

No. 20-

IN THE SUPREME COURT OF THE UNITED STATES

JOHN ESPOSITO,
Petitioner,

-v-

BENJAMIN FORD, Warden,
Georgia Diagnostic and Classification Prison,
Respondent

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Petitioner John Esposito, through undersigned counsel, moves pursuant to Supreme Court Rule 39.1 for leave to proceed *in forma pauperis* in his concurrently filed Petition for Writ of Certiorari. Mr. Esposito is indigent and has been appointed counsel in state and federal court.

As to his federal proceedings, the United States District Court for the Middle District of Georgia issued an order appointing counsel pursuant to 18 U.S.C. § 3599. *See* attached Order, at Appendix A. The Eleventh Circuit Court of Appeals likewise issued an order appointing counsel pursuant to 18 U.S.C. § 3599. *See* attached Order, at Appendix B.

Undersigned counsel hereby certify that Mr. Esposito remains indigent. Mr. Esposito requests that this Court allow him to proceed *in forma pauperis*.

Respectfully submitted,

/s/ Marcia A. Widder
Marcia A. Widder (Ga. 643407)
Counsel of Record
Akiva Freidlin (Ga. 692290)
Georgia Resource Center

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(404) 222-9202

COUNSEL FOR PETITIONER

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

JOHN ANTHONY ESPOSITO,

Petitioner

vs.

CARL HUMPHREY, Warden,

Respondent

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CIVIL ACTION NO.: 5:12-CV-163 (CAR)

ORDER

Petitioner has filed a Motion for Appointment of Counsel pursuant to the provisions in 18 U.S.C. § 3599.

I. PROCEDURAL HISTORY

Petitioner filed his motion for appointment of counsel along with his Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254. According to his federal habeas corpus petition, Petitioner is a prisoner in the custody of the State of Georgia pursuant to a judgment entered September 30, 1998. Petitioner received a sentence of death for one count of malice murder; life imprisonment for one count of armed robbery; and twenty years imprisonment for hijacking a motor vehicle.

Petitioner appealed and the Supreme Court of Georgia affirmed his conviction and sentence on October 30, 2000 and denied his motion for reconsideration on November 30, 2000. *Esposito v. State*, 273 Ga. 183 (2000).

Following a denial of certiorari by the United States Supreme Court on June 25, 2001 and denial of a request for rehearing, Petitioner filed a habeas corpus petition in the Butts County Superior Court on May 3, 2002. He amended the petition once, the court conducted an evidentiary

hearing, and denied the writ as to Petitioner's conviction and sentence on April 29, 2011.

The Georgia Supreme Court denied Petitioner's Application for Certificate of Probable Cause to Appeal on March 19, 2012.

On May 8, 2012, Petitioner filed a Petition for Writ of Habeas Corpus by a Person in State Custody in this Court pursuant to 28 U.S.C. § 2254.

II. APPOINTMENT OF COUNSEL

18 U.S.C. § 3599 (a) (2) provides as follows:

In any post conviction proceeding under section 2254 or 2255 of Title 28, United States Code, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with subsection (b) through (f).

18 U.S.C. § 3599 (a)(2). In this case, Petitioner has filed a Motion for Appointment of Counsel, Motion for Leave to Proceed *In Forma Pauperis*,¹ and a Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254. Petitioner's filings show that he is financially unable to obtain adequate representation. Under these circumstances, Petitioner is entitled to appointment of counsel under 18 U.S.C. § 3599 (a)(2).

Having concluded that Petitioner is entitled to appointment of counsel, the Court must next determine whether 18 U.S.C. § 3599 permits it to appoint Petitioner's requested counsel—Georgia Resource Center of Atlanta, Georgia (hereinafter "Resource Center"), specifically Brian S. Kammer and Kirsten Salchow, both of whom are attorneys with the Resource Center. Because of the seriousness of the death penalty and the unique and complex nature of this kind of litigation, counsel must have a certain level of experience before being eligible for appointment under § 3599. For

¹Petitioner's Motion to Proceed *In Forma Pauperis* (R. at 2) is **GRANTED**.

