

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

BRETT HARTMAN, :  
 :  
 Petitioner-Appellant. :  
 :  
 -vs- : No. 04-4138/4185/4243  
 :  
 DAVID BOBBY, WARDEN :  
 :  
 WARDEN, : *Death Penalty Case*  
 :  
 Respondent-Appellee. : Execution - April 7, 2009

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**MOTION UNDER 28 U.S.C. §2244 FOR AUTHORIZATION TO FILE  
SECOND-IN-TIME *HABEAS CORPUS* PETITION**

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Now comes Brett Hartman, by and through counsel, and moves this Court for authorization to file a second-in-time *habeas corpus* petition pursuant to 28 U.S.C. § 2244 and remand this petition to the District Court to permit litigation of the attached Petition. The reasons for this Motion are set out in the attached Memorandum in Support. Also attached to this Motion is the *habeas* petition Hartman will file upon authorization by the Court. (Exhibit C)

Respectfully submitted,

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**MEMORANDUM IN SUPPORT**

**I. Procedural History:**

Brett Hartman is under a sentence of death in the State of Ohio. His execution is set for April 7, 2009 at the Southern Ohio Correctional Facility at Lucasville, Ohio. Hartman seeks leave to file a second *habeas* petition pursuant to 28 U.S.C. § 2244 to litigate claims of actual innocence and an Eighth Amendment challenge to Ohio's lethal injection protocol.

Brett Hartman was charged with aggravated murder committed during the course of a kidnaping, pursuant to Ohio Rev. Code § 2903.01(B) and the sole statutory aggravating circumstance that the aggravated murder was committed during the course of kidnaping. Ohio Rev. Code § 2929.04(A)(7). Hartman was found guilty of aggravated murder, the statutory aggravating circumstance, kidnaping, and tampering with evidence.

At the penalty phase, defense counsel presented brief testimony from two witnesses, Hartman's sister and an aunt with whom he had lived as a boy. The jury returned a death verdict. The trial court sentenced Brett Hartman to death.

In his direct appeal to the Supreme Court of Ohio, Hartman raised thirteen Propositions of Law. The Supreme Court of Ohio affirmed Hartman's convictions and sentence. *State v. Hartman*, 93 Ohio St. 3d 274, 754 N.E. 2d 1150 (2001).

Contemporaneously with his direct appeal, Hartman litigated his Petition for Post-Conviction under Ohio Rev. Code § 2953.21 *et seq.* Hartman raised ten constitutional claims that his conviction and sentences were void or voidable under the Ohio and United States Constitutions. (*Id.*)

The post-conviction trial court dismissed Hartman's Petition without discovery, an evidentiary hearing, or ruling on his motion for expert and investigative assistance. Notice of this ruling was never provided to Hartman's counsel or to Hartman directly. Therefore his Notice of Appeal was not timely and the appeal was dismissed without ruling on the merits of his claims. However, because he was never served with notice, any default arising from his failure to timely file a notice of appeal was found by this court to be excused:

Hartman asserts in this regard that neither he nor his attorney ever received formal notice of the state trial court's order denying his petition. According to the docket, a copy of the order was sent only to Hartman, and not to his attorney. In support of his claimed nonreceipt, Hartman submitted an affidavit from a prison employee stating that no legal mail for Hartman was received during the relevant time period. The government raises no argument in response.

Hartman has thus established cause to excuse the procedural default resulting from his failure to timely appeal the denial of his postconviction petition.

*Hartman v. Bagley*, 492 F. 3d 347, 360 (6th Cir. 2008).

Following direct appeal, Hartman filed an Application for Reopening, raising three Propositions of Law with numerous sub-issues that had not been raised on the

direct appeal. The Supreme Court of Ohio denied Hartman's Application to Reopen on the merits.

On July 11, 2002, Hartman filed a Notice of Intent to File a Petition for Writ of Habeas Corpus, a Motion to Proceed *in forma pauperis*, and a Motion for Appointment of Counsel. On August 31, 2004, the District Court entered an Order and Opinion denying Hartman's Petition for Writ of Habeas Corpus without an evidentiary hearing.

On November 27, 2007, this Court affirmed the district court's dismissal of Hartman's Petition. *Hartman v. Bagley*, 492 F. 3d 347 (6th Cir. 2007).

