

Not Intended for Print Publication

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION**

EDWARD N. BELL,)	
)	
Petitioner,)	Case No. 7:04CV00752
)	
v.)	OPINION AND ORDER
)	
LORETTA KING, WARDEN, SUSSEX I STATE PRISON,)	By: James P. Jones
)	Chief United States District Judge
)	
Respondent.)	

James G. Connell, III, Devine & Connell, P.L.C., Fairfax, Virginia, and Matthew K. Roskoski, Latham & Watkins, L.L.P., Washington, D.C., for Petitioner; Katherine P. Baldwin, Senior Assistant Attorney General of Virginia, Richmond, Virginia, for Respondent.

In this habeas action brought by a Virginia prisoner under sentence of death, the petitioner has filed a Motion for Funds to Permit the Retention of Expert Witnesses, a Mitigation Investigator, and a Fact Investigator. The parties have briefed the issues and the motion is ripe for decision.¹ After considering the parties' arguments and the relevant authority, I grant the petitioner's motion for funding with

¹ The state advises that Loretta King has been appointed as the new warden at Sussex I State Prison. Accordingly, she has been substituted as the respondent pursuant to Federal Rule of Civil Procedure 25(d)(1).

respect to a Virginia fact investigator but deny funding for all other requested experts and investigators.

I

Petitioner, Edward N. Bell, is a state prisoner under capital sentence for murder. His conviction and sentence were affirmed on direct appeal by the Virginia Supreme Court, *Bell v. Commonwealth*, 563 S.E.2d 695 (Va. 2002), *cert. denied*, 537 U.S. 1123 (2003), and his state post-conviction efforts were unsuccessful. Bell filed a petition for writ of habeas corpus with this court, and I granted him an evidentiary hearing on his claim that he received ineffective assistance of counsel due to his trial attorneys' failure to present available evidence in mitigation at the sentencing phase of his trial. *See Bell v. True*, 413 F. Supp. 2d 657, 738 (W.D. Va. 2006).

The petitioner is indigent and desires funding for expert and investigative services to prepare for the evidentiary hearing. *See* 21 U.S.C.A. § 848(q)(4)(B), (q)(9) (West 1999) (providing that a capital habeas petitioner who is financially unable to obtain adequate investigative or expert services reasonably necessary for his case may apply to the court for payment of such fees or expenses). The petitioner moved for leave to file an ex parte motion seeking these services, but because the petitioner did not make the requisite showing of a need for confidentiality, I denied

this motion. *See Bell v. Washington*, No. 7:04CV00752, 2006 U.S. Dist. LEXIS 8415 (W.D. Va. Mar. 5, 2006).

The petitioner subsequently filed the present motion for expert and investigative assistance. Specifically, Bell requests funding to cover the costs for services of three expert witnesses and two investigators. The state argues that none of the various expert and investigative services requested are reasonably necessary and that the motion should thus be denied in its entirety. Because I find that the services of a Virginia fact investigator are reasonably necessary for Bell's representation at the evidentiary hearing, I will grant the petitioner authorization to cover such services. Authorization for the other expert and investigative services set forth in the petitioner's motion will be denied.

II

Bell requests funding totaling \$92,250, as well as permission to request additional funds should this amount prove inadequate, to cover the costs of a clinical and forensic psychology expert, a neuropsychology expert, an expert on the applicable standards of capital representation, a Jamaican mitigation investigator, and a Virginia fact investigator. Bell argues that the appointment of such experts is reasonably necessary for his representation.

The law entitles capital defendants to qualified legal representation in any post conviction proceeding under § 2254 of the federal habeas corpus statute. *See* 21 U.S.C.A. § 848(q)(4)(B), (9) (West 1999); *McFarland v. Scott*, 512 U.S. 849, 856-57 (1994). This right to counsel also entitles capital defendants to a variety of expert and investigative services upon a showing of reasonable necessity. *See McFarland*, 512 U.S. at 855. The statute provides that

[u]pon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence, the court may authorize the defendant's attorneys to obtain such services on behalf of the defendant and, if so authorized, shall order the payment of fees and expenses therefor

