

02/22/2001 *The punishment phase begins.* (RR34)

02-26/2001 Jury answers the special issues resulting in the imposition of a death sentence (yes to future danger issue #1; no to mitigation special issue #2). (CR 3:405)

- 2. Billable Hours: Only \$2,500 was approved for investigation. The investigator billed for 84 hours, 64% of which was travel time; she spent about 25 hours interviewing witnesses. An adequate mitigation investigation requires a minimum of 350 hours**

The trial court approved only \$2,500 for the investigation by Ms. Brownlee. *See* Exhibit 9. Present counsel's analysis of the billing records of Ms. Brownlee, a private investigator, reflects that she spent a total of 84 hours on this case that was billed to the court. Of those hours, 53.375 hours, or 64% of the 84 hours, was travel time, and 6.0 hours consisted of conference with defense counsel. Only 24.625 hours or 29% of the total time were spent interviewing witnesses. *See* Exhibit 13, Counsel's Analysis of Billing Records of Brownlee; Exhibit 14, Janie Brownlee Billing obtained from Tarrant County. In contrast, at a minimum, an adequate mitigation investigation often takes 350 hours of investigation. *See* Exhibit 5: Burdette Letter, dated 5/18/2014.

With the exception of one 30-minute phone call and another 15-minute phone call, these interviews did not begin until January 17, 2001, which was less than one month before the start of the guilt/innocence phase of the trial. *See* Exhibits 13 and 14. The total amount shown paid to Brownlee according to the records is \$2,500.00, with \$490.00 shown due to Brownlee from the Court. *See* Exhibit 14.

Attorneys for Petitioner located two sheets of paper in the file that contain what appears to be a witness list typed during the investigation of the case back in 2001, and is presumably the work product of Ms. Brownlee. *See* Exhibit 17. It lists eight potential

witnesses: a person named “Tiffany,” a “Blaine Holliman,” Terri White (guardian ad litem in the client’s juvenile case), Judith van Hoof (another guardian ad litem in the client’s juvenile case), Donald Murphy (the client’s mother’s boyfriend or husband), Leeverisia Jones (the client’s grandmother), Richard Bone (teacher that the client was accused of assaulting as a juvenile), and Mark Turner (another teacher client was accused of assaulting as a juvenile). Of these eight persons, Ms. Brownlee’s records show that she interviewed two: Leeverisia Jones (January 17, 2001), and Blain Holliman (January 18, 2001). Of these persons, none testified during the punishment hearing. *See* RR volumes 34-36).

There were no memos of the interviews in the files provided by trial and state habeas counsel of the work product from the Janie Brownlee investigation. Attempts to locate these records, if any were created, have not been successful. There was no social history of the client, no genogram to show family lineage to aid in identifying themes, such as genetic predispositions to mental or physical health issues. There was no timeline that could show correlations between significant events in the client’s life and concomitant behaviors.

A review of the billing records of Mr. Barnett reflects that he spent a total of 448.4 hours and billed the court for a total of \$41,270.00. Of those hours, 5.5 hours were spent interviewing witnesses (on February 11, 2001, after voir dire began), and 9.5 hours were spent meeting with expert witnesses (on February 13, 2011, also after voir dire began). *See* Exhibit 15, Billing Records of Rex Barnett obtained from Tarrant County. Further, after trial began, Mr. Barnett spent an unclear number of hours meeting with witnesses, as these times were mixed in with other activities on his invoice. *See* Exhibit

15, billings for February 17 and 22, 2001.

An analysis of the billing records of Mr. Moore reflects that he spent a total of 495.65 hours and billed the court for a total of \$46,020.00. Of those hours, it is unclear how many were spent interviewing witnesses because most of the time entries regarding the interview of witnesses are mixed with time spent speaking to co-counsel and the investigator. *See* Exhibit 16, Billing Records of Larry Moore obtained from Tarrant County, entry dates October 20, 2000 (Dr. Finn), January 27, 2001 (9.75 hours mixed with conferences and interviewing witnesses), February 1, 2001 (2.00 hours), February 3, 2001 (3.00 hours mixed with witnesses and investigator), February 13, 2001 (11.50 hours mixed with witnesses, investigator, meeting with client), February 17, 2001 (6.00 hours mixed with witnesses, co-counsel, and investigator), February 20, 2001 (2.50 hours), February 22, 2001 (5.50 hours mixed with witnesses, co-counsel, and investigator), February 25, 2001 (2.90 hours).

