

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

ROBERT HARDEN,

Petitioner,

v.

FRED BRITTEN, Warden, and
ROBERT HOUSTON, Director of the
Department of Corrections,

Respondents.

CASE NO. 4:11CV3084

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. Petitioner has made three claims.

Condensed and summarized for clarity, the claims asserted by Petitioner are:

Claim One: Petitioner was denied due process of law in violation of the Fourteenth Amendment *because* the State failed to prove beyond a reasonable doubt that Petitioner was not “entrapped” and the evidence was insufficient to find him guilty.

Claim Two: Petitioner was denied the effective assistance of counsel in violation of the Sixth Amendment *because* his trial counsel did not (1) defend Petitioner to the best of her abilities; (2) object to the personal opinion of a witness offered at trial; (3) move for a mistrial when the State called Petitioner a “stone cold killer;” (4) move for a judgment of not guilty; (5) move for a new jury selection due to bias of jurors; (6) advise petitioner of his right not to testify; (7) appeal the denial of motion to change venue; (8) bring to the attention of the judge that one of the witnesses was being coached; (9) introduce at trial the Domestic Violence Protection Order filed by Petitioner against his wife; (10) argue the State used the wrong criminal record of the wrong person with the same name; (11) argue that a grand jury indictment was needed to charge Petitioner; (12) argue that instructions for mitigation and aggravating

circumstances were not given; (13) inform Petitioner of any plea bargains offered by the court; (14) subpoena certain telephone conversations between Petitioner and his wife; (15) file a motion for mental evaluation; and (16) impeach three of the State's witnesses.

Claim Three: Petitioner was denied the effective assistance of counsel in violation of the Sixth Amendment *because* his appellate counsel failed to insist on oral argument and did not raise the following issues on appeal: (1) trial counsel's failure to seek a mental evaluation of Petitioner; (2) the different types of entrapment; (3) the FBI's knowledge of Petitioner's marital problems; (4) trial counsel's "weak" argument that State's witness "Brent Redden was the only contact between the Petitioner and the 'HIT-MAN,'" (5) the conflicts in the State's witness testimony; (6) the claims of abuse made by State's witness Amber Harden were unfounded; (7) trial counsel's refusal to subpoena witnesses from Petitioner's home state of Kentucky; (8) that the two alleged victims did not testify against Petitioner.

Liberalized construed, the court preliminarily decides that all three of Petitioner's claims are potentially cognizable in federal court. The court cautions, however, that no determination has been made regarding the merits of these claims or any defenses thereto or whether there are procedural bars that will prevent Petitioner from obtaining the relief sought.

Petitioner also seeks the appointment of counsel. (Filing No. 6.) "There is neither a constitutional nor statutory right to counsel in habeas proceedings; instead, [appointment] is committed to the discretion of the trial court." [McCall v. Benson, 114 F.3d 754, 756 \(8th Cir. 1997\)](#). As a general rule, counsel will not be appointed unless the case is unusually complex or the petitioner's ability to investigate and articulate the claims is unusually impaired or an evidentiary hearing is required. See, e.g., [Morris v. Dormire, 217 F.3d 556, 558-59 \(8th Cir. 2000\), cert. denied, 531 U.S. 984 \(2000\)](#); [Hoggard v. Purkett, 29 F.3d 469,](#)

[471 \(8th Cir. 1994\)](#) (citations omitted). See also Rule 8(c) of the [Rules Governing Section 2254 Cases in the United States District Courts](#) (requiring appointment of counsel if an evidentiary hearing is warranted.) The court has carefully reviewed the record and finds that there is no need for the appointment of counsel at this time.

IT IS THEREFORE ORDERED that:

1. Upon initial review of the Petition (Filing No. [1](#)), the court preliminarily determines that Petitioner's claims, as set forth in this Memorandum and Order, are potentially cognizable in federal court;
2. The Clerk of the court is directed to mail copies of this Memorandum and Order and the Petition to Respondents and the Nebraska Attorney General by regular first-class mail;
3. By September 9, 2011, Respondents 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: September 9, 2011: deadline for Respondents to file state court records in support of answer or motion for summary judgment;
4. If Respondents elect to file a motion for summary judgment, the following procedures shall be followed by Respondents 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 Respondents' brief shall be served upon Petitioner *except* that Respondents are only required to provide Petitioner with a copy of the specific pages of the record which are cited in Respondents' 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, Respondents shall file and serve a reply brief. In the event that Respondents elect not to file a reply brief, they should inform the court by filing a notice stating that they 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, Respondents shall file an answer, a designation and a brief that complies with 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. **Respondents are 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 Petitioner;**
5. If Respondents elect to file an answer, the following procedures shall be followed by Respondents and Petitioner:
- A. By September 9, 2011, Respondents 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, Respondents 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 Respondents' brief shall be served upon Petitioner at the time they are filed with the court *except* that Respondents are only required to provide Petitioner with a copy of the specific pages of the designated record which are cited

in Respondents' 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 Respondents' 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, Respondents shall file and serve a reply brief. In the event that Respondents elect not to file a reply brief, they should inform the court by filing a notice stating that they 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: October 11, 2011: check for Respondents to file answer and separate brief.
6. 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](#); and
7. Petitioner's Motion to Appoint Counsel (Filing No. [6](#)) is denied.

DATED this 25th day of July, 2011.

BY THE COURT:

s/Laurie Smith Camp
United States District Judge

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