IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

PAUL GREGORY HOUSE,	)	
	)	
Petitioner,	)	
	)	
v.	)	**No. 3:96-cv-883**
	)	**Judge Mattice**
RICKY BELL, Warden,	)	**CAPITAL CASE**
	)	
Respondent.	)	

PETITIONER'S OPPOSITION TO RESPONDENT'S
MOTION FOR STAY OF JUDGMENT PENDING APPEAL
AND MOTION FOR RELEASE PENDING APPEAL

I. Petitioner's Opposition to Respondent's Motion for Stay of Judgment Pending Appeal

Respondent has filed with this Court a notice of appeal from this Court's order of December 20, 2007, granting Petitioner, Paul Gregory House, a conditional writ of habeas corpus "that will result in the vacation of his conviction and sentence unless the state of Tennessee commences a new trial against him within 180 days after this judgment becomes final." Respondent has also moved this Court for a stay of judgment pending its appeal.

A. FED. R. APP. P. 23(c) requires Mr. House's release pending appeal unless Respondent satisfies the *Hilton v. Braunskill,* 481 U.S. 770, 773 (1987) criteria.

The sole issue before this Court, in considering Respondent's motion for stay, is whether Petitioner should be released from custody during the pendency of

Respondent's appeal. In its motion, Respondent cites FED. R. APP. P. 23(c), which provides that "[w]hile a decision ordering the release of a prisoner is under review, the prisoner must—unless the court or judge rendering the decision, or the court or appeals or the Supreme Court, or a judge or justice of either court orders otherwise—be released on personal recognizance, with or without surety." (emphasis added).

The mandatory nature of RULE 23(c) applies in cases—like the present case—in which the grant of habeas relief is conditioned upon an order that the State commence a new trial within a specified period of time, rather than ordering the prisoner's immediate release from custody. For example, in *Hilton v. Braunskill,* 481 U.S. 770 (1987), the Supreme Court decision that governs Respondent's motion, the Court reviewed just such a conditional writ. *Id.* at 773, *citing Braunskill v. Hilton,* 629 F.Supp. 511, 526 (D.N.J. 1986)(granting the state prisoner's habeas petition, "unless within 30 days the State of New Jersey shall afford [the prisoner] a new trial.") As the Supreme Court stated in *Hilton*, FED. R. APP. P. 23(c) "undoubtedly creates a presumption of release from custody" in cases in which district courts grant habeas relief, whether unconditional or conditional. 481 U.S. at 774. However, the presumption "in favor of enlargement of the petitioner [that is, his or her release from custody pending the state's appeal from the habeas judgment] with or without surety, may be overcome if the traditional stay factors tip the balance against it." *Id.* at 777.

In his stay motion, Respondent lists from *Hilton* the following factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits [in the appellate court]; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties

interested in the proceeding; and (4) where the public interest lies." *Id.* at 778.

In support of the first *Hilton* factor, Respondent offers only an argument previously rejected by the Supreme Court of the United States followed by an argument properly rejected by this Court (an argument also wholly unsupported by the record). Respondent offers no cogent argument whatsoever in support of the remaining three *Hilton* factors. Accordingly, Respondent fails to overcome the directive that Mr. House must be released. FED. R. APP. P. 23(c).

Petitioner addresses Respondent's arguments in the order Respondent lists them in his motion:

B. "Likelihood of success on the merits."

Respondent attacks this Court's findings (based on extensive evidentiary hearings and a record examined both by this Court and the Supreme Court of the United States) as flawed. Respondent claims he has made a showing that "there is a reasonable likelihood that the State will prevail in its appeal" to the Sixth Circuit (R. 348 at p. 4). This alleged "showing," however, falls short of (and does not even address) the "strong showing" of error required by the first *Hilton* factor. *Id*. at 778. Respondent's proffered issues on appeal fail to establish either the showing he claims to make or the showing required by the first *Hilton* factor.

