

In the Supreme Court of Ohio

State of Ohio, :  
Appellee, :  
-vs- : Case No.: 1998-1475  
Brett Hartman, :  
Appellant. : **This is a Capital Case.**

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Brett Hartman's Motion for Stay of Execution

**Execution Date: April 7, 2009**

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Sherri Bevan Walsh  
Summit County Prosecutor

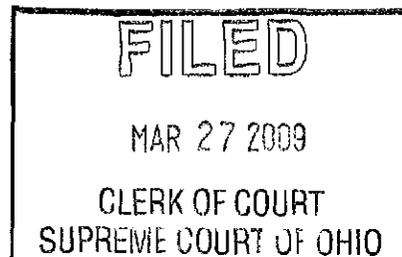
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In the Supreme Court of Ohio

State of Ohio, :  
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Appellant Brett Hartman's Motion for Stay of Execution

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Brett Hartman has filed a second post conviction petition in the Summit County Court of Common Pleas. Case No. 97-09-1987. (Exhibit A attached) This petition was filed on March 26, 2009. Because no other Ohio court is authorized to consider a stay of execution after this Court sets an execution date, Brett Hartman hereby moves this Court to stay the execution of his death sentence scheduled for April 7, 2009 pending the ultimate resolution of the post conviction petition.

Therefore, Brett Hartman moves this Court to stay his April 7, 2009 execution under the authority of *State v. Steffen*, 70 Ohio St. 3d 399, 639 N.E.2d 67 (1994).

Respectfully submitted,

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## **Memorandum in Support**

### **I. Background.**

Brett Hartman was sentenced to death in Summit County, Ohio, in September 1998, for his conviction for the aggravated murder of Winda Snipes. Hartman has thus far been unsuccessful in his attempts to obtain relief in state and federal court on the merits of his case. He faces an execution date of April 7, 2009.

### **II. Good cause exists to grant Hartman's motion**

On March 26, 2009, Hartman filed a second post conviction petition raising a challenge based on actual innocence and a challenge to Ohio's lethal injection scheme. In order to permit full development of these challenges a stay of execution is necessary. Determining, after Mr. Hartman's execution, that he is innocent or that Ohio's lethal injection scheme is unconstitutional is moot given that he will be dead.

#### **A. Actual Innocence**

Hartman's actual innocence claim is predicated on the recently discovered evidence that the jailhouse informant who testified that Hartman confessed to him committed perjury. Hartman recently learned that the attorney for Brian Tyson, the snitch, had *ex parte* communication with Hartman's trial judge, Judge Callahan, after Tyson testified. It is Hartman's understanding that the attorney advised Judge Callahan that Tyson had committed perjury in his testimony. The attorney will not

reveal further information about the conversation until relieved of the attorney client privilege. However, he did reveal that no one else was present during his meeting with Judge Callahan. At no time did Judge Callahan or the attorney reveal to Hartman or Hartman's attorneys this conversation.

The state has repeatedly referred to Tyson's testimony as the critical evidence of Hartman's guilt, including in filings to this Court. This new evidence severely undermines the credibility of Tyson and casts doubt on the validity of the conviction.

Compounding this new evidence is the fact that significant physical and forensic evidence remains untested. Among the evidence collected at the crime scene 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 the apartment after the police had stopped their investigation, a used condom was found in a wastebasket in the bathroom. The hairs were delivered to BCI with an express request from the prosecutors that the hairs be tested and compared to known samples from both Hartman and Snipes. To

Hartman's knowledge, these hairs were never tested and Hartman has never been given permission to independently test the hairs. The condom was never provided to BCI for testing nor was Hartman ever given leave to test it.

The Supreme Court currently has before it a case that will determine whether state defendants have a constitutional right to seek post conviction testing of DNA materials, especially when that evidence implicates a free standing claim of innocence. *District Attorney's Office v. Osborne*, Case No. 08-6. *Osborne* was argued on March 2, 2009. Depending on the outcome of this case, Hartman may be entitled under the 14th Amendment to seek the testing he currently seeks in his pending post conviction petition. Of course, executing Hartman before his right vests is significant harm but permitting the testing only minimally impacts the state's interest since the state has no interest in executing an innocent person and, if the evidence is not exculpatory, the state will still be able to execute Hartman.

There is a reasonable likelihood that this hair evidence and the DNA evidence found in the used condom that has never been tested will demonstrate that someone other than Brett Hartman committed this terrible crime. Such testing can be accomplished without undue delay or cost. There is a reasonable likelihood that this evidence will demonstrate that Brett Hartman is actually innocent of this crime. This evidence combined with the perjured testimony of the jailhouse informant indicates that no reasonable juror would have convicted Brett Hartman

on the remaining evidence. This Court must grant a stay of execution to permit Hartman to test these materials, develop the factual record, and vindicate his rights.

## **B. Lethal Injection**

Hartman's second claim is a direct challenge to Ohio's lethal injection scheme. 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 Supreme Court 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.

Prior to *Baze*, Ohio courts routinely summarily dismissed challenges to the constitutionality of Ohio's lethal injection practice. In summarily denying Ohio Constitutional and Eighth Amendment challenges to Ohio's lethal injection practices on the merits, the Ohio courts consistently rejected the claims without analysis and without suggesting that there was any procedural problem. There are currently several cases directly addressing the mechanics of Ohio's protocol

pending in state and federal courts. Only now are state and federal courts permitting factual development about how Ohio conducts executions.