3. Red Flags: The documentation raised red flags that further investigation needed to be conducted into Mr. Jones's mental health, intellectual functioning and life history

There is no record that the defense attempted to locate and interview former teachers or administrators about Mr. Jones's placement in special education, an evaluation of emotional disturbance in 4th grade, or his academic limitations in school. Despite Mr. Jones having been treated for several incidences of self-inflicted gunshot wounds to his body, there is no record that the defense attempted to locate and interview treating physicians, or personnel from agencies to whom Mr. Jones was thereafter referred for mental health treatment. Although the trial record appears to raise the

likelihood that Mr. Jones was addicted to drugs and alcohol at a very early age,² there does not appear to have been sufficient investigation and development so that counsel could have made an informed decision about an involuntary intoxication defense. Further, the trial testimony raised questions about Petitioner's intellectual functioning that did not appear to be adequately investigated and addressed.

There are red flags in the documentation reviewed by Attorneys for Petitioner that further investigation needed to be conducted into, inter alia, whether Mr. Jones suffered from:

1. severe, long-standing, and involuntary alcohol addiction;
2. traumatic, physical and sexual childhood abuse;
3. severe, long-standing, and involuntary addiction to polysubstances, beginning as early as age 12; and
4. dissociative disorder as a result of traumatic, physical and sexual childhood abuse.

These red flags should have placed trial counsel on notice that further investigation into Mr. Jones's life history had to be explored before they could make any reasonable strategic decisions about voir dire and the presentation of legal theories and defenses at the merits and sentencing phases of trial. Attorneys for Petitioner have accordingly concluded that the representation of trial counsel may have been deficient. However, to present a meritorious claim, present counsel must also identify and plead what information would have been reasonably discoverable by trial counsel had they not unreasonably narrowed the scope of their investigation.

² The trial testimony records that at the time of the offense, Mr. Jones was not drinking alcohol. (RR 31:65, 84). However, there is testimony that Mr. Jones had had a drug addiction from at least 14 years of age, long before age of majority. (RR 29:287). *See also* RR 29:288, 290. The medical records recently collected by present counsel note a referral for "addiction" counseling at age 16 (several years before the age of majority), raising a question of involuntary intoxication.

VI. An investigation into what information would have been discoverable by trial counsel had trial counsel not unreasonably narrowed the scope of their sentencing investigation has not been previously conducted by any previous counsel

The investigation that is reasonably necessary to provide adequate representation to Petitioner has not been conducted by any previous counsel. Jack Strickland represented Mr. Jones in state habeas corpus proceedings and, until the appointment of present counsel, in federal habeas corpus proceedings. His file does not reflect that any meaningful investigation occurred into what information would have been discoverable by trial counsel had they not unreasonably narrowed the scope of their sentencing investigation. There are no funding and appointment motions for a mitigation investigator, or fact investigator, or mental health professional, to conduct an investigation into what information trial counsel may reasonably have discovered had their investigation not been narrowed.

Attorneys for Petitioner recently located billing records for Mr. Strickland that were submitted to the trial court for payment. *See* Exhibit 19. An invoice attached to the Strickland billing records shows that an investigator named J.H. Lasater spent a total of 12 hours investigating the case at the state postconviction (Article 11.071) level. *See* Exhibit 19, July 12, 2004 Invoice. Some of the 12 hours appears to include driving time (3 hours coupled with 44 miles driven; 3.5 hours coupled with 62 miles driven, and 1.5 hours coupled with 44 miles driven). *See* Exhibit 19, July 12, 2004 Invoice. And Mr. Strickland's billing statement, which contains very little detail, shows no investigation into any mitigation issues. *See* Exhibit 19, October 6, 2004 statement.

The federal habeas corpus record contains no known requests for investigative

services.³ Finally, the pleadings filed on Mr. Jones's behalf by prior counsel in both state and federal court do not reflect that any such extra-record investigation occurred.

State habeas counsel, Strickland, admitted he would not -- and did not -- investigate and raise substantial IATC claims. In a letter dated January 12, 2006, prior habeas counsel clearly informed Petitioner that he had no intention of investigating any ineffective assistance of counsel claims. *See* Exhibit 1, Letter Jack Strickland to Quintin Jones, dated January 12, 2006. Mr. Strickland wrote Petitioner asserting that:

“Regarding your federal writ application, let me assure you that I did not seek to be appointed to represent you. To the contrary, I informed the federal court that I did not wish to assist you further. I did not elaborate on my reasons, but simply advised the court that I believed it would be in the best interest of everyone to have new counsel appointed. The court however felt differently and appointed me nonetheless. Under the circumstances, I will therefore continue as your counsel.

