

ORIGINAL  
ON COMPUTER - JJ

IN THE SUPREME COURT OF OHIO

CASE NO. 1998-1475

STATE OF OHIO

Appellee

On Appeal from the Summit  
County Common Pleas Court  
Case No. CR 97-09-1987

v.

DEATH PENALTY CASE

BRETT X. HARTMAN aka HARTMANN

Appellant

STATE'S MEMORANDUM IN OPPOSITION

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FILED  
MAR 30 2009  
CLERK OF COURT  
SUPREME COURT OF OHIO

## STATE'S MEMORANDUM IN OPPOSITION

Brent X. Hartman is scheduled to be executed by lethal injection on April 7, 2009 pursuant to the order of this Court. On March 27, 2009 Hartman filed a second Motion for Stay of Execution. For the following reasons the State requests that the motion be denied.

### PROCEDURAL HISTORY

Hartman was sentenced to death after jury trial in Summit County for the aggravated murder of Winda Snipes. This Court affirmed. *State v. Hartman*, 93 Ohio St.3d 274, 2001-Ohio-1580.

Hartman filed a petition for post-conviction that was denied by the trial court. Hartman's appeal to the court of appeals was dismissed as untimely. This Court declined to accept jurisdiction of that decision. An application to reopen was later filed and denied.

Hartman filed a habeas corpus action in federal court. The United States District Court denied the petition for writ of habeas corpus. *Hartman v. Bagley* (U.S.D.C. E.D. Ohio 2004), 333 F.Supp.2d 632. The Sixth Circuit Court of Appeals affirmed that decision. *Hartman v. Bagley* (2007 6<sup>th</sup> Cir.) 492 F.3d 347, cert. denied *Hartman v. Bobby* (2008), 128 S. Ct. 2971. Judge Gwin ruled in *Bagley* that Hartman was entitled to DNA testing of semen found in the anal cavity of Snipes' body (that test later conclusively showed that Hartman lied when he denied having anal sex with the woman) and denied Hartman's request for additional discovery.

Hartman attempted to intervene in *Cooey v. Strickland* (U.S.D.C. S.D. Ohio) 2:04cv 1156. Hartman's complaint seeking to intervene was dismissed. A

notice of appeal was filed with the Sixth Circuit Court of Appeals on September 22, 2008. That appeal is pending.

Hartman filed a motion to stay execution with this Court. That motion was denied by entry dated March 18, 2009.

Recently Hartman filed a motion with the Sixth Circuit Court of Appeals for permission to file a successive petition for writ of habeas corpus. That motion is pending.

In the instant Motion for Stay of Execution Hartman relies on an untimely and successive petition for post-conviction relief Hartman filed in the Summit County Court of Common Pleas on March 26, 2009. The State's Motion to Dismiss filed March 30, 2009 is attached.

#### APPLICABLE LAW AND ARGUMENT

This Court articulated the principles applicable to a motion for stay of a capital sentence in *State v. Steffen* (1994), 70 Ohio St.3d 399, 1994-Ohio-111.

There, referring to *McCleskey v. Zant* (1991), 499 U.S. 467, this Court stated:

The court adopted the "cause and prejudice" standard for determining whether a federal court could entertain a successive habeas petition. Under this standard, the petitioner must show " 'some objective factor external to the defense impeded counsel's efforts' " to raise the claim in his prior petition. *Id.* at 493, 111 S.Ct. at 1470, 113 L.Ed.2d at 544. Interference by public officials, a showing that the factual or legal basis for the claim was not reasonably available, or the ineffective assistance of counsel could constitute such just cause. *Id.* at 493-494, 111 S.Ct. at 1470, 113 L.Ed.2d at 544. After the petitioner has shown such cause, he must then show actual prejudice flowing therefrom. *Id.* at 494, 111 S.Ct. at 1470, 113 L.Ed.2d at 544.

The cause and prejudice standard also includes a failsafe. When a petitioner is unable to make a showing of just cause for failure to raise the claim previously, a federal court may nevertheless entertain the petition in a narrow class of cases where there exist extraordinary circumstances that have probably caused the conviction of one who is not guilty of the crime. The court described this class of cases as those "implicating a fundamental miscarriage of justice." *Id.* at 494, 111 S.Ct. at 1470, 113 L.Ed.2d at 545.

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We therefore hold the following: When a criminal defendant has exhausted direct review, one round of postconviction relief, and one motion for delayed reconsideration under *State v. Murnahan* in the court of appeals and in the Supreme Court, any further action a defendant files in the state court system is likely to be interposed for purposes of delay and would constitute an abuse of the court system.

