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 Tyrone Noling's Second Motion To Stay And Hold This Case In Abeyance Pending Exhaustion Of State Court Remedies

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Petitioner Tyrone Noling requests that this Court stay these proceedings and hold this case in abeyance to allow him the opportunity to exhaust facts relevant to constitutional claims pending before this Court, and to amend those facts into his petition for writ of habeas corpus once exhausted.

Noling is filing the necessary pleadings to exhaust these facts in the Portage County Court of Common Pleas today, November 3, 2006. After completing the exhaustion process in

state court, Noling will then amend his habeas corpus petition within 30 days. The reasons for this request are explained in the attached memorandum.

Respectfully submitted,

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Memorandum

A. Procedural Posture

Noling sought relief from his convictions and death sentence by filing a petition for a writ of habeas corpus on December 15, 2004. (Dkt. 21.) See 28 U.S.C. § 2254. In his petition, Noling raised grounds challenging his convictions and death sentence. Particularly relevant to this motion are Grounds 1 and 6. In his First Ground for Relief, Noling argued that he is actually

innocent of the Hartig's murders. In his Sixth Ground for Relief, Noling asserted that trial counsel rendered deficient performance, which prejudiced Noling's constitutional rights. Noling also asserted actual innocence and ineffective assistance as cause and prejudice to alleviate any procedural default present in his habeas claims. Noling now moves to stay and abey these proceedings to allow state court exhaustion of these facts.

B. Newly Discovered Evidence Demonstrates Ineffective Assistance

Noling's investigation has revealed that several (but not all) of the documents he believed the State failed to provide his trial counsel were, in fact, in their possession. (See Dkt. 66, 75.) The public records the Plain Dealer released, and Noling's ensuing investigation, have disclosed facts the State provided to trial counsel, which they failed to use in Noling's defense.

Trial counsel failed to provide these materials to Noling's postconviction counsel, John Gideon, when he prepared Noling's original state court pleadings. (See Exs. A,C.) These materials were only recently produced. (See Ex. A.) A habeas petitioner in the Fifth Circuit claimed that his failure to litigate claims in state court was excusable because he did not receive access to his trial file. Robison v. Johnson, 151 F.3d 256 (5th Cir. 1998). The Fifth Circuit did not accept this excuse as cause because the claim was based on a letter written by the petitioner. Robison, 151 F.3d at 263. He was thus aware of the factual basis of the claim. Id. (internal citation omitted). Unlike Robison, Noling's claims are not based on a letter that he wrote to trial counsel. Noling's claims are based on discoverable material, served on trial counsel, which was not turned over to his postconviction counsel. Any failure to litigate these facts at an earlier date is a result of trial counsels' failure to completely produce their file to postconviction counsel.

Counsel's failure to turn over the complete file is not unlike the prosecutor's failure to turn over Brady v. Maryland, 373 U.S. 83 (1963), materials. Both Strickler v. Greene, 527 U.S.

263 (1999), and Banks v. Dretke, 540 U.S. 668 (2004), indicate counsel can rely on a prosecutor's assurance that he has turned over all evidence required under the law. Banks, 540 U.S. at 693. See also Dobbs v. Zant, 506 U.S. 357, 359 (1993) (per curiam). If it is reasonable to rely on a prosecutor's representation of complete disclosure, it is equally reasonable to rely on a trial attorney's similar representation. Further, a delay in producing relevant evidence caused by the prosecutor's erroneous "assertions that closing arguments had not been transcribed" and Dobbs' reliance thereon was reasonable.

Such reliance is particularly well-founded given that trial counsel is ethically bound to turn over these materials. Counsel's trial file belongs to the client, not to the trial attorney. See Office of Disciplinary Counsel v. Cikraji, 35 Ohio St. 3d 7, 517 N.E.2d 547 (1988) (disciplining attorney in part for refusing to turn over client's file); Cleveland Bar Ass'n v. Johnson, 84 Ohio St. 3d 146 , 702 N.E.2d 409 (1998) (same); Cuyahoga County Bar Ass'n v. Vitullo, 86 Ohio St. 3d 549, 715 N.E.2d 1136 (1999) (same). And, a trial attorney continues to owe an ethical duty to his client, even after the trial is over and representation has ceased. See e.g. Damron v. Herzog, 67 F.3d 211, 214 (9th Cir. 1995). Noling had a right to expect, when postconviction counsel requested his files from lead trial counsel, that all materials were fully disclosed. Absent their complete disclosure, or some indication that the files released were less than complete, Noling had no way to access materials he did not know existed.

