

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

JEFFREY HAVARD

PETITIONER

VS.

CIVIL ACTION NO.: 5:08-CV-275-KS

**CHRISTOPHER EPPS, Commissioner, Mississippi
Department of Corrections, and
JIM HOOD, Attorney General of the State of Mississippi**

RESPONDENTS

**REBUTTAL IN SUPPORT OF MOTION TO STAY AND ABATE PROCEEDINGS
PENDING STATE COURT SUCCESSIVE PETITION**

Petitioner, Jeffrey Havard, a death-sentenced inmate, hereby files this rebuttal in support of his motion to stay or abate these proceedings on his Federal Amended Petition for Habeas Corpus relief, pending the outcome of a successive State post-conviction petition in state court arising from newly-discovered evidence demonstrating that the cause and manner of death of Chloe Britt was not shaken baby syndrome, as was testified to at Havard's trial. As stated in the motion, because the factual grounds for the claims were not discovered until recently, these grounds for relief have not previously been raised in Mississippi's state courts. 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*, 125 S. Ct. 1528 (2005) and is counseled by *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011).

I.

In its response in opposition to Petitioner's motion to stay, the State declares, without explanation, that "*Rhines* and *Pinholster* discourage this type of piecemeal litigation." Dkt. 93 at

2. Contrary to the State's naked assertion, this is exactly the sort of procedure provided for by *Rhines*.

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. The Court 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.

Id. at 1535. 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.

In this case, Petitioner Havard has shown good cause for his failure to exhaust claims based on newly-discovered evidence because the science has recently and drastically changed and a new consensus from the science and medical communities has surfaced. Further, Dr. Steven Hayne, the sole trial expert on the issue of shaken baby syndrome, has only recently altered his trial opinions. Havard has never had the opportunity to exhaust these claims until now, and he is availing himself of the proper procedure to do so: a successive court petition.

Likewise, Petitioner's claims are potentially meritorious. In its response, the State does not dispute that the substance of Petitioner's claims is potentially meritorious, but instead

contends that the claims are procedurally barred. Contrary to the State's assertions, however, Petitioner has solid grounds for overcoming any procedural bars.

First, there is no time bar for successive petitions. *Bell v. State*, 66 So.3d 90, 93 (Miss. 2011) (“Noticeably absent from this statute is a time limitation in which to file a second or successive application if such application meets one of the statutory exceptions”). Perversely, the State cites *Bell* as supporting its position. *See* Dkt. 93, at 10. Petitioner Bell was ultimately granted relief. Also, in *Grayson v. State*, 118 So. 3d 118, 129 (Miss. 2013), petitioner obtained merits review of a successor petition despite the state urging the claims were time-barred, even though petitioner did not prevail. Likewise, the Mississippi Supreme Court recently remanded a successive petition for an evidentiary hearing without applying the time-bar as urged by the state. *See Walker v. State*, 131 So. 3d 562 (Miss. 2013).

Furthermore, Miss. Code Ann. § 99-39-3 “provide[s] prisoners with a procedure, limited in nature, to review those objections, defenses, claims, questions, issues or errors *which in practical reality could not be or should not have been raised at trial or on direct appeal.*” (Emphasis added.) Here, Petitioner could not have previously presented the claims in the successive petition because they are based upon a paradigm shift in opinion within the medical and scientific communities with respect to shaken baby syndrome, a shift that had not taken place and therefore was not reasonably discoverable at the time of trial or appeal. *See Neville v. Dretke*, 423 F.3d 474, 479 (5th Cir. 2005) (stay and abeyance under *Rhines* is appropriate when the unexhausted claim is not “plainly meritless”).

Nevertheless, even if the state court were to find the successive application barred, the claims would not necessarily be barred from review by this Court. A federal habeas court may respect a state court judgment resting on a state procedural rule only if such a rule is adequate

and independent of federal law. *Coleman v. Thompson*, 501 U.S. 722 (1991). A rule is adequate if it is firmly established and consistently applied. *Ford v. Georgia*, 498 U.S. 411, 424 (1991). A rule is independent if it is not interwoven with federal law. *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985). “If the decision of the last state court to which the petitioner presented his federal claims fairly appeared to rest primarily on resolution of those claims, or to be interwoven with those claims, and did not clearly and expressly rely on an independent and adequate state ground, a federal court may address the petition.” *Coleman*, 501 U.S. at 734-35; *see also Michigan v. Long*, 463 U.S. 1032, 1041 (1983) (the presumption is that a state court decision is not based upon an independent state ground if the state court does not clearly and expressly state that its decision is “based on bona fide separate, adequate, and independent grounds”). *See also Ruiz v. Quarterman*, 504 F.3d 523 (5th Cir. 2007).

Here, the State’s successor bar arguments are intertwined with the merits. Petitioner has to show that the evidence is newly discovered and that it would have made a difference. A procedural bar need only be honored by this Court if the bar is related solely to questions of state procedure. If the application of a bar is intertwined with the merits, then federal review is not barred. Thus, if the state court dismisses the petition solely on state procedural grounds (*e.g.*, the facts were available), then the successor bar may apply, but if the state court bases on dismissal on whether Petitioner satisfied the other portion of the state successor rule, *i.e.*, the evidence would have made a difference, then the federal court would not be precluded from reaching the merits.