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The defendant wishing to stay his execution to engage in further state court proceedings must petition this court for such a stay. The petitioner must then satisfy the "cause and prejudice" standard as articulated in *McCleskey, supra*. We believe that the *McCleskey* standard properly balances the need for finality of judgments against the need for protection of those defendants who can demonstrate either cause for failing previously to raise a ground for litigation or circumstances constituting a fundamental miscarriage of justice, if the conviction were to stand.

Id. \*411-\*412.

The State contends that Hartman cannot meet the cause and prejudice standard. Hartman is subject to the cause and prejudice standard since he is well past direct review, has filed a petition for post-conviction relief and an application to re-open his appeal.

In the untimely and successive petition for post-conviction relief filed March 26, 2009 Hartman argued that he was not bound by the requirements of

R.C. 2953.23. Besides federal cases that have no application to the statute Hartman relied on *State v. Lott* (2002), 97 Ohio St.3d 303. *Lott* does not aid Hartman since in that case this Court extended the time in which a timely petition for post-conviction relief asserting a claim of mental retardation could be filed due to the recent holding from the United States Supreme Court that the mentally retarded could not be sentenced to death. There is no similar case changing federal constitutional law that might excuse Hartman from complying with R.C. 2953.23.

Hartman made three claims in the petition filed March 26, 2009. One challenged the constitutionality of lethal injection in Ohio. Apart from R.C. 2953.23 the State contends that this general issue was before this Court in Hartman's first motion for stay and is not cause to stay the execution. Hartman conceded that this Court has upheld the constitutionality of lethal injection. Petition, 19-22.

Hartman also argued that DNA tests on miscellaneous hair found at the murder scene and a used condom also found at the murder scene are likely to demonstrate that someone other than Hartman committed the murder. Petition, 8, 12. Apart from R.C. 2953.23 Hartman failed to employ the DNA testing statutes. He has further ignored that Judge Gwin allowed DNA testing on semen found in the victim's anal cavity, after Hartman proclaimed that he did not have anal sex with the victim and that the semen in the anal cavity would show the true killer. The semen turned out to be Hartman's. Moreover, Hartman conceded that Judge Gwin refused to order more testing after Hartman's claim was proved to be a lie. Motion to Dismiss, 2-3, 6.

Hartman cites *District Attorney's Office v. Osborne*, case number 08-6, pending in the United States Supreme Court. That case is entirely different from Hartman's because in *Osborne* the State agreed that DNA tests on the evidence in question was at least potentially exonerating as shown in the following excerpt from the Alderson Transcript of oral argument on March 2, 2009:

JUSTICE STEVENS: Am I right in understanding that the State has agreed that if this evidence is exonerating; that this evidence potentially could exonerate him?

MR. KATYAL: The -- the State has so agreed.

JUSTICE STEVENS: Yes.

In Hartman's case the evidence Hartman seeks to test is not exonerating since hairs are commonly found in a person's apartment (Hartman claims that a long hair attached to a hair dryer should be tested) and there is no showing or way to know when the condom was placed in the victim's apartment. Testing this evidence could only lead to confusion. The evidence that Hartman said would show his innocence was tested and the test destroyed his claim.

Hartman's last claim was that perjured testimony was presented at his trial by an inmate who testified that Hartman admitted the murder. Hartman presented no evidence that perjured testimony was presented. This claim centers on a report from an unnamed "media source". Hartman has not deigned to identify this "media source" nor has this person come forward with any evidentiary material. Motion to Dismiss, 7.

When viewed against the requirements of R.C. 2953.23 it should be clear that Hartman cannot comply with the statute in any particular. Motion to Dismiss, 7-8.

**CONCLUSION**

The State requests that the second motion for stay be denied.

Respectfully submitted,

**SHERRI BEVAN WALSH**  
Prosecuting Attorney



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**PROOF OF SERVICE**

I hereby certify that a copy of the foregoing was sent by U. S. Mail and by e-mail to Attorney Michael J. Benza, The Law Office of Michael J. Benza, 17850 Geauga Lake Road, Chagrin falls, Ohio 44023 and michael.benza@case.edu; and by e-mail to MKanai@ag.state.oh.us, Matthew A. Kanai, Senior Assistant Attorney General, Capital Crimes Unit Coordinator, Ohio Attorney General's Office, 30 East Broad Street, 17<sup>th</sup> Floor, Columbus, Ohio 43215, on this 30th day of March, 2009.



