

In The United States District Court
For The Northern District Of Ohio

Tyrone Noling,)	Case No. 5:04-cv-01232
)	
Petitioner,)	Judge Nugent
)	
vs.)	Magistrate Judge Hemann
)	
Margaret Bradshaw, Warden,)	
)	
Respondent.)	

Petitioner Noling’s Motion for Funds for Expert Assistance

Petitioner Tyrone Noling, under 21 U.S.C. § 848(q)(4)(B) and 18 U.S.C. § 3006A (a)(2)(B) and (e)(1), moves this Court for funds to employ experts necessary for investigation, evaluation, preparation, and presentation of his habeas claims. This motion is filed in the alternative—ruling is unnecessary should this Court stay and abey Noling’s case and allow him to return to state court to exhaust facts. The reasons for this request are set forth in the accompanying memorandum.

Respectfully submitted,

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Counsel for Petitioner

Memorandum in Support

Tyrone Noling was convicted and sentenced to death for Bearnhardt and Cora Hartig's murders. Subsequently Noling has obtained a variety of documents that demonstrate that his trial attorneys rendered deficient performance at his trial. These same documents support Noling's claims that he did not kill the Hartigs. Relevant to this request are documents that demonstrate that an alternative suspect owned a weapon that could have been used to kill the

Hartigs. Noling now seeks funds for ballistic testing to further litigate his innocence and ineffective assistance of counsel claims.

Funds needed for ballistics testing.

Noling requests funds to conduct ballistics testing on shell casings and bullet fragments found in the Hartig's home. This testing is relevant to Noling's First and Sixth Habeas Grounds for Relief.

Several shell casings and bullet fragments were recovered in the Hartig's home. BCI&I narrowed the weapon used to the kill the Hartig's to four possible brands. Lewis Lehman, one of the alternative suspects Noling addresses in his state court pleadings, owned a Titan .25 caliber handgun—one of four possible brands of weapon that could have been used to kill the Hartigs.

Undersigned counsel has spoken with two ballistics experts—Jim Kersey of Cleveland and John Nixon of Athena Research & Consulting in Indiana. Both men have indicated that additional testing of the casings and bullet fragments could further narrow the weapon used to kill the Hartigs.

Mr. Nixon reports the reference database used to identify ballistics evidence, such as bullet fragments and casings, is continually updated. The reference database may be as much as two times larger than it was in the 1990s. The increase in the size of the database means that more, or better results, maybe available if this evidence is re-tested. Mr. Nixon has indicated that such testing should cost a maximum of \$6,000.

Noling needs expert assistance to further investigate, prepare, and present his First and Sixth Habeas claims. He requests funds in the amount of \$6,000 to conduct the requested ballistics testing.

Expert assistance is authorized

Because this is a capital habeas corpus petition and Noling is indigent, he is entitled to funds for expert assistance under both 21 U.S.C. § 848(q)(4)(B) and 18 U.S.C. § 3006A (a)(2)(B) and (e)(1). These provisions permit application for funds for expert assistance that are reasonably necessary for the investigation, preparation, and presentation of claims for relief in a habeas corpus petition. Such assistance is likewise necessary to enable Noling to comply with McCleskey v. Zant, 499 U.S. 467 (1991). McCleskey requires the habeas corpus petitioner to conduct a reasonable investigation into the facts of his case and to present all claims to the district court in his initial petition for writ of habeas corpus.

The Anti-Drug Abuse Act of 1988 also entitled indigent capital defendants to necessary expert assistance in federal habeas corpus proceedings:

In any post-conviction proceeding under section 2254...of Title 28, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to...the furnishing of such services in accordance with paragraphs (5), (6), (7), (8), and (9).

21 U.S.C. § 848(q)(4)(B).

Under 21 U.S.C. § 848(q)(9), “[u]pon a finding in ex parte proceedings that investigative, expert, or other services are reasonably necessary for the representation of the defendant, the court shall authorize the defendant’s attorneys to obtain such services on behalf of the defendant and shall order the payment of fees and expenses therefore....” See also 18 U.S.C. § 3006A (2)(B) (persons seeking relief under 28 U.S.C. § 2254 entitled to representation when “the court determines that the interests of justice so require.”); 18 U.S.C. 3006A(e)(1) (counsel may request investigative, expert, or other services for those financially unable to obtain such services when

such services are “necessary for an adequate defense.”); Ake v. Oklahoma, 470 U.S. 68, 79-80 (1985).

Furthermore, expert assistance is necessary to permit counsel to comply with their duty to reasonably investigate this case and present all viable claims for relief in Noling’s initial habeas corpus petition. In McCleskey, the Supreme Court held that a habeas petitioner “abuses the writ” of habeas corpus “by raising a claim in a subsequent petition that he could have raised in the first, regardless of whether the failure to raise it stemmed from a deliberate choice.” 499 U.S. at 489. The petitioner who “abuses the writ” is not entitled to review of his claim, unless he can either show “cause and prejudice” for his actions, or demonstrate that failure to decide his claim will constitute a “fundamental miscarriage of justice.” 499 U.S. at 493-94.

To avoid an “abusing the writ” problem, Noling must comply with the mandate of McCleskey. Having “obtained a sufficient basis to allege” his claims, he thus seeks to make a “reasonable investigation” into all such claims—investigation that he cannot undertake without expert assistance. Petitioners have the affirmative duty to raise all claims in their initial petition. McCleskey has placed a concomitant duty upon the federal courts to provide petitioners the necessary tools to discharge this duty, including the provision of expert assistance and services necessary for counsel to explore critical issues in this case.

McCleskey compels expert assistance when, as here, Noling seeks to fully investigate the case and pursue all non-frivolous claims in his initial federal habeas petition. Because this is Noling’s initial petition and he has shown a sufficient basis for alleging deprivations of his constitutional rights, McCleskey entitles him to expert assistance that will reveal critical facts which demonstrate that he is entitled to relief.

Conclusion

Noling is indigent and cannot afford to employ expert witnesses who can assist him with evaluating, preparing, and presenting evidence to enable him to prove his claim. Under 28 U.S.C. 848, 18 U.S.C. § 3006A, and McCleskey v. Zant, Noling is entitled to the expert assistance he requests. It is reasonably necessary to the evaluation, preparation, and presentation of these claims.

Noling respectfully requests that this Court grant his request for expert assistance and authorize funds for the above described expert services.

Respectfully submitted,

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Certificate of Service

This is to certify that a copy of the foregoing has been electronically filed on November 3, 2006. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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