The previously undisclosed trial file materials include–inconsistent statements on which witnesses were not cross-examined, witnesses who were not called to testify at trial, and alternative suspects the defense did not pursue:

B.1 Alternative Suspects

Dr. Cannone, the Hartig's family doctor, advised authorities that he had talked with Bearnhardt Hartig just days before his murder. Mr. Hartig was upset over a loan to his insurance agent, which had been defaulted. Mr. Hartig intended to call the agent and demand immediate payment. (Ex. D.) Trial counsel possessed significant information that should have led them to pursue an alternative suspect defense. Indeed, two alternative suspects were available for use in Noling's defense.

If Dr. Cannone's statement were the only evidence available to trial counsel, failing to pursue an alternate suspect defense might have been a reasonable tactical decision. However, trial counsel were aware of additional evidence supporting the possibility of an additional suspect. Several documents in trial counsels' possession made Lewis Lehman, one of the Hartig's insurance agents, a viable alternative suspect in the murders, including:

> •Documentation that Lehman owned a .25 caliber Titan handgun, one of the four brands that could have been the murder weapon according to BCI (Ex. E.);
>
> •Documentation that William LeFever had seen Lehman's handgun only 4 years prior to the murder, in 1986 (Ex. F.);
>
> •A crime scene report that detailed that Mr. and Mrs. Hartig were sitting at the kitchen table when they were shot (Ex. G, H); it also appeared that one other subject was sitting at the table facing the door (Ex. G, H); and that the victims did not struggle and there was no sign of alarm (Ex. G, H); Mr. Hartig's wallet was undisturbed (815); and a desk was ransacked with papers on the floor (Ex. G.)

Defense counsel also were aware of William LeFever, the Hartig's other insurance agent. Several documents in trial counsels' possession made him a viable alternative suspect in the Hartigs' murders, including—

> •A crime scene report that detailed that Mr. and Mrs. Hartig were sitting at the kitchen table when they were shot (Ex. G, H); it also appeared that one other subject was sitting at the table facing the door (Ex. G, H); and that the victims did not struggle and there was no sign of alarm (Ex. G, H); Mr. Hartig's wallet was undisturbed (815); and a desk was ransacked with papers on the floor (Ex. G.)

•Documentation that LeFever always conducted business at the Hartig's kitchen table (Ex. F);

•Documentation that LeFever had his house for sale at the time of the police interview (Id.);

•Documentation that LeFever acted nervous and claimed not to know the Hartigs' until authorities indicated they had been murdered (Id.);

•Documentation that the police mirandized LeFever before questioning (Id.);

•Documentation that LeFever conducted business at the Hartig's kitchen table. (Id.) [1]

The crime scene report suggested a perpetrator who knew the Hartigs (Noling did not). The crime scene report suggested the perpetrator and the Hartigs were seated at the kitchen table, which is inconsistent with a home invasion and robbery. Gary Rini confirms the likelihood that the killer knew the Hartigs. (Ex. I.) An insurance agent conducted business at the Hartig's kitchen table, and Dr. Cannone gave both agents a potential motive to have killed the Hartig's. Lehman owned the right gun. LeFever was mirandized and conducted business with the Hartigs at their kitchen table. But no evidence was adduced at trial to prove these facts.

