

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

JEFFREY HAVARD

PETITIONER

V.

CIVIL ACTION NO.: 5:08cv275-KS

CHRISTOPHER EPPS, et al

RESPONDENTS

**MOTION FOR AN EVIDENTIARY HEARING
AND SUPPORTING MEMORANDUM OF LAW**

I. INTRODUCTION

Pursuant to 28 U.S.C. § 2254(e), *Townsend v. Sain*, 372 U.S. 293 (1963), and Rule 8 of the Rules Governing Section 2254 Cases, Petitioner, Jeffrey Havard, requests that the Court grant him an evidentiary hearing on the following claims asserted in his Petition for Writ of Habeas Corpus: Claims I (gross ineffective assistance of counsel for failure to challenge the underlying felony of sexual battery); IV (ineffective assistance of counsel for failure to adequately investigate and present mitigation evidence); V (ineffective assistance of counsel during sentencing phase closing argument); X (ineffective assistance of counsel during voir dire); XII (juror bias); XIII (aggregate error review violated due process); XIV (cumulative effect of ineffective assistance of counsel); and XV (cumulative error), to the extent that the Court finds that there are contested issues of fact with respect to those claims.¹ Petitioner also seeks a hearing on the alternative ineffective assistance of counsel aspects of Claims II (failure to object to improper closing argument) and III (failure to

¹Petitioner also relies on the Fifth, Sixth, Eighth, and Fourteenth Amendments.

object to improper victim impact testimony).

As set forth in his Petition for Writ of Habeas Corpus (Docket # 10), Memorandum Brief in support of the Petition (Docket # 22), and Reply Brief (Docket # 33), Petitioner has alleged facts with respect to each of the enumerated claims which, if proven, entitle him to federal habeas corpus relief. In state court, Petitioner diligently pursued every available avenue for obtaining a hearing, including the submission of numerous affidavits and records in support of his allegations. Petitioner also employed experts to further develop the factual bases for his claims.²

Because of his diligence in developing facts in support of his claims, Petitioner is not barred by 28 U.S.C. § 2254(e) from receiving an evidentiary hearing. *See generally (Michael) Williams v. Taylor*, 529 U.S. 420 (2000); *Hall v. Quarterman*, 534 F.3d 365, 367 (5th Cir. 2008) (“Section 2254(e)(2) . . . does not constrain the district court’s discretion here because Hall diligently developed the factual basis of his claim in state court”); *Dowthitt v. Johnson*, 230 F.3d 733, 758 (5th Cir. 2000). Because the Mississippi Supreme Court denied Petitioner a hearing in state court, Petitioner is now entitled to have the opportunity to prove his claims if the Court believes the record to be insufficient. *See Townsend v. Sain*, 372 U.S. 293 (1963); *Siehl v. Grace*, 561 F.3d 189, 196-97 (3d Cir. 2009); *Walker v. True*, 399 F.3d 315, 326-27 (4th Cir. 2005); *Fisher v. Lee*, 215 F.3d 438, 454 (4th Cir. 2000); *Matheney v. Anderson*, 253 F.3d 1025, 1039 (7th Cir. 2001).

Because Petitioner has already discussed elsewhere the substance of the claims for which he seeks a hearing (*see* Petition, Memorandum Brief, and Reply Brief), he will not repeat those arguments here. Petitioner does, however, incorporate by reference, as if fully reproduced herein,

² Chief among these experts was Dr. James Lauridson, who reviewed the scientific and medical bases for the State’s allegation of sexual battery, which alone made this a capital case. Dr. Lauridson unequivocally found that Chloe Britt had not been sexually assaulted. As demonstrated elsewhere, the Mississippi Supreme Court failed to provide a full and fair review of the findings and opinions of Dr. Lauridson. Therefore, Petitioner needs an evidentiary hearing in this Court so that Dr. Lauridson can be fully heard. An evidentiary hearing is also warranted because the State’s trial expert, Dr. Steven Hayne, recently executed a Declaration that also casts the underlying

the facts and legal arguments asserted in those pleadings for each of the claims for which an evidentiary hearing is sought. In this motion, Petitioner instead focuses on the principles applicable to when evidentiary hearings are warranted.

II. RELEVANT LEGAL PRINCIPLES

When Congress enacted AEDPA, it placed certain restrictions on the ability of a habeas petitioner to obtain an evidentiary hearing. Previously, under *Townsend*, if a petitioner alleged facts which, if proven, would entitle him to relief, he was entitled to a hearing in federal court if the state court fact finding procedures were inadequate, e.g., the state court did not afford the petitioner a hearing. *Townsend*, 293 U.S. at 313. AEDPA altered the legal landscape to a certain respect, restricting a petitioner's right to a hearing if the petitioner himself failed to develop the factual basis for his claim in state court.