I will be happy, as I have in the past, to raise any legitimate issue which bears on the merits of the judgment and sentence in your case. I will not file frivolous or meritless claims, nor will I casually impugn the integrity or competence of your prior attorneys.⁴ The facts presented in the prosecution of your case were unusually horrific. It is my opinion that all of your lawyers had done their best for you in spite of that. I do not understand why you seem intent on blaming everyone who has tried to assist you while seemingly ignoring your own behavior.”

Raising IATC claims has nothing to do with the “integrity” of trial counsel, nor does such a finding mean that trial counsel is “incompetent.” Even a lawyer with the

³ In response to pro se motions filed by Mr. Jones seeking replacement of his prior counsel, Mr. Strickland publicly disclosed his opinions about the adequacy of trial counsel's investigation. [ECF 13, p. 2-3] Present counsel have arrived at a different professional opinion than did Mr. Strickland.

⁴ The *Jones* case is not the first or only case in which Mr. Strickland has refused to investigate claims of IATC. As plead in an *en banc* rehearing petition in *Wilkins v. Stephens*, No. 13-70014 at p. 2:

During Mr. Strickland's representation, Mr. Wilkins repeatedly urged him, without success, to have the case comprehensively investigated and to raise ineffective assistance of trial counsel claims. He also urged Mr. Strickland -- again without success -- to withdraw from the case, and repeatedly sought to bring to the attention of the courts Mr. Strickland's failure to investigate, as required by the Texas habeas statute, Tex. Code Crim. Proc. Art. 11.071 sec. 3(a), and his refusal to raise IATC claims. Mr. Strickland denigrated his own client to the courts, ...

greatest integrity and thorough competence is capable of committing an error so substantial that it alone may constitute ineffective trial counsel. The Supreme Court has clearly established that “a single, serious error may support a claim of ineffective assistance of counsel.” See *Kimmelman v. Morrison*, 477 U.S. 365, 383 (1986).

Especially in a death penalty case, ineffective counsel could mean that trial counsel did not fully investigate, develop and present certain material evidence, did not investigate and develop mitigation, or simply did not present certain expert testimony. As the Supreme Court opined in *Wiggins v. Smith*, 539 U.S. 501, 521-522 (2003), by reaffirming *Strickland v. Washington*, 466 U.S. 668, 690-691 (1984):

“Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, ***a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances***, applying a heavy measure of deference to counsel’s judgments.

Yet, despite the red flag in the files, Strickland’s letter to Petitioner Jones reflects that state habeas counsel violated the very premise of *Strickland* as articulated by the Fifth Circuit in *Charles v. Stephens*, 736 F.3d 380, 389, 390 (5th Cir. 2013):

“under a *Strickland* analysis, trial counsel must not ignore pertinent avenues of investigation, or even a single, particularly promising investigation lead.”

Thus, it is impossible to know whether trial counsel had conducted a reasonable and adequate mitigation investigation if prior habeas counsel did not inquire into the issue because he was concerned about “casually impugn(ing) the integrity or competence of prior counsel.”

Further, Mr. Strickland admitted in correspondence that he relied on the investigation done by trial counsel in making the decision to forego investigation into Mr. Jones's life history. In his March 3, 2006 response (ECF 13) to Petitioner's Pro Se Motion for the Appointment of Different Counsel (ECF 9), prior habeas counsel admits that he relied completely on the mitigation investigation conducted by trial counsel:

"The first complaint raised by petitioner is that ***Strickland failed to investigate potential mitigating evidence***. What petitioner fails to tell the Court is that ***such investigation was done by trial counsel*** Larry Moore ***prior to petitioner's trial***. Following petitioner's conviction and death sentence, and during the investigation and preparation of writ claims, that information was shared with Strickland. Lengthy discussions were conducted between Strickland and Mr. Moore. All of the various school, hospital, and mental health records which petitioner mentions in this complaint number one were in fact discovered by Moore and made available to both expert witnesses and Strickland. ***Petitioner took his best shot at mitigation at his trial***. His lawyers uncovered much and presented it all to the jury. The jury was not swayed. ***Now petitioner complains that Strickland did not replot the same ground in application to the Texas Court of Criminal Appeals***. The complaint is meritless"

