**CASE NO. 17-1215**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE TENTH CIRCUIT**

IN RE: NATHAN DUNLAP, )
)
Petitioner. )

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Petition for Writ of Mandamus
The Honorable John L. Kane, Senior U.S. District Judge
U.S. District Court for the District of Colorado
District Court Case No. 08-cv-0256-JLK

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**DISTRICT COURT'S RESPONSE**

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Respectfully submitted,

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Honorable John L. Kane
Senior District Judge
U.S. District Court
District of Colorado

Dated: July 20, 2017

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## I. INTRODUCTION

Petitioner Nathan Dunlap ("Dunlap") was convicted and sentenced to death for committing four murders in 1993 in Colorado. He appealed his sentence and, in a unanimous *en banc* decision, the Colorado Supreme Court denied relief. *See People v. Dunlap*, 975 P.2d 723 (Colo. 1999). The U.S. Supreme Court denied certiorari, *see Dunlap v. Colorado*, 528 U.S. 893 (1999), and the Colorado Supreme Court affirmed subsequent denials of relief, *see People v. Dunlap*, 36 P.3d 778 (Colo. 2001); *Dunlap v. People*, 173 P.3d 1054 (Colo. 2007). The District Court denied Dunlap's 28 U.S.C. § 2254 petition for a writ of habeas corpus, *see Dunlap v. Zavaras*, No. 08-cv-0256-JLK, 2010 WL 3341533 (D. Colo. Aug. 24, 2010) (unpublished), a denial which this Court affirmed, *see Dunlap v. Clements*, 476 F. App'x 162 (10th Cir. 2012) (unpublished). Dunlap then sought state clemency relief. This Court issued an order "expressly invest[ing] jurisdiction" in the District Court for it to "administer[] clemency related matters" and "make its own determination as to the reasonableness of any [future] clemency related expenses." Order of Tenth Circuit at 2–3, *Dunlap v. Raemisch*, No. 08-cv-256-JLK (D. Colo. May 31, 2011), ECF No. 104.

The issues presented by the current Petition for a Writ of Mandamus ("Mandamus Petition") are whether a clemency petitioner may continue receiving federal funding under 18 U.S.C. § 3599 after the clemency petition is filed, and, if

so, what showing he must make. In 2013, Dunlap submitted a twenty-two page, CJA-funded clemency petition to Colorado Governor John Hickenlooper, which attached "hundreds of documents" and included "scientific information of psychiatric evaluation, psychological evaluation, [and] neuroimaging." Hearing Transcript at 10, 16, *Dunlap v. Raemisch*, No. 08-cv-256-JLK (D. Colo. Apr. 19, 2017) (hereinafter "Apr. 19, 2017 Tr."). The Governor granted Dunlap an indefinite "reprieve" based on questions surrounding the use of the death penalty. Colo. Exec. Order D2013-006 at 3 (attached as Ex. A).

The trial-court judge[1] has, to date, already approved approximately $465,000 in funding for Dunlap's representation. *See* Order at 7 n.8, *Dunlap v. Raemisch*, No. 08-cv-256-JLK (D. Colo. May 11, 2017), ECF No. 322 (hereinafter "Order on Reconsideration") (attached as Ex. B). Dunlap submitted a proposed budget of almost $500,000 for additional fees/services to fund ongoing clemency efforts through 2018.[2] The trial-court judge denied that request because Dunlap failed to

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[1] In the caption of the Mandamus Petition, Dunlap unnecessarily named the Honorable John L. Kane as Respondent. While parties to the trial court proceeding other than the petitioner are respondents, the trial-court judge is not and his response is governed by a separate provision of Federal Rule of Appellate Procedure 21.

[2] Although Dunlap submitted a proposed budget indicating that the total amount requested was $749,976, that figure appears to be an error. Based on the trial-court judge's most recent calculations, the requested services and attorney fees total approximately $495,476. Counsel's apparent error, however, has no impact on the trial-court judge's denial of § 3599 funding because, as discussed herein, that denial was based on Dunlap's failure to carry his burden of

meet his burden under 18 U.S.C. § 3599. *See* Order on Reconsideration at 7–8, ECF No. 322; Order, *Dunlap v. Raemisch*, No. 08-cv-256-JLK (D. Colo. June 2, 2017 (hereinafter "Order on Revised Clemency Budget"), ECF No. 324.

Dunlap now seeks a writ of mandamus to compel the trial-court judge to approve the proposed budget because, he contends, § 3599(f) requires only a showing that the Governor's staff "will consider" new information provided by Dunlap. Petition at 21. The Mandamus Petition should be denied because Dunlap failed to demonstrate, as required by § 3599(f), that the requested services are "reasonably necessary" to the Governor's determination of whether to grant or deny the clemency petition.