The Supreme Court addressed this statutory provision in (*Michael*) *Williams v. Taylor*, 529 U.S. 420, 120 S. Ct. 1479, 1490 (2000). The Court held that a petitioner "fails" to develop the facts in support of his claim when he does not act with due diligence in state court to obtain a hearing or take other available steps to uncover critical facts. "[A] failure to develop the factual basis of a claim is not established unless there is lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." *Williams*, 529 U.S. at 432; *see also Guidry v. Dretke*, 397 F.3d 306, 323 (5th Cir. 2005). On the other hand, if the petitioner made reasonably diligent efforts in state court, he is able to secure a hearing in federal court. *See also McDonald v. Johnson*, 139 F.3d 1056 (5th Cir. 1998).

felony of sexual battery into serious doubt.

Townsend controls a habeas petitioner's entitlement to an evidentiary hearing, so long as the petitioner passes through the gateway of § 2254(e)(2) and has not "failed to develop" the facts of his claims in state court proceedings. "[S]urmounting the hurdle set by section 2254(e) 'does not translate to a conclusion that [the petitioner] was entitled to a hearing' Instead, for an applicant to establish an entitlement to an evidentiary hearing, he must first prove one of the six factors set out by the Supreme Court in *Townsend v. Sain*" *Bacon v. Lee*, 225 F.3d 470, 489 (4th Cir. 2000) (quoting *Fisher v. Lee*, 215 F.3d 438, 454 (4th Cir. 2000)); *Simpson v. Norris*, 490 F.3d 1029, 1035 (8th Cir. 2007); *Baja v. Ducharme*, 187 F.3d 1075, 1078-79 (9th Cir. 1999) (citing cases).³

The *Townsend* Court recognized six situations in which a federal court's deference to a state court's factfindings would be inappropriate, and any one of which would make an evidentiary hearing *mandatory*:

(1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

Id. at 313. At a minimum, Havard satisfies the first three of the factors listed in *Townsend*.

Respondents touched on the availability of an evidentiary hearing in their Memorandum in Support of their Answer, but their brief discussion is inconsistent with the statutory language and completely at odds with controlling precedent. After quoting 28 U.S.C. § 2254(e)(2), Respondents assert that Petitioner fails to meet those criteria. (Docket #28 at p. 26). However, the exceptions

³*Baja* and the cases cited therein were cited with approval by the Supreme Court in *Michael Wayne Williams v. Taylor*, 529 U.S. 420, 120 S. Ct. 1479, 1488 (2000).

contained in Section 2254(e)(2) apply only if Petitioner failed to develop the facts in state court. As the Supreme Court has held, the “failure to develop” rule requires that the Petitioner be at fault. Respondents make no such assertion here (and cannot, as discussed below).

Respondents also claim that an evidentiary hearing would be contrary to the dictates of AEDPA. (Docket #28 at p. 26). Again, Respondents misread the controlling law. AEDPA places restrictions on evidentiary hearings only if the Petitioner is at fault for failing to develop facts in state court. It does not prohibit hearings. If Petitioner was not at fault for failing to develop facts in the state courts, and if he diligently sought a hearing and other ways of developing facts in state court, then this Court should hold a hearing if the criteria set out in *Townsend* are met.

The United States Supreme Court and the Fifth Circuit have consistently held that evidentiary hearings are critical in capital cases, in order to ensure reliability and fairness of the procedures that can lead to execution. *See e.g., Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion) (“ ‘the penalty of death is qualitatively different’ from any other sentence . . . We are satisfied that this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed.”); *Autry v. Estelle*, 719 F.2d 1251, 1252 (5th Cir. 1983) (requiring evidentiary hearing in capital case to ensure that petitioner had been afforded every opportunity to present his constitutional claims). As demonstrated below, Petitioner is entitled to an evidentiary hearing in this capital case, where both the conviction and death sentence are unreliable and attributable, in large part, to the ineffective assistance of Petitioner’s trial counsel.

III. PETITIONER IS ENTITLED TO AN EVIDENTIARY HEARING

Petitioner easily satisfied the diligence requirements set forth in *Williams*. He requested an evidentiary hearing during both direct appeal and post-conviction proceedings (*See State Court*

Record, *Motion for Rehearing* (following denial of direct appeal); *Petition for Post-Conviction Relief With Exhibits* (in which Petitioner sought an evidentiary hearing on numerous grounds)).⁴ In some cases, requesting an evidentiary hearing alone constitutes reasonable diligence. *See Mayes v. Gibson*, 210 F.3d 1284, 1288 n.2 & 1289 (10th Cir. 2000) (petitioner preserved right to federal habeas evidentiary hearing by requesting one in state court proceedings to resolve his fact-intensive ineffective assistance claim; denial of evidentiary hearing led to inadequate resolution of claim based primarily on written record, necessitating federal evidentiary hearing).