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**RICHARD S. KASAY**

Assistant Prosecuting Attorney  
Appellate Division

DANIEL M. HOPKINSON

2009 MAR 30 AM 7:57

SUMMIT COUNTY  
CLERK OF COURTS  
STATE OF OHIO

IN THE COURT OF COMMON PLEAS  
SUMMIT COUNTY, OHIO

**Plaintiff**

v.

**BRETT XAVIER HARTMAN**

**Defendant**

**CASE NO. CR 97 09 1987**

**JUDGE UNRUH**

**CAPITAL CASE**

**MOTION TO DISMISS**

Defendant Hartman filed a petition for post-conviction relief on March 26, 2009. The petition is successive, untimely, and barred by R.C. 2953.23. Hartman is scheduled to be put to death on April 7, 2009 pursuant to the order of the Supreme Court of Ohio. Despite Hartman's request to this Court the Supreme Court of Ohio is the only state court with authority to stay the execution and that court has declined to do so. R.C. 2953.21 (H).

**FACTS**

Hartman was sentenced to death after jury trial in Summit County for the aggravated murder of Winda Snipes. The Supreme Court of Ohio affirmed. *State v. Hartman*, 93 Ohio St.3d 274, 2001-Ohio-1580.

Hartman filed a petition for post-conviction that was denied by the trial court. Hartman's appeal to the court of appeals was dismissed as untimely. The Supreme Court of Ohio declined to accept jurisdiction of that decision. An application to reopen was later filed and denied.

Hartman filed a habeas corpus action in federal court. The United States District Court denied the petition for writ of habeas corpus. *Hartman v. Bagley* (U.S.D.C. E.D.

Ohio 2004), 333 F.Supp.2d 632. The Sixth Circuit Court of Appeals affirmed that decision. *Hartman v. Bagley* (2007 6<sup>th</sup> Cir.) 492 F.3d 347, cert. denied *Hartman v. Bobby* (2008), 128 S. Ct. 2971.

In the federal habeas corpus proceedings Hartman proclaimed that DNA from semen in the victim's anal cavity would prove that Hartman was not the killer since Hartman denied having anal sex with the woman. Judge Gwin ruled in *Bagley* that Hartman was entitled to DNA testing of semen found in the anal cavity of Snipes' body. That test conclusively showed that Hartman lied when he denied having anal sex with the woman.

As stated by Judge Gwin:

With his petition, Hartman asserts that additional discovery would enable him to make the extraordinarily high showing necessary for a freestanding actual innocence claim. In reliance upon this argument, the Court granted Hartman discovery on the most central of his actual innocence claim DNA testing of the seminal fluids obtained from Winda Snipes' anal cavity.

At Hartman's request, and recognizing the equitable power of courts in the habeas context, the Court ordered DNA testing of semen retrieved from Ms. Snipes' vaginal and anal cavities. Hartman averred that this testing would support his actual innocence claim by showing that the semen in the anal cavity came from another individual.<sup>FN6</sup> However, **the results of the test confirmed that Hartman was the source of semen found in both the vaginal and anal cavities.** This evidence does not bolster Hartman's actual innocence claim. **This showing is significant as Coroner Platt gave unchallenged testimony that the semen specimen found in Winda Snipes' anal cavity was deposited near the time of her death.** Further undermining his actual innocence claim, Hartman shows no evidence that anyone else was with Winda Snipes near the time of her death. Since Hartman has not made any persuasive showing of actual innocence based on new evidence, the Court does not need to decide whether the Supreme Court recognizes a freestanding actual innocence claim. Hartman does not make a compelling showing of actual innocence, and the Court concludes that it lacks jurisdiction over this claim. *Id.* at 404, 113 S.Ct. 853.

FN6. Hartman maintained that he had only vaginal intercourse, not anal intercourse, with Ms. Snipes 12 to 14 hours before the murder. Therefore, DNA proof that the semen did not belong to Hartman would support his claim of

actual innocence by showing that another individual had sex with Ms. Snipes around the time of her death.

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The Court concludes that Hartman does not prevail on his gateway actual innocence claim. Hartman has failed to show that “new facts raise [ ] sufficient doubt about [his] guilt to undermine confidence in the result of the trial.” See *Schlup*, 513 U.S. 317, 115 S.Ct. 851. Hartman offers no new evidence supporting his contention that he is innocent of the murder of Winda Snipes. To the contrary, the new evidence of DNA results retrieved from Ms. Snipes’ vaginal and anal cavities undermine his claim of actual innocence since it shows him as the source of the deposited semen. Coroner Platt testified that “penetration ensued at a time interval equivalent to the time that the-or close to the time the decedent met her death.” (Trial Tr. 1391). Coroner Platt further testified that “the acid phosphatase is in the-at a level which would be, again, consistent with the time of her death.” (Trial Tr. 1392).