Although *Baze* does not recognize lethal injection as *per se* unconstitutional, it does represent the first statement by the Supreme Court of the United States that recognizes that lethal injection protocols are uniquely susceptible to Eighth Amendment challenges and analysis. The numerous opinions making up the majority generally agree, for the first time, that the “evidence adduced by [a] petitioner” will in certain circumstances render a state’s protocol unconstitutional. *Baze*, 128 S.Ct. at 1556 (Stevens, J., concurring). Similarly, the plurality observes that in the absence of “extensive hearings,” it will be difficult to ascertain whether the “risk of pain from maladministration” of lethal injection protocols is sufficient to trigger Eighth Amendment protections. *Id.*, at 1526 (Roberts, C.J., plurality). This Court must grant a stay of execution in order to permit Hartman to demonstrate that Ohio’s scheme violates the Eighth Amendment and *Baze*. It is clear that if Ohio’s lethal injection scheme violates the 8th Amendment and *Baze* it will apply retroactively to all death row inmates in Ohio. *See Penry v. Lynaugh*, 492 U.S. 302, 329-330 (1989).

During the week of March 23, 2009, evidence was presented before Judge Gregory Frost in the United States District Court for the Southern District of Ohio in the case of *Cooley, et al v. Strickland, et al*, Case No. 04-1156. This evidence

was presented on behalf of Ohio death sentenced inmate Kenneth Biros to demonstrate the Court should continue its previously granted preliminary injunction to prevent the State of Ohio from carrying out Biros' execution.<sup>1</sup> The District Court had issues a preliminary injunction in 2007. The state appealed this to the Sixth Circuit Court of Appeals. Following the issuance of the *Baze v. Rees* opinion by the Supreme Court and the issuance of the *Cooley* decision by the Sixth Circuit, the Sixth Circuit remanded the case to the District Court to resolve the question "whether under a *Baze* inquiry Biros has a likelihood of success in this litigation so as to warrant continued injunctive relief." (Case No. 04-1156, Order No. 361, 8/26/2008)

In five days of testimony before Judge Frost, Biros presented substantial evidence from expert witnesses, from Wardens of the Southern Ohio Correctional Facility, and from members of the execution team at the Southern Ohio Correctional Facility and others to demonstrate that even under the standards of *Baze v. Rees, supra*, there exists under the Ohio protocol and the Ohio procedures a "substantial risk of serious harm," i.e. that the inmate will suffer excruciating pain during the execution. *Id.* at 1532. There was also substantial expert testimony that the execution team members are not properly trained or supervised by medical

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<sup>1</sup> Judge Frost has limited participation in this hearing to Kenneth Biros. Other participants in the lawsuit have not been permitted to participate in any manner. (Case No. 04-1156, Order #409, 9/26/2008)

personnel, and that there are not sufficient safeguards in place to insure that the inmate is properly anesthetized before the second and third drugs are administered or sufficient standards in place to address problems or emergencies. *Id.* There was also substantial expert testimony that there exist “feasible, readily implemented” alternatives that will “significantly reduce” that risk, *Id.* at 128 S.Ct. 1532.<sup>2</sup>

The information only became available to Hartman during the course of the evidentiary hearing. All of the discovery in the Biros litigation in front of Judge Frost was conducted under seal. Counsel for Biros were not permitted to divulge any of the information to anyone outside of the Biros team until it was divulged through testimony in open court. All of the discovery that was exchanged between the parties remains under seal. The sealing of the discovery and the sealing of all of the documents involved in the lethal injection procedures was done at the request of the defendants in the case, Governor Ted Strickland, *et al* and the State of Ohio. (Case No. 04-1156, Order No. 413, 10/09/2009) The state should not be permitted to keep the protocols and procedures it uses secret and then argue that Hartman (or any other death sentenced defendant) is too late to prove their claim

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Dr. Mark Hardy, an anesthesiologist testified gave his expert opinions on these matters, based on his expertise and on the testimony (and depositions) of the Wardens, former and present members of the execution team, and his knowledge of other systems on Friday march 27, 2009. Hartman has requested a copy of the transcript of his testimony - which is expected by Monday March 30. This Motion will be supplemented with a copy of that transcript as soon as it becomes available. It is unclear when Judge Frost will rule on the continuation of Biros’ preliminary injunction.

that the lethal injection procedure causes “cruel and unusual punishment” under the Eighth Amendment and related provisions of the Ohio Constitution.

Because there has recently been developed considerable evidence to demonstrate that the Ohio protocols and procedures carry a substantial risk of harm, i.e. excruciating pain during the execution, it will be unfair and inhumane to permit the state to execute anyone while that procedure is in place. It will be particularly unfair and inhumane to execute Brett Hartman within days of the first time that this information has become available to him and to the public in general. The state should not be permitted to benefit from its ongoing secrecy and its employment of methods of execution that have a substantial risk of causing undue pain and suffering.

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. To execute Hartman on April 7 only to subsequently determine that he would be able to demonstrate in his post-conviction petition or elsewhere that his execution should have been barred under *Baze* is the ultimate arbitrary and capricious imposition of the death penalty. As such it will violate “evolving standards of decency” under the Eight Amendment and corresponding sections of the Ohio Constitution. Hartman’s lethal injection challenge must be permitted to go forward for full merits review.

