

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.

Further, the state trial court further found that prior habeas counsel “should have investigated his claim before filing his application because the writ of habeas corpus cannot be allowed to conduct a fishing expedition.” *See* Exhibit 3, p. 11. As for the other claims raised by prior habeas counsel in the 11.071 proceeding, the following is a summary of the state trial court’s findings (See Exhibit 3, p. 2-13), which were adopted by the state trial court, reflect that they were record-based claims that should have been raised on direct appeal; or were based solely on state law and thus not cognizable in federal court; or were defaulted for lack of adequate factual development (*See* Exhibit 4). As reflected below, none of these claims was an IATC *Wiggins* claim for failure to conduct an adequate and reasonable investigation into Petitioner’s psychosocial history:

11.071 Claim A: challenge to admission of evidence.

State trial court’s findings and conclusions: Applicant’s claim is not cognizable because it was raised and rejected on direct appeal.

11.071 Claim B: challenge to admission of evidence.

State trial court’s findings and conclusions: Applicant’s claim is not cognizable because it was raised and rejected on direct appeal.

11.071 Claim C: the failure to appoint counsel in a timely manner deprived indigent Petitioner of his Fourteenth Amendment right to due process and his Sixth Amendment right to the effective assistance of counsel.

State trial court’s findings and conclusions: Applicant procedurally defaulted because he could and should have raised them on direct appeal. No prejudice shown.

11.071 Claim D: the failure to appoint counsel in a timely manner deprived an indigent Petitioner of his Fourteenth Amendment right to due process and his Sixth Amendment right to the effective assistance of counsel.

State trial court's findings and conclusions: Applicant procedurally defaulted because he could and should have raised them on direct appeal. No prejudice shown.

11.071 Claim E: the failure to appoint counsel in a timely manner deprived an indigent Petitioner of his rights under Texas Const. Article 1, §§ 10 and 19.

State trial court's findings and conclusions: claim is not cognizable in the habeas proceeding. Waived claim by failing to separately brief.

11.071 Claim F: the failure to appoint counsel in a timely manner deprived an indigent Petitioner of his rights under Texas Const. Article 1, §§ 10 and 19.

State trial court's findings and conclusions: claim is not cognizable in the habeas proceeding. Waived claim by failing to separately brief.

11.071 Claim G: newly-discovered evidence demonstrates that Karla Davis, a State's witness employed as a forensic scientist by the Fort Worth Police Department's crime laboratory, was not credible and not worthy of belief under oath.

State trial court's findings and conclusions: GeneScreen performed the actual DNA testing in Petitioner's case, so evidence that Davis or the laboratory may have had problems in other unrelated cases involving the actual testing of DNA evidence would have been inadmissible at trial. The claim is mere impeachment and not "newly-discovered evidence."

In summary, in preparing Petitioner's 11.071 application, prior habeas counsel conducted very little investigation, admitted that he did not seek any mitigation evidence, and otherwise presented claims that are not cognizable in 11.071 proceedings or that were procedurally defaulted.

VII. That an ineffective-assistance-of-counsel claim based upon trial counsel's unreasonable sentencing investigation was not raised in state court and may be procedurally defaulted if raised in an amended habeas corpus petition does not render investigative services not reasonably necessary to counsel's representation

In 2012 and 2013, respectively, the Supreme Court decided *Martinez* and *Trevino*. These cases held that ineffective assistance of state habeas counsel can act as cause and prejudice to excuse procedural default, giving a petitioner the right to one meaningful opportunity to have a substantial IATC claim (defaulted by state habeas counsel) determined on the merits by a federal court.

Prior Fifth Circuit law had held that it was not an abuse of discretion to deny funding for ancillary services if the claims sought to be investigated would be procedurally barred. *See e.g., Woodward v. Epps*, 580 F.3d 318, 334 (5th Cir. 2009). However, because of *Martinez* and *Trevino*, the strict application of this standard is no longer valid. The right to one meaningful opportunity to have a substantial IATC claim reviewed by a federal court necessarily includes the right to funding, because without funding, a petitioner cannot adequately present the facts of his claim nor the facts to establish cause and prejudice. *See Harris v. Nelson*, 394 U.S. 286, 298 (1969) (“Petitioners in habeas corpus proceedings, ... , are entitled to careful consideration and plenary processing of their claims including full opportunity for presentation of the relevant facts”).

Given that state habeas counsel failed to conduct any investigation into what mitigation information would have been reasonably discoverable by trial counsel had they followed up on red flags, Attorneys for Petitioner seek to make a strong showing that state habeas counsel's representation was deficient under the standards established

by *Strickland v. Washington*. However, showing a reasonable probability that state habeas counsel's inadequate investigation affected the outcome of the state habeas corpus proceeding will require the same investigation as counsel have deemed reasonably necessary to identifying and pleading a substantial IATC claim. Thus, funding for investigative services cannot be made to depend upon establishing cause and prejudice for procedural default first. Doing so would be starkly inconsistent with *McFarland v. Scott*'s recognition that counsel and ancillary services are critical for "researching" and "identifying" "possible" claims, and would fail to give "practical meaning" to 28 U.S.C. § 3599 (2014), *id.*, thereby depriving Mr. Jones of his statutory right to adequate representation. *See McFarland v. Scott*, 512 U.S. 849, 855 (1994).

VIII. The Proposed Investigative Plan and Funding Request

The foundation claim counsel seeks to identify is an IATC claim based on an absence of a reasonable and adequate pretrial investigation, development and presentation of facts about Mr. Jones's psychosocial history.