21 U.S.C.A. § 848(q)(9) (West 1999).

While the statute does not provide guidance as to what constitutes a “reasonable necessity,” courts have held that the services of an expert are reasonably necessary “when a substantial question exists over an issue requiring expert testimony for its resolution and the defendant’s position cannot be fully developed without professional assistance.” *Wright v. Angelone*, 151 F.3d 151, 163 (4th Cir. 1998) (quoting *Williams v. Martin*, 618 F.2d 1021, 1026 (4th Cir. 1980)) (internal quotations omitted). In other words, “established habeas corpus and death penalty precedent suggests that Congress intended to provide prisoners with all resources

needed to discover, plead, develop, and present evidence determinative of their ‘colorable’ constitutional claims.” *Patrick v. Johnson*, 48 F. Supp. 2d 645, 646 (N.D. Tex. 1999) (citation omitted). Expert services are not reasonably necessary if the petitioner would not be able to win on the merits regardless of the expert’s findings. *See Weeks v. Angelone*, 4 F. Supp. 2d 497, 519 (E.D. Va. 1998).

In considering whether the requested experts and investigators are reasonably necessary for Bell’s representation, it is important to note that the issue on which this court granted Bell an evidentiary hearing is a narrow one. The hearing gives Bell an opportunity to prove that his trial counsel was ineffective by virtue of their failure to investigate and present mitigation evidence during the trial’s sentencing phase, and the standard this court must apply in determining whether Bell has proven this claim is that announced in *Strickland v. Washington*, 466 U.S. 668 (1984).

In order to establish ineffective assistance under *Strickland*, Bell must prove both that counsel’s performance was deficient and that the deficient performance prejudiced the defense. *Id.* at 687. When analyzing the performance prong of this test, “[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” *Id.* at 689. Because Bell’s *Strickland* claim must be analyzed based on

the circumstances Bell's trial attorneys faced at the time of their representation, the mitigation case that could potentially be created by habeas counsel with unlimited resources is irrelevant and funding should not be authorized to produce such information. With this in mind, I will now consider each of Bell's funding requests.

A

Bell first requests two new mental health experts, namely a clinical and forensic psychology expert and a neuropsychology expert. According to Bell, testimony of the clinical and forensic psychologist is necessary to correlate the cognitive deficits and other mitigating factors. Bell contends that the neuropsychologist is necessary in order to determine and evaluate the existence of mitigating neuropsychological evidence that should have been presented at trial.

I find that the testimony of these proposed experts is not reasonably necessary for representation on the ineffective assistance claim.² At the request of Bell's trial attorneys, the state trial court appointed a psychological expert, William Stejskal, to assist Bell at trial. Dr. Stejskal conducted a complete mental status evaluation and indicated that Bell's cognitive ability was questionable, but Bell's trial counsel

² As explained above, Bell's claim of mental retardation is no longer an issue—the only matter to be addressed at the evidentiary hearing is the reasonableness of Bell's trial counsel's investigation and presentation of mitigation evidence during the sentencing phase. Thus, to the extent that these experts would perform a mental retardation evaluation, they are unquestionably not reasonably necessary for Bell's representation at the evidentiary hearing.

elected not to present Dr. Stejskal's findings at Bell's trial. The relevant issue to be decided at the evidentiary hearing is whether Bell's trial counsel was ineffective in failing to raise Bell's mental deficiencies as evidence in mitigation and whether that failure caused prejudice, not whether Bell's trial counsel should have procured additional experts with opinions even more favorable to Bell's position. Indeed, Bell "has no right to 'shop around' at state expense until he finds a doctor who will give him the opinion he wants," and thus there is no assurance that the trial court would have agreed to appoint additional psychological experts even if Bell's trial counsel so requested. *Pruett v. Commonwealth*, 351 S.E.2d 1, 7 (Va. 1986). Accordingly, I find that any opinions that may be obtained from the two requested psychological experts are irrelevant to Bell's ineffective assistance claim and are thus not reasonably necessary for his representation.