post-judgment appointments, as in this case, “at least one attorney so appointed must have been admitted to practice in the court of appeals for not less than five years, and must have had not less than three years experience in the handling of appeals in that court in felony cases.” 18 U.S.C. § 3599 (c). Based on the Affidavit submitted by Mr. Kammer, it appears that he has the appropriate experience to qualify for appointment under § 3599 (c). Additionally, Kirsten Salchow qualifies for appointment under 18 U.S.C. § 3599 (d) as she has the “background, knowledge, or experience that would enable . . . her to properly represent the defendant.” *Id.* Moreover, it appears that both Mr. Kammer and Ms. Salchow are familiar with the facts and procedural history of Petitioner’s case because the Resource Center has represented Mr. Esposito since 2000. Given this, Petitioner’s Motion for Appointment of Counsel is **GRANTED** and Brian S. Kammer and Kirsten Salchow are appointed to represent Petitioner in his federal habeas corpus action.

The next issue that must be determined is the rate at which counsel will be compensated. It appears that the Administrative Office of the United States Courts has approved \$178.00 an hour, for both in-court and out-of-court time. Therefore, the Court finds that it is appropriate to compensate Brian S. Kammer and Kirsten Salchow at a rate of \$178.00 per hour.

Counsel is reminded that they may obtain investigative, expert, or other services that are reasonably necessary for his representation of Petitioner; but they must obtain prior approval from the Court for such services. 18 U.S.C. § 3599 (f). *Ex parte* requests for payment of fees and expenses under § 3599 (f) may not be considered unless Petitioner makes a proper showing of the need for confidentiality. *Id.* Fees and expenses for such services are limited to \$7,500.00 unless the Court certifies that a larger amount is necessary and the Chief Judge of the Eleventh Circuit approves the larger amount. *See* 18 U.S.C § 3599 (g) (2),

The following procedures for interim payments and reimbursement of expenses shall apply during the course of this case:

A. Submission of Vouchers

Counsel shall submit to the Clerk's Office in Macon, Georgia, once every month, an interim voucher on CJA Form 30, "Death Penalty Proceedings: Appointment of and Authority to Pay Court Appointed Counsel." Compensation earned and reimbursable fees and expenses incurred for each calendar month shall be claimed on an interim voucher submitted no later than the fifth day of each subsequent month, or the first business day thereafter if the fifth day of the month is a Saturday, Sunday, or holiday. Each interim voucher shall be numbered sequentially and shall include the time period covered. Interim vouchers shall be submitted in accordance with this schedule and procedure even if little or no compensation, fees, or expenses are claimed for the time period covered. All interim vouchers shall be supported by detailed and itemized statements of time expended and fees and expenses incurred.

After an interim voucher is submitted to the Clerk's Office in Macon, Georgia, the Deputy Clerk assigned to this case will submit it to the Court for approval. The Court will then review the voucher, particularly the amount of time claimed, and will authorize compensation for the approved number of hours and for all reimbursable fees and expenses reasonably incurred. The Court will endeavor to review and act on each voucher within 30 days of submission.

At the conclusion of the representation, counsel shall submit a final voucher for payment of time expended and fees and expenses incurred during the final interim time period. The final voucher shall also set forth in detail, with supporting documentation, the time expended and fees and expenses incurred for the entire case. The final voucher shall also reflect all compensation and

reimbursement previously received on the appropriate line of the form.

B. Reimbursable Out-of-Pocket Expenses

Counsel may be reimbursed for out-of-pocket expenses (not including fees or expenses relating to investigative, expert, or other services that are reasonably necessary for the representation) reasonably incurred during the representation. Although neither § 3599 nor the applicable rules and regulations limit the amount of out-of-pocket expenses that may be incurred, counsel should not incur a single out-of-pocket expense in excess of \$500.00 without prior approval of the Court. Approval may be sought by filing an *ex parte* application with the Court stating (1) the nature of the expense, (2) the estimated cost, and (3) the reason the expense is necessary to the representation. Recurring out-of-pocket expenses, such as the cost of telephone toll calls, telegrams, photocopies, facsimiles, and photographs, that total more than \$500.00 on one or more interim vouchers are not considered single expenses requiring prior approval of the Court.

With respect to travel outside Atlanta for the purposes of consulting with Petitioner or his former counsel, interviewing witnesses, etc., the \$500.00 rule shall be applied in the following manner: Travel expenses, such as airfare, mileage, parking fees, meals, and lodging, may be claimed as itemized expenses. Therefore, if the total out-of-pocket expenses for a single trip will exceed \$500.00, the travel shall require prior approval of the Court.