Trial counsel "has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Reynoso v. Giurbino, 462 F.3d 1099, ___, 2006 U.S. App. LEXIS 22648, *33 (9th Cir. 2006) (citing Strickland v. Washington, 466 U.S. 668, 691 (1984)). In addition to investigation, counsel has a duty to present evidence "that demonstrates his client's factual innocence, or that raises sufficient doubts as to that question to undermine confidence in the verdict, renders deficient performance." Id. (internal citations omitted). See also Hart v. Gomez, 174 F.3d 1067, 1070 (9th Cir. 1999); Avila v. Galaza, 297 F.3d 911, 919 (9th Cir. 2002); Lord v. Wood, 184 F.3d 1083, 1093 (9th Cir. 1999).

[1] LeFever would have been an even more compelling alternative suspect but for the State's failure to provide trial counsel with Jim Geib's statement, indicating that he saw a lone driver, 30 year old male w/ black hair in a blue car driving rapidly from "the general area" around the date & time that authorities determined the murder occurred. The police notes further indicate that this description matched LeFever. (See Dkt. 75.)

Failure to present exculpatory evidence "is ordinarily deficient, 'unless some cogent tactical or other consideration justified it.'" Griffin v. Warden, Maryland Correctional Adjustment Center, 970 F.2d 1355, 1358 (4th Cir. 1992) (internal citations omitted).

House v. Bell, __ U.S. __, 126 S.Ct. 2064 (2006), is relevant to this Court's consideration. In House, the petitioner presented evidence of an alternative suspect. Despite the fact that the evidence was "by no means conclusive," the Supreme Court found that, coupled with other evidence the alternative suspect evidence "would reinforce other doubts as to House's guilt." Id. at 2085. Similarly, while not conclusive, evidence from Dr. Cannone and relating to insurance agents Lehman and LeFever, coupled with the other evidence discussed in this motion, would have reinforced doubts about Noling's guilt.[2] Cf. id.

"From beginning to end the case is about who committed the crime." House, 126 S.Ct. at 2079. The Hartig's murders were a whodunit. Trial counsel explicitly told the jury this in opening statement— "What we're here to argue about is who committed these crimes" (Tr. 642-43); "…we're here to dispute that Tyrone Noling had anything to do with the homicides of these folks. (Tr. 645) "When identity is in question, motive is key." Id. Trial counsel should have investigated, and presented, the relevant crime scene evidence, as well as information relating to Lehman and LeFever.

B.2 Witnesses Not Called

Ron Craig

Trial counsel possessed significant information that should have led them to pursue a fabrication defense. In 1990 numerous witnesses spoke to law enforcement about the Hartig's murders, and any involvement by Noling and his cohorts. No one implicated Noling in the

[2] Doubts about Noling's guilt would have been further reinforced by information not disclosed to counsel prior to trial. See Noling's Motion to Stay and Abey and Reply (Dkt. 66, 75), incorporated herein by reference.

crime. Joseph Dalesandro, Butch Wolcott, and Gary St. Clair denied any knowledge of, or participation in, the Hartig's murders—a fact counsel pointed out at trial. However, trial counsel failed to capitalize on two additional witnesses who never mentioned a murder when questioned by authorities in 1990. A 1990 investigative report reveals that Jill Hall told law enforcement officials that "Wolcott had talked to her 'about some of the robberies' Noling and his pals 'did in Alliance.'" The report does not mention a murder. Rini indicates normal practice would have been to document any reference to a murder, demonstrating that no such reference was made. (Ex. I.) Similarly, Julie Mellon was questioned by law enforcement officials in 1990 and failed to mention a murder. However, by 1992, both women had changed their story to add a murder confession on Wolcott's part.

Only after prosecution investigator Ron Craig became involved did Wolcott, Dalesandro, and St. Clair offer inculpatory statements. And, Hall and Mellon only implicated Noling after Craig became involved. The key to the State's creation of a case against Noling was Craig's involvement. Trial counsel should have exposed this fact to the jury.

