In The United States District Court
For The Northern District Of Ohio

Tyrone Noling,	)	Case No. 5:04-cv-01232
	)	
Petitioner,	)	Judge Nugent
	)	
vs.	)	Magistrate Judge Hemann
	)	
Margaret Bradshaw, Warden,	)	
	)	
Respondent.	)	

Petitioner Noling's Reply to Respondent's
Memorandum in Opposition to Second Discovery Motion

Respondent opposed all discovery requested by Tyrone Noling in his Second Motion for Discovery. In so doing, Respondent relied heavily on a State court "hearing" to argue Noling is not entitled to discovery.

Noling replies to Respondent's opposition in the attached memorandum.

Respectfully submitted,

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Memorandum

Respondent opposed all discovery requested by Tyrone Noling in his November 3, 2006 motion. In so doing, Respondent relied on three arguments. First, Respondent argued that Noling should not be permitted to conduct discovery on procedurally defaulted claims—specifically, sub-claim 2 of his First Ground for Relief, sub-claims 5-15 of his Fifth Ground for Relief, and sub-claims 1-8 and 11-15 of his Sixth Ground for Relief. (See Respondent's Motion at 5). Second, Respondent argued that Noling received a "hearing" in state court and cannot demonstrate that he was denied "the opportunity to conduct post-conviction discovery in support of his claims." (Id. at 8). Third, Respondent argued that Noling has not demonstrated good cause for this Court to grant discovery. (Id. at 9-10).

Noling extensively briefed the issue of procedural default in his Traverse, filed August 29, 2005. With respect to each claim addressed by Respondent, Noling explained why these claims were not defaulted. Or, if the claims were defaulted, Noling established cause and prejudice for any default. Respondent's assertion of procedural default is thus incorrect. For brevity, Noling incorporates his arguments with respect to procedural default and cause and prejudice herein as if fully rewritten.

Similarly, Noling has established good cause in both his Traverse and his discovery motion. For brevity, Noling incorporates those arguments herein as if fully rewritten.

Respondent goes further, arguing that because, according to her, Noling's claims are partially defaulted, he would not be entitled to an evidentiary hearing under 28 U.S.C. § 2254(e) and therefore would not be entitled to discovery. (Id. at 5-7). This argument is flawed. The standard for discovery is simply not the same as the standard for an evidentiary hearing.

Habeas Corpus Rule 6 provides the standard that must be met by a petitioner to be entitled to discovery. Noling notes that Respondent has cited no case law in support of her contention that Noling must meet the standard for an evidentiary hearing before being entitled to discovery. Moreover, as noted above, Noling's claims are not defaulted, and he therefore is not barred from the grant of an evidentiary hearing.

Noling must also address Respondent's allegation that the state court "hearing" received was somehow adequate to develop and present the claims that he now seeks discovery for in federal court. Review of the transcripts (found at ROW Tr. Vol. 12 -13) demonstrates Noling's hearing was a sham. The Portage County Court of Common Pleas originally scheduled a hearing for September 17, 1997. The state court, however, conducted a very limited hearing at which it allowed Noling to only present the testimony of a single witness. (Hrg. Sept. 17, 1997, p. 3.) The state court further limited Noling by denying his request to subpoena documentation, either prior to the evidentiary hearing or at the hearing itself. (See ROW Vol. 8, pp. 458-59, 550-78, 581, 604-05, 607-13, 618). The trial court thwarted Noling's efforts to fully develop these claims.

Moreover, the trial court demonstrated a complete misunderstanding of the postconviciton process, which resultantly deprived Noling of the opportunity to develop his claims in state court. Repeatedly, the trial court demonstrated its incorrect understanding that only "newly discovered evidence" could be presented on postconviction review. The court stated at the outset of the hearing:

> Gentlemen, we're here today, I limited this hearing to determine whether or not there is any **newly discovered evidence** that needs to be presented **other than what is submitted in the briefs.**

(ROW Tr. Vol. 12, p. 3.) (emphasis added). Noling's counsel advised the Court that he had subpoenaed a number of witnesses to the hearing. The court then said:

> I noticed you have. That is what I'm saying. I don't picture these cases or post conviction remedies **retrying the case**. I'm saying is there any **newly discovered evidence**?

(Id.) (emphasis added).

The trial court's statements showed a patent misunderstanding of postconviction litigation in Ohio. Postconviction petitions are not based on newly discovered evidence. Rather, postconviction petitions are based on evidence *dehors* the record. See State v. Milanovich, 325 N.E.2d 540 (Ohio 1975). That misunderstanding denied Noling the right to fully develop and litigate his claims in state court.

"When there is a factual dispute, [that,] if resolved in the petitioner's favor, would entitle [him] to relief and the state has not afforded the petitioner a full and fair evidentiary hearing, a federal habeas corpus petitioner is entitled to discovery and an evidentiary hearing." Hughes v. Johnson, 191 F.3d 607, 630 (5th Cir. 1999) (citing Goodwin v. Johnson, 132 F.3d 162, 178 (5th Cir. 1998)). The record of the state court's actions demonstrates that Noling was not allowed to adequately develop his claims in state court. He was not permitted discovery, nor was he given

the opportunity to fully present the evidence available to support his claims. Because Noling did not receive a full and fair hearing, he is entitled to discovery before this Court. Id.

Conclusion

The discovery requested by Noling is extensive, however, such encompassing discovery is not unprecedented where the habeas petition includes claims of actual innocence. (See Exhibit A, D'Ambrosio v. Bagley, Case no. 1:00CV 2521, Order issues Dec. 12, 2002). In her December 12, 2002 order, Judge O'Malley virtually opened up law enforcement and prosecution files to the petitioner asserting actual innocence. Noling presents no less compelling a case of innocence. His claim is entitled to the same scrutiny.

To conduct anything less than a full investigation and complete consideration of Noling's innocence claim runs the real risk that an innocent man will be executed, a clear violation of the Constitution. Herrera v. Collins, 506 U.S. 390, 419 (1993) (O'Connor, J., joined by Kennedy, J., concurring) ("executing the innocent is inconsistent with the Constitution"); Id. (O'Connor, J., joined by Kennedy, J., concurring) ("the execution of a legally and factually innocent person would be a constitutionally intolerable event."); Id. at 429 (White, J., concurring) ("I assume that a persuasive showing of 'actual innocence' made after trial, even though made after the expiration of the time provided by law for the presentation of newly discovered evidence, would render unconstitutional the execution of petitioner in this case."); Id. at 430 (Blackmun, J., joined by JJ. Stevens and Souter, dissenting) ("Nothing could be more contrary to contemporary standards of decency … than to execute a person who is actually innocent.")

In addition to his innocence claim, Noling has also presented compelling claims that of prosecutor misconduct and ineffective assistance of counsel claim that warrant consideration,

discovery, and habeas relief. This Court should reject Respondent's arguments in opposition and grant Noling's discovery requests.

Respectfully submitted,

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