

In The United States District Court
For The Northern District Of Ohio

Tyrone Noling,)	Case No. 5:04-cv-01232
)	
Petitioner,)	Judge Nugent
)	
vs.)	Magistrate Judge Hemann
)	
Margaret Bradshaw, Warden,)	
)	
Respondent.)	

**Petitioner Noling's Second Motion For Leave
To Conduct Discovery**

Petitioner Tyrone Noling first requested leave to conduct discovery under Rule 6 of the Rules governing Federal Habeas Cases, 18 U.S.C. §2254, and the Federal Rules of Civil Procedure on August 29, 2005. (Dkt. 35.) This Court denied that request. Subsequently, the Cleveland Plain Dealer published a series of articles on Noling's case, which support his claims of innocence, prosecutorial misconduct, and ineffective assistance of counsel. Therefore, Noling now makes a second request for discovery based on these new facts. Noling makes this request in the alternative, should this Court reject his motion to stay and abey these proceedings for state

court exhaustion. (Dkt. 66, 75.)¹ Argument for this request is detailed in the attached memorandum.

Respectfully submitted,

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**Memorandum In Support Of Petitioner Noling's
Second Motion For Leave To Conduct Specified Discovery**

I. Introduction.

A jury in Portage County, Ohio found Tyrone Noling guilty of aggravated murder with death penalty specifications and sentenced him to death. Noling exhausted direct appellate review of his convictions and sentences. He was denied postconviction relief in the Portage County Common Pleas Court. State v. Noling, No. 95 CR 0220, slip opin. (Portage County Common Pleas April 9, 1998). That denial was affirmed on appeal. State v. Noling, No. 98-P-0049, slip opin. (Ohio Ct. App. Sept. 19, 2003); State v. Noling, 802 N.E.2d 154 (Ohio 2004).

¹ A second motion to stay and abey these proceedings is being filed contemporaneously with this discovery request. A docket number for that pleading is thus not currently available.

This Court rejected Noling’s first request for discovery. (Dkt. 45.) Subsequently, the Plain Dealer investigated Noling’s case, accessed public records unavailable to Noling, and printed a series of articles about this case. Noling moved to stay and abey these proceedings to allow state court exhaustion of these newly discovered facts. (Dkt. 66.) In opposition, the Warden released a variety of documents, several undersigned counsel had not seen before. (Dkt. 69.) Subsequently, the Plain Dealer released the public records it obtained while investigating Noling’s case. These public records also contained facts with which undersigned counsel were unfamiliar.

A subsequent investigation revealed that the State failed to turn over significant information required by Brady v. Maryland, 373 U.S. 83, (1963). (See Dkt. 66, 75, for relevant facts and law.) The investigation also revealed the trial counsel possessed some of the unfamiliar materials. (See 2nd Stay and Abey request filed contemporaneously, for relevant facts and law.) These newly discovered facts warrant a grant of discovery by this Court. For the following reasons, Noling demonstrates good cause for this discovery request.

II. It Is The Duty Of The District Court To Authorize Discovery Where Good Cause Is Shown.

Habeas Corpus Rule 6 provides that “[a] party shall be entitled to invoke the process of discovery available under the Federal Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise.” Discovery should be authorized “at any time in the proceedings” where good cause is shown. Harris v. Nelson, 394 U.S. 286, 300 (1969). The Court emphasized that district courts should authorize discovery procedures that are “reasonably fashioned to elicit facts necessary to help the court ‘dispose of the matter as law and justice require.’” Id. at 290 (citation omitted).

A petitioner demonstrates “good cause” “[w]here specific allegations before the Court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally and is therefore entitled to relief.” Id. at 300 (citing 28 U.S.C. § 1651); accord Bracy v. Gramley, 520 U.S. 899, 908-09 (1997). Upon showing “good cause,” “it is the duty of the Court to provide the necessary facilities and procedures for an adequate inquiry.” Bracy, 520 U.S. at 909. Whether termed a violation of duty or an abuse of discretion, the failure to authorize discovery upon a showing of “good cause” constitutes reversible error. See id. (Habeas Corpus Rule 6 is meant to be consistent with the Supreme Court’s opinion in Harris).