Beyond merely pointing out this fact, trial counsel should have made the connection at trial that was made in postconviction investigation—Craig was coercing witnesses into incriminating Noling. In addition to these changed stories, St. Clair's April 15, 1993 statement should have tipped off trial counsel to Craig's tactics. St. Clair indicated that Craig threatened to have the Murphy's testify that he robbed them, along with Noling. (Ex. J.) This was patently untrue; the record reveals that Noling committed this robbery alone. Trial counsel had a clear threat from Craig to fabricate evidence against St. Clair if he failed to cooperate.[3]

[3] The need to pursue Craig would have been even more clear to trial counsel had the State disclosed all information required under Brady v. Maryland, 397 U.S. 742 (1970). The State failed to disclose Kenneth Garcia's Grand Jury testimony, wherein he claimed that Craig threatened to frame him for a crime he did not commit if he failed to cooperate in the Hartig case. (See Dkt. 75.)

Counsel also had information available demonstrating that St. Clair would have been particularly susceptible to such tactics. Counsel possessed a March 12, 1993 competency evaluation of St. Clair. This report reveals that St. Clair was in developmentally handicapped classes. (Ex. K, p. 4.) St. Clair has borderline intellectual functioning, with a full scale IQ of 76. (Id. at 6-7.) Dr. Ofshe affies that these deficits would have made St. Clair more susceptible to Craig's coercive tactics. (See Ex. L.)

Trial counsel had exculpatory evidence in their files, which should have led them to present witnesses attacking the State's use of Craig to create a case against Noling. See Reynoso, 2006 U.S. App. LEXIS 22648, *33 (citing Strickland, 466 U.S. at 691). This was evidence with significant exculpatory value. There is no excuse for counsels' failure to present it. See also Hart, 174 F.3d at 1070; Avila, 297 F.3d at 919; Lord, 184 F.3d at 1093; Griffin, 970 F.2d at 1358.

Dr. Grzegorek

Trial counsel were aware that Wolcott met with a psychologist, Dr. Alfred Grzegorek, several times. In their possession were three letters in which the doctor evaluated Wolcott. His observations made him a significant and compelling witness for Noling.

In a letter dated July 6, 1992, Dr. Grzegorek discussed Wolcott's repressed memories. He attributes Wolcott's spotty memory of the Hartig murders to his sexual abuse. "He has indicated to you questions as to whether or not he is remembering the events correctly or whether he made them up, he continues to question his own culpability in the robbery and murders, and overall, he is not certain as to whether or not what he is remembering is real or part of 'going crazy.'" (Ex. M.) Dr. Ofshe notes that Dr. Grzegorek's "explanation that Wolcott's inability to remember any involvement in the murders is because he repressed these memories…is utter

nonsense." (Ex. L, p. 2.) Dr. Ofshe explains that repression is little more than "rank speculation" that "has been rejected by the scientific community." (Id.) Instead of retrieving memories, Dr. Grzegorek's involvement served only to "rationalize the creation of beliefs that benefited Wolcott." (Id.) Had counsel utilized Dr. Grzegorek's reports, included obtaining an appropriate expert like Dr. Ofshe, Wolcott's credibility would have been destroyed.

Dr. Grzegorek encouraged interviews "in a firm, directed, but non-pressured fashion." He cautioned, "I would strongly caution that the continued interviews and examinations with him be done in a firm but non-pressured fashion since I believe he may either become more obstinate if overly pressured or will produce information to simply satisfy demand and that the information produced will not be able to be verified through other sources." (Ex. M, p. 3-4.) Dr. Grzegorek's letter is oddly prescient; Wolcott affied that the State used high-pressure tactics to coerce inculpatory statements from him. (See Postconviction Ex. F.)

Dr. Grzegorek drafted another letter on December 21, 1995. In this letter, Grzegorek notes that Wolcott has only begun to believe in the last six or seven months "that it did happen the way I remember. (Ex. N, p.1.) Wolcott continued, stating it was "It's still very hard to realize that it's true." (Id.) Wolcott expressed his need for "this to be over." (Id. at 2.) Wolcott expressed concern that he might have been more involved than he recalls, but was not sure. (Id.)

Dr. Grzegorek could have offered compelling testimony attacking the memory, and thus reliability, of the State's most important witness. Moreover, an expert such as Dr. Ofshe could have dismantled any reliance by the State on "repressed memories." In addition, trial counsel could have used Dr. Grzegorek's reports to cross-examine Wolcott, pointing out his uncertainty and the unreliability of his testimony.

