

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.	)	

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

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On November 3, 2006, Petitioner Tyrone Noling filed a second request asking 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. Respondent opposed that request on November 17, 2006. Noling replies to Respondent's motion in opposition in the attached memorandum

Respectfully submitted,

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Memorandum

**1. Tyrone Noling is actually innocent of the Hartig murders.**

Respondent suggests that Noling has somehow backed away from his actual innocence claim. Respondent, however, is wrong. What should be clear to this Court, having now reviewed Noling's first motion to stay and obey these proceedings, his reply to the Respondent's opposition to that request, and his second motion to stay and obey these proceedings is that Noling's trial went horribly wrong. Evidence that could have been used to prove his innocence, or at least demonstrate reasonable doubt to his jury, was withheld the prosecution. In his own

counsel's files is information, not provided to postconviction counsel, that demonstrates trial counsel marshaled little of the available evidence to prove Noling's innocence, or at a minimum, demonstrate reasonable doubt to Noling's jury. The combination of information presented in Noling's first and second requests to stay and abey these proceedings, incorporated herein by reference, makes a persuasive demonstration of ineffective assistance of counsel, violations of Brady v. Maryland, 373 U.S. 83 (1963) and its progeny, and Noling's innocence. Noling has not stopped arguing his innocence—with each passing day he makes a more compelling argument.

**2. Respondent's standard to evaluate ineffective assistance of counsel is incorrect.**

Noling notes that his pleading is a request to stay and abey these proceedings, not a habeas corpus petition raising the substantive claim of ineffective assistance of counsel. However, if this Court's analysis of whether to stay these proceedings is to be informed by the Supreme Court law relating to ineffective assistance of counsel, it cannot use the standard offered by the Respondent.

The standard for judging counsel's effectiveness is found in Strickland v. Washington, 466 U.S. 668 (1984). When evaluating claims of ineffective assistance of counsel under Strickland, this Court must first determine if counsel's performance was deficient. Id. at 686-87. The proper measure of counsel's performance is reasonableness under prevailing professional norms. Id. at 688. Second, this Court must determine if Noling was prejudiced by counsel's deficient performance. Id. at 686-87. This Court must assess whether Noling was deprived of a reliable trial result. Id. at 693-94. Thus, Noling need not demonstrate outcome determinative error as suggested by the Respondent. See id.; Glenn v. Tate, 71 F.3d 1204, 1210-11 (6th Cir. 1995).

### 3. Postconviction counsel did all he could do.

It is beyond question that Noling's trial counsel was obligated to turn over Noling's complete file to his postconviction counsel. 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.

Respondent attempts to mislead this Court with a creative reading of Gideon's affidavit. At paragraph 4 of his affidavit Gideon states that he contacted Noling's direct appeal counsel to obtain copies of "the transcript and portions and other portions of the record." Nowhere does Gideon state that direct appeal counsel had Noling's trial file, or that it had been made available to them.<sup>1</sup> In fact, at paragraph 11 of his affidavit, Gideon specifically notes that direct appeal counsel indicated they did not possess any of Noling's files—they directed him to Noling's trial counsel. Respondent's argument that direct appeal counsel possessed these files is thus unsupported by the record before this Court.

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<sup>1</sup> Moreover, undersigned counsel has over nine years experience as counsel in death penalty direct appeals in the Ohio Supreme Court, and notes that it is not standard practice for direct appeal counsel to obtain trial counsel's file. This is true because under Ohio law, an appellate court on direct review is constrained to the four corners of the appellate record when reviewing the merits of any claim. See State v. Ishmail, 423 N.E.2d 1068, 1070 (Ohio 1981).

The Respondent also takes issue with the chain of custody of Gideon's files. If anything, Respondent's argument bolsters the need for this Court to stay these proceedings so that Noling may litigate these issues in State court. If there is a question as to the veracity of Gideon's affidavit, or the accuracy of his recollection, it can only be answered through fact development—through discovery and an evidentiary hearing to ascertain what was turned over to Gideon and why certain materials were not provided to him.

### **Conclusion**

The facts before this Court support the granting of an abeyance order. 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.

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 filed this 29th 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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