In Bracy, the Supreme Court unanimously determined that the district court erred in refusing to authorize discovery on the petitioner’s theory of judicial bias. Id. at 901. After the trial judge was convicted of taking bribes, the petitioner sought discovery. Discovery requests included the prosecution’s files in the bribery case and depositions of the judge’s associates, based on the theory that the judge had a bias toward convicting Bracy to deflect attention away from acquittals secured through bribes. Id. at 905-06. The Supreme Court recognized that this was “only a theory at this point, not supported by solid evidence.” Id. at 908. The Supreme Court also acknowledged that petitioner might not be able to develop sufficient evidence to prove actual bias in his case. However, that did not foreclose the opportunity to try. Id. at 909. Petitioner presented “specific allegations” to establish “good cause” for discovery, resultantly the district court abused its discretion in denying discovery. Id.

It is important to note that none of the evidence Bracy submitted in support of his discovery motion constituted direct evidence of a constitutional violation in his own case. The sum total of his evidence was that his state trial judge had been convicted of taking a bribe in

another case and that one of the trial judge's former law partners had been implicated in the judge's illegal acts. Nonetheless, the Court held that Bracy was entitled to discovery under Habeas Rule 6 based on his theory that the trial judge was biased in convicting him in an effort to deflect attention away from acquittals that were obtained through bribes. This demonstrates Habeas Rule 6 creates only a minimal standard to demonstrate "good cause" to obtain discovery.

While courts must order discovery where "good cause" is shown, the Supreme Court has also suggested that courts may order discovery where claims simply are not so "palpably incredible [or] 'patently frivolous or false' as to warrant summary dismissal." Blackledge v. Allison, 431 U.S. 63, 76, 82-83 (1977) (quoting Herman v. Claudy, 350 U.S. 116, 119 (1956)). This Court is also well within its discretion in ordering discovery "when it would help the Court make a reliable determination with respect to the [Noling's] claim." Herrera v. Collins, 506 U.S. 390, 444 (1993) (Blackmun, J., dissenting on other grounds).

The need for discovery in capital cases is particularly acute. See e.g., Wilson v. Butler, 825 F.2d 879, 883 (5th Cir. 1987) ("[I]f death is involved, the Petitioner should be permitted every opportunity possible...to present the facts relevant to his constitutional claims.") Moreover, when an individual's life is at stake, the Supreme Court repeatedly has insisted upon higher standards of reliability and fairness. See e.g., Beck v. Alabama, 447 U.S. 637 (1980) (need for heightened reliability); Lockett v. Ohio, 438 U.S. 586, 604 (1978) (the penalty of death is qualitatively different from any other sentence and requires a heightened degree of reliability).

III. Noling Establishes Good Cause For Discovery.

In his petition for writ of habeas corpus and this motion, Noling has made specific allegations that satisfy the standard for “good cause” under Rule 6(a) of the Rules Governing Federal Habeas Cases, 28 U.S.C. §2254, Harris, 394 U.S. 286, and Bracy, 520 U.S. 899. Noling has presented specific facts to support allegations that are more compelling, and less attenuated, than the judicial bias claim that supported the Bracy Court’s finding of good cause to conduct discovery. Those allegations are now bolstered by the Plain Dealer’s publications relating to Noling’s case.

A. This Court should grant discovery on Noling’s first and fifth claims, as well as cause and prejudice.

Noling asserts in his First Claim that his convictions and death sentence violate the Constitution because he is actually innocent of the Hartig’s murders. In his fifth claim, Noling asserts that his convictions and sentence are the product of prosecutor misconduct. Noling raised both claims in his state postconviction petition. These claims are properly before this Court—they are exhausted and not subject to any state procedural bars. Additionally, Noling asserts his actual innocence as cause and prejudice to alleviate any procedural default in several of his grounds for relief.

Noling demonstrates “good cause” for this discovery request. See Bracy, 520 U.S. at 901 (citing Habeas Corpus Rule 6(a)). To decide whether to grant discovery on Noling’s actual innocence claim, this Court “must first identify the essential elements of [Noling’s] claim.” Id. at 904 (citing United States v. Armstrong, 517 U.S. 456, 468 (1996)). To succeed on this claim, Noling must demonstrate that he is a “legally and factually innocent person.” See Herrera v. Collins, 506 U.S. 390, 419 (1993) (O’Connor, J., concurring).

