional twelve thousand, five hundred dollars in expert mental health funding is DENIED without prejudice to Petitioner right to seek additional funding for the services of a qualified mental health professional to perform the limited scope risk assessment described in Petitioner's Response to this Court's Show Cause Order."

Hummel appeals all other parts of the *ORDER GRANTING IN PART MOTION FOR CLEMENCY FUNDING* (ECF-51) that denies the requested funding beyond $7,500.00.

Hummel also appeals the *ORDER DENYING WITHOUT PREJUDICE MOTION TO RECONSIDER PARTIAL GRANT OF FUNDING FOR CLEMENCY FUNDING* (ECF-53) in its entirety.

II. Statement of Appellate Jurisdiction (Jurisdiction of the 5th Circuit to Consider this Appeal)

Neither ECF-51 nor ECF-53 are termed "final judgment" and both deny relief in whole or in part "without prejudice." Still, jurisdiction of the 5th Circuit should

exist under 28 U.S.C. § 1291 (2020) (appeals from final decisions of district courts) because ECF-51 and ECF-53 should both be considered a "final decision."

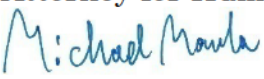
A "[f]inal decision generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 199 (1988), *citing Catlin v. United States*, 324 U.S. 229, 233 (1945). In determining whether a decision is "final" within the meaning of § 1291, a reviewing court should give § 1291 a "practical rather than a technical construction." *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949). A decision "by which a district court disassociates itself from a case" is deemed to be final. *Swint v. Chambers County Commission*, 514 U.S. 35, 42 (1995).

After the district court signed the Final Judgment (ECF-41), dismissing the petition filed under 28 U.S.C. § 2254 with prejudice, Hummel filed the *Amended Motion for Authorization of Funding and for Appointment of Experts to Assist in Clemency Proceedings* (ECF-48), which restarted litigation **only** for funding under 18 U.S.C. § 3599. Before ECF-53 was signed by the district court, the **only** issue "pending" before the district court is whether Hummel should be granted funding beyond $7,500.00 per 18 U.S.C. § 3599(g)(2). Hummel has twice-asked for such funding and has been twice-denied. Thus, when giving § 1291 a "practical rather than a technical construction" under the facts of this case, Hummel believes that the litigation for funding in the district court has effectively ended and he does **not** have additional arguments to make or evidence to present. *See Cohen*, 337 U.S. at 546.

Thus, Hummel argues that the 5th Circuit has jurisdiction to consider this appeal under 28 U.S.C. § 1291 (2020).

Respectfully submitted,

Michael Mowla
P.O. Box 868
Cedar Hill, TX 75106
Phone: 972-795-2401
Fax: 972-692-6636
michael@mowlalaw.com
Texas Bar No. 24048680
Attorney for Hummel



/s/ Michael Mowla
Michael Mowla

III. Certificate of Service

I certify that on February 24, 2020, a copy of this document was delivered to Gwendolyn Vindell of the Office of Attorney General, P.O. Box 12548, Austin, Texas 78711, by efile or email to gwendolyn.vindell2@oag.texas.gov.

/s/ Michael Mowla
Michael Mowla