However, Petitioner went much further than that minimal requirement: he submitted affidavits, records, and other documents. Moreover, he utilized experts and sought discovery in state court proceedings for additional fact development. The State of Mississippi delayed in complying with many of the discovery requests and, in one instance, has still not complied with an order compelling such discovery.⁵ Not only has Petitioner been diligent, Respondents have sought to thwart his diligence by dilatory tactics and by failing to comply with proper discovery.

In any event, Respondents cannot show, as they must, that Petitioner was not diligent in seeking to develop facts in the state courts: the state court record shows that Petitioner was diligent. (*See e.g.*, State Court Record, *Motion to Suspend Briefing and Remand to State Court Proceedings Consistent With M.R.A.P. 22(c)(4)(ii)* (seeking, on direct appeal, remand to trial court for discovery); *Motion for Access to Evidence or Remand to Trial Court or Other Relief* (seeking, on direct appeal,

⁴ The state court record was previously supplied by Respondents. In an effort to avoid “bulking up” the record of this Court, Petitioner is not attaching as exhibits to this motion the referenced portions of that record. However, if the Court desires that the specified pleadings be submitted separately, in conjunction with this motion, Petitioner will do so upon request.

⁵ The State has failed to turn over x-rays as ordered by the state court during post-conviction proceedings. These x-rays were recently the subject of a Motion for Discovery (Docket # 34), filed by Petitioner on March 9, 2010.

discovery of medical evidence needed by Dr. Lauridson); *Motion for Access to Evidence or Remand to Trial Court or Other Relief* (seeking those same materials during post-conviction proceedings); *Motion for Allowance of Disclosure of Youth Court Records*; *Motion to Stay Briefing Schedule* (due to the need for discovery, which had been hampered by the State's delay tactics); *Motion to Compel Discovery, Motion for a Stay of Proceedings, or for Equitable Tolling* (same); *Motion to Extend Deadline for Filing Post-Conviction Petition Due to State's Continuing Failure to Comply With Discovery Order* (same); *Petitioner's Motion for Relief to Supplement/Expand Petition for Post-Conviction Relief and for Particular Relief Under Mississippi Rule of Civil Procedure 37(b)(2)(A)*; *Motion to Supplement Petition for Post-Conviction Relief (Incorporating Supplemental Materials)*). Petitioner also sought, and was denied, an evidentiary hearing in state court. Clearly, during both direct appeal and post-conviction proceedings, Petitioner was diligent in seeking to develop the facts in support of his claims, including those for which an evidentiary hearing is sought here.

Furthermore, the *Towsend* factors favor granting Petitioner an evidentiary hearing in these proceedings. Petitioner was not afforded an evidentiary hearing in the state court proceedings, and, as demonstrated in the Petition and merits briefing, the factual bases for the decisions of the Mississippi Supreme are in serious dispute. Petitioner has not yet been afforded an opportunity to fully and fairly set forth the factual bases for his claims.

For instance, with regard to Claim I, the Mississippi Supreme Court clearly disregarded the findings and opinions of Dr. Lauridson, instead focusing on his early statement before he received all relevant materials that it was only "possible" that Chloe Britt was not sexually assaulted. That court clearly did not fully and fairly review Dr. Lauridson's ultimate opinion that the conclusion that Chloe Britt was sexually assaulted was "wrong." Also, state expert Dr. Hayne recently stated in a

Declaration, among other things, that (1) there is non-criminal explanation for the dilated condition of Chloe's anus (the chief focus of the sexual battery allegation) and (2) he cannot state to a reasonable degree of medical certainty that Chloe Britt was sexually assaulted. This information, combined with the failure of the Mississippi Supreme Court to properly consider the findings and opinions of Dr. Lauridson, demonstrate that an evidentiary hearing is needed. *See Hall*, 534 F.3d at 369 (evidentiary hearing required when a state court fails to provide a full and fair hearing, "where such a hearing would bring out facts which, if proven true, support habeas relief").