To decide whether to grant discovery on Noling's prosecutor misconduct claim, this Court must also "identify the essential elements of [Noling's] claim." Bracy, 520 U.S. at 901 (citing Habeas Corpus Rule 6(a)). To succeed on this claim, Noling must demonstrate either that the prosecutor's misconduct prejudiced a substantive right, see Donnelly v. DeChristoforo, 416 U.S. 637, 644 (1974) (citing Griffin v. California, 380 U.S. 609 (1965)) (footnote omitted); United States v. Carter, 236 F.3d 777, 785 (6th Cir. 2001), or that the prosecutor's misconduct rendered the trial fundamentally unfair. See Berger v. United States, 295 U.S. 78 (1935); Gravley v. Mills, 87 F.3d 779, 786 (6th Cir. 1996).

To succeed on a Brady claim, the petitioner must show that the prosecution withheld favorable evidence, including impeachment evidence, material to either to guilt or to sentencing. Brady v. Maryland, 373 U.S. 83, 87 (1963); United States v. Bagley, 473 U.S. 667, 676 (1985). Evidence is material "if there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." Kyles v. Whitley, 514 U.S. 419, 433-34 (1995).

And, to satisfy actual innocence as a gateway to procedurally defaulted claims, Noling must demonstrate that it is more likely than not that a reasonable juror, given all the evidence presented to the habeas court, would not have found the petitioner guilty beyond a reasonable doubt. Schlup v. Delo, 513 U.S. 298, 329 (1995). When a petitioner makes this showing, the accompanying constitutional claims may be reviewed by the federal courts. Id. at 316.

Noling may be entitled to relief on either claim if this Court grants discovery. See Bracy, 520 U.S. at 908-09. In support of these claims, he presented the affidavits of his three alleged accomplices recanting their inculpatory statements (Tr. 961-62, 965-66, 969, 972, 997-1000; ROW Apx. Vol. 8, p. 72) and asserting they were coerced by the State of Ohio to fabricate false

statements and testimony (Tr. 75-76, 390-91, 961-62; ROW Apx. Vol. 8, pp. 54-70). There was no physical evidence linking Noling to the crime scene. No fingerprints were found at the scene. (ROW Apx. Vol. 8, p. 42). No murder weapon was recovered. The bullets used to kill the Hartigs did not match the only .25 caliber handgun Noling is known to have had. (ROW Apx. Vol. 8, p. 48). The State's witness's testimony was inconsistent. Unlike the prior robberies committed by Noling, nothing was taken from the Hartig home. The couple still wore their jewelry (Id. at 425), Mr. Hartig's wallet was still in his pocket (Id. at 425), and no electronics or cash were missing (Id. at 429). Despite the lack of evidence of Noling's guilt and the strong evidence of his innocence, the Court rejected Noling's claims without discovery, and without an evidentiary hearing.

In addition to the information previously presented, documents produced by the Warden and the Plain Dealer bolster his innocence and misconduct claims—documents that were suppressed by the state prosecutor.

For brevity, Noling will not discuss all of improperly suppressed evidence. Noling incorporates both requests to stay and obey these proceedings as if fully re-written herein. Significant and compelling evidence, which supports both Noling's claims of innocence and his prosecutor misconduct claim, was suppressed, including—

- Threats by Ron Craig to frame Kenneth Garcia if he did not cooperate in the Hartig case;
- Threats made by the prosecutor to Gary St. Clair when he recanted his statement, and then an attempt to cover this fact up in reports of the meeting;
- William LeFever, one of the Hartig's insurance agents, acted suspiciously when law enforcement contacted him and matched a description of someone leaving the crime scene at a high rate of speed on the date the State believes the murders occurred;
- Significant inconsistent statements given by—Robyn Elliott, St. Clair, Butch Wolcott, Jill Hall, Joseph Dalesandro, and Julie Mellon;

- Dalesandro's car was searched at the time of his arrest—no murder weapon was found;
- The Hartigs were known to keep money in their home;
- Lewis Lehman refused to take a polygraph examination;
- Despite Dr. Cannone's report that Mr. Hartig intended to confront on the phone his insurance agent, only incomplete records were obtained by authorities (or the complete records have disappeared from the prosecutor's file).

