

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

JEFFREY HAVARD,

PETITIONER

versus

No. 5:08-cv-275-KS

**CHRISTOPHER EPPS, Commissioner,
Mississippi Department of Corrections
And JIM HOOD, Attorney General, State
Of Mississippi**

RESPONDENTS

MOTION FOR CLARIFICATION

COME NOW, Respondents, in the above-styled and numbered cause and file this Motion for Clarification. Respondents submit that Petitioner, Jeffrey Havard, has filed a Memorandum in Support of Amended Petition for Writ of Habeas Corpus (both the petition and supporting memorandum are collectively referred to herein as “Amended Petition”). In this Amended Memorandum, Mr. Havard readdresses issues from his original Petition for Writ of Habeas Corpus (both the petition and supporting memorandum are collectively referred to herein as “Original Petition”), despite the fact that those issues were not made the subject of Havard’s Motion to Amend. Accordingly, the State is unable to discern whether Petitioner has, in his Amended Petition, readopted and realleged all original claims; or whether Petitioner has actually rebriefed all issues in their entirety. In support thereof, the State respectfully submits as follows:

On April 10, 2009, Jeffrey Havard filed his Original Petition in the case *sub judice*. The State filed its Answer on May 8, 2009. On July 31, 2009, Petitioner filed a Memorandum in

Support of his Original Petition; the State's Memorandum Response was filed on November 13, 2009.

After conducting discovery, on April 12, 2011, Petitioner filed a Motion to Amend his Original Petition, "to also include the claims raised in the successive state post-conviction petition." Those claims, as set forth in *Havard v. State*, 86 So. 3d 896 (Miss. 2012), were as follows:

- I. The State violated Petitioner's Constitutional rights to a fair trial and due process of law as governed by *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed. 2d 1217 (1959) and related authority.
- II. The State withheld exculpatory information in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1963) and its progeny.
- III. Alternatively to the immediately preceding issue, Petitioner's trial counsel were ineffective for failing to utilize the videotaped statement at issue if it was disclosed or produced prior to trial.
- IV. Newly-discovered evidence demonstrates that Petitioner is innocent of the underlying felony of sexual battery— which alone makes Petitioner's case a capital murder case and Petitioner eligible for the death sentence that was imposed.
- V. Newly-discovered evidence further demonstrates that Petitioner's trial counsel were ineffective in failing to challenge the underlying felony of sexual battery.

Petitioner submitted, as an Exhibit to his Motion Amend, a proposed amended petition, which appears to have re-submitted the claims from the Original Petition, while integrating or adding the new claims made the subject of Petitioner's Motion to Amend.

On June 28, 2012, this Court granted Petitioner leave to amend his Original Petition.

Mr. Havard filed his Amended Petition on September 28, 2012. This Amended Petition differs in both length and substance from the proposed amended petition. However, like the

proposed petition it too appears to include re-submitted claims from the Original Petition, which claims do not relate to “the claims raised in the successive state post-conviction petition.”

On December 13, 2013, the State filed its Answer to the Amended Petition.¹

On March 29, 2013, Mr. Havard filed a Memorandum in Support of his Amended Petition. The State’s responsive memorandum is due September 12, 2013.

The State has never objected to Petitioner amending his Original Petition. However, Petitioner sought to amend his Original Petition solely to raise claims submitted in his successive state court post-conviction review. Those claims, as identified by the Petitioner, related to false testimony; failure to disclose exculpatory evidence; newly discovered evidence showing actual innocence; and two ineffectiveness claims based on that exculpatory and newly discovered evidence.

Petitioner’s Amended Petition addresses these new issues; but it also readdresses all issues contained in his Original Petition. The State is unable to discern whether Petitioner simply resubmitted his Original Petition (as “cut and paste” arguments), and added new allegations; or whether Petitioner rewrote and resubmitted his arguments as a whole. If Petitioner has, in fact, made any changes to the arguments NOT made the subject of his Motion to Amend, Petitioner has not only violated the Order of this Court; he also has given himself carte blanche to rewrite his memorandum—notably, after the State filed its response. This would, of course, be improper.

Petitioner did not seek leave to amend his Original Petition to rewrite that memorandum in its entirety. Where typically an amended petition would include only the amended arguments, Petitioner’s Amended Petition includes all claims, both old and new. Unless the State goes word

¹ The State responded to all allegations contained therein, despite the fact that many of the allegations were the same as those presented in the Original Petition.

by word, through a one hundred and sixty-eight (168) page Amended Petition, to compare it to the sixty-one (61) page Original Petition, **the State cannot determine whether (and where) Petitioner made substantive changes to arguments which Petitioner did not move to amend. Therefore, the State cannot identify which issues need responsive pleadings.**

Further, the State is concerned that the procedural filing history of this case has given rise to the possibility of two records, and two sets of briefs, being submitted before this Court on the same issues. For instance, in Claim IX of the Original Petition, Petitioner alleged error in trial counsel's failure to secure a life without parole instruction. Havard makes this same allegation of error in his Amended Petition, despite the fact that such allegation does not relate to any of the claims for which Petitioner moved to amend. It is unclear whether Havard has rebriefed said issue or whether Havard (essentially, although not evidently) simply readopted and realleged his arguments from 2009. Regardless, however, the refiling of an original claim muddies the waters of what pleadings this Court is actually to consider. It also leaves the State uncertain as to whether it is to respond anew, when allegations have already been briefed in full.

Petitioner moved to amend his Original Petition, to the limited extent of addressing five issues from his successive PCR. Thus, the resubmission of all of Petitioner's arguments has given rise to confusion, the possibility of competing briefs on the same issues, and the possible inability of the State to formulate a comprehensive response.

WHEREFORE, PREMISES CONSIDERED, the State respectfully requests this Court order Petitioner to clarify the substance of his amendments, by refiling his Memorandum in Support of Amended Petition for Writ of Habeas Corpus. In so refiling, Petitioner will only include claims made the basis of his April 12, 2011, Motion to Amend. In this way, Petitioner's

Original Petition, including all unamended claims, will remain fully intact; and the State will be able to prepare a responsive memorandum that fully addresses all new or amended issues.

The State has, on this day, notified counsel for Petitioner (via e-mail) of its intent to file such motion and of Petitioner's right to object. To the State's knowledge, Mark Jicka, counsel for Petitioner, is out of the office this week serving on jury duty. Graham Carner, co-counsel for Petitioner, has not responded to the State's notification at the time of said filing.

Respectfully submitted, this, the 8th day of August, 2013.

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STATE OF MISSISSIPPI

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CERTIFICATE OF SERVICE

This is to certify that I, Melanie Thomas, Special Assistant Attorney General for the State of Mississippi, have electronically filed the foregoing MOTION FOR CLARIFICATION with the Clerk of the Court using the ECF system which sent notification of such filing to the following:

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This the 8th day of August, 2013.

BY: /s/ Melanie Thomas