## II. 18 U.S.C. § 3599

### A. Legal Standard

Section 3599 seeks to "ensure[] that no prisoner w[ill] be put to death without meaningful access to the 'fail-safe' of our justice system," *i.e.*, clemency proceedings, *Harbison v. Bell*, 556 U.S. 180, 194 (2009), by providing federally-funded counsel as well as federal funding for "investigative, expert, or other services that are reasonably necessary for the representation of the defendant" in connection with those proceedings, 18 U.S.C. § 3599(f); *see Matthews v. White*,

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establishing that any of the requested services are "reasonably necessary." 18 U.S.C. § 3599(f).

807 F.3d 756, 759–60 (6th Cir. 2015).[3] In undertaking the required "reasonably-necessary" inquiry, courts generally consider whether "the requested services are reasonably necessary to provide the Governor and [Parole Board] the information they need in order to determine whether to exercise their discretion to extend grace to the petitioner in order to prevent a miscarriage of justice." *Brown v. Stephens*, 762 F.3d 454, 460 (5th Cir. 2014).[4]

Under § 3599 a court does not act merely as a rubber stamp. Rather, it must exercise its discretion in authorizing such expenses. *See* 18 U.S.C. § 3359(f) (stating that "court *may* authorize" expenses following a finding of reasonable necessity (emphasis added)). In reviewing an application for attorney fees and expenses under 18 U.S.C. § 3599's predecessor statute, 21 U.S.C. § 848, this Court recognized that it was "duty bound to undertake a very considered evaluation of the reasonableness of each and every time entry," in light of the need to "act[] as trustees of the public's funds" and "guardians of the taxpayers' dollars." *United States v. Nichols*, 184 F.3d 1169, 1171–72 (10th Cir. 1999). Other circuits have recognized that a district court has discretion in considering requests for funding under § 3599. *See Wilkins v. Davis*, 832 F.3d 547, 552 (5th Cir. 2016) ("[T]he district court may, in the exercise of its sound discretion, authorize federal funding

[3] This Court, in interpreting 18 U.S.C. § 3599's predecessor statute, concluded that the reasonableness standard also applies to attorney fees. *See United States v. Nichols*, 184 F.3d 1169, 1170–71 (10th Cir. 1999).

[4] *Accord Foley v. White*, 835 F.3d 561, 563 (6th Cir. 2016).

for investigative and expert services in subsequent state clemency proceedings."); *Fautenberry v. Mitchell*, 572 F.3d 267, 268 (6th Cir. 2009) ("Due to the discretionary language in § 3599(f), we review the district court's decision for an abuse of discretion."); *Fautenberry v. Mitchell*, 1:00-cv-332, 2009 WL 2132638, at *2 (S.D. Ohio July 11, 2009) (unpublished) ("It is within the district court's discretion to find that Petitioner has not demonstrated that funds are reasonably necessary, and to deny a request for funding as a result, where the petitioner's request is based on mere suspicion and surmise." (internal quotation marks and citation omitted)), *aff'd*, 571 F.3d 1341 (6th Cir. 2009). Courts, moreover, have "emphatically reject[ed] the suggestion that [they] must simply rubber-stamp a voucher in whatever amount a defense attorney has the audacity to request." *United States v. Smith*, 76 F. Supp. 2d 767, 768 (S.D. Tex. 1999).

### B. Dunlap Has Not Shown the Requested Expenses Are Reasonably Necessary

The proposed budget at issue sought approximately $500,000 for attorney fees and various services, including victim outreach, a mitigation specialist, an investigator, a paralegal, and a psychologist. Dunlap later filed a revised proposed budget, seeking $98,713 in funds specifically for the period from April 19 to December 31, 2017, for the same services included in his prior proposed budget—*e.g.*, victim outreach, a mitigation specialist, an investigator, a paralegal, and a psychologist. *See* Revised Clemency Budget, *Dunlap v. Raemisch*, No. 08-cv-256-

JLK (D. Colo. May 31, 2017), ECF No. 323. The trial-court judge denied both of the proposed budgets because Dunlap failed to carry his burden of showing that the requested services were "reasonably necessary" for the Governor to make a determination on Dunlap's already-filed clemency petition. Order on Reconsideration at 4, ECF No. 322; Order on Revised Clemency Budget at 1, ECF No. 324.