Noling's convictions for aggravated murder and other related charges cannot stand in light of this evidence. Again, however, to receive discovery Noling need not carry the day on his claims. Instead, he must demonstrate that he "may" be entitled to relief upon further factual development of his claim, based on specific allegations of constitutional error raised in his petition. See Bracy, 520 U.S. at 908-09 (quotation omitted). In assessing Noling's discovery request, he meets the burden to show good cause for further fact development of the first and fifth claims in his habeas petition. This Court previously rejected Noling's contention that Wolcott, Dalesandro, and St. Clair's affidavits alone establish good cause. Those same affidavits, in conjunction with information disclosed by the Plain Dealer and the Warden, must establish good cause.

Fact development will assist this Court in deciding whether the first claim in Noling's habeas petition meets the Herrera standard, which requires him to demonstrate his legal and factual innocence. Further, fact development will assist this Court in deciding whether the fifth claim in Noling's habeas petition meets either the standard enunciated in Donnelly v. DeChristoforo, 416 U.S. 637, 644 (1974), Berger v. United States, 295 U.S. 78 (1935), and Brady. Finally, fact development will allow this Court to assess Noling's cause and prejudice arguments under the Schlup standard. See McCleskey v. Zant, 499 U.S. 466, 494 (1991).

Because Noling has demonstrated good cause for discovery, he requests under Fed. R. Civ. P. 29, 30, and 32, permission to:

Depositions and records from the prosecution and law enforcement:

1. Conduct records deposition or subpoena duces tecum of the entire Portage County Prosecutor's file maintained and relating to the Hartig murder investigation, including any separate files relating to all suspects in this homicide, including but not limited to Noling, Butch Wolcott, Gary St.Clair, and Joseph Dalesandro.
2. Conduct records deposition or subpoena duces tecum of the entire Portage County Sheriff's Department file maintained and relating to the Haritg murders, including any separate files relating to all suspects in this homicide, including but not limited to Noling, Butch Wolcott, Gary St.Clair, and Joseph Dalesandro.
3. Conduct records deposition or subpoena duces tecum of Portage County Sheriff's Office file regarding any follow-up investigation on Lewis Lehman, including but not limited to records collected and interviews conducted, whether in written, tape recorded, or videotaped format. This request includes notes or summaries regarding any such follow-up.
4. Conduct records deposition or subpoena duces tecum of Portage County Prosecutor's Office file regarding any follow-up investigation on Lewis Lehman, including but not limited to records collected and interviews conducted, whether in written, tape recorded, or videotaped format. This request includes notes or summaries regarding any such follow-up.
5. Conduct records deposition or subpoena duces tecum Portage County Sheriff's Office file regarding any follow-up investigation on William LeFever, including but not limited to records collected and interviews conducted, whether in written, tape recorded, or videotaped format. This request includes notes or summaries or summaries regarding any such follow-up.
6. Conduct records deposition or subpoena duces tecum of Portage County Prosecutor's Office file regarding any follow-up investigation on William LeFever, including but not limited to records collected and interviews conducted, whether in written, tape recorded, or videotaped format. This request includes notes or summaries regarding any such follow-up.
7. Conduct records deposition or subpoena duces tecum of the Hartig's phone records from March 29 through April 7, 1990.
8. Conduct records deposition or subpoena duces tecum of the subpoena issued, and any evidence collected therefrom, to the phone company addressing the Hartig's phone records, from both the files of Portage County Sheriff's Office and the Portage County Prosecutor's Office.