Finally, Petitioner has not engaged in dilatory tactics. He has raised this claim promptly after the discovery of this new advancement in the scientific and medical fields and the changes

in Dr. Hayne's trial opinions. Accordingly, an order staying these proceedings is appropriate under *Rhines*.

II.

The State further contends that a stay on these proceedings should not be granted because the state court successive petition is based on claims that are barred by the one-year limitation period found in 28 U.S.C. § 2244(d)(1)(A). The State's contention is without merit.

First, 28 U.S.C. § 2244(d)(1)(A) is not the only potentially relevant statute of limitations provision. Under 28 U.S.C. § 2244(d)(1)(B), the time begins to run from "the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action" and (d)(1)(D) provides that time begins to run from "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." Thus, it is far from clear that the limitations period would prevent the Court from considering the claims after state court review.

With regard to its time-bar argument under 28 U.S.C. § 2244(d)(1)(A), the State relies on *Mayle v. Felix*, 545 U.S. 644 (2005). In *Mayle*, the United States Supreme Court held that "claims added by amendment [must] arise from the same core facts as the timely filed claims," and must not be "separate in both time and type from the originally raised episodes." *Id.* at 657 (internal quotation marks omitted). Under *Mayle*, a newly asserted claim relates back to a claim in the initial pleading if the two arose out of the same "conduct, transaction or occurrence." *Id. passim*. Therefore, "[s]o long as the original and amended [complaints] are tied to a common core of operative facts, relation back will be in order." *Id.* at 664. Similarly, if an amended complaint presents a new legal theory based on the same operative facts, the amendment will

relate back. *See F.D.I.C. v. Bennett*, 898 F.2d 477, 477, 479 (5th Cir. 1990). The relation-back doctrine is “liberally applied . . . based on the idea that a party who is notified of litigation concerning a given transaction or occurrence is entitled to no more protection from statutes of limitation than one who is informed of the precise legal description of the rights sought to be enforced.” *Williams v. United States*, 405 F.2d 234, 236 (5th Cir. 1968).

Petitioner would first point out that the State’s *Mayle* arguments are premature as the claims at issue are not yet a part of the currently pending Amended Habeas Petition. The time for Respondents’ *Mayle* arguments is upon exhaustion of the claims based on the newly-discovered evidence and once the claims are actually before the Court in these proceedings.

Nevertheless, and contrary to the State’s assertions, *Mayle* will not prevent this Court from staying the proceedings in this case pending the state court’s disposition of the successive petition. The claims asserted in the successive petition, based on newly-discovered evidence, pertain to the validity of the trial testimony offered by State’s sole expert witness, *i.e.*, the validity of his testimony in light of the recent sea change in scientific and medical opinion regarding shaken baby syndrome and the changes in Dr. Hayne’s trial opinions regarding such. The validity of the State’s expert testimony is already the subject of an exhausted claim in the amended petition: Claim XIX, which pertains to the expert’s testimony regarding whether Chloe Britt was sexually battered. Furthermore, other exhausted claims—claims related to the physical evidence on Chloe’s body—share a common core of operative facts with the new claims: Claim I, pertaining to the failure of trial counsel to challenge the underlying felony of sexual battery; and Claim VII, pertaining to the insufficiency of the evidence in support of the Chloe’s death being especially heinous, atrocious, or cruel, as an aggravating circumstance. Thus, under the

“liberally applied” relation-back doctrine, *Williams*, 405 F.2d at 236, amendment is in order, and *Mayle* will not prevent this Court from staying these proceedings under *Rhine*.

III.

Finally, independently of *Rhine*, the Court should stay these proceedings out of concern for judicial efficiency. Briefing before the Mississippi Supreme Court on the successive petition is almost complete, with Petitioner set to soon file his rebuttal to the State’s response to the petition. Soon the Mississippi Supreme Court will likely do one of the following:

- Enter an order vacating Petitioner’s conviction and sentence;
- Send Petitioner back to the circuit court for an evidentiary hearing; or
- Deny the successive petition;

leaving the federal as the only proceeding pending. It will unnecessarily complicate matters and increase the risk of inconsistent rulings to allow the two proceedings to go forward at once, especially considering the progress of the state proceeding. And given the availability of state court remedies for the claims raised, the Court should permit the state court to have the first opportunity to pass on them. *See Granberry v. Greer*, 481 U.S. 129, 131 (1987), (“[T]here is a strong presumption in favor of requiring the prisoner to pursue his available state remedies.”).

IV.

For these reasons and those previously asserted, Petitioner respectfully requests that this Court stay proceedings in this case 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.

Respectfully submitted, this the 31st day of March, 2014.

JEFFREY HAVARD, PETITIONER

s/Mark D. Jicka

MARK D. JICKA

Mark D. Jicka (MSB#8969) [**LEAD COUNSEL**]

Watkins & Eager PLLC

P.O. Box 650

Jackson, MS 39205

Telephone: (601) 965-1900

Facsimile: (601) 965-1901

mjicka@watkinseager.com

Graham P. Carner (MSB# 101523)

Graham P. Carner, PLLC

771 N. Congress Street

Jackson, MS 39202

Telephone: 601-949-9456

Facsimile: 601-354-7854

graham.carner@gmail.com

CERTIFICATE OF SERVICE

I hereby certify that on March 31, 2014, 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

Brad A. Smith

bsmit@ago.state.ms.us

s/Mark D. Jicka

MARK D. JICKA