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 Reply to Respondent's Opposition to Noling's Motion for Funds for Expert Assistance

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On November 3, 2006, Petitioner Tyrone Noling, under 21 U.S.C. § 848(q)(4)(B) and 18 U.S.C. § 3006A (a)(2)(B) and (e)(1), moved this Court for funds to employ experts necessary for investigation, evaluation, preparation, and presentation of his habeas claims. Respondent opposed that request on November 17, 2006. Noling replies to Respondent's motion in opposition in the attached memorandum.

Respectfully submitted,

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Memorandum in Support

1. Ineffective assistance of counsel does not require Noling to prove his innocence.

In arguing against an expenditure of funds for ballistics testing in this case, Respondent suggests that Noling is not entitled to these funds because the testing will not exculpate him. However, that is not the standard of review for an ineffective assistance of counsel claim.

The standard for judging counsel's effectiveness is found in Strickland v. Washington, 466 U.S. 668 (1984). When evaluating claims of ineffective assistance of counsel under

Strickland, this Court must first determine if counsel's performance was deficient. Id. at 686-87. The proper measure of counsel's performance is reasonableness under prevailing professional norms. Id. at 688. Second, this Court must determine if Noling was prejudiced by counsel's deficient performance. Id. at 686-87. This Court must assess whether Noling was deprived of a reliable trial result. Id. at 693-94. Thus, Noling need not demonstrate outcome determinative error, or that someone else committed the offense, as suggested by the Respondent. See id.; Glenn v. Tate, 71 F.3d 1204, 1210-11 (6th Cir. 1995). Moreover, exculpating the Petitioner is not the standard of review for assessing a habeas petitioner's request for funds. See McCleskey v. Zant, 499 U.S. 467 (1991); 21 U.S.C. § 848(q)(4)(B). See also 21 U.S.C. § 848(q)(9); 18 U.S.C. § 3006A (2)(B); 18 U.S.C. 3006A(e)(1); Ake v. Oklahoma, 470 U.S. 68, 79-80 (1985).

2. Testing will enhance compelling evidence of alternative suspect.

As Noling notes in section 1, outcome determinative error need to be established to demonstrate ineffective assistance of counsel. Rather, a Court must consider whether the trial result was reliable. Noling already presents a compelling case that his trial was not reliable because two alternative suspects were not offered to the jury. The ballistics testing relates to one of those suspects, Lewis Lehman.

Noling could have established at trial, had counsel done their job, that:

•Dr. Cannone, told authorities that Mr. Hartig was upset over a loan to his insurance agent, which had been defaulted. Mr. Hartig intended to call the agent and demand immediate payment. (See Dkt. 77, Ex. D.)

•Documentation that Lehman owned a .25 caliber Titan handgun, one of the four brands that could have been the murder weapon according to BCI (Id., Ex. E.);

•Documentation that William LeFever had seen Lehman's handgun only 4 years prior to the murder, in 1986 (Id., Ex. F.);

•A crime scene report that detailed that Mr. and Mrs. Hartig were sitting at the kitchen table when they were shot (Id., Ex. G, H); it also appeared that one other subject was

sitting at the table facing the door (Id.); and that the victims did not struggle and there was no sign of alarm (Id.); Mr. Hartig's wallet was undisturbed (Id.); and a desk was ransacked with papers on the floor (Id., Ex. G.)

The following facts were withheld by the State, which would have further bolstered Lehman as a viable alternative suspect, including:

•Lehman refused a polygraph examination. (See Dkt. 75, Ex. N.)

Additional testing that could narrow the murder weapon down to only one brand, the brand Lehman owned, would have significantly strengthened Lehman as an alternative suspect. Trial counsel knew he was a one in four shot, they should have done more.

3. There was no third gun.

Respondent continues to rely on the State's claim at trial that Noling possessed a third gun, never recovered by authorities. But the little evidence that supported this claim has been destroyed.

Because the murder weapon was never found in this case, it was important to find a witness who could testify that Noling and his co-defendants had a third gun that had never been discovered. Ron Craig, the Prosecutor's investigator, got that testimony, at least at the Grand Jury, from Kenneth Garcia. However, when law enforcement initially interviewed Garcia on May 9, 1990, he told law enforcement only that Dalesandro came to his house to sell two guns—a sawed off shotgun and a .25—and that Ray Rose purchased the .25. (Dkt. 75, Ex. F). This .25 was stolen in the Hughes robbery and used in the Murphy robbery and is not the murder weapon.