### III. Conclusion

The only Ohio court authorized to grant a stay of execution at this point is this Court. Hartman has pending significant factual and legal challenges to the conviction and sentence imposed on him. His actual innocence claim deserves full and careful review by the courts in order to ensure that the greatest injustice of all, the execution of an innocent man, is avoided. Further, the growing – and only recently available – body of evidence that Ohio’s lethal injection scheme is deeply flawed mandates a stay of execution to allow the courts to properly review how Ohio conducts its executions and determine whether that process complies with the Constitution.

Brett Hartman respectfully requests this Court to issue an Order staying his April 7, 2009 execution date.

Respectfully submitted,

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(216) 319-1247  
**Counsel of Record**

### Certificate of Service

I hereby certify that a true copy of the foregoing Motion for Stay of Execution was forwarded by regular U.S. mail to Richard S. Kasay, Assistant Prosecuting Attorney, Summit County Prosecutor's Office, 53 University Avenue, 6<sup>th</sup> Floor, Akron, Ohio 44308-1680, and also via email at [kasay@prosecutor.summitoh.net](mailto:kasay@prosecutor.summitoh.net) , and to Thomas Madden and Stephen Maher, Office of the Ohio Attorney General, Capital Crimes, 150 East Gay Street, 16th Floor, Columbus, OH 43215 on this 27<sup>th</sup> day of March, 2009.

Michael J. Benza by DJ (SAM) 0005839  
Michael J. Benza  
Counsel for Brett Hartman

# **EXHIBIT A**

**In the Court of Common Pleas  
Summit County, Ohio**

<b>State of Ohio,</b>	:	<b>Judge:</b>
<b>Plaintiff-Respondent,</b>	:	<b>Case No: 97-09-1987</b>
<b>-vs-</b>	:	<b>Evidentiary Hearing Requested</b>
<b>Brett Hartman,</b>	:	
<b>Defendant-Petitioner.</b>	:	

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**Petition to Vacate or Set Aside Judgment and/or Sentence Pursuant to  
Ohio Revised Code Section 2953.21**

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Now comes, Brett Hartman, by and through counsel, and files this Petition for Post-Conviction Relief pursuant to Ohio Revised Code § 2953.21. *et seq.* Hartman requests the Court declare his convictions and sentence of death imposed by the Court of Common Pleas, Summit County, Ohio on May 22, 1998 void or voidable under the Ohio and United States Constitution and order a new trial. Hartman further requests that he be granted leave to engage in Discovery and that he be granted an evidentiary hearing to further develop the factual bases for his claims.

Hartman further states that while this is his second Petition for Post Conviction Relief, a) he has only recently been able to discover and litigate evidence (and the absence of testing) to support his claim of actual innocence, and b) legal

developments have only recently made available to him constitutional challenges to the lethal injection protocols. These reasons are more fully explained in the context of each of the claims presented here.

## **INTRODUCTION**

This petition for post-conviction relief presents claims that were not available to Brett Hartman at the time of Hartman's previous Petition for Post-Conviction Relief. While this petition is technically second in time to Hartman's previous Petition for Post-Conviction Relief, it is not a "second or successive" petition as defined by Ohio Revised Code § 2953.23. On the contrary, because the basis for one claim only became apparent recently and the second claim only recently became recognized as a federal constitutional claim - long after the completion of Hartman's first post-conviction relief proceeding - this is a "first" petition, and is therefore governed by the standards set forth in Ohio Rev. Code § 2953.21, *et seq.*

## **JURISDICTION/VENUE**

As this Court convicted Hartman and imposed his death sentence, jurisdiction and venue are proper pursuant to Ohio Rev. Code Section 2953 *et seq.*

The claims presented in this petition were either not known or were not cognizable in post-conviction at the time the original petition was filed and thus were not "ripe" for litigation in that first petition. Denying Hartman the right to litigate this

current petition will bar him from ever obtaining post-conviction review of these claims. See *Stewart v. Martinez-Villareal*, 523 U.S. 637 (2000).

In a similar situation, in addressing the potential of losing the right to federal review, The Sixth Circuit Court of Appeals ruled that a second-in-time petition is necessarily a second or successor petition. The Court found the petition was not a second or successor petition. *In re: Bowen*, 436 F.3d 699, 704-06 (6th Cir. 2006). Other Circuits have reached the same conclusion. See *United States v. Scott*, 124 F.3d 1328, 1330 (10th Cir. 1997) (“Furthermore, Mr. Scott’s ineffective assistance of appellate counsel claim did not even exist until the direct appeal process concluded.”); *James v. Walsh*, 308 F.3d 162, 168 (2nd Cir. 2002); *Allen v. Ornoski*, 2006 U.S. Dist Lexis 990, \*7 (E.D. Cal. 2006). See also *Nguyen v. Gibson*, 162 F.3d 600, 603-604 (10th Cir. 1998) (Briscoe, J., dissenting). Although the question in all of these cases under the rules limiting second or successive Petitions for a Writ of Habeas Corpus, the legal question is the same in that the impact of dismissing Hartman’s petition will prevent Hartman – and others similarly situated - from ever being able to avail themselves of Ohio’s post-conviction process to litigate such later arising claims. This squarely implicates the ongoing constitutionality of Ohio’s death penalty scheme. See *Gregg v. Georgia*, 428 U.S. 153 (1976).