B

Next, Bell requests funding for a Jamaican mitigation investigator and a Virginia fact investigator. The proffered Jamaican mitigation investigator is a social worker with extensive experience in death penalty mitigation investigations and in working with Jamaicans. Bell states that if funding is permitted, she would meet with Bell and his family in Virginia, as well as travel to Jamaica to interview Bell's associates and obtain relevant documents. Bell indicates that the Virginia fact

investigator would meet with Bell's family members in Virginia and with other potential witnesses in order to locate mitigating evidence that could have countered the Commonwealth's evidence regarding aggravating factors. For the following reasons, I deny funding for the Jamaican mitigation investigator but will award funding to cover the costs of the Virginia fact investigator.

A Virginia fact investigator is reasonably necessary to Bell's representation in the evidentiary hearing on his ineffective assistance claim because the record indicates that Bell's trial counsel had access to a mitigation investigator but failed to take advantage of such resource. Bell's trial court appointed a mitigation investigator, Marie Deans, in February of 2000. Deans interviewed Bell and concluded that Bell had problems with his cognitive abilities. She alerted Bell's trial counsel to these findings and requested the contact information for Bell's family so that she could perform her investigation, but trial counsel did not respond and Deans was thus unable to continue her services. If Bell succeeds in proving that his trial counsel's failure to pursue this investigation was deficient, the evidence uncovered by a Virginia fact investigator employed by Bell's current habeas counsel would be relevant to the prejudice prong of *Strickland*. While Bell's habeas counsel has already pointed to several pieces of evidence that they allege Bell's trial counsel should have uncovered and may potentially demonstrate prejudice, I will grant

funding for a Virginia fact investigator so that Bell may have an opportunity to discover any other evidence that would have been discoverable using the resources reasonably available to his trial attorneys.

While the Virginia fact investigator is reasonably necessary for Bell's representation, the same cannot be said for the Jamaican mitigation investigator. As explained above, the relevant issue at the evidentiary hearing will be whether Bell's trial attorneys' performance was objectively unreasonable under the circumstances they faced in the case at the time of their representation, and it is doubtful that the trial court would have appointed another investigator in addition to the investigator it had already provided. Indeed, under Virginia law, a defendant does not have an absolute right to even one investigator, and in order to obtain an investigator a defendant must show "that the services . . . would materially assist him in the preparation of his defense and that the denial of such services would result in a fundamentally unfair trial." *See Green v. Commonwealth*, 580 S.E.2d 834, 840 (Va. 2003) (quoting *Husske v. Commonwealth*, 476 S.E.2d 920, 925-26 (Va. 1996)). Bell lived in the United States for several years prior to the murder which placed him on death row, and his immediate family and friends live here; therefore, it is unlikely that Bell's attorneys could have obtained a specialized Jamaican mitigation investigator even if they had so requested. Thus, what a Jamaican mitigation investigator with an

extensive budget might find is largely irrelevant to Bell's claim and his request for funding for such investigator is denied.

C

Finally, Bell requests funding for an expert on the applicable standards for representation of capital defendants. Specifically, Bell wishes to hire an expert who will testify as to the applicable standards for investigation and mitigation and explain why Bell's trial counsel's conduct failed to meet this standard. Admittedly, courts do occasionally consider legal expert testimony regarding attorney standard of care when evaluating ineffective assistance claims. *See, e.g., Smith v. Massey*, 235 F.3d 1259, 1269 (10th Cir. 2000). However, because the standard is clearly set forth in *Strickland* and Bell has not set forth any argument as to why the testimony of a legal expert would be particularly enlightening, I need not grant Bell's funding request with respect to this expert. *See Duckett v. Mullin*, 306 F.3d 982, 999 (10th Cir. 2002) (holding that district court did not abuse its discretion in refusing to authorize legal expert for habeas petitioner on claim of ineffective assistance of defense counsel in failing to present adequate mitigation evidence at capital trial).

III

For the foregoing reasons, it is **ORDERED** as follows:

1. The petitioner's Motion for Funds to Permit the Retention of Expert Witnesses, a Mitigation Investigator, and a Fact Investigator is GRANTED IN PART AND DENIED IN PART;
2. The petitioner's request for authorization to obtain the services of Virginia fact investigator Bob Lessemun as described in the motion is GRANTED;³ and
3. The remaining requests are DENIED.

ENTER: April 11, 2006

/s/ JAMES P. JONES
Chief United States District Judge

³ Counsel for Bell must submit a completed CJA Form 31 to the court as a condition to this authorization.