In making his actual innocence claim, **Hartman represented that he could not have deposited the seminal fluids found in Winda Snipes’ anal cavity, fluids that we know from Coroner Platt were deposited near the time of death.** Hartman testified:

Q. Did you have sex with her [on September 8, 1997]?

A. Yes, I did.

Q. Plaintiff Hartman, you have-what kind of sex?

A. Just regular vaginal sex.

Q. Okay. At any point did you have anal sex with her?

A. No, I did not.

(Trial Tr. 1822-23).

**Hartman agrees that the seminal fluids found in Winda Snipes’ anal cavities identify her murderer: “Based upon the coroner’s testimony, the most likely evidence available for the identification of Ms. Snipes’ assailant is the semen and seminal fluid found in her vaginal and anal cavities.” Pet. Mot. for Discovery at 30. Given Coroner Platt’s testimony and the DNA match with Hartman, Hartman’s newly discovered evidence only supports a conclusion that he killed Snipes. Therefore, Hartman’s gateway actual innocence claim fails.**

(Emphasis added.) 333 F.Supp2d at \*653-\*655

Judge Gwin denied Hartman's request for additional discovery.

Hartman attempted to intervene in *Cooley v. Strickland* (U.S.D.C. S.D. Ohio) 2:04cv 1156. Hartman's complaint seeking to intervene was dismissed. A notice of appeal was filed with the Sixth Circuit Court of Appeals on September 22, 2008. That appeal is pending.

Hartman has requested clemency from the Governor. The clemency board voted on March 5, 2009 unanimously to not recommend clemency and in so doing rejected Hartman's claims that he repeats in the instant petition.

Hartman filed a motion to stay execution with the Supreme Court of Ohio. That motion was denied by entry dated March 18, 2009. Copy of entry and State's Memorandum in Opposition attached.

Recently Hartman filed a motion with the Sixth Circuit Court of Appeals for permission to file a successive petition for writ of habeas corpus. That motion is pending. The Memorandum in response filed by the Ohio Attorney General is attached.

**R.C. 2953.23**

When Hartman was convicted in May of 1998 R.C. 2953.23 required that the defendant show either that he was unavoidably prevented from discovery of the facts upon which the defendant relies or that the United States Supreme Court recognized a new right with retroactive application to defendant's case. Hartman cites no case from the United States Supreme Court favorable to his case. In addition the defendant must show by clear and convincing evidence that but for constitutional error at trial (Hartman is not challenging the sentencing hearing) no reasonable factfinder would have found the defendant guilty. The statute remains unchanged in those particulars to the present day.

See *State v. Price*, 9<sup>th</sup> Dist. App. No. 07CA0025, 2008-Ohio-1774, ¶7; *State v. McDonald*, 6<sup>th</sup> Dist. App. No. E-04-009, 2005-Ohio-798, ¶10.

Moreover Hartman has no right to discovery in this case. *State v. Smith*, 9<sup>th</sup> Dist. App. No. 04CA008546, 2005-Ohio-2571, ¶20; *State v. White* (June 16, 1999), Summit App. No. 19040, \*2; *State v Phillips* (Feb. 3, 1999), Summit App. No. 18940, 1999 WL 58961, p. \*4 (a capital case); *State v. Samatar Franklin* App. No. 03AP-1057, 2004-Ohio-2641, ¶21, ¶23; See *State ex rel. Steckman v. Jackson* (1994), 70 Ohio St.3d 420.

### **HARTMAN'S CLAIMS**

Hartman alleges that he is not bound by R.C. 2953.23 but that is not true. There is no case that would excuse him from complying with the statute. *State v. Lott* (2002), 97 Ohio St.3d 303 was decided after the United States Supreme Court declared that execution of the mentally retarded was unconstitutional and the Supreme Court of Ohio in *Lott* allowed defendants wishing to assert a retardation claim extra time but not unlimited time to do so. No similar situation is present here.

Hartman is attempting to file a successive federal habeas corpus action but that has no relevance to R.C. 2953.23. Hartman has not complied with the statute's requirements. But the State will address the claims on the merits along with Hartman's non-compliance with R.C. 2953.23.

Hartman has three claims: 1) material that has not been tested for DNA should be tested; 2) an unsupported allegation that perjured testimony was presented at the guilt phase; 3) death by lethal injection in Ohio is unconstitutional.