As the Seventh Circuit Court of Appeals has acknowledged

[t]here remains the possibility that a claim in no sense abusive, because it could not have been raised earlier, yet not within the dispensation that section 2244(b)(2) grants for the filing of some second or successive petitions, would have sufficient merit that the barring of it would raise an issue under the clause of the Constitution that forbids suspending federal habeas corpus other than in times of rebellion or invasion. U.S. Const., art. I, §9, cl. 2; *Felker v. Turpin*, 518 U.S. 651, 663-664, 135 L.Ed. 2d 827, 116 S.Ct. 2333 (1996); *LaGuerre v. Reno*, 164 F.3d 1035, 1038-39 (7th Cir. 1998); *In re Davenport*, 147 F.3d 605, 609-11 (7th Cir. 1998).

*In re Page*, 179 F.3d 1024, 1026 (7th Cir. 1999) (holding that §2244 did apply to *Page* and that *Page* case was not the proper one for Suspension Clause analysis).

In sum, denying a post-conviction petition here would render Ohio's post-conviction scheme invalid and implicate the constitutionality of Ohio's death penalty scheme.

The Ohio Supreme Court specifically recognizes the reality that a post conviction petition is capable of being a second-in-time first petition. *State v. Lott*, 97 Ohio St.3d 303, 306 (2002). "Because Lott's claim is in the nature of a postconviction relief claim filed for the first time since *Atkins* established the new standard for mental retardation, Lott's petition is more akin to a first petition than a successive petition for postconviction relief." So that Ohio's post-conviction scheme serves its statutory and constitutional purpose, this Court must review Hartman's claims on the merits, permit discovery and an evidentiary hearing.

The claims presented in this petition are not barred under any form of *res judicata* given that Hartman has brought his claims in timely manner upon discovering the factual basis for the claim and since the claim became available as a constitutional challenge. Consequently, Rule 11 of the Ohio Rules of Civil Procedure prohibited Hartman from previously litigating these claims because he either did not have a factual basis or the claims were not cognizable in post conviction. Therefore, although this petition is technically second in time to Hartman's first petition for post-conviction relief, it cannot be construed as a "second or successive" petition pursuant to Ohio Rev. Code § 2953.23.

### **PROCEDURAL POSTURE**

Brett Hartman was convicted of aggravated murder committed during the course of a kidnaping, Ohio Rev. Code § 2903.01(B), and the statutory aggravating circumstance that the aggravated murder was committed during the course of kidnaping, Ohio Rev. Code § 2929.04(A)(7), kidnaping, Ohio Rev. Code § 2905.01; and tampering with evidence, Ohio Rev. Code § 2921.12. Following the jury's recommendation of a death sentence, the trial court sentenced 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 (2001).

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

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, the Sixth Circuit Court of Appeals excused any default arising from his failure to timely file a notice of appeal:

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).

On July 11, 2002, Hartman initiated his federal habeas corpus proceedings by filing 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. Hartman subsequently filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254.

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 or discovery being granted.

On November 27, 2007, the Sixth Circuit Court of Appeals affirmed the denial of a Writ of Habeas Corpus. *Hartman v. Bagley*, 492 F.3d 347 (6th Cir. 2007).

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

On March 20, 2009, Hartman filed with the Sixth Circuit Court of Appeals a Motion under 28 U.S.C. § 2244 for Order Authorizing District Court to Consider Second or Successive Application for Relief Under 28 U.S.C. § 2254 and all required accompanying documents. Hartman sought leave to file and litigate a Second Habeas Petition in the District Court and to engage in discovery to develop the factual bases for his claims. Hartman raised the same claims in that Petition that he is now presenting to the state courts for resolution. These claims are based on new additional evidence that he was denied a fair trial and due process in that he is actually innocent of the crimes for which he was convicted and - the previously unavailable habeas claim - that Ohio's lethal injection procedures that will be used to execute him will

cause incredible pain and suffering and is therefore cruel and unusual punishment under the Eighth Amendment.<sup>1</sup>

### CLAIMS FOR RELIEF

- I. BRETT HARTMAN WAS DENIED DUE PROCESS AND A FAIR TRIAL BY THE STATE'S WITHHOLDING OF EVIDENCE DEMONSTRATING HIS INNOCENCE AND BY THE PRESENTATION OF PERJURED TESTIMONY FROM A JAILHOUSE INFORMANT IN VIOLATION OF THE 5TH, 6TH, 8TH, AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION. ABSENT THESE VIOLATIONS OF DUE PROCESS, NO REASONABLE JUROR WOULD HAVE CONVICTED HIM.