It was not until August of 1992 when Ron Craig interviewed him, that Garcia mentioned a second .25. (Id., Ex. G.) Garcia's grand jury testimony raises serious concerns about the methods used by Craig to question Garcia and to elicit his statements and testimony. Did Garcia

create the third gun out of fear for what Craig would do to him? Did other witnesses do the same?

Moreover, it is less than clear that Garcia ever actually saw this third gun. Despite his August 4, 1992 statement to Craig in which he said he sold this gun to Norman Scott, at the grand jury, Garcia testified that "The problem here is I did tell Craig about the [sic] cause there was a third gun. Cause I can not [sic] remember too good if it took (inaudible) there was a third gun, but I don't remember if I sold it or I gave it back to him." (Id., Ex. E.) Not only could Garcia not remember exactly what happened to this gun, but also he is inconsistent about who came to him and how they knew him. At one point in his testimony, Garcia says he did not know how Dalesandro and the others knew him. He said that he used to work with his aunt and knew the family, "but how the kid came to me I don't know." (Ex. E.) Yet, he also testified that he was not sure who was with Dalesandro when he came to sell the second .25, stating that "I'm not quite sure, it's been so long. Cause he up [sic] so many times with them [sic] guys…" (Ex. E.)

More significantly, Garcia's testimony was coerced by Craig. While being questioned by Assistant Prosecutor Robert Durst, Garcia testified that:

> Yea, I got nervous, not only that but I would rather speak to you than speak to Craig because I mean so far, he scares everybody by, I'm trying to help him find a weapon and he scared me and I tell him I'm trying my best and he pulled over with all these dope dealers one day trying to get me and he said if I have to I'll put it where a snitch in your house (the tape is hard to understand at this point) and I got kids and he scared me right there more than anything else.

(Id., Ex. E.) Garcia's testimony appears less than truthful, an appearance bolstered by Craig's threat to frame him for a crime he did not commit if he did not cooperate.

Noling's alleged accomplices' trial testimony consistently referenced their possession of only three guns: a BB gun, a shotgun, and the .25 stolen during the Hughes robbery. (Tr. 832,

842, 949, 953, 1033-34, 1040, 1048.) When Wolcott described the guns Noling and St. Clair carried into the Hartig home, he indicated that Noling carried the small gun that he stole at the previous robbery. (Tr. 909). Similarly, Dalesandro's inventory of the weapons carried on April 5, 1990 only accounted for three weapons. (Tr. 1048).

Subsequently, Dalesandro's testimony diverged from Wolcott's and St. Clair's. Dalesandro asserted that the boys possessed two small automatic guns. (Tr. 1066). Dalesandro claimed that he sold one of the small guns to "Chico" Garcia after the Hartig murders. (Tr. 1059.) However, Dalesandro testified that Noling had placed the gun he used inside the Hartig's home in the glovebox, (Tr. 1064), and Noling asked Dalesandro to sell that gun after the police released Dalesandro from jail. (Tr. 1064.) Dalesandro implied that it was this second gun that Noling used in the Hartig murders.

However, there was substantial evidence apparent from the trial record that demonstrated that there was only one .25. Wolcott does not mention a second .25. St. Clair does not mention a second .25. Moreover, prior to the State eliciting a statement from Dalesandro that there was a fourth gun, Dalesandro had consistently maintained that they only had possession of three guns—a .25 automatic, a BB gun, and a sawed off shotgun. (Tr. 1040, 1048.) And, Dalesandro did not mention that second .25 automatic until February 24, 1993, years after the crime and his earlier inculpatory statements. (Tr. 1115.)

Dalesandro's story about the third gun becomes even more incredible after review of the *Cleveland Plain Dealer*. Detective Mucklo informed the *Plain Dealer* that Dalesandro's car was searched at the time he was arrested—and no weapon was found. (Dkt. 69, Ex. A.) It stretches credulity to believe that authorities would not have opened the glovebox and discovered the weapon Dalesandro claimed was hidden there.

There is no missing third gun. It is a smokescreen—Noling did not kill the Hartigs with a some mystery gun.

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, 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 29, 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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