On June 23, 2008, the Supreme Court denied Hartman's Petition for a Writ of Certiorari. *Hartman v. Bobby*, 128 S.Ct. 2971 (2008).

Subsequently, the Ohio Supreme Court set April 7, 2009 as the date for Hartman's execution. *State v. Hartman*, 120 Ohio St.3d 1413, 897 N.E.2d 649 (2008).

## **II. Factual Predicate**

Brett Hartman has always denied that he killed Winda Snipes, including during all police interrogations, and in his testimony at trial. At trial, Hartman testified and explained all of his connections to Ms. Snipes and the crime scene that the state claimed demonstrated his guilt.

The state's case at trial was circumstantial, consisting primarily of physical evidence and the testimony of forensic witnesses, most of which was of questionable

scientific validity. The testimony of the forensic witnesses centered primarily on evidence gathered from the crime scene and from Ms. Snipes' body.

Among the evidence collected at the crime scene by the Akron Police Department and the Summit County Coroner were hairs removed from Winda Snipes's right forearm and her left "butt cheek." Hairs were also recovered from the rear leg of a bloody plastic chair next to her bed. A hair was found in blood on the bottom of the seat of the same chair. A hair was found enmeshed in a pair of pantyhose; a mop sponge contained hairs; a bloody cloth removed from Ms. Snipes's mouth contained hairs; and a long hair was discovered attached to a hair dryer. In addition, while the family and a victim's advocate were cleaning out the apartment after it was unsealed, a used condom was found in a wastebasket in the bathroom. The used condom was turned over to the police although it was never submitted to BCI. These items have never been tested. (Tr. 1285)

The Akron Police Department clearly believed that these hairs were likely to have significant evidentiary value. The Akron Police obtained blood as well as head hair and pubic hair samples from Brett Hartman and from the victim. This evidence was then sent to the Ohio Bureau of Investigation and Identification (BCI) for testing and comparison. BCI documented the receipt of this evidence.

The Prosecutor sent a letter dated March 2, 1998 to BCI requesting an examination comparing the hair evidence collected from the crime scene with that

taken from Brett Hartman. In spite of this direct request, no testing of this critical evidence was ever completed. At a recent hearing before the Ohio Parole Board, the Prosecutor claimed that BCI stops testing when they have enough evidence to convict.

The state also collected several beer bottles bearing at least one fingerprint, several other items with fingerprints, including one cryptic note of "print compared" of a print lifted from the clock whose cord was used to bind the victim. The results of this comparison were never revealed to Hartman.

The collection and processing of hair evidence by the police and coroner was obviously intended to attempt to explain the circumstances surrounding the death of Winda Snipes and to identify her killer. Identifying the hair on the body of the victim and in the blood surrounding the victim, would have provided powerful evidence for the state to identify the actual killer. Likewise a used condom found in the wastebasket of the victim's bathroom - mere feet from where the body was found - is likely to contain powerful evidence demonstrating the identity of the killer. Similarly, the identification of the found prints would also demonstrate the identity of the killer. After going to great lengths to collect, and transmit the hair evidence, the used condom, the fingerprints, and the cigarette butts to BCI with a request that they be tested, it is incongruous that BCI failed to test the evidence or that the results were not transmitted to the state.

At Hartman's clemency hearing two facts were revealed that directly impact the merits of Hartman's claim. First, Detective Urbank testified that Ms. Snipes boyfriend was the prime suspect. The police eliminated him as a suspect when his alibi which began after 9:00 p.m. that evening was verified. Detective Urbank further testified that the police did not follow up investigation even when they discovered that Ms. Snipes had been killed substantially before 9:00 p.m. No reports of the investigation into Nicholas have ever been disclosed to the defense or anyone else.

Second, Summit County Prosecutor Sheri Bevan Walsh testified that recent genetic testing of Hartman was conducted and positively excluded him as a suspect in an unrelated and unsolved crime in Wisconsin, demonstrating that the state has access to the necessary genetic material as well as the capability of promptly conducting necessary tests.