The state has in its possession hair evidence and a used condom recovered from the scene of the murder that are likely to demonstrate that someone else committed this murder and that Brett Hartman did not commit this crime. As far as Hartman knows, these items have never been submitted to scientific testing to determine their origin or the origin of any DNA evidence contained therein. As he is actually innocent of this crime, he has been denied due process and a fair trial and his

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<sup>1</sup> Hartman's Lethal Injection Claim in his Second in Time Petition is not necessarily a claim that qualifies as a second or successive petition. Because the lethal injection claim was not previously supportable by any factual basis of botched executions, see *Baze v. Rees*, \_\_\_ U.S. \_\_\_, 128 S. Ct. 1520 (2008), and because the Sixth Circuit only recently recognized that Eighth Amendment lethal injection challenges could be raised in a habeas petition, Hartman could not have raised this claim in his first petition. Hartman's numerically second petition is therefore not a second or successive petition subject to the restrictions of 28 U.S.C. § 22449b). *In re Bowen*, 436 F. 3d 699, 705-06 (6th Cir. 2006).

conviction and sentence of death violate Art, I, §§ 2, 9, 10, and 16 of the Ohio Constitution as well as the 5th, 6th, 8th, and 14th Amendments.

Hartman has only recently obtained information that the dramatic testimony of a jailhouse informant that Hartman confessed to the crime while in jail awaiting trial may have been perjured, that the informant's attorney (who had nothing to do with Hartman's case) may have known it to be perjured, and that the informant's attorney met with the trial judge after the informant's testimony and may have told the trial judge that the informant had presented perjured testimony. Hartman is in the process of investigating these claims.<sup>2</sup>

A conviction based on perjured testimony, especially if such perjury was revealed to the trial judge, is a fair trial and due process in violation of the 5th, 6th, 8th, and 14th Amendments. Absent the dramatic testimony of the jailhouse informant, Brian Tyson, that Hartman had confessed to the murder, no reasonable juror would have convicted Brett Hartman of aggravated murder.

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The informant's attorney (who had no 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. A). The trial judge has "no independent recollection" of either the jailhouse informant or the conversation. The jailhouse informant refused to speak with and threatened counsel's investigator.

Evidence of actual innocence undermines confidence in the verdict of conviction so as to merit review of the case despite procedural obstacles. The Supreme Court has recognized that actual innocence can excuse a petitioner's procedural default and provide a "gateway" for courts to assess constitutional claims. *Schlup v. Delo*, 513 U.S. 298, 327 (1995). Petitioners "must establish that, in light of new evidence, 'it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt'." *House v. Bell*, 547 U.S. 518, 536-37 (citing *Schlup*, 513 U.S. at 327). Such an exception provides a "a meaningful avenue by which to avoid a manifest injustice." *McCleskey v. Zant*, 499 U.S. 467, 494 (1991).

Present counsel had no connection with and were not appointed to represent Hartman until Hartman's habeas corpus litigation reached the Sixth Circuit. As such, counsel was only recently able to discover this evidence and to initiate litigation. The Summit County Prosecutor refuses to provide the evidence for testing or agree to any further testing. (See Exhibit B, Letter from Sheri Bevan Walsh, March 20, 2009, attached.)

Counsel only learned of the potential perjured testimony of jailhouse informant Brian Tyson on March 13, 2009 and have been diligently investigating the factual basis for this claim since that time. Hartman nor counsel had no evidence to show that Tyson had indeed presented fabricated testimony, that his attorney had knowledge of the fabrication, or that the attorney had informed the trial judge of the fabrication

until March 13, 2009. Absent the perjured testimony of the jailhouse informant that Hartman had confessed to the murder of Winda Snipes there is a reasonable probability that no reasonable juror would have convicted Brett Hartman.

Further support for Hartman's claim that he was denied due process and a fair trial and that he is actually innocent was revealed at his February 26, 2009 clemency hearing before the Ohio Parole Board.

- a) The most likely alternate suspect in this brutal murder was and is the victim's former boyfriend, Jeff Nicholas, who had lived in the same building as the victim until shortly before the murder. At the Parole Board hearing, for the first time, the investigating detective admitted that they had initially focused on the former boyfriend but once the police began to focus on Hartman they did not pursue whether the former boyfriend had an alibi for the time of the murder.
- b) Nicholas had established an alibi during the time initially believed to be the time of death 9:00 to 10:00 p.m. Once the investigation focused on Hartman, the former boyfriend was eliminated as a suspect, even though the coroner's results eventually demonstrated that the time of death was actually much earlier than law enforcement previously believed, 4:30 to 5:00 p.m. the same day. The admission of the detective that Nicholas was eliminated as a suspect based on a faulty assumption, and that no follow-up was ever conducted, provides additional support for Hartman's claim that he was not the perpetrator and that a viable alternative suspect exists.
- c) The detective and the prosecuting attorney, at the same Parole Board hearing admitted that the hair evidence and the used condom had never been tested, claiming that BCI stops testing when they have enough evidence to obtain a conviction - even if there is untested evidence that may point to someone else as the true perpetrator.

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 his connections to the crime scene.

The state's case at trial was all circumstantial, consisting primarily of physical evidence and the testimony of forensic witnesses, some of which was of questionable scientific validity, and the apparently perjured testimony of the jailhouse informant. 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 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 the apartment after the police had stopped their investigation, a used condom was found in a wastebasket in the bathroom. The victim's advocate called the police who retrieved the used condom although it was never submitted to BCI. Transcript 1285.

The Akron Police Department apparently believed that the hair evidence was 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.

The hair evidence was then sent to the Ohio Bureau of Investigation and Identification (BCI) for testing and comparison. BCI documented the receipt of this evidence. In spite of specific requests to test the hair evidence, no testing of this critical evidence was ever done according to the admissions of the Summit County Prosecutor at the Ohio Parole Board hearing.

