

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

HAMLET LOPEZ, :
Petitioner, :
 :
v. : C.A. No. 13-451S
 :
A.T. WALL, Director of Rhode Island :
Department of Corrections, :
Respondent. :

**MEMORANDUM AND ORDER
DENYING MOTION TO APPOINT COUNSEL**

Before the Court is Petitioner Hamlet Lopez's motion for appointment of counsel (ECF No. 3) to represent him in connection with his Petition for Writ of Habeas Corpus challenging his conviction in the Providence Superior Court for first-degree murder. This Petition was filed on June 17, 2013; the motion for appointment of counsel was filed on July 18, 2013, and has been referred to me for determination.¹

Petitioner seeks to have counsel appointed to represent him in connection with his Petition because:

- 1) He is serving a sentence of life without possibility of parole for a conviction of first-degree murder, which was affirmed by the Rhode Island Supreme Court on June 22, 2012;
- 2) He is indigent and was represented on his state court appeal by the Rhode Island Public Defender's Office;
- 3) His claim for habeas corpus relief involves legally and scientifically complex and cutting-edge issues involving DNA evidence and the Confrontation Clause of the Sixth Amendment; and
- 4) He is Spanish-speaking and is unable to present his own case to the Court in English.²

¹ Petitioner also filed a motion for leave to proceed *in forma pauperis* (ECF No. 4). By text order, the Court ruled that motion moot because Petitioner had already paid the \$5 filing fee.

² The motion recites that it was prepared for Petitioner as a courtesy by his former appellate counsel.

There is no constitutional right to counsel in habeas corpus proceedings. Bido v. Wall, No. CA 08-399 ML, 2008 WL 4960197, at *1 (D.R.I. Nov. 18, 2008) (Mem. & Order of Martin, M.J.); see Pennsylvania v. Finley, 481 U.S. 551, 555 (1987); Ellis v. United States, 313 F.3d 636, 652 (1st Cir. 2002). Rather, federal law allows for the appointment of counsel in a § 2254 action “[w]henever the United States magistrate judge or the court determines that the interests of justice so require” 18 U.S.C. § 3006A(a)(2). In making this discretionary determination whether to appoint counsel, “a court must examine the total situation, focusing, *inter alia*, on the merits of the case, the complexity of the legal issues, and the litigant’s ability to represent himself.” Manisy v. Maloney, 283 F. Supp. 2d 307, 317 (D. Mass. 2003) (quoting DesRosiers v. Moran, 949 F.2d 15, 24 (1st Cir. 1991)).

The Petition seeks relief solely based on the admission of DNA evidence at his trial (over his objection) “through a lab supervisor, who never touched the DNA evidence, never performed any part of the testing on the evidence, and was never physically present when any of the testing was being conducted.” Petition, ECF No. 1, at 5. The Petition requests that the Court vacate the conviction and remand the matter for a new trial.

The first factor to be considered in assessing whether the interests of justice require the appointment of counsel is the merit of Petitioner’s claim. Here, this factor tips strongly against the appointment of counsel. The facts laid out by the Rhode Island Supreme Court in its decision demonstrate that, aside from the DNA evidence challenged by the Petition, the other evidence against Petitioner was overwhelming. State v. Lopez, 45 A.3d 1, 6-9 (R.I. 2012). As a result, the State has raised harmless error, which is an appropriate reason for concluding that a habeas petition should be dismissed. See Pettway v. Vose, 100 F.3d 198, 202 (1st Cir. 1996) (limitation of right to cross examine victim did not have substantial and injurious effect because other

evidence in case so overpowering). Moreover, the most recent pronouncements from the United States Supreme Court on the application of the Confrontation Clause to the presentation of DNA evidence suggest that Petitioner's substantive argument faces an uphill climb. Williams v. Illinois, 132 S. Ct. 2221, 2228 (2012) (if DNA profiles could not be introduced without calling technicians who participated in the preparation of the profile, economic pressures would encourage prosecutors to forgo DNA testing and rely instead on older forms of evidence, such as eyewitness identification, which is less reliable); Bullcoming v. New Mexico, 131 S. Ct. 2705, 2722 (2011) (Sotomayor, J., concurring in part) (no constitutional deprivation under Confrontation Clause if person testifying about DNA test results is supervisor with personal, albeit limited, connection to scientific test). Based on these considerations, I find that the lack of merit of Petitioner's claim weighs strongly against the appointment of counsel.

The second factor to be examined – the complexity of the legal issues – is similarly insufficient to justify appointment of counsel. While the motion states that the claim involves legally and scientifically complex and cutting-edge issues involving DNA evidence and the Sixth Amendment's Confrontation Clause, in fact, the Petition raises only a discrete legal issue regarding the application of the Confrontation Clause to the presentation of DNA evidence. While the operative cases from the Supreme Court are relatively recent, the Respondent correctly summarizes the issue in its objection to the motion (ECF No. 6): "the only determinative issue before this Honorable Court is the straightforward question of whether the Rhode Island Supreme Court's Confrontation Clause determination constitutes an unreasonable application of clearly established Supreme Court law." The complexity of this legal issue does not weigh in favor of appointing counsel.

Consideration of the third factor – Petitioner’s ability to represent himself – does not alter the analysis or suggest that this is a circumstance where the interests of justice require appointment of counsel. While the motion indicates that it was prepared as a courtesy by Petitioner’s former appellate counsel, neither the Petition itself nor the motion to proceed *in forma pauperis* are so designated, yet both are clearly-written and understandable. Therefore, the filings Petitioner has made demonstrated that he has the ability to file motions and communicate in writing in an understandable manner despite his indication that he is Spanish-speaking and is unable to present his case in English. The Court concludes that Petitioner has an adequate, if rudimentary, ability to manage self-representation.

After considering the totality of these circumstances, the Court is not persuaded that this is a case where the interests of justice require that counsel should be appointed. See Ellis v. United States, 313 F.3d 636, 653 (1st Cir. 2002) (habeas cases where counsel should be appointed are “few and far between”); United States v. Gonzalez-Vazquez, 219 F.3d 37, 42 (1st Cir. 2000) (appointment of counsel in habeas cases will be “rare”); Serrano v. Dickhaut, Civil No. 12-40012-FDS, 2012 WL 2343730, at *1-2 (D. Mass. June 19, 2012) (when habeas petition time-barred appointment of counsel not warranted). Accordingly, the motion for appointment of counsel (ECF No. 3) is DENIED.

So ordered.

ENTER:

/s/ Patricia A. Sullivan
PATRICIA A. SULLIVAN
United States Magistrate Judge
August 6, 2013