

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

HOPE T. NPIMNEE,

Petitioner,

vs.

SHAUN SETTLES,

Respondent.

8:24CV130

MEMORANDUM AND ORDER

This matter is before the Court on a motion seeking appointment of counsel, Filing No. 4, filed by Petitioner Hope T. Npimnee (“Petitioner”) and for preliminary review of Petitioner’s Petition for Writ of Habeas Corpus, Filing No. 1, brought pursuant to 28 U.S.C. § 2254.

For the reasons set forth below, the motion to appoint counsel shall be denied without prejudice. On preliminary review the Court determines that Petitioner’s claims, when liberally construed, are potentially cognizable in federal court and the Petition shall progress consistent with this Memorandum and Order.

I. MOTION TO APPOINT COUNSEL

Petitioner seeks appointment of counsel arguing that appointment is appropriate due to the legal complexities in his case. Filing No. 4. Petitioner spends multiple pages outlining the legal issues in his Petition and submits that the appointment of counsel is necessary to provide him a fundamentally fair review and a meaningful opportunity to be heard. Filing No. 4 at 1.

“[T]here 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). *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 finds there is no need for the appointment of counsel at this early stage in the proceedings as Respondent has not yet addressed the Petition. The motion for counsel shall therefore be denied without prejudice.

II. PRELIMINARY REVIEW

The purpose of this review is to determine whether Petitioner’s claims, when liberally construed, are potentially cognizable in federal court. Condensed and summarized for clarity, Petitioner’s claims are:

Claim One: Petitioner was denied a fair trial because the trial court erred in determining there was sufficient evidence to instruct the jury that witness “S.M.” was both incapable of resisting and did not consent.¹ Petitioner raises a claim of trial court’s jury instruction regarding capability of consent was in error.

Claim Two: The jury selection in Petitioner’s trial was unconstitutional due to the disqualification of non-whites based on their felony status.

¹ See Filing No. 1 at 2, 5; *State v. Npimnee*, 2 N.W.3d 620 (Neb. 2024).

Claim Three: The trial court erred by restricting cross examination of witness “S.M.,” denying Petitioner the ability to impeach the witness.

Claim Four: Petitioner received ineffective assistance of appellate counsel because appellate counsel failed to specifically allege trial counsel’s deficient performance on direct appeal.

The Court determines that these claims, when liberally construed, are potentially cognizable in federal court. However, the court cautions Petitioner that no determination has been made regarding the merits of these claims or any defenses to them or whether there are procedural bars that will prevent Petitioner from obtaining the relief sought.

IT IS THEREFORE ORDERED that:

1. Upon initial review of the habeas corpus petition, Filing No. 1, the court preliminarily determines that Petitioner’s claims, as they are set forth in this Memorandum and Order, are potentially cognizable in federal court.

2. By **April 17, 2025**, Respondent must 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: **April 17, 2025**: deadline for Respondent to file state court records in support of answer or motion for summary judgment.

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

- A. The motion for summary judgment must be accompanied by a separate brief, submitted at the time the motion is filed.
- B. The motion for summary judgment must be supported by any state court records that are necessary to support the motion. Those records must 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 must be served on Petitioner *except* that Respondent is only required to provide Petitioner with a copy of the specific pages of the record that are cited in Respondent’s motion and brief. In the event that the designation of state court records is deemed insufficient by Petitioner or Petitioner needs additional records from the designation, Petitioner may file a motion with the court requesting additional documents. Such motion must 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 must file and serve a brief in opposition to the motion for summary judgment. Petitioner

may not submit other documents unless directed to do so by the court.

- E. No later than 30 days after Petitioner's brief is filed, Respondent must 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 must file an answer, a designation and a brief that complies with terms of this order. (See the following paragraph.) The documents must be filed no later than 30 days after the denial of the motion for summary judgment. **Respondent is warned that failure to file an answer, a designation and a brief in a timely fashion may result in the imposition of sanctions, including Petitioner's release.**

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

- A. By **April 17, 2025**, Respondent must file all state court records that 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 must be

contained in a separate filing entitled: “Designation of State Court Records in Support of Answer.”

- B. No later than 30 days after the relevant state court records are filed, Respondent must file an answer. The answer must be accompanied by a separate brief, submitted at the time the answer is filed. Both the answer and the brief must 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 must be served on 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 that are cited in Respondent’s answer and brief. In the event that the designation of state court records is deemed insufficient by Petitioner or Petitioner needs additional records from the designation, Petitioner may file a motion with the court requesting additional documents. Such motion must set forth the documents requested and the reasons the documents are relevant to the cognizable claims.

- D. No later than 30 days after Respondent's brief is filed, Petitioner must file and serve a brief in response. Petitioner must not submit any other documents unless directed to do so by the court.

- E. No later than 30 days after Petitioner's brief is filed, Respondent must 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.

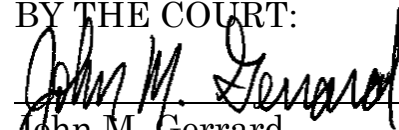
- F. The clerk of the court is directed to set a pro se case management deadline in this case using the following text:
May 19, 2025: check for Respondent's answer and separate brief.

5. 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*.

6. Petitioner's motion seeking the appointment of counsel, Filing No. 4, is denied without prejudice.

Dated this 5th day of March, 2025.

BY THE COURT:



John M. Gerrard
Senior United States District Judge