Case-related travel by privately owned automobile shall be claimed at the rate authorized by the government for business-related travel by federal judiciary employees, plus parking fees, ferry fares, and bridge, road, and tunnel tolls. For information regarding the current mileage rate for federal judiciary employees, counsel should consult the Clerk's Office in Macon, Georgia. Transportation other than by privately owned automobile should be claimed on an actual-expense

basis. First-class air travel is prohibited.

Actual expenses incurred for meals and lodging while traveling outside Atlanta, Georgia for case-related purposes must conform to the prevailing limitations placed upon travel and subsistence expenses for federal judiciary employees in accordance with existing government travel regulations. For information regarding per diem rates for federal judiciary employees, as well as for specific details concerning high-cost areas, counsel should consult the Clerk's Office in Macon, Georgia.

The cost of telephone toll calls, telegrams, photocopies, facsimiles, and photographs may be reimbursable out-of-pocket expenses if they are reasonably incurred. However, general office overhead (such as rent, secretarial assistance, and telephone service) is not reimbursable; nor are items of a personal nature.

Finally, expenses for service of subpoenas on fact witnesses are not reimbursable out-of-pocket expenses and should not be included on any voucher. Instead, such expenses will be paid by the United States Marshals Service, but only upon prior approval by the Court. Payment of such expenses shall be governed by 28 U.S.C. § 1825.

SO ORDERED, this 18th day of May, 2012.

S/ C. Ashley Royal
C. ASHLEY ROYAL, JUDGE
UNITED STATES DISTRICT COURT

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APPENDIX B

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Douglas J. Mincher
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

April 02, 2015

Marcia A. Widder
Georgia Resource Center
303 ELIZABETH ST
ATLANTA, GA 30307

Appeal Number: 15-11384-P
Case Style: John Esposito v. Warden
District Court Docket No: 5:12-cv-00163-CAR

Party To Be Represented: John Esposito

Dear Counsel:

We are pleased to advise that you have been appointed to represent on appeal the indigent litigant named above. This work is comparable to work performed pro bono publico. The fee you will receive likely will be less than your customary one due to limitations on the hourly rate of compensation contained in the Criminal Justice Act (18 U.S.C. § 3006A), and consideration of the factors contained in Addendum Four § (g)(1) of the Eleventh Circuit Rules.

Your Criminal Justice Act (CJA) Voucher is enclosed. The following additional documents are available on the internet at www.ca11.uscourts.gov:

- [Instructions for Completing CJA Voucher](#)
- [Notice to Court-Appointed Counsel](#) of Public Disclosure of Attorney Fee Information
- Addendum Four to the Eleventh Circuit Rules entitled [Eleventh Circuit Plan Under the Criminal Justice Act](#)

For questions concerning the CJA voucher, or if you do not have internet access and would like copies of these documents mailed to you, you may call the CJA Clerk at 404-335-6122. For all other questions, please call the "Reply To" number shown below.

FRAP 26.1 and the accompanying circuit rules provide that the Certificate of Interested Persons and Corporate Disclosure Statement (CIP) must be filed with the court by every appellant, appellee, intervenor and amicus curiae, including governmental parties. Appellants (and cross-appellants) must file their CIP within 14 days of the date this appeal has been docketed, or along with the filing in this court of any motion, petition, or pleading, whichever occurs first. The time

for filing the opposing party's CIP or notice is set by 11th Cir. R. 26.1-2(c). In the case of publicly traded corporations, counsel must include the stock ticker symbol after the corporate name. See 11th Cir.R. 26.1-3(c).

On the same day the CIP is served, the party filing it must also complete the court's web-based certificate at the [Web-Based CIP](#) link of the court's website. Pro se parties are **not required or authorized** to complete the web-based certificate.

Your claim for compensation under the Act should be submitted within 60 days after issuance of mandate or filing of a cert. petition. We request that you enclose with your completed CJA Voucher one additional copy of each brief, petition for rehearing, and cert. petition which you have filed. Please ensure that your voucher includes a detailed description of the work you performed. Thank you for accepting this appointment under the Criminal Justice Act.