(ECF 13, p. 2-3)

There was no discussion in prior habeas counsel's documents about the application of standard errors of measurement or whether any of the testing was appropriately performed. Instead, prior habeas counsel provided as follows:

"Prior to his trial, petitioner was extensively tested by Dr. Raymond Finn, a Tarrant County forensic psychologist. Doctor Finn, is a well-respected expert who has testified in both state and federal courts in Texas and elsewhere. Doctor Finn testified as a defense witness at the punishment phase of petitioner's trial. In his testimony, Doctor Finn discussed the various tests and evaluations which he conducted on petitioner at the request of Mr. Moore. there was no testimony and no evidence that any testing remotely suggested that petitioner fell into that range or was retarded or even close to retarded."

Petitioner essentially complains to this Court that Strickland did not once again engage in the pointless task of seeking further intelligence testing. ***Such testing had already been done and the results presented to the jury.***

The jury either found petitioner's IQ scores to be not mitigating or in the alternative, insufficiently mitigating to warrant a life sentence. The trial court did not limit petitioner's presentation of this IQ evidence or any other psychological opinions, and therefore no complaint was raised on direct appeal.

It was certainly not unreasonable or deficient for Strickland to refrain from seeking yet another IQ test for petitioner. In fact, under the circumstances presented by this case, it would have been unreasonable and pointless to have done so.

(ECF 13, p. 3-4).

Attorneys for Petitioner have learned that by the age of 24 (since the age of 13), Petitioner had engaged in nearly 11 years of heavy, constant drug and alcohol abuse giving rising to the need for further investigation into facts of "condition-of-the-mind" evidence, which would have been admissible under Texas Code of Criminal Procedure Article 38.36. *See* Tex. Code Crim. Proc. Art. 38.36 (2001-2006). Attorneys for Petitioner have also learned that at no time did prior habeas counsel ask him about his drug and alcohol abuse. There is some evidence of Petitioner's drug use in the record on appeal. The undersigned Attorneys for Petitioners, however, have learned that Petitioner began using marijuana at the age of 12. About the same time, Petitioner began to drink large amounts of alcohol. By age 15, Petitioner was snorting cocaine, snorting heroin, using cocaine, crank, and heroin intravenously, and began to also smoke crack cocaine.

Finally, a review of State Writ Application reflects the claims that were run were procedurally defaulted, or premised exclusively on state law. As to whether he raised any mitigation claims in the Article 11.071 writ application, prior state habeas counsel, Strickland, asserted as follows:

*"Petitioner complains that Strickland failed to raise any mitigation claims in his state writ application. That is not exactly correct. **Strickland raised***

the question of allowing evidence of the effect of serotonin levels on behavior to be developed post-trial. (Claim H, State writ application). Such evidence could arguably be considered mitigating.”

(ECF 13, p. 4).

However, prior habeas counsel failed to even attempt to present any evidence on the effect of serotonin levels on behavior. Even at the time of the state habeas proceeding, the law was clear that the failure to fully develop the factual basis of a claim renders the claim just as procedurally defaulted in federal court as it would have been had the claim not been raised at all (*e.g.*, an unexhausted claim) -- unless a petitioner can show that there was a fundamental miscarriage of justice. *See McCleskey v. Zant*, 499 U.S. 467, 494 (1991); *Murray v. Carrier*, 477 U.S. 478, 496 (1986). Prior state habeas counsel made no showing of a miscarriage of justice.

Prior state habeas counsel raised the mere “possibility” of a mitigation claim regarding “evidence of the effect of serotonin levels on behavior to be developed post-trial.” All habeas counsel did is attach an article from the American Bar Association and asked for an evidentiary hearing on the issue. *See Exhibit 2*. No experts were hired by prior habeas counsel, and there is no record that shows that prior habeas counsel even attempted to hire an expert for this potential mitigation claim. It is unclear what evidence prior habeas counsel intended to present during an evidentiary hearing for “claim H” of the 11.071 writ without an expert.

And as it turned out, the state trial court found prior habeas counsel “offer(ed) no evidence whatsoever” that Petitioner may suffer from low serotonin levels, “much less any evidence that low serotonin levels, if they existed at the time in question, had any connection to” Petitioner’s murder of the victim in the case. *See Exhibit 3*, p. 11.