9. Conduct records deposition or subpoena duces tecum of the Portage County Prosecutor's Office's file regarding all witness statements/interviews relating to the Hartig murders, including but not limited to witnesses testifying at trial, in written, videotape, and/or audiotape form. Additionally, notes or summaries taken by authorities during any such statement/interview.
10. Conduct records deposition or subpoena duces tecum of the Portage County Sheriff's Office's file regarding all witness statements/interviews relating to the Hartig murders, including but not limited to witnesses testifying at trial, in written, videotape and/or audiotape form. Additionally, notes or summaries taken by authorities during any such statement/interview.
11. Conduct records deposition or subpoena duces tecum of the Portage County Prosecutor's Office's file regarding all co-defendant statements/interviews relating to the Hartig murders, including but not limited to witnesses testifying at trial, in written, videotape, and/or audiotape form. Additionally, notes or summaries taken by authorities during any such statement/interview.
12. Conduct records deposition or subpoena duces tecum of the Portage County Sheriff's Office's file regarding all co-defendant statements/interviews relating to the Hartig murders, including but not limited to witnesses testifying at trial, in written, videotape and/or audiotape form. Additionally, notes or summaries taken by authorities during any such statement/interview.
13. Conduct records deposition or subpoena duces tecum of the DRC file on Gary St. Clair. St Clair's signed release is attached as exhibit A.
14. Deposition of Ron Craig. Deposition to address the Hartig murder investigation.
15. Conduct records deposition or subpoena duces tecum of the files of Patrick Kelly, Ted Hornyak, Ron Craig, David Norris, and Joseph Szymanski, and their respective agencies, for any and notes, summaries, reports, relating to the May 25, 1993 interview of Gary St. Clair.
16. Depositions of Patrick Kelly, Ted Hornyak, Ron Craig, David Norris, and Joseph Szymanski. Deposition to discuss May 25, 1993 interview of Gary St. Clair.
17. Deposition of William Mucklo. Deposition to address the search of Joseph Dalesandro's car.
18. Conduct records deposition or subpoena duces tecum any formal statements given to the Portage County Prosecutor or the Portage County Sheriff's Department. Additionally, notes or summaries taken by authorities during any such statement/interview.

Noling seeks records and depositions from entities in a position to know that Noling did not kill the Hartigs. These same entities are likely to possess information that will lead to

identifying the actual perpetrator of these crimes. Based on compelling evidence the prosecution suppressed material exculpatory and impeaching evidence, Noling requests permission to conduct records depositions or subpoena duces tecum of the previously named entities.

Central to Noling's innocence claim are Wolcott, Dalesandro, and St. Clair's assertions that state actors, specifically Ron Craig, coerced them into fabricating false statements and testimony against Noling. Noling seeks records and depositions from entities in a position to know that such statements and testimony were fabricated through coercion. Noling seeks records and depositions related to the threats apparent in these materials, made against St. Clair and Garcia. Noling further supports his request with numerous documents produced by the Plain Dealer and the Warden. These documents detail threats, alternative suspects, and impeachment material.

Noling requests records and depositions to further investigate the Hartig's phone records. Either the Hartig's complete phone records are in Portage County's possession, or the authorities did not do their job when investigating Dr. Cannone's claim.

Noling requests records and depositions to further develop what transpired at the May 25, 1993 interview of St. Clair. Three different versions of events are now in Noling's possession. These do not fully account for all who attended this meeting.

Noling also requests a deposition of William Mucklo. Mucklo told the Plain Dealer that they searched Dalesandro's car when the boys were arrested—and found no murder weapon. This impeaches Dalesandro's story of leaving jail and subsequently disposing of a third small caliber handgun. Absent Dalesandro's story of a third gun, the State has no explanation for how Noling managed to commit these murders, since the gun he stole during the Hughes' robbery was excluded as the murder weapon.

In addition to formal statements, notes and summaries must be produced to ensure the accuracy of the formal statements. As the 3 versions of St. Clair's May 25, 1993 interview demonstrate, the State's files contain multiple versions of the same incident, and these versions are not identical.

Prosecutorial personnel records:

1. Subpoena duces tecum or records deposition of the entire Portage County Prosecutor's Office personnel file on Ron Craig.
2. Subpoena duces tecum or records deposition of the entire Kent Police Department's personnel file on Ron Craig.

Noling requests records that may well substantiate allegations made by several witnesses and co-defendants in this case—Craig coerced and manipulated them into incriminating Noling. A pattern of similar behavior or similar complaints would shed light, and inform this Court's decision on the propriety of Craig's actions in this case.