B.3 Inconsistent Witnesses

Numerous inconsistencies were available to trial counsel, but went unused in attacking the State's case. For example, trial counsel failed to question witnesses on these inconsistencies:

Jill Hall[4]

Knowledge of the murder

1990	**1992**
Wolcott implicated himself, Noling, St. Clair, and Dalesandro in some robberies committed in Alliance	Wolcott implicated them in the Atwater murders. (Ex. O.)

Details of Wolcott's confession to the murders

1992	**Trial Voir Dire & Testimony**
Noling, St. Clair, Wolcott and Wolcott's brother & some other guy went to Atwater. (Ex. O, p. 2)	Noling, St. Clair, Wolcott, & Dalesandro went to Atwater. (Tr. 927)

Hall also claimed that she contacted the Stark County Sheriff's Department about the murders after speaking to Wolcott. (Tr. 936.) Trial counsel had no documentation of this contact—an inconsistency that should have been investigated and crossed on.

Joseph Dalesandro[5]

Killing witnesses

Trial Testimony	**Handwritten statement 7/2/92 (Ex. P.)**	**7/29/92 statement (Ex. Q.)**	**2/24/93 investigative report (Ex. R.)**	**3/2/93 investigative report (Ex. S.)**
Noling stated in the car that killed the Hartigs because he did not want	No mention of killing to eliminate witnesses.	No mention of killing to eliminate witnesses.	No mention of killing to eliminate witnesses.	No mention of killing to eliminate witnesses.

[4] Additional inconsistencies can be found when considering Jill Hall's Grand Jury testimony, which was not turned over to trial counsel. (See Dkt. 75.)

[5] Additional inconsistencies can be found when considering Jill Hall's Grand Jury testimony, which was not turned over to trial counsel. (See Dkt. 75.)

witnesses (Tr. 1054)				

Butch Wolcott[6]

Condition of the Hartigs

Statement 6/8/92	**Trial Testimony**
Hartigs were tied up in the kitchen. (Ex. O, p. 83.)	No testimony regarding this fact, and inconsistent with the crime scene.

Shooting

Trial testimony	**All prior statements**
Heard shots, a lady scream, then some more shots (Tr. 848)	No testimony regarding

Killing a witness

Trial testimony	**All prior statements**
Said lady had to because she saw them, could tell the police (Tr. 851)	No mention.

Gary St. Clair[7]

Location of the murders

Grand jury 3/19/93	**Investigative Rpt 4/6/93 (Ex. T.)**
Didn't know name of street at time of offense (Tr. 508)	East on Moff Rd.

Acts witnessed in Hartig home

Grand jury 3/19/93	**Investigative Rpt 4/6/93 (Ex. T.)**
Ran out the front door when heard the 1st shot (Tr. 511) Saw 2 victims on the floor (Tr. 518) thinks went in kitchen (Tr. 520) Mrs. H shot first (Tr. 520) Now shot Mr first (Tr. 521) Saw	Saw Noling shoot victims while on floor

[6] Additional inconsistencies can be found when considering Jill Hall's Grand Jury testimony, which was not turned over to trial counsel. (See Dkt. 75.)

[7] Additional inconsistencies can be found when considering Jill Hall's Grand Jury testimony, which was not turned over to trial counsel. (See Dkt. 75.)

Tyrone shot them on the floor (Tr. 523)	

Trial counsel told the jury in opening statement that the State's witnesses were not credible. "Now the reasons we're here in this case is because we're submitting to you that many of the State's witnesses don't have any credibility at all." (Tr. 643-44) And, the lack of credibility in the State's case was the central theme of trial counsels' closing argument. (See Tr. 1467 et seq.) Establishing as many significant and compelling inconsistencies as possible was thus consistent with, and central to, Noling's defense.