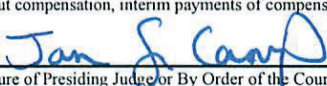
Sincerely,

DOUGLAS J. MINCHER, Clerk of Court

Reply to: Jan S. Camp
Phone #: (404) 335-6171

CJA-1 Appointment of Counsel Letter

CJA 30 DEATH PENALTY PROCEEDINGS: APPOINTMENT OF AND AUTHORITY TO PAY COURT APPOINTED COUNSEL (Rev.12/03)

1. CIR./DIST./ DIV. CODE GAUAT/11th Circuit		2. PERSON REPRESENTED JOHN ANTHONY ESPOSITO		VOUCHER NUMBER		
3. MAG. DKT./DEF. NUMBER		4. DIST. DKT./DEF. NUMBER 5:12-cv-00163-CAR		5. APPEALS DKT./DEF. NUMBER 15-11384-P		
7. IN CASE/MATTER OF (Case Name) John Esposito v. Warden		8. TYPE PERSON REPRESENTED <input type="checkbox"/> Adult Defendant <input checked="" type="checkbox"/> Appellant <input type="checkbox"/> Other <input type="checkbox"/> Habens Petitioner <input type="checkbox"/> Appellee		9. REPRESENTATION TYPE <input checked="" type="checkbox"/> D1 28 U.S.C. § 2254 Habeas (Capital) <input type="checkbox"/> D3 28 U.S.C. § 2255 (Capital) <input type="checkbox"/> D2 Federal Capital Prosecution <input type="checkbox"/> D4 Other (Specify) 1983		
10. OFFENSE(S) CHARGED (Cite U.S. Code, Title & Section) <i>If more than one offense, list (up to five) major offenses charged, according to severity of offense.</i> Death Penalty						
11. ATTORNEY'S NAME (First Name, M.I., Last Name, including any suffix), AND MAILING ADDRESS Marcia A. Widder 303 ELIZABETH ST ATLANTA, GA 30307 Telephone Number: (404) 222-9202		12. COURT ORDER: <input checked="" type="checkbox"/> O Appointing Counsel <input type="checkbox"/> C Co-Counsel <input type="checkbox"/> F Subs For Federal Defender <input type="checkbox"/> R Subs For Retained Attorney <input type="checkbox"/> P Subs For Panel <input type="checkbox"/> Y Standby Counsel Prior Attorney's _____ Appointment Date: _____ (A) Because the above-named person represented has testified under oath or has otherwise satisfied this Court that he or she (1) is financially unable to employ counsel and (2) does not wish to waive counsel, and because the interests of justice so require, the attorney whose name appears in Item 11, who has been determined to possess the specific qualifications by law, is appointed to represent the person in this case. (B) The attorney named in Item 11 is appointed to serve as: <input type="checkbox"/> LEAD COUNSEL <input type="checkbox"/> CO-COUNSEL Name of Co-Counsel _____ Appointment Date: _____ or Lead Counsel: _____ (C) If you represented the defendant or petitioner in any prior proceeding related to this matter, attach to your initial claim a listing of those proceedings and describe your role in each (e.g., lead in counsel or co-counsel). <input type="checkbox"/> (D) Due to the expected length of this case, and the anticipated hardship on counsel in undertaking representation full-time, for such a period without compensation, interim payments of compensation and expenses are approved pursuant to the attached order. <div style="text-align: center;"> Signature of Presiding Judge or By Order of the Court 4/2/2015 3/31/2015 Date of Order Nunc Pro Tunc Date (E) Repayment or partial repayment ordered from the person represented for this service at time of appointment. <input type="checkbox"/> YES <input type="checkbox"/> NO</div>				
CLAIM FOR SERVICES AND EXPENSES						