Physical evidence:

1. A court order directing the release of medical records relating to Lewis Lehman is deceased. Prior to his death, Lehman was treated for cancer. His DNA may exist in any number of labs. Potential sources for his DNA include Alliance Hospital, Aultman Hospital in Canton, Ohio, Timken Mercy (Now know as Mercy Medical) and the Cleveland Clinic. Should DNA be available, Noling will request DNA comparison to be conducted with the cigarette butts found at the crime scene.
2. A court order to conduct DNA testing on William LeFever against cigarette butts found at the crime scene.

DNA testing might allow Noling further substantiate his claim that he is actually innocent of these murders and that the prosecutor committed misconduct when it fabricated evidence against him. An insurance agent owed a large debt to the Hartigs, a debt Mr. Hartig was concerned about immediately prior to his death. Further, Lehman owned a .25 caliber handgun, the same type weapon as used to kill the Hartigs, but could not tell authorities when, or to whom,

he sold that weapon. LeFever matched a description given by Jim Geib of someone leaving the scene on the date the murders were committed at a high rate of speed. Such evidence would assist this Court in assessing Noling's innocence and fabrication claims, as well as his gateway innocence claim.

Depositions and records from witnesses and co-defendants:

1. Deposition of Dr. Daniel Cannone. Deposition to address any conversations with the Hartigs immediately prior to their deaths and the investigation into their murders.
2. Subpoena duces tecum or records deposition of any and all amortization schedules prepared on behalf of Bearnhardt and Cora Hartig.
3. Deposition of Butch Wolcott. Deposition to address the Hartig murders and the State's investigation into those crimes.
4. Deposition of Gary St. Clair. Deposition to address the Hartig murders and the State's investigation into those crimes.
5. Deposition of Joseph Dalesandro. Deposition to address the Hartig murders and the State's investigation into those crimes.

Noling requests records and depositions that may well substantiate allegations made by several witnesses and co-defendants in this case. Dalesandro, St. Clair, and Wolcott have never been allowed to tell their story—the truth of which is bolstered by the materials released by both the Plain Dealer and the Warden. Moreover, Dr. Cannone has a part to play here. He advised authorities of an alternative suspect nearly two decades ago and may be able to shed additional light on that suspect. Finally, the Hartig's had an amortization schedule prepared for a loan given to Dr. Cannone—it is therefore probable that a similar schedule exists relating to the loan to the insurance agent. This evidence will aid in establishing Noling's innocence, and the prosecutor's misconduct.

Depositions and records from the Grand Jury proceedings:

1. Subpoena duces tecum and/or records deposition of Grand Jury notes of Kenneth Garcia's testimony.
2. Subpoena duces tecum and/or records deposition of prosecutor's file relating to Garcia's Grand Jury testimony. This request includes any notes, summaries, reports, etc., prepared in response to Garcia's revelation about Ron Craig. This request also includes any follow-up action taken to address Garcia's allegation against Craig.

Garcia is deceased. However, his words before the Grand Jury speak volumes. He was not a co-defendant, yet Craig threatened to frame him for a crime if he did not cooperate. Interestingly, Garcia was not called to testify at Noling's trial. Certainly such allegations would have been investigated.

Review of the aforementioned records and conduct of these depositions will allow Noling to further substantiate that his conviction was obtained through prosecutor misconduct. It will allow him to prove his claim of actual innocence. Finally, it will establish that he meets the Schlup gateway to alleviate any procedural defaults in this case. McCleskey, 499 U.S. at 494.

D. This court should grant discovery on Noling's first and sixth claims.

In Noling's first and sixth claims he asserts that his convictions violate the Constitution because he is actually innocent of the Hartig's murders and that his trial counsel rendered ineffective assistance. Noling also asserts his innocence and ineffective assistance of counsel as cause and prejudice to alleviate any procedural default in this case. These claims are properly before this Court—they are exhausted, and Noling has established cause and prejudice for any procedural bar.

Noling demonstrates "good cause" for this discovery request. See Bracy, 520 U.S. at 901 (citing Habeas Corpus Rule 6(a)). To decide whether to grant discovery on Noling's sixth, this Court must first identify the essential elements of [Noling's] claim, Noling must demonstrate that his trial and/or appellate counsel's representation was constitutionally deficient and that the

deficiencies prejudiced him. Strickland v. Washington, 466 U.S. 668, 687 (1984); Smith v. Jago, 888 F.2d 399, n.1 (6th Cir. 1989). Noling previously delineated the standards of review for his substantive and gateway innocence claims.

