

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OHIO**

<b>DANNY LEE HILL,</b>	)	
	)	<b>Case No.: 96-CV-795</b>
<b>Petitioner,</b>	)	
	)	<b>Judge John Adams</b>
<b>v.</b>	)	
	)	<b>Capital Habeas Corpus Case</b>
<b>CARL ANDERSON, Warden</b>	)	
	)	
<b>Respondent.</b>	)	

**EMERGENCY  
MOTION FOR DISCOVERY BY WAY  
OF DEPOSITION OF WITNESS**

Petitioner Hill, through undersigned counsel, requests an order from this Court granting this initial request for discovery for the deposition of Kevin Keith, a fellow death row inmate. Mr. Keith is scheduled currently to be executed by the State of Ohio on September 15, 2010. Pursuant to this Court's scheduling order entered November 25, 2009, counsel for Mr. Hill has until September 15, 2010 to file motions for discovery and evidentiary hearing. While counsel intends to file more thorough and comprehensive motions, the need to have an expedited ruling requires counsel to file this request concerning a deposition of Mr. Keith now.

Mr. Keith provided a detailed declaration concerning his interactions and observations of Mr. Hill while incarcerated on death row with him for several years. ECF #95-1. Mr. Keith's testimony detailing Mr. Hill's adaptive functioning and interaction with prison staff while on death row is critical to the issues raised in the Amended Habeas Petition. A deposition of his testimony before he is executed is therefore necessary. Counsel also requests the Court stay the execution of Mr.

Keith until such time as the Court can rule on the forthcoming motion for an evidentiary hearing.<sup>1</sup> Counsel is filing simultaneously with this motion a request for a stay of Mr. Keith's execution.

**MEMORANDUM IN SUPPORT**

Rule 6 of the Rules Governing Section 2254 Cases, allows a district court to conduct discovery when good cause is shown. The commentary to the Rule states:

Discovery may, in appropriate cases, aid in developing facts necessary to decide whether to order an evidentiary hearing or to grant the writ following an evidentiary hearing.

\* \* \*

Granting discovery is left to the discretion of the court, discretion to be exercised where there is a showing of good cause why discovery should be allowed.

The Supreme Court has held that a petitioner is entitled to discovery where a valid claim has been demonstrated, but the factual basis for that claim needs to be developed further. Bracy v. Gramley, 520 U.S. 899 (1997). A district court should grant leave to conduct discovery in habeas corpus proceedings "where specific allegations before the court show reason to believe that the petitioner may, if the facts are more fully developed, be able to demonstrate that he is ... entitled to relief..." Id. 520 U.S. at 908-09.

The Sixth Circuit has held that "a court must provide discovery in a habeas corpus proceeding only 'where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally

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<sup>1</sup> Counsel for Mr. Hill intend to file a subsequent motion for discovery and evidentiary hearing by the current due date of September 15, 2010. Counsel is still investigating and gathering information that would be relevant to a more detailed and thorough request for discovery and an hearing. Because of the time sensitive nature of Mr. Keith's execution, counsel is forced to file this initial motion for discovery.

and is therefore entitled to relief . . .” Lynott v. Story, 929 F.2d 228, 232 (6<sup>th</sup> Cir. 1991), *quoting* Harris v. Nelson, 394 U.S. 286, 300 (1969) (setting forth standards for discovery under All Writs Act, 28 U.S.C. § 1651).

Discovery is consistent with the judicial interests to conserve judicial resources by, *inter alia*: (1) clarifying issues, which may in turn influence the need for evidentiary hearing(s); (2) assisting the court in resolving defenses raised by the State (e.g., exhaustion of State remedies); (3) allowing the parties to determine whether out-of-state witnesses need to appear at an evidentiary hearing; and (4) minimizing the possibility of surprise at a hearing. See Liebman, *Federal Habeas Corpus Practice and Procedure*, section 19.4d (5th ed. 2005). Moreover, granting the habeas petitioner an opportunity to develop the facts of his allegations is consistent with the purpose of habeas corpus: to protect against detention and sentencing obtained by violations of an individual’s constitutional rights. Blackledge v. Allison, 431 U.S. 63, 69-72 (1977).