Moreover, these facts were of particular significance. For example, two witnesses added testimony that Noling killed Mrs. Hartig because she was a witness to Mr. Hartig's murder. This was an extremely significant fact since Noling was charged with O.R.C. § 2929.04(A)(3) capital specifications. This necessarily required the State to adduce testimony from a witness (or witnesses) that Noling killed to eliminate witnesses. The fact that Dalesandro mentioned this for the first time at trial, after he lost his deal for his participation in this crime, would have been a significant and compelling fact with which the jury could have assessed his credibility.

B.4 Conclusion

All of this unused material would have been consistent with Noling's trial defense. Indeed, trial counsel argued in opening statement that both Wolcott and Dalesandro were lying to get deals. They cross-examined these witnesses, and others, on inconsistent statements. Use of all available inconsistent statements would have bolstered counsels' claim. Similarly, witnesses who were not called—like Ron Craig (or those who could have shed light on his tactics) and Dr. Grzegorek—would have bolstered the defense's claim that the State's witnesses fabricated the evidence against Noling. Finally, providing two alternative suspects, with a motive from a

disinterested family doctor, would have further bolstered the claim that Noling did not commit these murders.

These are not new grounds for relief as defined by Mayle v. Felix, 545 U.S. 644, 125 S. Ct. 2562 (2005). Rather these are new facts, consistent in both time and type as those set forth in Noling's initial habeas petition. (See Grounds for Relief 1 and 6, and cause and prejudice arguments to alleviate any procedural default.)

Noling is simultaneously filing the appropriate state court pleadings to exhaust these newly discovered facts. Noling requests that this Court hold these proceedings in abeyance pending state court exhaustion.

C. Noling Must Give The State Courts The First Opportunity To Review The Facts Discovered

C.1 A Habeas Petitioner Must Exhaust The Facts Upon Which He Relies

The federal courts have repeatedly recognized that the state courts should be given the first opportunity to address the issues contained in a federal habeas petition prior to the federal court conducting its own review. Duckworth v. Serrano, 454 U.S. 1, 3-4 (1981); O'Guinn v. Dutton, 88 F.3d 1409, 1412-13 (6th Cir. 1996).

The principles of comity govern habeas proceedings. Federal courts are normally prohibited from adjudicating a habeas petition that contains unexhausted claims. Rose v. Lundy, 455 U.S. 509, 522 (1982). This holding is consistent with the mandate of 28 U.S.C. § 2254(b), which provides that a petition for habeas corpus relief will not be granted unless the petitioner has exhausted the state court remedies available or there is an unavailability of remedies. For reasons of both judicial efficiency and comity, it is important that the state courts have the first opportunity to review federal constitutional claims. See Keeney v. Tamayo-Reyes, 504 U.S. 1, 9 (1992); Coleman v. Thompson, 501 U.S. 722, 731 (1991).

However, the requirement of state court exhaustion is not jurisdictional. Rose v. Lundy, 455 U.S. at 515; Granberry v. Greer, 481 U.S. 129, 135 (1987); O'Guinn, 99 F.3d at 1412. The Courts have repeatedly emphasized that the purpose of exhaustion is to provide state courts the first opportunity to consider constitutional claims. Duckworth, 454 U.S. at 3; Picard v. Connor, 404 U.S. 270, 275 (1971); Anderson v. Harless, 459 U.S. 4, 6 (1982). Federal courts have the power to entertain unexhausted claims under certain narrowly defined conditions. Granberry, 481 U.S. at 133-34. In making this determination, there is a strong presumption in favor of having the state courts review and consider the issues presented and make a determination regarding available remedies. Id. at 131. If the case involves important unresolved questions of fact or state law or where there are important state interests at stake, the return of the case to allow the state courts the first opportunity to address the issues is appropriate. Id. at 134-35.

