

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

DAVID LUCAS :
 :
 :
 v. : MISC. ACTION
 : 3:04 mc 232 (SRU)
 :
 LINDA M. RIDDLE, :
 ORCHID DIAGNOSTICS, :
 NAVAL CRIMINAL INVESTIGATIVE :
 SERVICES, DEPARTMENT OF THE :
 NAVY. :

RULING ON PETITION FOR RULE 27 PRE-ACTION DISCOVERY

While serving in the United States Navy, Petitioner David Lucas (“Lucas”) was charged with a crime involving an attack on a woman named Anna Edwards. In connection with Lucas’ prosecution, the United States Navy requested that Lucas undergo DNA testing. Although DNA tests were performed in 1989, they were neither used at trial nor provided to the defendant. Lucas was convicted and is currently incarcerated at the W.E. Donaldson Correctional Facility in Bessemer, Alabama. Lucas contends that the DNA test materials will exonerate him and petitions the court for permission to conduct discovery pursuant to Fed. R. Civ. P. 27. Lucas’s petition, a *pro se* submission, will be construed liberally. Burgos v. Hopkins, 14 F.3d 787, 790 (2d Cir. 1994) (Courts will “read [pro se] supporting papers liberally, and will interpret them to raise the strongest arguments that they suggest.”).

Rule 27 permits discovery before an action is commenced or pending appeal when the court is “satisfied that the perpetuation of testimony may prevent a failure or delay of justice.” Fed. R. Civ. P. 27(a)(3). A party petitioning the court pursuant to Rule 27 must demonstrate:

1, that the petitioner expects to be a party to an action cognizable in a court of the United States but is presently unable to bring it or cause it to be brought, 2, the subject matter of the

expected action and the petitioner's interest therein, 3, the facts which the petitioner desires to establish by the proposed testimony and the reasons for desiring to perpetuate it, 4, the names or a description of the persons the petitioner expects will be adverse parties and their addresses so far as known, and 5, the names and addresses of the persons to be examined and the substance of the testimony which the petitioner expects to elicit from each, and shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony.

Fed. R. Civ. P. 27(a)(1).

Lucas fulfills these conditions, having shown that he: (1) expects to be a party to an action under 28 U.S.C.S. § 2255; (2) seeks to discover relevant DNA evidence; (3) intends to establish facts proving his actual innocence; (4) has supplied names and addresses of proposed adverse parties; and (5) has supplied names and addresses of persons from whom he seeks discovery.

Rule 27 discovery is intended to “apply to situations where, for one reason or another, testimony might be lost to a prospective litigant” without immediate action. Petition of Ferkauf, 3 F.R.D. 89, 91 (D.C.N.Y. 1943). In addition to permitting deposition, Rule 27 allows the court to “make orders of the character provided for by Rules 34 and 35.” Fed. R. Civ. P. 27(a)(3).

Interpreting Lucas’ papers to raise the strongest possible arguments, I find good cause to grant Lucas’ petition. Proprietors of the DNA evidence that Lucas believes could exonerate him no longer have any need to maintain items related to his DNA test. Prompt discovery may be necessary to prevent loss or destruction of this material. Accordingly, Lucas’ petition is sufficient to permit pre-action discovery.

CONCLUSION

For the reasons stated above, the petitioner's request for pre-action discovery is GRANTED.

It is so ordered.

Dated at Bridgeport, Connecticut, this 11th day of May 2004.

 /s/ Stefan R. Underhill
Stefan R. Underhill
United States District Judge