1. Respondent fails to set forth any authority that even suggests this Court's decision contains legal error.

Respondent's motion renews his assertion that this Court is bound by the "independent judgment as to whether reasonable doubt exists that the standard

addresses" and "discrete findings regarding disputed points of fact," made by the former district judge in this matter. This argument has no chance of success on appeal. First, this argument was presented to the Supreme Court of the United States in an attempt to defeat Mr. House's showing of *Schlup* "actual innocence." It is the same argument discussed and expressly rejected by the Supreme Court. *House v. Bell,* 547 U.S. 518, ___, 126 S.Ct 2064, 2078 (2006). Respondent's reliance on a quote from a dissenting opinion fails to make a "strong showing" that this losing argument may succeed on appeal. (R. 348 p.3)

Second, Respondent fails to present even a single authority to suggest that this Court erred in assessing the evidence presented to establish the materiality/prejudice arising from constitutional error. Every Court addressing the materiality/prejudice and *Schlup* standards has described them as differing only to the extent that the *Schlup* showing already made by Mr. House is significantly higher. *Schlup* 513 U.S. at 327, citing *Strickland v. Washington*, 466 U.S. 666, 694 (1984) and *United States v. Bagley*, 473 U.S. 667, 682 (1985), *Hays v. Battaglia*, 403 F.3d 935, 938 (7th Cir. 2005); *Hargarve-Thomas v. Yukins*, 374 F.3d 383, 389 at fn.4 (6th Cir. 2004). Accordingly, this Court properly viewed the facts contained in the Supreme Court's opinion and as presented in the parties' recent briefs.[1]

Both *Schlup* and *Strickland* require the court to make a probablistic determination of the effect of excluded evidence on reasonable jurors. Under

[1]Notably, Respondent conceded that there were no material factual issues before this Court and did not petition the Supreme Court for rehearing based upon the factual basis of its opinion.

Strickland, the test is whether "there is a reasonable probability that, absent the errors, the factfinder would have a reasonable doubt." *Strickland v. Washington,* 466 U.S. at 695. In *Schlup*, there is a similar inquiry into the probable effect of excluded evidence on the factfinder. "[T]he court must make a probablistic determination of what reasonable, properly instructed, jurors would do." *Schlup v. Delo,* 513 U.S. at 329. These probablistic inquiries do not permit a court to usurp the role of the jury and reach its own conclusion regarding factual conflicts. *House v. Bell,* 547 U.S. at ___, 126 S.Ct. at 2078.[2] The only difference between the two standards is that *Strickland* did not even require this Court to determine that the facts show it is more likely than not that the defendant would be acquitted, *Strickland v. Washington,* 466 U.S. at 693, whereas *Schlup* required, and Mr. House proved to the Supreme Court, that the facts show it is more likely than not that every individual juror in the country would vote for acquittal.

Third, the Supreme Court decided that Mr. House had met a standard far higher than that required to demonstrate materiality/prejudice. Any argument that this Court was bound by the former district judge's "findings" has now been decided against Respondent by the highest court in the land and is therefore barred under the doctrine of *res judicata*. Whatever good-faith basis Respondent may have once had for his argument no longer exists. Far from making a "strong showing" of a likelihood of success on appeal, Respondent's first proposed appellate issue is frivolous.

2. This Court's finding that constitutional error infected Mr. House's capital trial is fully supported by the record.

---

[2]Moreover, the Supreme Court explicitly questioned the basis for the "findings" of the original district judge.

Respondent also alleges that he has a likelihood of success on the merits because this Court did not specifically hold whether the prosecution withheld material information, or whether trial counsel was in possession of that information and ineffectively failed to present it. Respondent has proffered no explanation how material, exculpatory information, once in the possession of either trial counsel or the prosecution, could be withheld from Mr. House's jury without violating the Constitution of the United States. In addition, Respondent offers not a single authority to support his argument that it is material to this Court's resolution of Mr. House's petition which constitutional violation occurred. Instead, he makes no more than a bald assertion that this Court's decision (to focus on whether the Constitution was violated as opposed to whether trial counsel or the prosecution committed the violation) relieved Mr. House of proving his case (R. 348 at page 3). In short, as this Court observed, both possible explanations violated the Constitution. More importantly, even if this Court was required to specify which constitutional violation contributed to the exclusion of which particular piece of evidence, Respondent utterly fails to demonstrate that the record does not support this Court's conclusions, and Mr. House will still prevail on appeal.

