IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

BILLY JACK CRUTSINGER,	§	
	§	
PETITIONER,	§	
v.	§	
	§	No. 4:07-CV-00703-Y
LORIE DAVIS, Director,	§	
Texas Department of Criminal	§	(death-penalty case)
Justice, Correctional	§	
Institutions Division,	§	
	§	
RESPONDENT.	§	

OPINION AND ORDER DENYING MOTION FOR RECONSIDERATION

Before the Court is petitioner Billy Jack Crutsinger's Motion for Reconsideration of Order Denying Motion for Services of DNA Expert to Conduct Preliminary Review, filed June 12, 2017. (ECF No. 76, "Motion for Reconsideration.") Crutsinger moves the Court to reconsider its denial of his request for a DNA expert "to conduct an initial review and screening of the bench notes/data" supporting the DNA testing conducted in 2003 for purposes of trial. See Opposed Motion for Services of DNA Expert to Conduct Preliminary Review, p. 1 (ECF No. 72, "Motion for Services"). The Motion for Services stated that, after the preliminary review, Crutsinger may seek additional funding from this Court to perform the actual DNA testing. (Motion for Services, p. 1.)

The Court denied the request because there is a Texas statute that provides counsel to indigent inmates for the purpose of pursuing DNA testing and, in the alternative, because Crutsinger did not demonstrate a reasonable necessity for the requested

services. See *Crutsinger v. Davis*, 2017 WL 2418635 (N.D. Tex. June 5, 2017) (ECF No. 75,"Order Denying Authorization").

Crutsinger's motion for reconsideration contends that the Texas statute is not applicable to him, that he does not have counsel in state court, and that the services are sought in connection with a stage of proceedings covered by the appointment statute for federal habeas counsel. See 18 U.S.C. § 3599. Respondent asserts that the requested services are outside the scope of federal habeas counsel's representation and that Crutsinger failed to demonstrate a reasonable necessity for the funds. See Respondent's Opposition to Petitioner's Motion for Reconsideration of the Court's Order Denying Expert Funding (ECF No. 80). Crutsinger's Reply reasserts that the Texas statute does not avail him because he does not seek DNA "testing" but only a "reinterpretation" of DNA test results. He also contends that the Court has erroneously required him to show a "substantial need" for funding, a standard that is currently under Supreme Court review. See Reply to the Director's Response (ECF No. 81, "Reply").

I. Counsel and Expert Funding are Available Under State Law

The Court denied the requested expert authorization because Texas has a statute that provides counsel for the purpose of pursuing post-conviction DNA testing. The statute provides that a Texas court "shall appoint counsel for the convicted person if the person informs the court that the person wishes to submit a motion

under this chapter, the court finds reasonable grounds for a motion to be filed, and the court determines that the person is indigent." *See* Tex. Code Crim. Proc. Ann. art. 64.01(c). Compensation of such counsel is provided in the same manner as is required by article 11.071, the procedure for habeas corpus applications in death penalty cases. *See* Art. 64.01(c)(1); Tex. Code Crim. Proc. Ann. art. 11.071.

Article 11.071 allows *ex-parte* requests for the prepayment of counsel's expenses, including expert fees, to investigate potential claims. See Art. 11.071, § 3(b), (c), (d). Thus, the plain text of the DNA statute provides for the expert services that Crutsinger is asking this Court to provide--expert services in advance of a motion for DNA testing. *See Pruett v. State*, No. AP-77,065, 2017 WL 1245431, *10 (Tex. Crim. App. Apr. 5, 2017) (unpublished) (acknowledging that a court shall grant a timely and reasonable request for expenses, including experts, in a DNA proceeding under article 64.01).

Crutsinger contends that he cannot take advantage of the Texas statute because he is not at this time seeking actual testing but only a re-interpretation of existing results and a preliminary assessment of whether DNA testing is warranted. He contends there "is no statute that even remotely affords counsel or expert assistance to reinterpret prior DNA testing." (Reply, p. 4.) In *Skinner*, however, the Court of Criminal Appeals remanded the appeal

of a DNA motion to the trial court to address the same issues raised by Crutsinger in this case. See *Skinner v. Texas*, 484 S.W.3d 434, 439 (Tex. Crim. App. 2016) (ordering abeyance for trial court to address possible errors in DNA results based on errors in the statistical database and the manner in which DNA mixtures were analyzed). Based on *Skinner*, this Court concludes that the reinterpretation of mixture results is within the scope of an article 64.01 motion.

Further, Crutsinger's assertion, "maybe I will and maybe I won't" seek actual retesting does not render Crutsinger ineligible under the Texas statute. If there is a reason to retain a DNA expert *other* than for the purpose of possibly seeking DNA testing, Crutsinger does not state what that reason is. Crutsinger need only notify the state court that he "wishes" to submit a motion and show reasonable grounds therefor. Crutsinger has already expressed to this Court his "wish" to possibly "seek additional expert services to perform the actual testing." (Motion for Services, p. 1.) That he has made the inherent choice *not* to file a motion in state court does not disqualify him under the Texas statute.

Crutsinger relatedly contends the Court was mistaken in its conclusion that he has adequate counsel provided in state court. Crutsinger advises that Lee Kovarsky does not in fact represent him, but only handled his petition for a writ of certiorari in the United States Supreme Court. To the extent this Court previously

concluded that Crutsinger had access to counsel in state court, it was based on exhibits Crutsinger filed, which identify Mr. Kovarsky as his counsel of record. (ECF No. 72-1.) If the Court was mistaken in its conclusions, it is because Crutsinger did not qualify his exhibits, as he does now. In any event, the present assertion that Mr. Kovarsky is no longer his counsel of record misses the point: the state court may yet appoint counsel for him under article 64.01.