14. STAGE OF PROCEEDING Check the box which corresponds to the stage of the proceeding during which the work claimed at Item 15 was performed even if the work is intended to be used in connection with a later stage of the proceeding. CHECK NO MORE THAN ONE BOX. Submit a separate voucher for each stage of the proceeding. CAPITAL PROSECUTION HABEAS CORPUS OTHER PROCEEDING a. <input type="checkbox"/> Pre-Trial e. <input type="checkbox"/> Appeal g. <input type="checkbox"/> Habeas Petition k. <input type="checkbox"/> Petition for the U.S. Supreme l. <input type="checkbox"/> Stay of Execution o. <input type="checkbox"/> Other b. <input type="checkbox"/> Trial f. <input type="checkbox"/> Petition for the U.S. Supreme Court h. <input type="checkbox"/> Evidentiary Hearing m. <input type="checkbox"/> Appeal of Denial of Stay c. <input type="checkbox"/> Sentencing i. <input type="checkbox"/> Dispositive Motions n. <input type="checkbox"/> Petition for Writ of Certiorari to the U.S. Supreme Court Regarding Denial of Stay d. <input type="checkbox"/> Other Post Trial j. <input type="checkbox"/> Appeal Writ of Certiorari						
HOURS AND COMPENSATION CLAIMED			FOR COURT USE ONLY			
15. CATEGORIES (Attach itemization of services with dates)		HOURS CLAIMED	TOTAL AMOUNT CLAIMED	MATH/TECH. ADJUSTED HOURS	MATH/TECH. ADJUSTED AMOUNT	ADDITIONAL REVIEW
a. In-Court Hearings (RATE PER HOUR = \$ 181.00)					IN COURT TOTAL	IN COURT TOTAL
b. Interviews and Conferences with Client					Category a	Category a
c. Witness Interviews						
d. Consultation with Investigators & Experts						
e. Obtaining & Reviewing the Court Record						
f. Obtaining & Reviewing Documents and Evidence					OUT OF COURT TOTAL	OUT OF COURT TOTAL
g. Consulting with Expert Counsel					Categories b-j	Categories b-j
h. Legal Research and Writing						
i. Travel						
j. Other (Specify on additional sheets)						
TOTALS: Categories b thru j (RATE PER HOUR = \$ 181.00)						
CLAIM FOR TRAVEL AND EXPENSES (Attach itemization of expenses with dates)						
16. Travel Expenses (lodging, parking, meals, mileage, etc.)						
17. Other Expenses (other than expert, transcripts, etc.)						
GRAND TOTALS (CLAIMED AND ADJUSTED):						
18. CERTIFICATION OF ATTORNEY/PAYEE FOR THE PERIOD OF SERVICE FROM: _____ TO: _____			19. APPOINTMENT TERMINATION DATE IF OTHER THAN CASE COMPLETION		20. CASE DISPOSITION	
21. CLAIM STATUS <input type="checkbox"/> Final Payment <input type="checkbox"/> Interim Payment Number _____ <input type="checkbox"/> Supplemental Payment Have you previously applied to the court for compensation and/or reimbursement for this representation? <input type="checkbox"/> YES <input type="checkbox"/> NO If yes, were you paid? <input type="checkbox"/> YES <input type="checkbox"/> NO Other than from the Court, have you, or to your knowledge has anyone else, received payment (compensation or anything of value) from any other source in connection with this representation? <input type="checkbox"/> YES <input type="checkbox"/> NO If yes, give details on additional sheets. I swear or affirm the truth or correctness of the above statements. Signature of Attorney _____ Date _____						
APPROVED FOR PAYMENT — COURT USE ONLY						
22. IN COURT COMP.	23. OUT OF COURT COMP.	24. TRAVEL EXPENSES	25. OTHER EXPENSES	26. TOTAL AMT. APPROVED		
27. SIGNATURE OF THE PRESIDING JUDGE			DATE	27a. JUDGE CODE		

MGA

No. 20-

IN THE SUPREME COURT OF THE UNITED STATES

JOHN ESPOSITO,
Petitioner,

-v-

BENJAMIN FORD, Warden,
Georgia Diagnostic and Classification Prison,
Respondent

CERTIFICATE OF SERVICE

Pursuant to Supreme Court Rule 29.5(a), I certify that a copy of the Motion to Proceed *In Forma Pauperis* was sent via 1st Class Mail to the U.S. Supreme Court and a digital copy was sent to counsel for the Respondent by electronic mail on February 12, 2021. The parties have consented to electronic service. Respondent's counsel's name, address and telephone number are set forth below:

Sabrina D. Graham, Esp.
Senior Assistant Attorney General
Georgia Office of the Attorney General
Capital Litigation Section
40 Capitol Square, SW
Atlanta, GA 30334
(404) 458-3239

Respectfully submitted,

/s/ Marcia A. Widder
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