

FILED

**United States Court of Appeals
Tenth Circuit**

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

July 31, 2017

**Elisabeth A. Shumaker
Clerk of Court**

In re: NATHAN DUNLAP,

Petitioner.

No. 17-1215
(D.C. No. 08-CV-00256-JLK)
(D. Colo.)

ORDER

Before **PHILLIPS, O'BRIEN**, and **McHUGH**, Circuit Judges.

Nathan Dunlap is a Colorado capital prisoner whose execution is postponed by an indefinite order of reprieve issued by the Governor in 2013 following Dunlap's submission, through federal Criminal Justice Act (CJA) counsel, of an application for clemency. Recently his CJA counsel requested additional funds, for their own fees and for expert and investigative services, in connection with proposed efforts to supplement the clemency materials filed with the Governor, whose term will expire in January 2019. The district judge overseeing CJA counsel denied the request, concluding it had not been justified under the governing standard, 18 U.S.C. § 3599(f) (services must be "reasonably necessary for the representation of the defendant"). Contending the judge used an improperly heightened version of that standard, Dunlap petitions for a writ of mandamus directing the judge to reconsider his request and "approve a reasonable budget for his attorneys, experts, and investigators for the duration of his clemency proceedings before the Governor of Colorado." Pet. at 1. We deny the petition.

To warrant mandamus relief, Dunlap must (1) have “no other adequate means to attain the relief he desires,” (2) show “his right to the writ is clear and indisputable,” and (3) satisfy this court that, “in the exercise of its discretion, . . . the writ is appropriate under the circumstances.” *In re Cooper Tire & Rubber Co.*, 568 F.3d 1180, 1187 (10th Cir. 2009)(internal quotation marks omitted). The second and third requirements preclude mandamus relief here.

In his order of reprieve, the Governor made it clear that his concern was “about the use of the death penalty itself, and not about [Dunlap],” and thus he “opted to grant a reprieve and not clemency in this case.” Exec. Order D 2013-006, at 3 (May 22, 2013). Noting the funds sought by CJA counsel had to do with the development of additional materials relating personally to Dunlap, the district judge held that, absent sufficient indication such materials could have an impact on a possible clemency decision, the funds were not reasonably necessary for Dunlap’s representation in the proceedings. We cannot say Dunlap has shown his right to mandamus relief interfering with that decision is clear and indisputable and would be an appropriate exercise of our discretion under the particular circumstances presented here. Of course, a material change in circumstances could warrant reconsideration of additional funding under § 3599, which the district court has made clear it has not foreclosed.

The petition is denied. Dunlap’s motion to file a reply brief in support of the petition is granted, as is his motion to proceed in forma pauperis in this matter. Finally, Dunlap’s motion to continue the appointment of CJA counsel is also granted. Pursuant to § 3599, Madeline S. Cohen and Mary Claire Mulligan are appointed as Dunlap’s counsel

of record for purposes of this mandamus action, effective *nunc pro tunc* to the date the mandamus petition was filed.

Entered for the Court

A handwritten signature in cursive script, reading "Elisabeth A. Shumaker", followed by a long horizontal flourish.

ELISABETH A. SHUMAKER, Clerk

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
OFFICE OF THE CLERK**

Byron White United States Courthouse
1823 Stout Street
Denver, Colorado 80257
(303) 844-3157

Elisabeth A. Shumaker
Clerk of Court

July 31, 2017

Chris Wolpert
Chief Deputy Clerk

Ms. Madeline S. Cohen
Madeline S. Cohen, Attorney at Law
1942 Broadway, Suite 314
Boulder, CO 80302

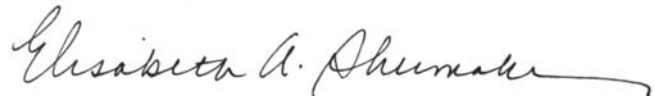
Ms. Mary Claire Mulligan
Mulligan & Mulligan
89 Gold Trail
Boulder, CO 80302

RE: 17-1215, In re: Dunlap
Dist/Ag docket: 08-CV-00256-JLK

Dear Counsel:

Enclosed please find an order issued today by the court. Please contact this office if you have questions.

Sincerely,



Elisabeth A. Shumaker
Clerk of the Court

cc: Laura Cramer-Babycz
T. Markus Funk
Paul Koehler

EAS/as