II. Section § 3599 does not mandate federal representation

Crutsinger challenges the Court's conclusion that DNA testing is not a stage that is ordinarily "subsequent" to federal habeas and, therefore, not a stage that requires the assistance of federal counsel under 18 U.S.C. § 3599. He argues that the Court is wrong because he is not presently seeking to conduct DNA testing and because his request is driven by a change in DNA protocols that occurred long after federal counsel's appointment.

Whether Crutsinger is seeking DNA testing or investigating the possibility of doing so, he fails to provide any authority identifying such proceedings as a stage subsequent to federal habeas within the meaning of § 3599 such that the assistance of federal counsel is mandatory. Crutsinger cites *Wilkins v. Davis*, 832 F.3d 547, 557–58 (5th Cir. 2016), *cert. denied*, 137 S. Ct. 808, 196 L. Ed. 2d 594 (2017) to argue that federal habeas counsel is obligated to represent him under § 3599. The issue in *Wilkins* was

whether federal habeas counsel, who had been appointed by the Court of Appeals to represent Wilkins on appeal, must seek reappointment from the district court to represent Wilkins in connection with a state clemency petition and a subsequent state habeas application. *See id.* at 551, 557. The Court of Appeals held that federal habeas counsel did not have to be reappointed by the district court to seek compensation for such work that included, among other things, a state court motion for the appointment of a DNA expert. See *id.* at 551 n.5.

Unlike the case at hand, Wilkins was represented in connection with an existing clemency petition and a subsequent state habeas application. Also, *Wilkins* did not hold that the district court was obligated to pay counsel's fees for seeking a DNA expert in state court; it remanded that issue to the district court. See *id.* at 558. As noted in this Court's Order Denying Authorization, a district court may have discretion under § 3599 to pay counsel on a case-by-case basis in "other appropriate motions and procedures." *See Harbison v. Bell*, 556 U.S. 180, 190 n.7 (2009). But *Wilkins* does not mandate it. On the contrary, *Wilkins* acknowledged that the present circumstances, where the prisoner has a statutory right to counsel under state law, are an exception to the general rule that federal counsel must represent petitioners in subsequent proceedings. *See Wilkins*, 832 F.3d at 558, n.39 (citing *Irick v. Bell*, 636 F.3d 289 (6th Cir. 2011)).

Further, the fact that the DNA protocol changed subsequent to federal habeas counsel's appointment is not the controlling factor. *Harbison* teaches that state habeas is not a stage "subsequent" to federal habeas even though state exhaustion proceedings sometimes follow the initiation of federal habeas. *See Harbison*, 556 U.S. at 189-90. Likewise, the fact that a new DNA protocol followed the federal habeas proceedings in this case does not automatically make DNA reinterpretation a stage "subsequent" to federal habeas.

III. Necessity of the requested services

Crutsinger asserts that the Court has no discretion to deny funding because he might use the funding to prepare a successive federal or state habeas application or executive clemency petition. Assuming this is true, he has not identified an issue that he intends to raise in any such proceeding and has not, therefore, shown a reasonable necessity for such funds.

Crutsinger asserts that this holding subjects him to an inappropriately burdensome test for the authorization of CJA funds, a test that is currently pending Supreme Court review. See *Ayestas v. Davis*, 137 S. Ct. 1433 (2017). Crutsinger asserts that the Court used the questionable "substantial need" test by requiring him to "identify the claim and demonstrate its merit as a pre-condition for authorizing. . . the services needed to make that very showing." Reply, p. 5.

This assertion is incorrect. The Court's Order Denying Authorization stated:

> To be clear, the Court is not requiring Crutsinger to show a "substantial need" for the requested DNA services nor is the Court requiring him at this point to demonstrate procedural viability of the claim. **The Court does, however, expect Crutsinger to identify a constitutional claim and articulate how the requested funds would be used to develop it.**

(Order Denying Authorization, p. 13-14(emphasis added).)

The Court did not require Crutsinger to show the potential merit of a claim. It asked only that Crutsinger (1) identify a constitutional claim and (2) articulate how the requested funds would be used to develop it. Although Crutsinger contends he needs a DNA expert to make this showing, the Court disagrees. Crutsinger does not need a DNA expert to state why it might help him to have a favorable reinterpretation of the DNA test results. Nor does Crutsinger need an expert to assert he is actually innocent, if that is his intent.

Crutsinger points out that the State of Texas previously notified him that his case may potentially be impacted by a change in the mixture protocol and that the medical examiner's office subsequently could not issue an amended report because they were no longer using the necessary kits. Crutsinger concludes, therefore, that this demonstrates a reasonable need to determine "whether or how" his case may be impacted in executive clemency and future applications for habeas relief in state and federal court. But it

is precisely because the State of Texas initiated this issue that makes the Texas statute a more appropriate vehicle for Crutsinger's request. *E.g.*, *Skinner*, 484 S.W.3d at 439 (ordering trial court to address the application of errors in statistical database and the manner in which DNA mixtures were analyzed).

Crutsinger fails to demonstrate that the Texas statute's provision of counsel is not available to him, should he chose to inform the state court of his "wish" to pursue DNA testing. Further, he fails to show a reasonable necessity for the requested funds because he makes no attempt to identify a constitutional claim or demonstrate how the requested funds would be used to develop it.

The motion for reconsideration [ECF No. 76] is **DENIED.**

SO ORDERED this 24th day of August, 2017.

Terry R. Means

TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

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