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. Clearly, identifying the hair on the body of the victim and in the blood surrounding the victim, can provide 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. This is especially true when Hartman admitted to sexual activity with Ms. Snipes and his DNA was found confirming unprotected sexual activity.

After going to great lengths to collect, and transmit the hair evidence to BCI with a request that they be tested, the failure to test this evidence to see if it pointed

to Brett Hartman or someone else is incongruous and denied Hartman due process and a fair trial.

It is unreasonable and a denial of due process for the authorities to cease testing of critical evidence because they fear that it may result in exculpatory evidence to their prime suspect, i.e. that the hairs and contents of the condom were identified as belonging to someone else. Brett Hartman must be afforded the opportunity to have this evidence examined and tested before he is executed. He has thus far been denied this opportunity.

During his original habeas proceedings Hartman requested the testing of this evidence. The district court denied Hartman's request for the testing of this missing hair evidence without explanation while at the same time permitting testing of other evidence. As a result, the hair evidence collected at the crime scene, from Ms. Snipes's body and from Brett Hartman, and the used condom found in the bathroom have still not been analyzed despite their potential for exculpating Brett Hartman.

Brett Hartman should not be executed until testing of the hair evidence and the used condom is accomplished or the results of such testing is disclosed to Brett Hartman. Such testing can be done without significant delay or great cost.

The Supreme Court currently has before it a case that will determine whether state defendants have a constitutional right to seek post conviction testing of DNA materials, especially when that evidence implicates a free standing claim of evidence.

*District Attorney's Office v. Osborne*, Case No. 08-6. *Osborne* was argued on March 2, 2009. Depending on the outcome of this case, Hartman may be entitled under the 14th Amendment to seek the testing he currently seeks this Court's leave to pursue. Of course, executing Hartman before his right vests is significant harm but permitting the testing only minimally impacts the state's interest since the state has no interest in executing an innocent person and if the evidence is not exculpatory the state will still be able to execute Hartman.

There is a reasonable likelihood that this hair evidence and the DNA evidence found in the used condom that has never been tested will demonstrate that someone other than Brett Hartman committed this terrible crime. Such testing can be accomplished without undue delay or cost. There is a reasonable likelihood that this evidence will demonstrate that Brett Hartman is actually innocent of this crime. This evidence combined with the perjured testimony of the jailhouse informant indicates that no reasonable juror would have convicted Brett Hartman on the remaining evidence. Brett Hartman's conviction for aggravated murder and his sentence of death are in violation of the 5th, 6th, 8th, and 14th Amendments. Brett Hartman is entitled to discovery and the process of the court to further develop the factual bases for his claim of actual innocence. Brett Hartman is entitled to post conviction relief.

## II. THE PRACTICE OF EXECUTION BY LETHAL INJECTION VIOLATES HARTMAN'S RIGHT TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The ability to challenge the constitutionality of lethal injection under the Eighth Amendment cruel and unusual punishment clause was only recently recognized by the Supreme Court. In *Nelson v. Campbell*, 541 U.S. 637, 644-45 (2004), the Supreme Court held that federal courts have jurisdiction under 42 U.S.C. § 1983 to hear challenges to lethal injection procedures. But *Nelson's* limited holding addressed only whether a petitioner could raise a challenge to a means of execution under § 1983, and never considered whether an Eighth Amendment challenge to lethal injection was a viable issue. It was not until four years later, in *Baze v. Rees*, \_\_\_ U.S. \_\_\_, 128 S. Ct. 1520 (2008), that the Supreme Court actually analyzed a challenge to a lethal injection protocol using Eighth Amendment cruel and unusual punishment jurisprudence.

More recently, the Sixth Circuit 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 Sixth Circuit remanded capital habeas petition under § 2254 for limited factual development on lethal injection claims. These remands implicitly sanction habeas proceedings (and by analogy state post-conviction

proceedings) as a proper avenue of litigation to challenge lethal injection. In light of these new legal developments, Hartman now seeks to litigate his constitutional challenges to lethal injection in this post-conviction petition as well as in his pending 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 Art. I, §§ 2, 9, 10, and 16 of the Ohio Constitution as well as the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. *Trop v. Dulles*, 336 U.S. 86, 101 (1958).

The practice in Ohio of putting to death a person through lethal injection also violates the United States's obligations under the International Convention on Civil and Political Rights ("ICCPR") and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment ("CAT").

Hartman's constitutional rights were and are violated because he is subject to a death sentence by lethal injection, in violation of Art. I, §§ 2, 9, 10, and 16 of the Ohio Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments. As such this Court should grant his Petition for Post Conviction Relief.

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 Supreme Court 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.

Prior to *Baze*, both the Supreme Court of Ohio and Ohio district courts of appeals routinely summarily dismissed challenges to the constitutionality of Ohio’s lethal injection practice. In summarily denying Ohio Constitutional and Eighth Amendment challenges to Ohio’s lethal injection practices on the merits, the Ohio courts consistently rejected the claims without analysis and without suggesting that there was any procedural problem.