Noling may be entitled to relief on these claims should discovery be granted. See Bracy, 520 U.S. at 908-09 (quotation omitted). In addition to the materials previously presented to this Court, documents produced by the Warden and the Plain dealer bolster his innocence and ineffective assistance of counsel claims, including—

- Counsel possessed significant evidence pointing to the Hartig’s insurance agents as suspects. crime scene report strongly suggested that the Hartig’s were killed at their kitchen table, and that the perpetrator was seated with them. Dr. Cannone told authorities Mr. Hartig was upset, and planned to confront, his insurance agent regarding a defaulted loan—he planned to demand immediate payment. Counsel had evidence that at least one of these agents always conducted business at the Hartig’s kitchen. One of the insurance agents, Lehman, owned a gun that was one of the four brands that could be the murder weapon. The other, LeFever, was mirandized by authorities before he was questioned.
- Counsel could have pursued a fabrication defense based on evidence in their possession that Ron Craig was threatening witnesses and based on the fact that, before Craig became involved in this case, not one witness implicated Noling in these murders.
- Counsel could have dismantled the State’s most important witness, Wolcott, via the testimony of Dr. Grzegorek and use of his reports during Wolcott’s cross-examination.
- Counsel had at their disposable inconsistent statements given by Jill Hall, Dalesandro, Wolcott, and St. Clair.

For brevity, Noling incorporates the facts and law from his 2nd stay and abey request, filed contemporaneously with this motion, as if fully re-written herein.

Because Noling has demonstrated good cause for discovery, he requests under Fed. R. Civ. P. 29, 30, and 32, permission to depose several witnesses:

Depositions:

1. Peter Cahoon, trial attorney.
2. George Keith, trial attorney.

3. Victoria Buckwalter, the investigator for trial counsel when Noling was originally indicted.
4. Annette Mitchell, trial counsels' investigator when Noling was re-indicted.
5. Dr. Grzegorek.
6. Dr. Cannone.

Discovery is warranted as to Noling's ineffective assistance claim. Noling should have the opportunity to depose trial counsel to determine the extent of their preparation for trial, their investigation into viable defenses, and their failure to cross-examine witnesses. Noling should be permitted to depose his investigators, to ascertain the direction they received from counsel, investigation into viable defenses, and impeachment evidence. Further, Noling should be permitted to depose Dr. Cannone and Grzegorek to ascertain what efforts at investigation trial counsel made. No tactical or strategic reason for trial counsels' failures, either through acts of omission or commission, can be gleaned from the trial record. Further fact development of this claim is justified under the standards set forth in Bracy. See 520 U.S. at 908-09.

Conduct of these depositions will allow Noling to further substantiate his claims of innocence and ineffective assistance of counsel. It will also allow Noling to establish cause and prejudice—through ineffective assistance of counsel and innocence—for any procedural default in this case. See McCleskey, 499 U.S. at 494.

E. Conclusion.

The above requested discovery is extensive, but the stakes in this case are high. Noling presented sworn affidavits of Wolcott, Dalesandro, and St. Clair asserting that they were coerced into falsely implicating him in this crime. Given the new facts available, discovery must be granted in this case. Further fact development of this claim is justified under the standards set forth in Bracy. See 520 U.S. at 908-09.

Conclusion

Capital cases require that the court conduct procedures to ensure heightened reliability in the determination of both the defendant's culpability and his sentence. Beck, 447 U.S. at 637. Moreover, when a habeas petitioner has shown good cause for discovery, the district court should grant such discovery under Rule 6 of the Rules Governing § 2254 petitions. Bracy, 520 U.S. at 608-09. Noling has made a good cause showing of the need for discovery. All previous attempts to obtain discovery in state court have been denied. Accordingly, Noling requests this Court to grant him leave to conduct the discovery outlined in this request.

Respectfully submitted,

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Certificate Of Service

This is to certify that a copy of the foregoing has been electronically filed this 3rd day November, 2006. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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