The Sixth Circuit's capital decision in O'Guinn illustrates the importance the Sixth Circuit places on exhaustion and providing the state courts with the first opportunity to hear the case. In O'Guinn the district court granted the petitioner the opportunity to conduct discovery during the course of which the petitioner for the first time discovered a violation of the Fourteenth Amendment and Brady. After the completion of discovery, the petitioner was awarded an evidentiary hearing on this issue. Neither party raised the exhaustion issue. Ultimately the district court decided the case adversely to the petitioner. The case was appealed to the Circuit, briefed and the judgment of the district court was affirmed. Again neither party raised the exhaustion issue. The Court granted rehearing en banc and at oral argument one of the judges sua sponte raised the exhaustion issue. The Court ordered the case returned to state court for purposes of exhaustion:

> In this case, the state courts have an important interest in reviewing a serious, unexhausted constitutional claim. O'Guinn's Brady

> claim involves the conduct of a state prosecutor (in particular, his decisions regarding the withholding of evidence) in a state trial in which the defendant was prosecuted for violating state law. Even if there were not a presumption in favor of returning mixed petitions to state court, this would be an appropriate case in which to do so. The interests of justice and comity do not weigh in favor of having this Court decide the question. Extending Granberry beyond the "exceptional" or "unusual" case undermines the law's clear preference for having unexhausted claims decided in state court. Because this case presents no exceptional or unusual circumstances, it should be addressed by the state courts in the first instance.
>
> We note that the District Court held an evidentiary hearing on some of the issues raised in O'Guinn's habeas petition. The holding of a hearing is neither "exceptional" nor "unusual" and therefore does not provide grounds for this Court to decide unexhausted claims. Moreover, in this case it was not a full hearing and the question of exhaustion was never discussed by the District Court. See 870 F. Supp. 779.

Id. at 1412-13. See also Hill v. Anderson, 300 F.3d 679 (6th Cir. 2002) (exhaustion on Atkins claim required).

Moreover, Noling's request is timely. See Rhines v. Weber, 544 U.S. 269, 277-78 (2005). The Cleveland Plain Dealer article was published on August 13, 2006. Noling did not obtain access to the public records cited by the Plain Dealer until September 9, 2006. Noling has taken less than 60 days to investigate voluminous claims of violations of Brady, and ineffective assistance of counsel. Thirty days was recognized as reasonable by the Supreme Court. See id. And, the Rhines Court allowed the petitioner 60 days to proceed into state court. See Rhines, 544 U.S. at 273. Noling has acted without undue delay, in a timely fashion.

Noling's request is consistent with Judge Dlott's ruling in Mills v. Mitchell, 96-CV-423, slip opin., Dkt. 158 (S.D. Ohio Jan 6, 2006). There the petitioner had pending before the district court a Brady claim. After a grant of discovery, additional facts supporting petitioner's Brady claim were discovered. Judge Dlott ordered Mills back to state court to exhaust the new facts

supporting his already pending Brady claim. The Court held Mills' habeas proceedings in abeyance pending that exhaustion. Noling's request is also consistent with Judge Carr's ruling in Davis v. Mitchell, No. 1:99CV2400, slip. opin., Dkt. 76 (N.D. Ohio Feb. 27, 2001).

Noling has raised issues implicating his actual innocence and ineffective assistance of trial counsel. The Ohio courts have an important interest in reviewing Noling's substantial, but unexhausted actual innocence and ineffective assistance of counsel facts. See O'Guinn, 88 F.3d at 1412-13. This Court should not deny the Ohio courts the opportunity to address the significant constitutional issues that Noling wants to include in his amended habeas petition.

D. The Court Should Grant An Abeyance To Permit Noling To Return To State Court

Noling's case presents facts similar to that found in Rhines. There the district court ordered habeas proceedings be held in abeyance "conditioned upon petitioner commencing state court exhaustion proceedings within sixty days of this order and returning to this court within sixty days of completing such exhaustion." 544 U.S. at 273. The only distinction with Rhines is that Noling needs to exhaust facts relevant to pending claims, rather than the claims themselves. The Rhines Court required good cause to justify a petitioner's failure to exhaust his claims in state court. Id. at 277. Noling easily demonstrates good cause. He incorporates by reference his discussion in section B, which delineates his efforts to obtain the information provided to the Cleveland Plain Dealer. Indeed, it would be an abuse of discretion for a stay to be denied under these circumstances, as Noling demonstrates good cause, these facts render his pending claims potentially meritorious, and Noling has not been dilatory. See id. at 278.