Respondent refuses to acknowledge the abundant and undisputed record evidence establishing these claims. Mr. House specifically set out this evidence both in his motion for summary judgment (R. 307 at pages 5-15 – outlining *Brady/Giglio* violations – and at pages 15-22 – outlining trial counsel's deficient performance) and in his amended complaint (R. 335 at pages 4-14 – outlining *Brady/Giglio* violations – and at pages 14-21 – outlining trial counsel's deficient performance).

Respondent's only response to this record evidence is the bare argument[3] that trial counsel's testimony did not support a finding that exculpatory evidence was withheld. (R. 348 at page 3) This argument is baseless. As trial counsel testified without rebuttal or contradiction,[4] he did not recall receiving the exculpatory evidence (described in Mr. House's summary judgment motion), but if he had, he would have presented it at trial. It would therefore appear in the trial record. Its absence proves that it was withheld. Furthermore, as this Court held, even accepting Respondent's wholly unsupported musings, if the material information was not withheld, then the fact that trial counsel did not present it to the jury establishes trial counsel's ineffectiveness.

Respondent's argument that this Court should have specifically stated which constitutional violation led to the exclusion of which piece of material exculpatory information lacks any legal basis. If indeed there were such a basis, the appellate court is required to affirm this Court's decision on any basis appearing in the record, and Mr. House will still prevail. *Angel v. Kentucky,* 314 F.3d 262, 264 (6th Cir. 2002). The record in this case clearly establishes specific violations of both *Brady* and *Strickland* and Respondent has made no showing of, and in fact cannot show, any evidence to the

---

[3]Respondent affirmatively alleged that there were no issues of material fact and that summary judgment was warranted. Respondent and his counsel cannot, having not obtained the outcome they wished, allege for the first time on appeal that such issues precluded summary judgment. *In re Allied Supermarkets, Inc.,* 951 F.2d 718 (6th Cir. 1991).

[4]Respondent has never alleged, nor offered any proof, questioning trial counsel's credibility during federal habeas corpus proceedings. Furthermore, he called no agents of the State of Tennessee to testify that this information had been turned over to defense counsel. Furthermore, he offered no affidavits to like effect in opposition to Mr. House's motion for summary judgment.

contrary. Once again, as opposed to making a “strong showing” of a likelihood of success, Respondent’s arguments establish that the appeal he is currently pursuing is completely frivolous.

C. "Irreparable Harm to the Applicant."

The second section of Respondent's motion claims that it "risks irreparable harm absent a stay of the court's judgment." This claim has no merit. In a single paragraph Respondent simply asserts that Petitioner's release from custody during the pendency of Respondent's appeal would "effectively defeat[…] the State's ability to appeal the judgment in this case." This is nonsense, unworthy of the Court's consideration. Petitioner's release from death row will not hinder Respondent in pursuing its appeal to the Sixth Circuit, as Petitioner will remain under this Court's supervision. In the highly unlikely event that Respondent were to prevail on appeal, Petitioner would simply be returned to state custody.

D. "No substantial injury to other parties."

This claim, drawn from the Supreme Court's *Hilton* opinion, is difficult to understand from the single paragraph in Respondent's motion that addresses it. Respondent does not identify what "other parties," aside from himself and Petitioner, might be adversely affected by his release pending Respondent's appeal. Respondent simply asserts that, "given the strength of the State's interest in petitioner's continued custody until execution of his death sentence, petitioner's interest in release pending appeal is weak." Given this Court's well-supported grant of habeas relief to Petitioner, a more callous statement is difficult—if not impossible—to imagine. To claim, as

Respondent does, that Petitioner's "liberty interest . . . is minimal at best," compared to the State's interest in executing him, despite this Court's grant of habeas relief, would make a nullity of the Fifth and Fourteenth Amendments' protection against deprivation of life or liberty without Due Process.