A. Summary of efforts in the federal habeas due diligence review

After the court granted equitable tolling, as part of the due diligence inquiry to seek funding for ancillary services, Attorneys for Petitioner conducted some preliminary investigation into this case. This investigation included attempted interviews of Paula Freeman, Petitioner's ex-fiancé, and Brandy and Michael Jones, Jr., Petitioner's sister-in-law and brother. Attorneys for Petitioner made requests for available school records, medical records, records of incarceration, and numerous other documents.

Attorneys for Petitioner learned that Mr. Jones's mother has died since the trial.

Attempts to locate the original files and notes of Dr. Finn were not successful. Although Dr. Finn was willing to search his storage for records, Dr. Finn was unable to locate any. *See* Exhibit 18, confirmation letter to Dr. Finn.

On April 7, 2014, Attorneys for Petitioner learned that aside from what is attached as Exhibit 6, no school records were available at the time from the Fort Worth Independent School District. There are pages of school records in prior habeas counsel's file, but these records are incomplete and are missing a substantial number of pages. On April 15, 2014, Attorneys for Petitioner obtained some school records and other records from the Tarrant County District Attorney's Office. These documents should be reviewed by a mitigation specialist to identify whether the records reveal significant limitations in intellectual functioning or other mental impairments (e.g., emotional disturbance, attention deficit disorder, etc.).

Attorneys for Petitioner also requested records from the Texas Department of Criminal Justice on March 1, 2014 (*See* Exhibit 7), but as of this date have not received certain records.

B. Proposed investigation

Based in part on the fruits of the above investigation, there may be a substantial claim that trial counsel failed to conduct a reasonable sentencing investigation. A mitigation investigator trained in investigating a client's life history, and in identifying various mental health and other themes, is now reasonably necessary to continue the investigation. Attorneys for Petitioner seek to retain Mary Burdette to conduct the mitigation investigation outlined below.

1. Life History Claims: The foundation for the majority of claims that Petitioner seeks to raise pivot on the alleged failure of trial counsel to reasonably investigate, develop and present the psychosocial history of Petitioner. The mitigation investigation would initially include an inquiry into the following topics:

- **Family History**: to initially interview persons about:
 - Genetic and Environmental influences The trial record reveals that Mr. Jones has an extensive family,⁵ the majority of whom were not interviewed to learn of the genetic and environmental influences on him. Neither does there appear to be any investigation into the neighborhood in which he was reared;
 - Maternal and paternal history of drug and alcohol abuse (mother, brother, father), suicidal tendencies (sister admitted to Charter Hospital), and gambling addiction (mother);
 - Petitioner's home life during early childhood, including the split-up of his parents; and abandonment and neglect of his caretakers; and Petitioner's placement into various relatives households; and
 - Sexual molestation of Petitioner that began as early as ages 7-8.⁶
- **Mental Health**: to conduct initial interviews of persons (lay persons, educators and administrators, mental health professionals, treating physicians) about Petitioner's:
 - Special education placement. There was documentation that showed placement in special education. An adequate mitigation investigation requires interviews of teachers and educational administrators, as well as a review of educational records to identify issues of significant limitations in intellectual functioning, borderline intellectual functioning, emotional disturbance, attention deficit disorder, etc.
 - Emotional Disturbance evaluation in 4th grade. There was documentation that spoke to an evaluation of Petitioner for

⁵ **Error! Main Document Only.**Through Mattie Long, aunt, the prosecution introduced evidence that revealed that there were at least 24 persons in Jones's extensive family, and suggested the neighborhood Jones was raised in was dangerous — evidence not investigated by the defense. (RR 29:27-28, 42-43, 44, 60).

⁶ See Testimony of Keisha Jones, Mr. Jones's sister, and Dr. Raymond Finn, the defense expert about sexual molestation by sister, older brother, and a cousin. (RR 35:58-59, 69; RR 30:166).

emotional disturbance in 4th grade. An adequate mitigation investigation requires interviews of persons who did the evaluation, and those who have knowledge of these behaviors exhibited by Petitioner Jones;

- Self-inflicted injuries.⁷ There was documentation in the record and from independent record collection done by Attorneys for Petitioner that recorded that Petitioner had several self-inflicted injuries, such as gunshot wounds to his chest, thigh and hand at different times; burning himself with cigarettes; hitting his head against the wall; with treatment and hospitalizations at JP Hospital, Charter Hospital, and referrals to Tarrant County MHMR; and
- Drug use and abuse before the age of majority.

2. Delay in Appointment of Counsel: Counsel anticipates further inquiry into the timing and circumstances of the appointment of counsel for Petitioner and the approximately three weeks delay after he had asked for representation.

It is anticipated that the mitigation investigator will prepare a social history, a genogram, and a timeline, based on witness reports and record collection and review. From these documents, themes are identified so that appropriate expert(s) can be selected. It is anticipated that it will become reasonably necessary to the representation for counsel to seek funding at a later time for one or more forensic mental health experts.

It is also anticipated that record collection will continue, as for example, requesting records of Mr. Jones's work history (including Social Security), and referrals to the Parent Guidance Center and the YMCA (from school records), Tarrant County MHMR (from hospital records), and the files of Brownlee, etc.

⁷ Some instances are described in the trial transcript with no indication of Mr. Jones's age, where the injuries occurred, what the circumstances were that triggered the behavior, etc. see (RR 35:72; 73-74).

IX. Conclusion and Prayer

Attorneys for Petitioner request that the court grant this Opposed First Motion for Funding.

Respectfully submitted,

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X. Certificate of Conference

This certifies that on May 13, 2014, Michael Mowla conferred with Jeremy Greenwell of the Texas Attorney General's Office, who indicated that he opposes this motion.

/s/ Michael Mowla

By: Michael Mowla

XI. Certificate of Service

I certify that on June 3, 2014, a true and correct copy of this document was served upon all parties of record via the ECF filing system.

/s/ Michael Mowla

By: Michael Mowla