The only explanation ever given for the failure to test these critical pieces of evidence was the Prosecutor's statement that BCI stops testing when they have enough evidence. Apparently evidence that may point to another person or may prove to be exculpatory is simply ignored and buried by the Summit County Prosecutor in violation of all concepts of due process and fair trial encompassed in the 5<sup>th</sup>, 6<sup>th</sup>, 8<sup>th</sup>, and 14<sup>th</sup> Amendments. Brett Hartman has a due process right to have these hairs, the contents of the condom, fingerprints, and cigarette butts were identified as belonging to someone else tested for exculpatory evidence. Undersigned

counsel recently requested that the Summit County Prosecutor release these items for testing at Hartman's expense. (See Letter to Sherri Bevan Walsh attached as Ex. A) The Summit County Prosecutor has failed to respond to the letter as of this date. This intentional suppression of this exculpatory evidence pointing to another suspect, Brett Hartman should be afforded the opportunity to have this evidence examined and tested before he is executed. He has thus far been denied this opportunity.

Only recently, for the first time, Hartman has learned that the jailhouse informant who testified that Hartman had confessed to the crime to him may have committed perjury, and that his attorney may have told the trial judge that his client had committed perjury in his testimony. Hartman is in the process of investigating these claims.<sup>1</sup>

A conviction based on dramatic - but perjured - testimony of a jailhouse informant raises questions about the fairness of the trial, whether Hartman was afforded due process, and undermines any confidence remaining in the guilty verdict under the 5th, 6th, 8th, and 14th Amendments, especially if the trial judge was aware

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<sup>1</sup>The informant's attorney (who had not role in this trial ) has admitted that he had a meeting with the trial judge after his client had testified. The attorney refuses to say more because of attorney-client privilege. The attorney has apparently been advised that he must continue to honor the attorney-client privilege. (See Affidavit of Investigator Richard Vickers, attached as Ex. B) Hartman is in the process of attempting to interview the trial judge, the jailhouse informant, and trial counsel to verify this claim.

of the perjury. Until the last week, Hartman had no reason to believe that jailhouse informant had perjured himself, that the informant's attorney was aware of the perjury, or that the trial judge had been made aware that the informant had perjured himself.

### **III. Hartman's Petition Satisfies the Requirements of § 2244(b)(2)(B) to File a Second *Habeas* Petition.**

In order to obtain authorization to file a second or successive petition, Hartman must make a prima facie showing that either: (1) a new rule of constitutional law applies to his case that the Supreme Court has made retroactive to cases on collateral review; or (2) there is a newly discovered factual predicate which, if proven, sufficiently establishes that no reasonable fact-finder would have found the applicant guilty of the underlying offense but for constitutional error. 28 U.S.C. § 2244(b); *In re Clemmons*, 259 F.3d 489, 491 (6th Cir. 2001). 28 U.S.C. § 2244(b)(2)(B).

“The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements” of § 2244(b)(2). 28 U.S.C. § 2244(b)(3)(C). “Prima facie in this context means simply sufficient allegations of fact together with some documentation that would warrant a fuller exploration in the district court.” *In re Lott*, 366 F.3d 431, 433 (6th Cir. 2004). Accordingly, “we do not need to find that” Keith’s claim compels relief as written, but we still must determine whether his allegations “require a district court to engage in additional analysis in order to ascertain whether but for the constitutional error, no reasonable factfinder would have found [him] guilty.” *In re McDonald*, 514 F.3d 539, 547 (6th Cir. 2008).

*Keith v. Bobby*, 551 F.3d 555, 557 (6th Cir. 2009).

As set forth, *supra*, Hartman sets forth a prima facie claim that satisfies § 2244(b)(2)(B)(1). Hartman has never been given access to the materials identified in this motion to conduct independent testing to demonstrate his innocence. No amount of diligence or investigation by Hartman could have led to discovery of the factual predicate of this claim because every effort he made to obtain this evidence in order to conduct this testing has been either denied or ignored. *See Williams v. Taylor*, 529 U.S. 420, 442-443 (2000) (no evidence existed to lead attorneys to investigate whether a juror was formerly married to the investigating police officer or that the prosecutor represented the juror in divorce proceedings). Hartman's petition relies on factual predicates that did not exist at the time of his earlier petition and therefore a second petition should be authorized.