A case recently handed down by the Mississippi Supreme Court further underscores the need for an evidentiary hearing in this case. That case, *Williams v. Mississippi*, No. 2008-KA-02129 (Miss. Apr. 1, 2010) (opinion attached as Exhibit "A"), involved allegations of child sexual abuse, as does Petitioner's case. The defendant was convicted of sexually battery of his two daughters, aged 10 months ("Ann") and four years ("Jane"). (Op. at p. 1). The Mississippi Supreme Court affirmed the defendant's conviction as to the battery of Jane. (Op. at p. 18). However, that court reversed and rendered the defendant's conviction as to the alleged sexual battery of Ann. (Op. at pp. 9).

In *Williams*, allegations of sexual battery were first made against the defendant with respect to his older daughter, Jane. (Op. at p. 4). When those allegations were made, DHS also took custody of Ann, who was then examined by Doctor William Marcy. (Op. at pp. 4-5). Dr. Marcy "found that her anal area was inflamed and swollen and that the shape of the anus was irregular." (Op. at p. 5). He also found that Ann's anus was torn, a finding that the doctor termed "very consistent with sexual abuse." (Op. at p. 5). At trial, Dr. Marcy testified that the anal findings on Ann led him to a finding that sexual abuse was "probable," and that the findings were "very consistent with anal penetration." (Op. at p. 8). There was no evidence to support the allegation of

sexual battery of Ann other than the testimony of Dr. Marcy. (Op. at pp. 7, 9). The defendant denied abusing the child and suggested that her “anal injuries might have been caused by severe constipation.” (Op. at p. 5).

The Mississippi Supreme Court based its analysis of the adequacy of the evidence of sexual battery of Ann on two major principles: (1) “Before a qualified expert’s opinion may be received, it must rise above mere speculation” and (2) “Only opinions formed by medical experts upon the basis of credible evidence in the case and which can be stated with reasonable medical certainty have probative value.” (Op. at p. 8) (internal citations omitted). The Mississippi Supreme Court found that Dr. Marcy “couched his opinions in terms of *suspicion of probability*, which, standing alone, absent additional corroborating evidence, is insufficient in a criminal case.” (Op. at p. 9). Since the testimony of Dr. Marcy was the sole evidence in support of the allegation, the Court held that the evidence was insufficient to support a conviction beyond a reasonable doubt. (Op. at p. 9). Concluding its discussion of this issue, the Court stated: “[T]he evidence, which was **entirely circumstantial** with regard to the charge involving the younger child, Ann, fell far short of the applicable standard of proof of guilt beyond a reasonable doubt **and to the exclusion of every reasonable hypothesis consistent with innocence.**” (Op. at p. 9) (emphases added). The count involving sexual battery of Ann was reversed and rendered. (Op. at p. 9).

Petitioner, too, was charged with sexual battery of a young child. The evidence against him was also entirely circumstantial. The only properly tendered and qualified expert to testify at Petitioner’s trial, Dr. Steven Hayne, like Dr. Marcy in *Williams*, couched his opinions regarding sexual battery in terms of possibility, and not to a reasonable degree of medical certainty. Dr. Hayne recently underscored this point in his Declaration, which states, in Paragraph 10, that he “cannot

include or exclude to a reasonable degree of medical certainty that she [Chloe Britt] was sexually assaulted.” (See Petition Exhibit “A”). Unlike in *Williams*, where the doctor found an anal tear, Dr. Hayne found no such tearing during his examination, making the evidence in support of Petitioner’s conviction even more dubious than that in *Williams*.

Dr. Hayne further points to a reasonable hypothesis consistent with Petitioner’s innocence as to sexual battery in Paragraph 9 of his Declaration, where he states that dilated anal sphincters may be seen on those who, like Chloe, were alive but “without significant brain function” at the time such condition is observed (as Petitioner discusses in his Memorandum Brief, Dr. Dar opined that Chloe was “brain dead” before the anal dilation was first noticed). Dr. Lauridson’s opinions also support that reasonable hypothesis, which is based upon the injuries incurred by Chloe Britt when she was accidentally dropped by Petitioner, causing her to strike her head. The cause of Chloe’s death was a closed head injury. Again, Petitioner was charged with capital murder during the course of sexual battery. Without the underlying felony of sexual battery, Petitioner’s conviction and sentence are null and void.

The allegations and evidence involving the alleged sexual battery of Ann (in *Williams*) are highly similar to that in Petitioner’s case, but the decisions of the Mississippi Supreme Court in Petitioner’s case and in *Williams* stand in stark contrast to one another. While the defendant in *Williams* had his conviction on the count involving Ann reversed and rendered by the Mississippi Supreme Court, Petitioner’s conviction and death sentence, both based upon the allegation of sexual battery of a young child, were affirmed. The Mississippi Supreme Court has decided two highly similar cases and reached drastically different results—and the result in Petitioner’s case leaves his life hanging in the balance. With the stakes so high, an evidentiary hearing is necessary to flesh out

the factual bases of Petitioner's claim, so that he can finally demonstrate that the evidence in support of the allegation of sexual battery is fundamentally flawed, and that there is, to quote the Mississippi Supreme Court in *Williams*, a "reasonable hypothesis consistent with innocence."