The last claim, that death by lethal injection is unconstitutional, is easily disposed of on the merits since Hartman concedes that the Supreme Court of Ohio has held on several occasions that the procedure is not unconstitutional. Petition, 19-22. This Court

has no authority to gainsay that precedent and Hartman's claim must be rejected. Moreover Hartman made claims relating to the constitutionality of Ohio's lethal injection procedure in his Motion for Stay filed in the Supreme Court of Ohio and the court did not stay its order setting the execution date. See State's Memorandum in Opposition attached. The State believes that had Hartman made any colorable showing in the Supreme Court of Ohio that Ohio's lethal injection procedure is unconstitutional that court would have stayed the execution date.

Concerning Hartman's DNA claim he asserts without any support that DNA testing of hair evidence and a used condom "are likely to demonstrate that someone else committed the murder and that Brett Hartman did not commit the crime." Petition, 8. This claim must be rejected on the merits since Hartman has not complied with statutory procedures concerning DNA testing. See R.C. 2953.71 - 2953.84; See generally *State v. Prade*, 9<sup>th</sup> Dist. App. No. 24296, 2009-Ohio-704.

Further Hartman attempts to hide from his prior claim that the semen in the anal cavity of the victim was most likely deposited by the actual killer. Hartman asserts that "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." Petition, 14. Hartman is being more than evasive here; the hair was not tested because Judge Gwin allowed testing of the semen, the test that Hartman announced would prove his innocence.

Since Hartman's bluff was called and the semen shown to be his he has now changed his tune and points to miscellaneous hairs, including "a long hair attached to a hair dryer" and a used condom which could have been in the victim's apartment for days as the crucial evidence. Petition, 12. Hartman has conceded that he requested further

DNA testing be ordered by Judge Gwin and that Judge Gwin refused to order further testing, because of the test on the semen. See Ohio Attorney General Memorandum, 2-3.

Concerning the alleged perjured testimony there is no evidence at all that any such testimony was presented. Attached to the petition is an email purported to be from Attorney Thomas Adgate in which Adgate says that he "went to judge Callahan after the testimony, not before. A huge difference... As a result of attorney client privilege, I am unable to assist you any further." Further, "no one was present and I did get a ruling from the ethics committee, which indicated I have to hold my silence which really bothers me but that is the way it is". This is no evidence that perjured testimony was presented at the trial despite the unnamed "media source"s speculations to the contrary. Petition, Ex. A. Apparently this "media source" cannot be revealed by Hartman but Hartman expects that the source's speculations to be credited; this is a shell game at best.

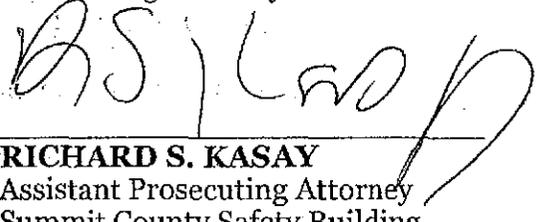
When viewed through the lens of R.C. 2953.23 it must be found that Hartman has not been unavoidably prevented from discovery of the facts underlying all of his claims. Hartman has always known that the hairs and the condom were not DNA tested; he could have challenged lethal injection at any time; and as pointed out by the Ohio Attorney General nothing prevented Hartman from investigating the witness now alleged to have perjured himself. Ohio Attorney General Memorandum, 4. Further Hartman has not come close to showing by clear and convincing evidence that there was any constitutional error at trial much less that error led to his conviction. The DNA issue is speculative at best and completely undermined by the DNA test ordered by Judge Gwin. The perjured testimony claim is speculative also and at this remove must

be viewed with the knowledge that the best evidence, according to Hartman himself, conclusively proves Hartman's guilt.

The petition must be denied.

Respectfully submitted,

**SHERRI BEVAN WALSH**  
Prosecuting Attorney

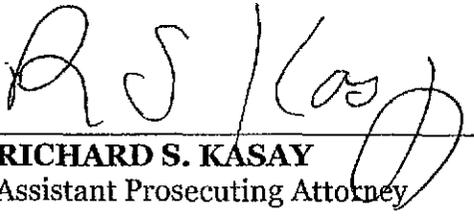


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**PROOF OF SERVICE**

I hereby certify that a copy of the foregoing has been mailed by regular U.S. Mail to-Attorney Michael J. Benza, 17850 Geauga Lake Road, Chagrin Falls, Ohio 44023 on this 30th day of March, 2009.



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