Hartman had not reason to believe that evidence existed that the jailhouse informant had actually committed perjury, that he had told his attorney that he had committed perjury, or that the attorney had informed the trial judge that the informant had committed perjury. Having only recently learned of this, Hartman has made every reasonable effort to investigate the underlying facts of this claim in the days since he has learned of this. Hartman has contacted the trial attorney who admits to a meeting with the trial judge in Hartman's case but cannot reveal more. Hartman is attempting to locate and interview the trial judge and the jailhouse informant. (See Exhibit B, attached)

The testing requested will sufficiently establish the facts necessary to demonstrate that no reasonable fact-finder would have found Hartman guilty had these facts been known. If testing on the requested materials reveals that Jeff Nicholas or some other person besides Brett Hartman was in Ms. Snipes' apartment the evening of the crime, those facts would raise sufficient questions about Hartman's innocence to demonstrate that no reasonable juror would have convicted Hartman. In addition, if Hartman can establish that the dramatic testimony of the jailhouse informant that Hartman confessed this murder to him was fabricated, Hartman will be able to again demonstrate that no reasonable juror would have convicted him on the state of the evidence remaining. Therefore, Hartman satisfies § 2244 and this matter should be remanded to the District Court for full discovery, testing, and hearing on the merits of Hartman's petition.

Hartman also seeks to challenge Ohio's lethal injection protocol. This Court has recently recognized that habeas proceedings are an appropriate means of challenging lethal injection procedures. In two cases, *Odraye Jones v. Bradshaw* (6th Cir. Case No. 07-3766) and *Stanley Adams v. Bradshaw* (6th Cir. Case No. 07-3688), the Court remanded capital habeas petition under § 2254 for factual development on their lethal injection claims. These remands sanction habeas proceedings as a proper forum for litigating lethal injection challenges. Those petitioners will now have the opportunity to develop the factual predicate developed in all twenty-eight of Ohio's

prior executions. Until now, § 2254 proceedings were not available to litigate these facts as they apply to lethal injection challenges. In light of these new legal developments, Hartman now seeks to litigate his constitutional challenges to lethal injection in this habeas proceeding.

Brett Hartman was sentenced to death for the aggravated murder of Winda Snipes. Ohio Revised Code § 2949.22(A) provides that Hartman's death sentence "shall be executed by causing the application to the person, upon whom the sentence was imposed, of a lethal injection of a drug or combination of drugs of sufficient dosage to quickly and painlessly cause death." The practice in Ohio of putting to death a person through lethal injection causes massive pain and violates all contemporary standards of decency. Thus Ohio's practice of execution by lethal injection is cruel and unusual punishment as that term is defined by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. *Trop v. Dulles*, 336 U.S. 86, 101 (1958).

In *Baze v. Rees*, \_\_\_ U.S. \_\_\_, 128 S. Ct. 1520 (2008), the plurality concluded that an execution method can be viewed as "'cruel and unusual' under the Eighth Amendment" where the petitioner can demonstrate a "substantial risk of serious harm," and a "feasible, readily implemented" alternative that will "significantly reduce" that risk, *Id.* at 128 S.Ct. 1532. The plurality opinion reflects a dramatic change to the Eighth Amendment landscape. Prior to *Baze*, there was no binding

constitutional precedent holding that a death sentenced prisoner could potentially prove, through discovery and a hearing, that a state's lethal injection protocol violated the Eighth Amendment. *Baze*, 128 S.Ct. at 1526.

It is clear that if Ohio's lethal injection scheme violates *Baze*, it will apply to all death row inmates in Ohio. *See Penry v. Lynaugh*, 492 U.S. 302, 329-330 (1989). Given the recent legal developments and substantive challenges to Ohio's scheme, Hartman must be given the same opportunity as other death sentenced persons to challenge the constitutionality of Ohio's scheme. Since a successful lethal injection challenge will apply retroactively, and this Court has recently determined that lethal injection challenges are proper in *habeas* proceedings, Hartman must be given the opportunity to litigate the merits of the law. To execute Hartman on April 7 only to subsequently determine that his execution should have been barred under *Baze* is the ultimate arbitrary and capricious imposition of the death penalty. Hartman's lethal injection challenge satisfies § 2244(b)(2)(A) and (B).

#### IV. CONCLUSION

WHEREFORE, Brett Hartman requests the Court to remand this matter to the District Court for filing and consideration of his second petition on the merits.

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**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing Motion under 28 U.S.C. §2244 for Authorization to File Second-in-time *Habeas Corpus* Petition was delivered by operation of the Court's electronic filing system to Thomas Madden and Stephen Maher and Matthew Kanai, Assistant Attorneys General, 150 E. Gay Street, 16th Floor, Columbus, OH 43215, this 19th day of March, 2009.

By: /s/ David C. Stebbins  
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