

IN THE COURT OF COMMON PLEAS
PORTAGE COUNTY, OHIO

STATE OF OHIO

Plaintiff,

v.

TYRONE NOLING

Defendant.

Case No. 1995 CR 220

JUDGE ENLOW

STATE'S MOTION TO DISMISS THE
DEFENDANT'S MOTION FOR
RELIEF OF JUDGMENT PURSUANT
TO CIV.R. 60(B)

Now comes plaintiff, the State of Ohio, by and through the undersigned counsel, and responds in opposition to the Defendant's November 3, 2006 successive petition for postconviction relief, motion for a new trial pursuant to R.C. 2945.79(B), (F) and Crim.R. 33, and motion for relief from judgment pursuant to Civ.R. 60(B).

MEMORANDUM OF LAW

This Court Lacks Jurisdiction

The trial court retains all jurisdiction not inconsistent with the reviewing court's jurisdiction to reverse, modify, or affirm the judgment. *Yee v. Erie Cty. Sheriff's Dept.* (1990), 51 Ohio St.43, 44. Absent an order from the Northern District of Ohio, U.S. District Court, staying the federal habeas action and conferring jurisdiction on this Court, Noling's federal habeas action divests this Court of jurisdiction to consider the merits of any of Noling's November 3, 2006 filings in this Court.

As the Northern District Court has recently denied Noling's request for a stay and remand to state court to further exhaustion of state remedies, (Exhibit A), this Court is without

jurisdiction to consider the merits of any of Noling's November 3, 2006 filings in this Court. Accordingly, this Court should dismiss Noling's motion for discovery filed on November 3, 2006, for lack of jurisdiction.

Assuming *arguendo* that this Court determines it has jurisdiction of this motion the State submits the following.

Motion for Relief of Judgment per Civ.R. 60

Civ.R. 60(B)(2) provides that the court may relieve a party from a final judgment when there is newly discovered evidence which in the exercise of due diligence could not have been discovered in time for trial. The same relief is available on a showing of misconduct by an adverse party per Civ.R. 60(B)(3). To prevail on his motion for relief of judgment, Noling had the burden to demonstrate that he has a meritorious defense to present, that he is entitled to relief under Civ.R. 60(B)(2) or (3), and that he made his motion within a reasonable time. *GTE Automatic Electric, Inc. v. ARC Industries* (1976), 47 Ohio St.2d 146.

Although the Eleventh District Court of Appeals has recently held that in certain circumstances Civ.R. 60 may be applied to criminal matters, a motion for relief of a criminal judgment pursuant to Civ.R. 60(B) that raises prosecutorial misconduct claims is to be treated as a petition for postconviction relief under R.C. 2953.21. *State v. Schlee* (June 23, 2006), Lake App. No. 2005-L-105, 2006-Ohio-3208, at ¶26. The *Schlee* court relied on the following language from the Supreme Court of Ohio, “[w]here a criminal defendant, subsequent to his or her direct appeal, files a motion seeking vacation or correction of his or her sentence on the basis that his or her constitutional rights have been violated, such a motion is a petition for postconviction relief as defined in R.C. 2953.21” *State v. Reynolds* (1997), 79 Ohio St.3d 158, 160.

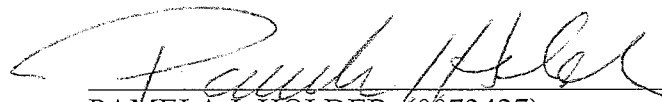
Analysis

In the present case, this Court does not need to resort to the Civil Rules of Procedure to dispose of Noling's motion for relief of judgment. Noling's Civ.R. 60(B) motion alleged three constitutional violations as a basis for relief from his criminal conviction. Specifically, Noling asserted: (1) a violation of his constitutional due process rights from the State's alleged violation of *Brady v. Maryland* (1963), 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (60(B) Motion, p.g. 4-20), (2) a violation of his constitutional right to the effective assistance of trial counsel (60(B) Motion p.g. 20-30), and (3) a violation of the Eighth Amendment to the United States Constitution (60(B) motion, p.g. 31-37). Accordingly, this Court should determine that despite its caption, Noling's Civ.R. 60(B) motion is really a petition for postconviction relief under R.C. 2953.21. *Schlee*, 2006-Ohio-3208, at ¶26.

Therefore, the State respectfully moves that this Court dismiss Noling's November 3, 2006 motion for relief of judgment pursuant to Civ.R. 60(B), as a successive petition for postconviction relief that failed to satisfy the two requisite prongs of R.C. 2953.23(A)(1) and (2).

Respectfully submitted,

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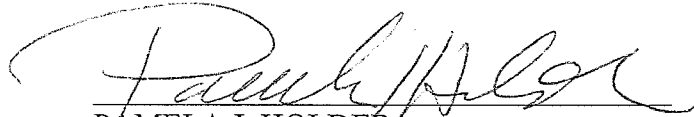
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Dismiss has been sent to Kelly L. Culshaw at the Office of the Ohio Public Defender, 8 East Long Street, 11th Floor, Columbus, Ohio 43215 this 16th day of November 2006.

A handwritten signature in cursive script, appearing to read 'Pamela J. Holder', written over a horizontal line.

PAMELA J. HOLDER
Assistant Prosecuting Attorney

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U.S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

TYRONE NOLING,)	CASE NO. 5:04 CV 1232
)	
Petitioner,)	
)	
vs.)	JUDGE DONALD C. NUGENT
)	
)	
MARGARET BRADSHAW, WARDEN,)	<u>ORDER</u>
)	
Respondent.)	