The trial-court judge did not, as Dunlap in his Mandamus Petition repeatedly states, condition funding on the "governor's assurance that he will exercise his authority under the state constitution in a particular way," Petition at 23, or require a showing that the requested funding will ineluctably "lead to a grant of clemency," *id.* at 1. Dunlap mischaracterizes the analytical heart of the trial-court judge's ruling in this way at least ten times in his Mandamus Petition. *See id.* at 1, 11, 12, 13, 15, 18, 20, 21, 22, 23. It is worth noting that this is not the first time Dunlap has misunderstood and/or mischaracterized the trial-court judge's rulings. *See, e.g.*, Apr. 19, 2017 Tr. at 9 (Dunlap's counsel explaining misunderstanding about whether proposed budget was approved); Order on Reconsideration at 3, ECF No. 322 (explaining that Dunlap's arguments in his motion for reconsideration "are based on a misunderstanding and mischaracterization of" the trial-court judge's previous order); Order on Revised Clemency Budget at 1 n.2, ECF No. 324 ("The Revised Clemency Budget claims that I directed Mr. Dunlap to

file a budget in my May 11, 2017 Order. . . . I did nothing of the sort.”).

Contrary to Dunlap’s retelling, the trial-court judge relied on the above-discussed statutory language, *Brown*, and the information presented by Dunlap to reach the conclusion that Dunlap failed to carry his burden in that he did not “demonstrate that [the requested amount] is reasonably necessary to provide the Governor with the information he needs to make a clemency determination.” Order on Reconsideration at 4, ECF No. 322 (emphasis added).[5] Dunlap did not satisfy his burden of showing how and why the requested services were reasonably necessary for the clemency process.

Such necessity might be demonstrated if, for example, there was a reliable indication that Governor Hickenlooper needed any information beyond that included in his already-filed clemency petition to decide whether to grant or deny the petition. *See Brown*, 762 F.3d at 459–60 (affirming denial of § 3599 funds in clemency context and explaining that “it was appropriate for the district court . . .

[5] The trial-court judge has repeatedly explained this basis for denying Dunlap’s recent proposed budgets. *See* Apr. 19, 2017 Tr. at 29 (“[I] am going to withhold approval of any further vouchers or approval of a budget as requested for $749,976 for future expenditures until such time as I receive from the Governor or from you a specific statement as to what sort of things and what is needed by the Governor in order for him to make a decision.”); Order on Reconsideration at 4, ECF No. 322 (“My denial of Mr. Dunlap’s requests is due to his failure to demonstrate that the attorney, expert, investigative, or other services are reasonably necessary.”); Order on Revised Clemency Budget at 1, ECF No. 324 (“[Dunlap] still has not shown that the budgeted fees and expenses are reasonably necessary; thus, I deny his request for their approval.”).

to consider whether the proposed investigation would only supplement prior evidence that . . . was . . . available to the Board and the Governor"); *see also Foley v. White*, 835 F.3d 561, 565 (6th Cir. 2016) (ruling that a court does not abuse its discretion by denying expert expenses where evaluation would "be duplicative of information already available to the state executives entertaining his clemency petition" (quoting *Fautenberry*, 572 F.3d at 270–71)).

Although Dunlap asserts that "the governor's office will expect to receive additional and updated information," Petition at 9–10 (citing Apr. 19, 2017 Tr. at 11), and that he has "reason to believe that a renewed clemency petition may ultimately succeed," *id.* at 20, the record presented to the District Court shows otherwise:

First, Governor Hickenlooper's Executive Order states that the Governor's decision is not tied to the facts of Dunlap's case. To the contrary, after Dunlap submitted to the Governor a clemency petition in 2013, the Governor granted Dunlap a "reprieve," explaining:

> Because the question is about the use of the death penalty itself, and not about Offender No. 89148 [Dunlap], I have opted to grant a reprieve and not clemency in this case.

Colo. Exec. Order D2013-006 at 3 (attached as Ex. A). The Executive Order itself, therefore, belies any assertion that additional information about Dunlap will be necessary to the Governor's ultimate decision on Dunlap's clemency petition.

Second, Dunlap was unable to support his assertion that the Governor "expects" to receive any additional (let alone any particular) information about him. During the April 19, 2017 hearing the trial-court judge questioned whether the Governor needed additional information to make a decision on the clemency petition. The most Dunlap's counsel could say was:

> [W]e have been told fairly obliquely . . . . that we will need to present something new and additional on top of the mountains of material we submitted in 2013 in order to secure, hopefully, clemency for our client.

Apr. 19, 2017 Tr. at 11. Dunlap failed to provide the following details: who provided this information, what was said, and how his funding request provided the "something new and additional" he claimed might be of interest to the Governor.

