

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

JEFFREY HAVARD

PETITIONER

V.

CIVIL ACTION NO.: 5:08cv275-KS

CHRISTOPHER EPPS, et al

RESPONDENTS

**MOTION TO STAY AND ABATE
PENDING STATE COURT SUCCESSIVE PETITION**

Petitioner, Jeffrey Havard, a death-sentenced inmate, hereby moves this Court to stay or abate its proceedings on this Petition, pending the outcome of a successive State post-conviction petition filed this day with respect to claims that (1) the State of Mississippi solicited and allowed to go uncorrected false testimony in violation of *Napue v. Illinois*, 360 U.S. 264 (1959), and related authority; (2) the State of Mississippi failed to disclose exculpatory evidence (a videotaped statement of Rebecca Britt, the mother of Chloe Britt) prior to or at Petitioner's criminal trial, in violation of *Brady v. Maryland*, 373 U.S. 82 (1963), and its progeny; (3) alternatively, Petitioner's trial counsel were ineffective for failing utilizing the videotaped statement of Rebecca Britt to support the defense theory and impeach Britt's trial testimony; (4) that newly-discovered evidence demonstrates that Petitioner is innocent of the underlying felony of sexual battery; and (5) that newly-discovered evidence demonstrates that Petitioner's trial counsel were ineffective in challenging the underlying felony of sexual battery.

These grounds for relief have not previously been raised in Mississippi's state courts, because the factual grounds for the claims were not discovered until recently. An order staying proceedings on this Petition pending resolution of the State Court proceedings therefore fits

within the United States Supreme Court's teachings in *Rhines v. Weber*, 544 U.S. 269, 125 S.Ct. 1528 (2005).

In support of this Motion, Petitioner represents the following to the Court:

1. During the pendency of this Petition, through discovery ordered by the Court, Petitioner has uncovered evidence that the State suppressed exculpatory evidence in his case; namely, the State withheld a videotaped statement of Rebecca Britt, the mother of Chloe Britt, in which Rebecca Britt discussed, among other things, the events on the night of Chloe's death and the nature of the relationship between Petitioner and Chloe. This evidence was never turned over during discovery, despite requests from Petitioner's trial counsel for all exculpatory evidence and a specific request for statements given by all potential prosecution witnesses. The evidence was also not turned over despite the fact that the prosecution represented in open court to the trial judge and Petitioner's trial counsel that all materials requested in discovery had been produced. Petitioner's counsel in his direct appeal proceedings and original post-conviction proceedings have verified that the files concerning Petitioner's case did not contain the videotaped statement at issue, despite the fact that discovery requests that would include that statement were made at every stage of Mr. Havard's state court proceedings (including on direct appeal and post-conviction proceedings).

2. "[I]t is established that a conviction obtained through the use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment. The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Napue*, 360 U.S. at 269, 79 S.Ct. at 1177 (internal citations omitted). See also *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763 (1972); *Miller v. Pate*, 386 U.S. 1, 87 S.Ct. 785 (1967). The Mississippi Supreme Court has recognized these same

rights, and has held that they are violated even if the prosecutor is merely negligent in allowing false testimony to go uncorrected. *See, e.g., Smith v. State*, 492 So.2d 260 (Miss. 1986).

3. In the recently turned-over videotaped statement, Rebecca Britt makes statements that are inconsistent with and directly contrary to her testimony at Petitioner's capital murder trial. For instance, Rebecca Britt says in the videotaped statement that Mr. Havard was actively involved in the care of Chloe Britt before the night of her death, that she did not find it strange that Mr. Havard bathed Chloe on the night of her death, that Mr. Havard had changed Chloe's diapers on prior occasions, and that Mr. Havard loved Chloe. These statements stand in stark contrast to Rebecca Britt's trial testimony, and are relevant both to her credibility as well as to guilt and sentencing issues in the original trial.

4. In addition, the prosecution bolstered Rebecca Britt's testimony at trial, by soliciting testimony from her in which she stated, under oath, that she had never told law enforcement officials anything different from the substance of her trial testimony. The contents of the videotaped statement demonstrate this bolstering to be patently false, as, again, Rebecca Britt makes statements therein that contradict her trial testimony.

5. The State, having obtained the videotaped statement through law enforcement and having the statement in its possession, knew or should have known of its contents. By soliciting testimony that contradicted that statement and by allowing such false testimony to go uncorrected, the State violated Petitioner's rights under *Napue v. Illinois* and related authority.

6. In *Brady v. Maryland*, the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad

faith of the prosecution.” 373 U.S. 83, 87 (1963). *See also Banks v. Dretke*, 540 U.S. 668, 124 S.Ct. 1256 (2004); *Kyles v. Whitley*, 514 U.S. 419 (1995).

7. The Supreme Court of Mississippi has recognized the protections afforded by *Brady* and its progeny, and has developed a four part test for examining *Brady* claims. *See, e.g. Manning v. State*, 929 So.2d 885, 891 (Miss. 2006) (citing *King v. State*, 656 So.2d 1168, 1174 (Miss. 1995)). The four part test requires a defendant to prove: “(a) the State possessed evidence favorable to the defendant (including impeachment evidence); (b) that the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence; (c) that the prosecution suppressed the favorable evidence; and (d) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.” *Manning*, 929 So.2d at 891.