Before the Court is Petitioner Tyrone Noling's Motion for Preservation of Evidence, (ECF No. 67)(hereinafter "Preservation Motion") and a Motion to Stay this Case and Hold It In Abeyance Pending Exhaustion, (ECF No. 66)(hereinafter "Motion to Stay"). The Respondent opposed both Motions. (ECF Nos. 69, 70). The Petitioner filed a Reply brief for the Motion to Stay on September 20, 2006. (ECF No. 75). For the following reasons, the Court denies both Motions.

I. Preservation Motion

Petitioner first requests that this Court order the preservation of all evidence pertaining to his case in the possession of the Stark, Portage, and Alliance Police Departments, and the Portage County Prosecutor's Office. The Respondent maintains that a court order is unnecessary because there is no

indication from these law enforcement agencies that the Petitioner's file will be destroyed.

The Court finds the Respondent's reasoning to be persuasive. The Petitioner does not set forth any reasons why he believes evidence concerning his case will be destroyed. Absent any indication to the contrary, the Court expects that the above mentioned law enforcement agencies will preserve this evidence. Accordingly, the Court denies the Preservation Motion.

II. Motion to Stay

The Petitioner next asks the Court to stay this case and hold it in abeyance pending his return to state court to exhaust the actual innocence and *Brady v. Maryland*, 373 U.S. 83 (1963), claims raised in the Petition. He asserts that a recent Plain Dealer (hereinafter "PD") article revealed that the State of Ohio withheld pertinent information regarding another suspect in the murders. He also claims that a State witness, Robynn Elliot, who testified during Petitioner's trial that Petitioner had told her about the murders before they became known to the public, stated during her grand jury testimony and to a police investigator that she was unsure whether Petitioner spoke to her before or after the publication of the murders. Finally, the Petitioner notes that the article revealed the opinion of the examining psychiatrist of one of Petitioner's co-defendant's who now asserts that a police investigator coerced him into falsely accusing the Petitioner of the murder. The examining psychiatrist, who initially believed the co-defendant had repressed the memory of the murders, stated in the PD article that he remains uncertain whether the co-defendant was ever involved with them. Because he has not yet asserted a *Brady* violation or an actual innocence claim based on the information that came to light in the PD article, Petitioner contends, the Court should now permit him to return to state court and exhaust these claims.

Inherent in a federal court's ability to hear a case is its ability to stay a case and hold it in

abeyance. *Int'l Bhd. Of Elec. Workers v. AT & T Network Sys.*, 879 F.2d 864 (Table), 1989 WL 78212, at *8 (6th Cir. July 17, 1989)(citing *Landis v. N. Am. Co.*, 299 U.S. 248, 255 (1936)). Before granting a party's motion to stay a case and hold it in abeyance, however, a court must evaluate three facts: (1) the hardship the movant will endure if the case goes forward; (2) the injury to the opposing party; and (3) the public's interest, "including the judiciary's interest in efficiency, economy, and fairness." *Hill v. Mitchell*, 30 F.Supp.2d 997, 1000 (S.D. Ohio 1998) (citing *Landis, supra*; *Lynch v. Johns-Mansville Corp.*, 710 F.2d 1194 (6th Cir. 1983); *Bedel v. Thompson*, 103 F.R.D. 78 (S.D. Ohio 1984)).

In the recent *Rhines v. Weber*, 544 U.S. 269 (2005), the United States Supreme Court provided guidance to habeas courts regarding when it is appropriate to stay a case pending a petitioner's return to state court. The *Rhines* Court cautioned that stay and abeyance, if utilized too often, would frustrate the Anti-Terrorism and Effective Death Penalty Act's, "twin purposes" of reducing delay and encouraging petitioner's to fully exhaust claims in state court prior to filing a federal habeas petition. *Id.* at 276-77. Accordingly, the Court held that habeas courts should only grant a petitioner's motion to stay the federal habeas case to exhaust a claim in state court if that court determines "there was good cause for the petitioner's failure to exhaust his claims first in state court." *Id.* at 277. Moreover, a district court should only grant a stay if it appears that there is some merit to the petitioner's unexhausted claims. *Id.*

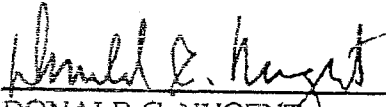
In the instant case, the Petitioner has failed to explain why he did not previously fully exhaust his actual innocence and *Brady* claims in state court. In her opposition to the Petitioner's Motion to Stay, the Respondent asserts that all of the "new" information contained within the PD article was previously published in a Cleveland Scene Magazine article on September 10, 2003. That article

predated the Petitioner's initiation of his habeas litigation. Although the Petitioner argues in his Reply brief that the Cleveland Scene article did not "reference the significant documentary support upon which the Plain Dealer article relied," he fails to articulate how the information raising doubt about his participation in the Hartigs' murders differs among the two articles.¹ Unless the Petitioner can provide this Court with some further explanation as to why he did not fully investigate these claims after the release of the Cleveland Scene article in 1993, the Court must heed the admonitions of the *Rhines* Court and find that there is no good cause to stay this proceedings pending Petitioner's return to state court for exhaustion. The Motion to Stay is denied.

III. Conclusion

For the foregoing reasons, the Petitioner's Motion for Preservation of Evidence, (ECF No. 67), and Motion to Stay this Case and Hold It In Abeyance Pending Exhaustion, (ECF No. 66), is denied.

IT IS SO ORDERED.



DONALD C. NUGENT
United States District Judge

DATED: November 6, 2006

¹ A review of both articles reveals that they raise substantially similar arguments regarding Petitioner's innocence and coercion on the part of a police investigator.