

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

MOHAMED A. EL-TABECH,)
)
Petitioner,)
)
v.)
)
FRED BRITTEN,)
)
Respondent.)

4:10CV3179

**MEMORANDUM
AND ORDER**

The court has conducted an initial review of the Petition for Writ of Habeas Corpus (filing no. [1](#)) to determine whether the claims made by Petitioner are, when liberally construed, potentially cognizable in federal court. Liberally construed, Petitioner asserts two claims, one of which is cognizable.

Condensed and summarized for clarity, Petitioner asserts that:

Claim One: Petitioner was denied the effective assistance of counsel in violation of the Sixth and Fourteenth Amendments *because* trial counsel (1) failed to produce the true murderer despite promising the jury that he would do so in his opening statement, and (2) ignored Petitioner’s persistent requests to take the stand and testify. (*Id.* at CM/ECF p. 5.)

Claim Two¹: Petitioner was denied due process and is actually innocent *because* DNA evidence revealed hair in a bathrobe belt that did not belong to Petitioner or the victim. (*Id.* at CM/ECF pp. 7-9.)

¹Claim Two combines allegations from Grounds Two and Three of the Petition. (Filing No. [1](#) at CM/ECF pp. 7-9.)

Liberally construed, the court preliminarily decides that Petitioner's Claim One is potentially cognizable in federal court. Petitioner's "actual innocence" assertion, Claim Two, is not a cognizable habeas corpus claim. [*Herrera v. Collins*, 506 U.S. 390, 404-05 \(1993\)](#) ("[O]ur habeas jurisprudence makes clear that a claim of 'actual innocence' is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits."). However, liberally construed, Claim Two survives initial review as a due process claim. However, the court cautions Petitioner that no determination has been made regarding the merits of these claims or any defenses thereto or whether there are procedural bars (such as whether the Petition is "successive") that will prevent Petitioner from obtaining the relief sought.

IT IS THEREFORE ORDERED that:

1. Upon initial review of the Petition (filing no. [1](#)), the court preliminarily determines that Petitioner's Claim One, as set forth in this Memorandum and Order, is potentially cognizable in federal court.

2. Upon initial review of the Petition (filing no. [1](#)), the court preliminarily determines that Petitioner's Claim Two, liberally construed as a due process claim only, and as set forth in this Memorandum and Order, is potentially cognizable in federal court.

3. The Clerk of the court is directed to mail copies of this Memorandum and Order and the Petition to Respondent and the Nebraska Attorney General by regular first-class mail.

4. By November 10, 2010, Respondent shall file a motion for summary judgment or state court records in support of an answer. The Clerk of the court is directed to set a pro se case management deadline in this case using the following

text: November 10, 2010: deadline for Respondent to file state court records in support of answer or motion for summary judgment.

5. If Respondent elects to file a motion for summary judgment, the following procedures shall be followed by Respondent and Petitioner:

- A. The motion for summary judgment shall be accompanied by a separate brief, submitted at the time of the filing of the motion.
- B. The motion for summary judgment shall be supported by such state court records as are necessary to support the motion. Those records shall be contained in a separate filing entitled: “Designation of State Court Records in Support of Motion for Summary Judgment.”
- C. Copies of the motion for summary judgment, the designation, including state court records, and Respondent’s brief shall be served upon Petitioner *except* that Respondent is only required to provide Petitioner with a copy of the specific pages of the record which are cited in the Respondent’s brief. In the event that the designation of state court records is deemed insufficient by Petitioner, Petitioner may file a motion with the court requesting additional documents. Such motion shall set forth the documents requested and the reasons the documents are relevant to the cognizable claims.
- D. No later than 30 days following the filing of the motion for summary judgment, Petitioner shall file and serve a brief in opposition to the motion for summary judgment. Petitioner shall submit no other documents unless directed to do so by the court.

- E. No later than 30 days after the filing of Petitioner's brief, Respondent shall file and serve a reply brief. In the event that Respondent elects not to file a reply brief, he should inform the court by filing a notice stating that he will not file a reply brief and that the motion is therefore fully submitted for decision.
- F. If the motion for summary judgment is denied, Respondent shall file an answer, a designation and a brief that complies with the terms of this order. (See the following paragraph.) The documents shall be filed no later than 30 days after the denial of the motion for summary judgment. **Respondent is warned that the failure to file an answer, a designation and a brief in a timely fashion may result in the imposition of sanctions, including the release of the petitioner.**

6. If Respondent elects to file an answer, the following procedures shall be followed by Respondent and Petitioner:

- A. By November 10, 2010, Respondent shall file all state court records which are relevant to the cognizable claims. See, e.g., [Rule 5\(c\)-\(d\) of the Rules Governing Section 2254 Cases in the United States District Courts](#). Those records shall be contained in a separate filing entitled: "Designation of State Court Records In Support of Answer."
- B. No later than 30 days after the filing of the relevant state court records, Respondent shall file an answer. The answer shall be accompanied by a separate brief, submitted at the time of the filing of the answer. Both the answer and brief shall address all matters germane to the case including, but not limited to, the merits of Petitioner's allegations that have survived initial review,

and whether any claim is barred by a failure to exhaust state remedies, a procedural bar, non-retroactivity, a statute of limitations, or because the petition is an unauthorized second or successive petition. *See, e.g., [Rules 5\(b\) and 9 of the Rules Governing Section 2254 Cases in the United States District Courts](#).*

- C. Copies of the answer, the designation, and Respondent's brief shall be served upon Petitioner at the time they are filed with the court *except* that Respondent is only required to provide Petitioner with a copy of the specific pages of the designated record which are cited in Respondent's brief. In the event that the designation of state court records is deemed insufficient by Petitioner, Petitioner may file a motion with the court requesting additional documents. Such motion shall set forth the documents requested and the reasons the documents are relevant to the cognizable claims.
- D. No later than 30 days following the filing of Respondent's brief, Petitioner shall file and serve a brief in response. Petitioner shall submit no other documents unless directed to do so by the court.
- E. No later than 30 days after the filing of Petitioner's brief, Respondent shall file and serve a reply brief. In the event that Respondent elects not to file a reply brief, he should inform the court by filing a notice stating that he will not file a reply brief and that the merits of the petition are therefore fully submitted for decision.

F. The Clerk of the court is directed to set a pro se case management deadline in this case using the following text: December 10, 2010: check for Respondent to file answer and separate brief.

7. No discovery shall be undertaken without leave of the court. *See [Rule 6 of the Rules Governing Section 2254 Cases in the United States District Courts](#).*

DATED this 24th day of September, 2010.

BY THE COURT:

s/ Joseph F. Bataillon
Chief United States District Judge

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