E. "The Public Interest"

Respondent finally asserts that "the public interest weighs heavily in favor of a stay" of this Court's ruling pending the outcome of Respondent's appeal. "If House is released," Respondent claims, "the public may be harmed," alleging his "propensity for violent criminal conduct." Citing Petitioner's prior conviction for sexual assault (and continuing to pretend as if there is enough evidence to convince any reasonable person that Mr. House actually killed Carolyn Muncey), Respondent claims 'there are reasonable grounds to believe that he poses a danger to the public."

Petitioner does not deny his guilty plea in 1981 to sexual assault in Utah, a fact that clearly influenced the jury in his 1986 trial to recommend the death penalty. However, Mr. House served his sentence for that conviction and was cleared for release by the Utah parole board. More importantly, the asserted "public interest" in his continued confinement on death row in Tennessee, some 22 years after his wrongful conviction in this case, is substantially diminished by his present medical condition. He poses no danger to anyone. Petitioner has been confined to a wheelchair for the past several years with an advanced case of multiple sclerosis, unable to walk or care for himself; an undisputed fact of which this Court may take judicial notice.[5] Respondent

[5] *See also* Attachment A.

ignores Mr. House's physically debilitating disease and utterly failed to demonstrate, as is his burden, that Mr. House could commit a violent crime when he can't even manage To claim, as Respondent does, that his release would pose "a danger to the public" is, quite simply, unsupported by the facts.

II. Petitioner's Motion for Release Pending Appeal

Petitioner respectfully moves this Court for an order directing Petitioner's immediate release from death row during the pendency of Respondent's appeal to the Sixth Circuit. As quoted above, the Supreme Court noted in *Hilton* that FED. R. APP. P. 23(c) "undoubtedly creates a presumption of release from custody" during the pendency of state appeals from conditional grants of habeas relief. 481 U.S. at 774.

Discussing the factors that district judges should consider in their "individualized judgments" in cases such as this, the Supreme Court stressed two such: first, "the possibility of flight should be taken into consideration," and, second, the "risk that the prisoner will pose a danger to the public if released[.]" *Id*. at 777.

As noted above, the undisputed facts of Petitioner's serious and advancing medical condition, confining him to a wheelchair, unable to walk, effectively negate any risks of flight[6] or danger to the public, should he be released from death row during the pendency of Respondent's appeal.

Petitioner suggests that "enlargement" of his custody should include his release to the custody of his mother, Joyce House, of Crossville, Tennessee, under such conditions as this Court may impose. This enlargement of custody would in no way

[6]Respondent has never contended that Mr. House poses a risk of flight.

"defeat[…] the State's ability to appeal the judgment in this case," as Respondent claims.

III. Conclusion

For the reasons stated above, Petitioner urges this Court to deny Respondent's motion for stay of judgment pending appeal. Petitioner further respectfully moves this Court for an order directing his immediate release to the custody of his mother pursuant to Fed. R. App. P. 23(c), under such conditions as this Court may impose.

Respectfully submitted,

FEDERAL DEFENDER SERVICES
OF EASTERN TENNESSEE, INC.

s/Stephen M. Kissinger
Stephen M. Kissinger
Asst. Federal Community Defender
800 S. Gay Street, Suite 2400
Knoxville, TN 37929
(865) 637-7979

CERTIFICATE OF SERVICE

I hereby certify that on January 28, 2008, the foregoing Petitioner's Opposition to Respondent's Motion for Stay of Judgment Pending Appeal And Petitioner's Motion for Release Pending Appeal was filed electronically. Notice electronically mailed by the Court's electronic filing system to all parties indicated on the electronic filing receipt. Notice delivered by other means to all other parties via regular U.S. Mail. Parties may access this filing through the Court's electronic filing system.

/s/Stephen M .Kissinger