The Sixth Circuit and its district courts, as well as other circuit courts have frequently held habeas proceedings in abeyance while the petitioner returned to state court to exhaust state court remedies. These numerous decisions are based on the principles of comity and federalism,

and the desire to avoid piecemeal litigation. Holding federal habeas corpus proceedings in abeyance in capital cases in general, and in Noling's case in particular, encourages the policies of comity and non-intervention by federal courts while avoiding piecemeal litigation.

Rhines states that the district court has the authority to hold habeas corpus proceedings in abeyance pending state court exhaustion. 544 U.S. at 273, 277-78. The Supreme Court has concluded that the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, counsel, and litigants. Landis v. North American Co., 299 U.S. 248, 254 (1936). In habeas corpus, federal courts have wide-ranging powers to shape relief and procedures to effectuate habeas corpus jurisdiction. Harris v. Nelson, 394 U.S. 286, 291 (1969). The "stay and abeyance" procedure allows the courts to balance the delicate principles of exhaustion and non-piecemeal litigation in capital habeas proceedings while protecting the petitioner's right to federal review if necessary. See Fetterly v. Paskett, 997 F.2d 1295, 1301-02 (9th Cir. 1993).

Federal courts outside the State of Ohio have consistently stayed and held in abeyance habeas proceedings. See Lambrix v. Singletary, 520 U.S. 518, 521, 524 (1997) (noting that Eleventh Circuit held proceedings in abeyance to permit petitioner to exhaust state remedies); Calderon v. United States Dist. Court, 144 F.3d 618, 620 (9th Cir. 1998); Simpson v. Camper, 927 F.2d 392, 393 (8th Cir. 1991) (held appeal in abeyance pending exhaustion of state court remedies); Scott v. Dugger, 891 F.2d 800, 802 (11th Cir. 1989) (district court stayed proceedings to permit petitioner to exhaust state court remedies); Giarratano v. Procunier, 891 F.2d 483, 485 (4th Cir. 1989) (district court stayed judgment denying the petitioner relief in to permit petitioner to exhaust state court remedies); Prejean v. Blackburn, 743 F.2d 1091, 1094 (5th Cir. 1984) (same); Arango v. Wainwright, 716 F.2d 1353, 1355 (11th Cir. 1983) (remanded case, stayed

and held in abeyance to permit petitioner to exhaust state court remedies; noted interest in judicial economy).

Conclusion

The facts support the granting of an abeyance order. Postconviction counsel contacted Noling's lead trial attorney and believed trial counsel completely produced Noling's file. No discovery or evidentiary was granted by this Court. But for the Plain Dealer's access of public records, Noling would have had no reason to contact trial counsel regarding Brady materials. And, Noling would not have discovered that trial counsel failed to provide his postconviction counsel with the complete trial file.

Noling raised actual innocence and ineffective assistance of counsel in the state courts and before this Court. This case does not involve a habeas petitioner who desires to raise facts that were clearly on the face of the record throughout the state court proceedings. It is instead, a case of deficiently performing trial counsel failing to turn over their complete file. Noling could not have previously identified, let alone relied upon, this evidence in state court. But for the interest of the Plain Dealer, Noling would never have known of these materials.

Trial counsel precluded Noling from knowing that they possessed, but failed to utilize, compelling information relating to other suspects, other witnesses, and inconsistencies. The lack of exhaustion in this case is directly attributable to trial counsels' failure to turn over their complete file.

Staying these proceedings and holding Noling's case in abeyance will serve the principles of comity and federalism. Moreover, it will avoid piecemeal litigation and foster finality by permitting Noling to fully and fairly litigate the important constitutional claims raised in the petition.

Wherefore, Noling requests that this proceeding be held in abeyance pending state court exhaustion. Further, Noling requests that this Court order amendment of his habeas petition with the facts to be exhausted in state within 30 days of that exhaustion.

Respectfully submitted,

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Certificate Of Service

This is to certify that a copy of the foregoing was electronically field this 3rd day of 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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