

ORIGINAL

IN THE SUPREME COURT OF OHIO

CASE NO. 98-1475

STATE OF OHIO

Appellee

v.

BRETT X. HARTMAN aka HARTMANN

Appellant

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

DEATH PENALTY CASE

STATE'S MOTION TO SET NEW EXECUTION DATE

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**STATE'S MOTION TO SET NEW EXECUTION DATE**

On September 4, 2009 the Sixth Circuit Court of Appeals denied Hartman's request to file a successive habeas petition and lifted the prior stay of execution. Copy of Order attached.

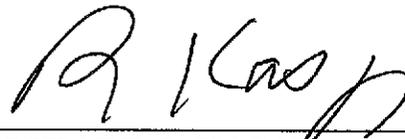
On March 26, 2009 Hartman filed an untimely petition for post-conviction relief in the Summit County Court of Common Pleas. That petition remains pending. The Summit County Court of Common Pleas has no authority to stay an execution date. R.C. 2953.21 (H).

By Order dated March 30, 2009 this Court denied a motion for stay of execution where the motion was based on the untimely petition for post-conviction relief.

The State says that the Ohio Assistant Attorney General who litigates federal litigation has indicated that there is no pending federal litigation that would delay the execution of Brett X. Hartman. The State requests that this Court set an execution date in this case.

Respectfully submitted,

**SHERRI BEVAN WALSH**  
Prosecuting Attorney

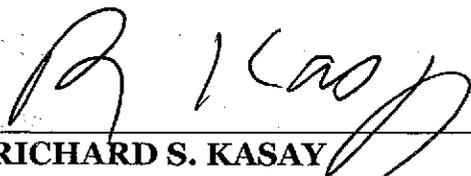


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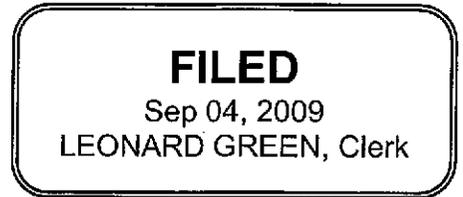
**PROOF OF SERVICE**

I hereby certify that a copy of the foregoing was sent by regular 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 the 8th day of September, 2009.

  
**RICHARD S. KASAY**  
Assistant Prosecuting Attorney  
Appellate Division

No. 09-3299

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT



In re: BRETT HARTMAN,  
  
Movant.

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ORDER

Before: CLAY, GILMAN, and ROGERS, Circuit Judges.

Brett Hartman, an Ohio prisoner sentenced to death, moves this court for permission to file a successive petition for a writ of habeas corpus under 28 U.S.C. § 2254. We previously granted Hartman a stay of execution pending the Supreme Court’s decision in *District Attorney’s Office for the Third Judicial District v. Osborne*, \_\_\_ U.S. \_\_\_, 129 S. Ct. 2308 (2009). See *Hartman v. Bobby*, 319 F. App’x 370 (6th Cir. 2009). That Court now has issued its opinion in *Osborne*, and the parties have filed supplemental briefs addressing the impact of that decision.

In 1998, an Ohio jury convicted Hartman of aggravated murder, kidnapping, and tampering with evidence, and the jury recommended that Hartman be sentenced to death. The trial court accepted this recommendation and imposed the death penalty on Hartman. The court also sentenced Hartman to ten years on the kidnapping conviction and five years on the tampering with evidence conviction. The Ohio Supreme Court affirmed Hartman’s convictions and sentences on direct appeal. *State v. Hartman*, 754 N.E.2d 1150 (Ohio 2001).

In 2003, Hartman filed a § 2254 petition in the district court, presenting ten issues for review. The district court determined that Hartman’s claims were without merit and dismissed the petition. *Hartman v. Bagley*, 333 F. Supp. 2d 632 (N.D. Ohio 2004). On appeal, this court affirmed the district court’s judgment. *Hartman v. Bagley*, 492 F.3d 347 (6th Cir. 2007).

In March 2009, Hartman filed his current motion for authorization to file a second § 2254 petition. As the basis for his motion, Hartman argues that: (1) testing of hair fibers and other evidence found at the scene of the crime would demonstrate his innocence, and (2) execution pursuant to Ohio's lethal injection protocol would violate his constitutional rights. As to his second claim, we already have rejected it as a possible ground for filing a successive habeas petition because the Supreme Court's decision in *Baze v. Rees*, \_\_\_ U.S. \_\_\_, 128 S. Ct. 1520 (2008), did not create a new rule of constitutional law that applies retroactively to his claim. *Hartman*, 319 F. App'x at 371 n.1.