Third, Dunlap has conceded on the record that the Governor does not appear willing to even consider a renewed clemency request. Dunlap's counsel stated that they had "'discerned little willingness [from the Governor's office] to consider a renewed clemency request at this time.'" Order on Reconsideration at 6, ECF No. 322.

Dunlap, therefore, failed to provide the trial-court judge with anything more than gossip, rumors, and speculation as to whether (1) the Governor may at some future date take further action on the clemency petition, and, if so, (2) whether additional information about Dunlap (as opposed to about the nature and

functioning of the death penalty) would play a role in his making any such determination.

Finally, the trial-court judge asserts Dunlap is incorrect in claiming that, in denying his most recent proposed budgets, the trial-court judge effectively denied him the opportunity to pursue executive or other clemency, or "foreclose[d]" all future work related to his clemency petition. Petition at 17–18. The trial-court judge has already approved approximately $465,000 in expenses for Dunlap under 18 U.S.C. § 3599. *See* Order on Reconsideration at 7 n.8, ECF No. 322. These considerable funds allowed him to submit a voluminous clemency petition to the Governor in 2013. If Dunlap can point to facts he believes sufficient to carry his burden of establishing reasonable necessity, the trial-court judge has made clear that Dunlap is free to submit revised proposed budgets or expense requests for the court's review and consideration. *See id.* at 8.

## III. CONCLUSION

Numerous courts have noted the lack of guidance regarding § 3599's reasonably-necessary standard as it applies to state clemency proceedings. *See Matthews*, 807 F.3d at 760 (explaining that question of whether funding is "reasonably necessary" is "more often litigated in the context of federal habeas proceedings, where it is clearer what questions could affect the outcome of proceedings"); *Fautenberry*, 2009 WL 2132638, at *2 ("Few cases exist defining

what 'reasonably necessary' means within the context of [§ 3599]."). The need for guidance is heightened here by the unique circumstances presented—*i.e.*, where a petitioner has been provided ample access to clemency proceedings and now seeks to supplement his petition with information petitioner's counsel believes may be of interest to a governor who has issued an indefinite "reprieve."[6] The trial-court judge is unaware of any other case in which a governor has refused to either grant or deny a pending clemency petition, placing the petitioner in a state of perpetual limbo with no indication of whether or when the governor may need or want additional information in order to reach his decision on an already-filed clemency petition.

The trial-court judge has acknowledged the limited scope of appellate review for CJA-funding decisions. *See Rojem v. Workman*, 655 F.3d 1199, 1202 (10th Cir. 2011) (quoting *United States v. French*, 556 F.3d 1091, 1094 (10th Cir. 2009)); *see also Hooper v. Jones*, 536 F. App'x 796, 800 (10th Cir. 2013) (unpublished); *Wilkins*, 832 F.3d at 559. In reviewing Dunlap's § 3599 funding

[6] The amount of requested funding also distinguishes Dunlap's case. *See, e.g.*, *Wilkins*, 832 F.3d at 551 (district court did not abuse its discretion in denying $38,500 for investigative and expert funding to support a state clemency petition); *Brown*, 762 F.3d at 459 (affirming denial of funding for mitigation specialist costing $20,000, and petitioner requested $7,500); *In re Carlyle*, 644 F.3d 694, 700 (8th Cir. 2011) ("no injustice" in attorney "failing to receive appellate review of district judge's administrative refusal to" pay anything more than $7,000, where counsel requested $37,000); *Selsor v. Trammell*, No. 01-CV-721(CVE), 2014 WL 320212, at *2 (N.D. Okla. Jan. 29, 2014) (unpublished) (approving only $16,979.64 for services in addition to $9,247.91 approved by Tenth Circuit).

requests over the past six years—and, in particular, his most recent proposed budgets—the trial-court judge has attempted to strike the appropriate balance between providing Dunlap with meaningful access to the clemency process, while concurrently safeguarding taxpayer funds. Granting Dunlap's request would render meaningless § 3599's explicit requirements that a district court, based on the facts provided by the petitioner, determine that the requested services are reasonably necessary for the representation of a petitioner in clemency-related proceedings.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 21(d)(1), I certify that this brief is produced by computer and contains 2,847 words. I relied on my word processor to obtain the count and it is Microsoft Word 2010.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

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By: *s/ Chin Sue Virnich*
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I hereby certify that a copy of this **DISTRICT COURT'S RESPONSE** was furnished through (ECF) electronic service to the following on this 20th day of July, 2017.

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