The Ohio Supreme Court rejected lethal injection challenges without any substantive Eighth Amendment analysis whatsoever. The Court summarily rejected the claim on the basis that no reported United States Supreme Court or other federal court had found lethal injection procedures to be unconstitutional. See e.g., *State v. Carter*, 89 Ohio St.3d 593, 608, 734 N.E.2d 345 (2000) (“Carter fails to cite any case in which lethal injection has been found to be cruel or unusual punishment. This proposition of law is overruled.”) The Supreme Court of Ohio never explained why it could not itself undertake a substantive Eighth Amendment analysis or an analysis under comparable provisions of the Ohio Constitution.

In spite of the absence of analysis in *Carter*, four years later, the Ohio Supreme Court again summarily rejected the claim, citing to *Carter*. *State v. Adams*, 103 Ohio St.3d 508, 535, 817 N.E.2d 29 (2004) (“Adams challenges the constitutionality of lethal injection to carry out the death penalty. However, we have previously rejected similar arguments. See, *State v. Carter*, 89 Ohio St.3d at 608, 734 N.E.2d 345.”). Again in 2006, the Ohio Supreme Court failed to conduct any substantive Eighth Amendment analysis of Ohio constitutional analysis of lethal injection, summarily rejecting Craig’s challenge on authority of *Carter* and *Adams*. See *State v. Craig*, 110 Ohio St.3d 306, 327, 853 N.E.2d 621, 643 (2006) (“Craig also disputes the constitutionality of lethal injection as a means to carry out the death penalty. We

reject this claim. See *Adams*, 103 Ohio St.3d 508, 2004-Ohio-5845, 817 N.E.2d 29, ¶ 131; *Carter*, 89 Ohio St.3d at 608, 734 N.E.2d 345.”).

Despite *Carter*'s lack of substantive Eighth Amendment or Ohio constitutional analysis, numerous appellate districts around the state of Ohio have subsequently used *Carter* to summarily reject challenges to lethal injection under the Eighth Amendment without addressing the substance of the challenge. See, *State v. Fitzpatrick*, 2004 WL 2367987 (Ohio App. 1 Dist.) at \*12 (unreported) (affirming Fitzpatrick's convictions on post conviction, noting that on direct appeal, the Ohio Supreme Court overruled his “general Eighth Amendment attack on Ohio's statutes governing capital punishment. [citation omitted] And the supreme court specifically held in *State v. Carter* [citation omitted] that execution by lethal injection does not run afoul of the Eighth Amendment's proscription against cruel and unusual punishment. We, therefore, hold that the common pleas court properly denied Fitzpatrick's thirteenth claim.”); See also, *State v. Skatze*, 2003 WL 24196406 (Ohio App. 2 Dist.) at \*62 (unreported) (rejecting Eighth Amendment claim relating to electrocution, noting that Ohio had now permitted election of lethal injection and noting that Ohio Supreme Court had also rejected Eighth Amendment challenge pursuant to *State v. Carter*.); *State v. Williams*, 149 Ohio App.3d 434, 442, 777 N.E.2d 892, 897 (Ohio App. 6 Dist.) (rejecting post conviction claim noting, “Execution by lethal injection has been found constitutional. *State v. Carter* (2000),

89 Ohio St.3d 593, 608, 734 N.E.2d 345.”); *State v. Foust*, 2005 WL 2462048 (Ohio App. 8 Dist.), at \*9 (unreported) (rejecting Foust’s tenth ground for relief, that Ohio’s method of lethal injection violates the due process protections of life and constitutes cruel and unusual punishment, because “[t]he Ohio Supreme Court has held that execution by either electrocution or lethal injection does not run afoul of the Eighth Amendment’s proscription against cruel and unusual punishment,” citing to *State v. Braden*, Franklin Cty. App. No. 02AP-954, 2003-Ohio-2949 (Ohio App. 10 Dist.), citing *State v. Carter* (2000), 89 Ohio St.3d 593, 734 N.E.2d 345); *State v. Phillips*, 2002 WL 274637 (Ohio App. 9 Dist.) at \*4 (unreported) (rejecting post conviction claim and noting “Neither execution by electrocution nor by lethal injection constitutes cruel and unusual punishment. *State v. Carter* (2000), 89 Ohio St.3d 593, 608, 734 N.E.2d 345.”); *State v. Conway*, 2005 WL 3220243 (Ohio App. 10 Dist.) at \*10 (unreported) (rejecting Conway’s sixth ground for relief that “administration of the death penalty by lethal injection violates his constitutional rights,” as *res judicata* and also noting that “the Ohio Supreme Court has rejected such a claim. See *State v. Carter* (2000).”); *State v. Hanna*, 2002 WL 4529 (Ohio App. 12 Dist.) at \*8 (unreported) (denying post conviction challenge, noting that “The Ohio Supreme Court has upheld the use of lethal injection, noting that no case law, federal or state, has held that method constitutes cruel and unusual punishment. *State v. Carter* (2000), 89 Ohio St.3d 593, 608.”).