Before Hartman can file a second or successive § 2254 petition, he must receive authorization for the filing from the court of appeals. 28 U.S.C. § 2244(b)(3)(A). To obtain this authorization, Hartman must make a prima facie showing either that: (1) a new rule of constitutional law applies to his case that the Supreme Court made retroactive to cases on collateral review; or (2) a newly discovered factual predicate exists which, if proven, sufficiently establishes that no reasonable factfinder would have found Hartman guilty of the underlying offense but for constitutional error. 28 U.S.C. §§ 2244(b)(2) and 2244(b)(3)(C); *In re Nailor*, 487 F.3d 1018, 1023 (6th Cir. 2007); *In re Bowen*, 436 F.3d 699, 704 (6th Cir. 2006); *In re Cook*, 215 F.3d 606, 607 (6th Cir. 2000). In this context, a prima facie showing means sufficient allegations of fact combined with some documentation that would warrant fuller exploration in the district court. *Keith v. Bobby*, 551 F.3d 555, 557 (6th Cir. 2009).

Hartman argues that he recently learned of new evidence that demonstrates the likelihood of another individual having committed the murder for which he was convicted. Hartman must show that his factual allegations are sufficient to require the district court to engage in additional analysis in order to ascertain whether, except for the constitutional error, no reasonable factfinder would have found him guilty. *Id.* After the victim's murder, police collected several hairs, a cigarette butt, and a used condom from the crime scene. Hartman does not allege that he previously was unaware of this evidence. Instead, he maintains that he recently learned additional information about these materials at his clemency hearing. Specifically, a police detective testified that the victim's boyfriend initially was the chief suspect until his alibi excluded him as the culprit based on the

victim's time of death. Hartman notes that the police subsequently revised the time of death by several hours, thereby rendering the boyfriend's alibi inapplicable for the time in question. Despite this revision to the time of death, the police never re-examined their conclusion that the boyfriend was not the murderer. Of most relevant significance to Hartman, the evidence at issue was never subjected to scientific testing to determine if it matched the boyfriend or possible other suspects. Hartman asks that these materials now be provided to him so that he can conduct his own tests, which he maintains will exonerate him.

Hartman's allegations are insufficient to meet the requirements of § 2244(b)(2). First, with respect to the crime scene evidence, Hartman does not dispute the fact that he has been aware of this evidence since the time of his conviction. At most, Hartman is speculating that testing of the evidence could demonstrate his innocence. Even that conclusion is debatable. Previous testing of semen samples taken from the victim's body matched Hartman's DNA. *Hartman*, 492 F.3d at 355. If scientific testing of these new materials would show that they do not match Hartman (the "best case" scenario for him), it would merely demonstrate that someone else had been in the victim's apartment and likely engaged in intercourse with her at some point. While this conclusion may raise some doubt concerning Hartman's guilt, the evidence does not rise to the required level -- that no reasonable factfinder would have convicted Hartman of murdering the victim. *See id.* at 351-55 (setting forth the facts underlying Hartman's convictions and sentences). Second, the testimony at the clemency hearing that the estimated time of death had changed, by itself, does not make it any less likely that a reasonable jury would have convicted Hartman.

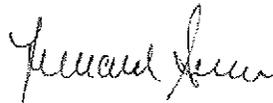
Hartman additionally argues that he recently received information concerning perjury by a prosecution witness. At trial, Bryan Tyson, a fellow inmate of Hartman, testified that Hartman admitted to Tyson that he killed the victim. *Id.* at 353. Hartman denied making any jailhouse admission to Tyson. Hartman now asserts that he has learned from another source that Tyson may have perjured himself. Although Hartman is investigating this allegation, he has not yet discovered any evidence confirming it. Therefore, this alleged perjury does not meet the requirements of § 2244(b)(2). *Keith*, 551 F.3d at 557.

As Hartman's new factual allegations are insufficient to establish that no reasonable fact-finder would have found him guilty of the underlying offense, he must show that the *Osborne* decision creates a new rule of constitutional law that applies retroactively on collateral review. In that case, the Supreme Court held that a convicted prisoner has no free-standing substantive due process right to DNA evidence. *Osborne*, 129 S. Ct. at 2322-23. While the Court did recognize that the prisoner may have a state-created liberty interest in demonstrating his innocence through new evidence, *id.* at 2319, he has the burden of demonstrating the inadequacy of the state procedures. *Id.* at 2321.

Hartman has not made a prima facie showing that *Osborne* created a new rule of constitutional law that applies retroactively to him. Since *Osborne* clearly rejected the conclusion that he had a free-standing due process right to access and test the evidence at issue, Hartman strongly relies on *Osborne*'s holding that he may have a state-created liberty interest in pursuing state post-conviction relief. However, this is not a new rule of constitutional law. The Supreme Court has repeatedly held in the past that the states may create a liberty interest which would then receive due process protections. *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005); *Sandin v. Conner*, 515 U.S. 472, 483-84 (1995); *Evitts v. Lucey*, 469 U.S. 387, 401 (1985).

Accordingly, we deny Hartman's motion for authorization to file a second § 2254 petition. Since our prior order in this case provided that Hartman's stay of execution would only "remain in effect until our ruling" on his pending motion to file a successive habeas petition, *Hartman*, 319 F. App'x at 372, we hereby lift his stay of execution.

ENTERED BY ORDER OF THE COURT



Leonard Green  
Clerk