The Mississippi Supreme Court similarly failed to properly consider the mitigation evidence presented by Petitioner during direct appeal and post-conviction proceedings. This evidence was in the form of affidavits, records, and the expert opinion of Adrien Dorsey-Kidd. Petitioner has not yet had this mitigation evidence fully and fairly considered, and an evidentiary hearing is warranted for Claim IV. *See Sinisterra v. United States*, 2010 WL 1236310 (8th Cir. Apr. 1, 2010) (remanding case to district court for evidentiary hearing on similar claim, since the record did not "affirmatively refute the factual assertions" upon which the claim, chiefly focused on the lack of investigation, was based).

The same is true for the remaining claims for which an evidentiary hearing is sought. For each of those claims, Petitioner has presented facts in his Petition and merits briefing which, if proven, entitle him to relief. Accordingly, Petitioner desires an evidentiary hearing so that he can demonstrate the factual bases for all of these claims, so that his Petition and the relief requested therein can be fully considered.

Since many of the claims for which Petitioner seeks an evidentiary hearing involve the ineffective assistance of his trial counsel, Petitioner underscores the following failures of his trial counsel under the "performance prong" of *Strickland v. Washington*, 466 U.S. 668 (1984): (1) failure to investigate the underlying felony of sexual battery, including alternative medical and scientific causes of the conditions used by the State to support that allegation; (2) failure to retain or consult independent expert assistance to counter the State's allegation of sexual battery; (3)

submitting a woefully inadequate expert funding motion, and failing to cure the inadequacies after denial of that motion; (4) consulting with a nurse, rather than a qualified expert, to attempt to interpret the Autopsy Report; (5) failing to interview Dr. Hayne as instructed by the trial court; (6) failing to challenge improper opinion testimony about child sexual abuse; (7) failure to submit a jury instruction for a lesser offense; (8) failing to effectively cross-examine the State's witnesses; (9) failure to object to patently improper closing argument by the State; (10) failure to object to obviously improper and inflammatory victim impact testimony in the form of a demand for a death sentence based on religious principles; (11) failure to investigate, obtain, and present readily available and compelling mitigation evidence; (12) failing to prepare the two mitigation witnesses that were called during the sentencing phase; (13) failure to consult, retain, or utilize mitigation experts; (14) conceding an aggravator that did not exist; (15) failing to argue mitigation during the sentencing phase; (16) failure to ask death-qualifying questions during voir dire; and (17) failure to expose and excuse biased jurors. These failures, and others, have been more fully discussed in Petitioner's merits briefing, along with the prejudice suffered by Petitioner as a result of these failures. The failures are mentioned here to demonstrate the factual issues that need to be fleshed out during an evidentiary hearing, so that Petitioner may fully and fairly present his constitutional claims, which he was not allowed to do in the state courts below.

IV. CONCLUSION

WHEREFORE, for the foregoing reasons, Petitioner requests that the Court grant him an evidentiary hearing on Claims I, II (alternative ground), III (alternative ground), IV, V, X, XII, XIII, XIV, and XV.

This the 19th day of April, 2010.

Respectfully submitted,

JEFFREY HAVARD

s/ Mark D. Jicka

MARK D. JICKA

OF COUNSEL:

Mark D. Jicka (MSB No. 8969) [**LEAD COUNSEL**]
WATKINS & EAGER PLLC
400 East Capitol Street
The Emporium Building (39201)
P. O. Box 650
Jackson, MS 39205
Phone: (601) 965-1900
Fax: (601) 965-1901
Email: mjicka@watkinseager.com

Graham P. Carner (MSB No. 101523)
THE GILLIAM FIRM, PLLC
P.O. Box 1303
Clinton, MS 39060
Phone: (601) 488-4044
Fax: (601) 488-4043
Email: gcarner@gilliamfirm.com

CERTIFICATE OF SERVICE

I hereby certify that on April 19, 2010, I electronically filed the foregoing with the Clerk of the Court using the ECF system which sent notification of such filing to the following:

Jim Hood
agcivillit@ago.state.ms.us

Patrick J. McNamara, Jr.
pmcna@ago.state.ms.us

Marvin L. White, Jr.
swhit@ago.state.ms.us

s/ Mark D. Jicka

MARK D. JICKA