

NO. 1992-CRA-0000

STATE OF TEXAS)	
)	
VS.)	IN THE DISTRICT COURT
)	49TH JUDICIAL DISTRICT
JOE SMITH)	WEBB COUNTY, TEXAS
)	

***EX PARTE* CONFIDENTIAL REQUEST FOR ADVANCE PAYMENT OF
FEES AND EXPENSES FOR TDCJ CLASSIFICATION
AND RECORDS EXPERT**

TO THE HONORABLE JOE LOPEZ, JUDGE OF THE 49TH JUDICIAL DISTRICT
COURT OF WEBB COUNTY, TEXAS:

Joe Smith requests approval in advance of fees and expenses for mitigation investigation in this capital case as provided for by article 26.052(f) of the Texas Code of Criminal Procedure.¹

**I.
FACTUAL BACKGROUND**

Mr. Smith was indicted for killing Ben Jones the course of robbery on January 5, 1991. Trial was held in 1992, and Mr. Smith was convicted and sentenced to death. On June 20, 2010, the Texas Court of Criminal Appeals granted habeas relief and remanded the case for retrial on punishment.

¹Chapter 26.052(f) provides “for advance payment of expenses to investigate potential defenses.” In this case, which involves only a capital resentencing, not a full retrial, the potential defenses fall into the category of mitigating evidence and/or rebuttal of the state’s attempt to show future dangerousness.

II. THE ASSISTANCE OF A TDCJ CLASSIFICATION AND RECORDS EXPERT IS ESSENTIAL

Mr. Smith asks that the Court approve in advance funding for an expert in the classification and record-keeping systems of the Texas Department of Criminal Justice (TDCJ).

Mr. Smith needs an expert familiar with the classification process and inmate-related records in the Texas Department of Criminal Justice to assist the defense in two ways. The first has to do with whether Mr. Smith poses a risk, or does not pose a risk, for future dangerousness, based on the record of his extensive incarceration in TDCJ both before and after his capital conviction. The second has to do with identifying and analyzing all of the TDCJ-related records for Ricardo Brown, who was a jailhouse informant who received benefits for his testimony against Mr. Smith in his first trial and who is expected to be a witness for the prosecution in the resentencing trial.

Mr. Smith's risk of future dangerousness will be a crucial issue at trial. The jury that decides whether Mr. Smith lives or dies will be forced to determine "whether there is a probability that Mr. Smith would commit criminal acts of violence that would constitute a continuing threat to society". Tex. Code Crim. Proc., Art. 37.071(b)(2) (Vernon Supp. 2009). The Court of Criminal Appeals has unequivocally defined "society" to include prison populations. *See Berry v. State*, 233 S.W.3d 847 (Tex. Crim. App. 2007)

Mr. Smith has been incarcerated in the Texas Department of Criminal Justice

under a sentence of death for nearly nineteen (19) years. Prior to his arrest for the murder of Mr. Jones, Mr. Smith was in county jail and TDCJ custody off and on for approximately ten (10) years. Mr. Smith's adaptability to prison life as well as TDCJ's classification and risk assessment systems will undoubtedly be evidence essential to the question of whether Mr. Smith should live or die.

TDCJ uses classification procedures to determine the level of security risk of, and the corresponding security measures for, any inmate in the custody of TDCJ, as well as programs that an inmate should be provided access to. Classification procedures encompass both the initial assessment and placement of an inmate, as well as ongoing periodic assessments based on the inmate's performance, behavior, and progress in TDCJ. The defense is in need of expert assistance concerning the classification procedures employed by TDCJ. Such expert will assist the defense in the following manner:

- Providing consultation services regarding the classification system and risk assessment tools employed by TDCJ;
- Determining how TDCJ would assign Mr. Smith to a custody level and what the level would likely be— based on a comprehensive review of Mr. Smith's custodial records— should the jury impose a sentence less than death;
- Providing consultation services regarding the security measures employed by TDCJ for capitally convicted offenders who are serving a life sentence;
- Determining whether security measures employed by TDCJ are sufficient to

manage and control Mr. Smith should the jury impose a sentence less than death;

- Assisting the defense in identifying all relevant documents potentially in the possession of Dimmit County, Zavala County, and Webb County officials bearing on the question of Mr. Smith's lack of future dangerousness; and
- Preparing defense counsel for cross-examination of state experts.

The area of inmate classification is highly complex. Indeed, the Court of Criminal Appeals recently overturned the death sentence of Adrian Estrada precisely because the prosecution's classification expert unknowingly gave false testimony about TDCJ's classification procedures at Mr. Estrada's punishment phase. *Estrada v. State*, 313 S.W.3d 274, 286-88 (Tx. Crim. App. 2010). For all these reasons, Mr. Smith needs the assistance of a TDCJ records and classification expert.

In addition, Mr. Smith needs the assistance of this expert to help mount his defense against the anticipated testimony of Ricardo Brown. Brown was an inmate in the Zavala County Jail during the time Mr. Smith was held there before his trial. During this time period, Brown was involved in an escape with Mr. Smith and a third inmate from the Zavala County Jail. Brown testified for the state thereafter in both phases of Mr. Smith's first trial. He testified that the escape was Smith's plan, that during the escape Smith confessed that he killed Jones during a home invasion and robbery, and that while on escape Smith led them to where Jones's gun had been buried after the robbery/murder. We dispute the credibility of all of Brown's testimony and intend to challenge its

admissibility, and if admitted, its credibility before the jury. To assist us in this effort, we need the expertise of the TDCJ records and classification expert to review Brown's prison and jail records and parole-application records for evidence of his deception, manipulation of others, and self-serving shifting of blame to others.

III.
**FRANK AUBUCHON IS A QUALIFIED EXPERT IN TDCJ CLASSIFICATION
AND RECORD-KEEPING PRACTICES**

The resume of Frank G. Aubuchon is attached as an Appendix to this motion. Mr. Aubuchon has extensive expertise in TDCJ's classification procedures. He was employed by TDCJ for twenty-six years (26). During his tenure with TDCJ, he held classification-related positions for over twenty years. From 1988 to 1992, he was chief of Classification for the Huntsville Unit. From August 1, 1992 to September 30, 1994, he was Count Room Coordinator for TDCJ. From October 1, 1994 to June 30, 2000 he held the position of Administrator for Unit Classification. Most recently, he served as Administrator for Classification Operations from July 1, 2000 to December 31, 2007.

Mr. Aubuchon charges \$150.00 per hour for consulting services. It is estimated that 75 hours of his time will be required by the defense, for a total of \$11,250. The records that the defense has already obtained for Mr. Aubuchon's review are voluminous, he will likely be required to go to TDCJ's central records office to identify the existence of a number of additional records concerning Mr. Brown, he will consult extensively with counsel, and he will likely need to testify in at least one pretrial hearing as well as at trial.

IV.
***NUNC PRO TUNC* AUTHORIZATION OF FUNDING**

Mr. Aubuchon began the preliminary work on Mr. Smith's case on July 11, 2011. For this reason, we ask that the Court authorize him to bill for his services from that date forward. **FOR THESE REASONS**, the defense asks that the Court authorize the payment of reasonable funds to Frank G. Aubuchon as the TDCJ classification and records expert in this case, and to order the County Auditor of Dimmit County to compensate him for up to 75 hours of work at \$150.00 per hour, from July 11, 2011, forward.

Respectfully submitted:

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