8. In the alternative to the *Brady* claim, Petitioner’s trial counsel were ineffective in the event that it is somehow demonstrated that the videotaped statement of Rebecca Britt was disclosed or produced. They were ineffective for failing to inform Petitioner of the existence and contents of the statement, for failing to use the statement to support the defense theory at trial, and for failing to utilize the statement to cross-examine or impeach the trial testimony of Rebecca Britt.

9. Furthermore, newly-discovered evidence demonstrates that Petitioner is innocent of the underlying felony of sexual battery and, accordingly, of capital murder. The newly-discovered evidence, deposition testimony of Dr. Steven Hayne, shows that there were non-criminal explanations for the conditions used by the State to support the sexual battery allegation and that there is insufficient evidence to support Petitioner’s capital murder conviction and death

sentence. Most significantly, Dr. Hayne testified that he cannot state to a reasonable degree of medical certainty that Chloe Britt was sexually assaulted.

10. The newly-discovered evidence also demonstrates that Petitioner's trial counsel were ineffective in failing to counter the underlying felony of sexual battery. Namely, the newly-discovered evidence shows that Dr. Steven Hayne, the sole expert called by the State on the issue of sexual battery, could not opine to a reasonable degree of medical certainty that Chloe Britt was sexually assaulted. Petitioner's trial counsel did not meet with or speak to Dr. Hayne prior to trial. Dr. Hayne states that he would have met with Petitioner's trial counsel had they requested that meeting, and that he would have told them the same information that he recently testified about in a deposition in Petitioner's federal habeas proceedings (namely, that he could not state to a reasonable degree of medical certainty that Chloe Britt was sexually abused and there were alternative explanations to the evidence used by the State to support the sexual battery allegation).

11. Counsel for Havard have filed this day a Motion for Relief From Judgment or For Leave to File Successive Petition for Post-Conviction Relief in the Mississippi Supreme Court. A true and correct copy of that pleading is attached as Exhibit "A" to this Motion.

12. In *Rhines*, the United States Supreme Court held that a federal district court has discretion to **stay** a mixed habeas petition containing exhausted and unexhausted claims to allow the petitioner to present his unexhausted claims to the state court in the first instance, and then to return to federal court for review of his perfected petition.

13. The Court further explained that:

[S]tay and abeyance should be available only in limited circumstances. Because granting a stay effectively excuses a petitioner's failure to present his claims first to the state courts, stay and abeyance is only appropriate when the district court

determines there was good cause for the petitioner's failure to exhaust his claims first in state court. Moreover, even if a petitioner had good cause for that failure, the district court would abuse its discretion if it were to grant him a stay when his unexhausted claims are plainly meritless.

Rhines, 544 U.S. at 277, 125 S.Ct. at 1535.

14. The Court went on, however, to make clear that:

On the other hand, it likely would be an abuse of discretion for a district court to deny a stay and to dismiss a mixed petition if the petitioner had good cause for his failure to exhaust, his unexhausted claims are potentially meritorious, and there is no indication that the petitioner engaged in intentionally dilatory litigation tactics. In such circumstances, the district court should stay, rather than dismiss, the mixed petition.

Id. at 278, 125 S.Ct. at 1535.

15. In this case, Petitioner Havard has good cause for his failure to exhaust these claims: the State did not disclose the existence of the videotaped statement in discovery either at trial or in post-conviction proceedings, despite specific requests for such information and the state's independent duty to disclose all exculpatory and impeachment material. Petitioner only recently learned of the existence and contents of the videotaped statement, during the course of discovery ordered by this Court in his federal habeas corpus proceedings. The videotaped statement was first turned over to attorneys for Petitioner more than 8 years after he was charged with capital murder. The deposition of Dr. Hayne was only recently completed.

16. Also, Petitioner's claims are potentially meritorious.

17. Finally, Petitioner Havard has not engaged in dilatory tactics. He has raised this claim as soon as possible after the discovery ordered by the Court, including the recent deposition of Dr. Steven Hayne, was completed.

18. For these reasons, the Supreme Court's holding in *Rhines v. Weber* applies with full force to this case. Accordingly, this Court should stay proceedings in this case pending the Mississippi Supreme Court's disposition of the successive petition.

WHEREFORE, PREMISES CONSIDERED, Petitioner requests that this Court enter its order staying or abating proceedings on this Petition until thirty (30) days after the Mississippi Supreme Court fully and finally adjudicates Petitioner Havard's Motion for Relief From Judgment or For Leave to File Successive Petition for Post-Conviction Relief. In the alternative, if this Motion is denied, Petitioner requests (1) that these proceedings continue on Petitioner's Motion to Amend (also filed this day) and (2) that Petitioner be granted sixty (60) days from the denial of this Motion within which to present the Court supplemental briefing concerning the recently-taken deposition of Dr. Steven Hayne.

Respectfully submitted,

JEFFREY HAVARD, PETITIONER

s/ Mark D. Jicka
BY: MARK D. JICKA

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CERTIFICATE OF SERVICE

I hereby certify that on April 12, 2011, I electronically filed the foregoing with the Clerk of the Court using the ECF system which sent notification of such filing to the following:

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s/ Mark D. Jicka
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