The Ohio 11th District Court of Appeals recently specifically addressed the issue and ruled that the claim is not cognizable in state post conviction. *State v. Jackson*, 2006 WL 1459757 at \* 25, 2005-Ohio-2651, at 44 (Ohio Ct. App.11th Dist. Trumbull County 2006) (unreported)(“Under his thirteenth cause of action, appellant contends that the trial court erred when it rejected his claim that the state's use of a lethal injection in the imposition of the death penalty constitutes cruel and unusual punishment. In regard to this point, we would first indicate that this claim does not raise an issue pertaining to the propriety of appellant’s criminal trial. To this extent, a post conviction proceeding is not the proper legal context in which to litigate this issue; instead, this type of issue should be raised in a declaratory judgment or habeas corpus action.”).<sup>3</sup> Moreover, the court noted “as to the substance of this argument, our review of the relevant case law shows that the basic assertions raised in the evidentiary materials relating to this point have previously been rejected as insufficient to establish that Ohio’s use of the lethal-injection method is unconstitutional. See *Cooper v. Rimmer* (9th Cir., 2004), 358 F.3d 655.”<sup>4</sup>

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The Ohio Supreme Court has never suggested either of those processes are available to a similarly situated petitioner.

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The *Cooper* opinion is from the 9th Circuit Court of Appeals and clearly does not address Ohio’s procedures. The *Cooper* opinion was amended and superseded by *Cooper v. Rimmer*, 379 F.3d 1029, 1033 (9th Cir. 2004), where it was noted that the first *Cooper* opinion had specifically focused upon “whether the protocol sufficiently assures” that the lethal injection would be carried out such “that the drug will have

Although *Baze* does not recognize lethal injection as *per se* unconstitutional, it does represent the first statement by the Supreme Court of the United States that recognizes that lethal injection protocols are uniquely susceptible to Eighth Amendment challenges and analysis. The numerous opinions making up the majority generally agree, for the first time, that the “evidence adduced by [a] petitioner” will in certain circumstances render a state’s protocol unconstitutional. *Baze*, 128 S.Ct. at 1556 (Stevens, J., concurring). Similarly, the plurality observes that in the absence of “extensive hearings,” it will be difficult to ascertain whether the “risk of pain from maladministration” of lethal injection protocols is sufficient to trigger Eighth Amendment protections. *Id.*, at 1526 (Roberts, C.J., plurality).

The new guidance the *Baze* Court has recently provided as to what constitutes an unconstitutional “substantial risk” from the specific administration of a specific protocol, thus supports the litigation of and factual development through limited

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its intended effect.” This was also the focus of the *Baze* analysis. Prior to the *Baze* decision, a least one federal district court had rejected a lethal injection challenge in habeas based upon *Cooper*. See *Adams v Bradshaw*, 484 F.Supp.2d 753, 796 (N.D. Ohio 2007). The Sixth Circuit has recently remanded *Adams* to the District Court for an evidentiary hearing on Stanley Adams’ lethal injection issue. (“The petitioner, death sentenced inmate, moves for an order staying his current § 2254 capital habeas appeal, . . . and remanding the case to the district court for factual development on lethal injection. . . . the motion is GRANTED insofar as the proceedings in this court are stayed and the case is REMANDED to the district court for further proceeding in accordance with this order.” Order, 6th Circuit Court of Appeals, 02/13/2009 Exhibit C, Attached).

discovery on the lethal injection issue. There are multiple ongoing challenges to the constitutionality of Ohio's lethal injection scheme. It is clear that if Ohio's lethal injection scheme violates the 8th Amendment and *Baze* it will apply retroactively 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. 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 must go forward for full merits review.

## **CONCLUSION**

There is a reasonable likelihood that the hair evidence and the DNA evidence found in the used condom that was not tested will demonstrate that someone other than Brett Hartman committed this crime. Brett Hartman also requires discovery and an opportunity to develop the factual bases of his claim that the conviction is based on the perjured testimony of a jailhouse informant. The combination of the testing of the untested evidence and the removal of the perjured testimony of the jailhouse informant will indicate that no reasonable juror would have found him guilty. Because there is a reasonable likelihood that this evidence will demonstrate that Brett Hartman is actually innocent of this crime, Brett Hartman's conviction for aggravated

murder and his sentence of death are in violation of the 5th, 6th, 8th, and 14th Amendments. Brett Hartman is entitled to this Court granting his Petition for Post Conviction Relief.

The Supreme Court in *Baze v. Rees* recognized that the way a method of execution is carried out can implicate Eighth Amendment concerns over prohibition against cruel and unusual punishment. Therefore, an analysis of Ohio's lethal injection protocol under the Eighth Amendment is required to prevent the unconstitutional infliction of undue pain and suffering. Hartman therefore requests that he be permitted full factual development through limited discovery on the lethal injection issue as well as a stay of execution to permit him sufficient time to develop the factual bases for his claim.

WHEREFORE, Brett Hartman respectfully requests that this Court:

1. Issue an Order allowing Mr. Hartman to conduct discovery into this matter;
2. Stay Mr. Hartman's execution while discovery is conducted;
3. Appoint an investigator to assist Mr. Hartman with the discovery process;
4. Appoint Attorney Michael Benza to represent Mr. Hartman;
5. Hold an evidentiary hearing;
6. Order such other relief as this Court deems just.

Respectfully Submitted,

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#### Certificate of Service

A copy of the foregoing Petition to Vacate was served by ordinary U.S. mail upon the Summit County Prosecuting Attorney, 53 University Avenue, 6th Floor, Akron, OH 44308-1680, this \_\_\_\_ day of March, 2009.

\_\_\_\_\_  
Michael J. Benza  
Counsel for Brett Hartman