The decision of the Sixth Circuit in Stanford v. Parker, 266 F.3d 442 (6<sup>th</sup> Cir. 2001), is instructive in this regard and held as follows:

Habeas petitioners have no right to automatic discovery. A district court has discretion to grant discovery in a habeas case upon a fact specific showing of good cause under Rule 6. *See, Bracy v. Gramley*, 520 U.S. 899, 138 L. Ed. 2d 97, 117 S.Ct. 1793 (1997); *Bryd v. Collins*, 209 F.3d 486, 515-16 (6th Cir. 2000).

Rule 6(a) provides : “A party shall be entitled to invoke the process of discovery available under the Federal Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise.”

The burden of demonstrating the materiality of information requested is on the moving party. *See, Murphy v. Johnson*, 205 F.3d 809, 813-15 (5th Cir. 2000).

Id., 266 F.3d at 460.

Mr. Hill hereby incorporates the arguments presented in his Traverse, (ECF #102), in support of this request. As demonstrated, Mr. Hill should be granted discovery because (1) he presents "specific allegations" that demonstrate reason to believe that he may, if the facts are fully developed, be able to demonstrate that he is entitled to relief; (2) he meets the standard for discovery pursuant to Habeas Rule 6 and the Supreme Court's decision in Bracy, *supra*; (3) he is not conducting a "fishing expedition" in an attempt to develop evidence based upon speculation of its existence; and (4) his Atkins litigation, as a matter of law, requires factual findings made as a result of procedures that ensure reliability and accuracy in the determination of Mr. Hill's ineligibility to be executed because of mental retardation.

Kevin Keith executed a declaration wherein he provided relevant details as to Mr. Hill's functioning while on death row. The information relates to the claims in the habeas petition that Mr. Hill is mentally retarded and that Atkins counsel never communicated with Mr. Keith about Mr. Hill's functioning. These are valid claims that if proven correct would warrant habeas relief. A deposition of Mr. Keith to preserve his testimony for any possible future evidentiary hearing is appropriate under the circumstances. See Drammond v. Houk, Case No. 07-CV-1776, Doc #42, Order, March 11, 2008 (order granting discovery including deposition of witness who had provided affidavit).

Counsel for Mr. Hill believe Mr. Keith has important and relevant information about Mr. Hill's functioning and other events that occurred while they were incarcerated in the same area on death row. Counsel has attempted within the last few weeks to communicate directly with Mr. Keith through his counsel. However, the stress of his impending execution date has left Mr. Keith in a frame of mind where he is not able to deal with Mr. Hill's situation. Therefore, counsel's requests for a meeting have not been granted by Mr. Keith. While counsel for Mr. Hill believe a deposition

of Mr. Keith is appropriate, to conduct one under these circumstances would not produce the best results as Mr. Keith's personal stress would have an impact on his testimony.

Rule 32(a)(4) of the Rules of Civil Procedure allows for the use of a deposition at a hearing when the witness is unavailable due to death, Rule 32(a)(4)(A), and "in the interest of justice." Rule 32(a)(4)(F). Unless the Court stays Mr. Keith's execution until such time as any hearing that might be granted could be conducted, the only manner by which to secure Mr. Keith's testimony is through a video deposition.

There is precedent in the federal rules for preserving the testimony of a potential witness who may be unavailable for future proceedings. Federal Rule Criminal Procedure 15 allows for the deposition of a witness who may be too ill to testify at a later criminal trial. Federal Rule Civil Procedure 27 details a procedure by which a deposition of a witness should be obtained for any possible future litigation, if there is the possibility the witness will either be too ill or die before the litigation can commence.

Ideally, counsel for Mr. Hill would like to proceed with the habeas action for Mr. Hill in a deliberative and thorough process. If it were not for the impending execution date for Mr. Keith, counsel for Mr. Hill would most likely not be requesting a deposition of Mr. Keith, but instead would list him as a potential witness in the motion for an evidentiary hearing. However, the reality

of the situation forces counsel to proceed with this request for a deposition. The Office of the Federal Public Defender is prepared to bear the costs associated with the deposition.

Respectfully submitted,

/s/ Vicki Ruth Adams Werneke

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Counsel for Danny Lee Hill

**CERTIFICATE OF SERVICE**

I hereby certify that on August 26, 2010, a copy of the foregoing EMERGENCY MOTION FOR DISCOVERY BY WAY OF DEPOSITION OF WITNESS will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. Mail. Parties may access this filing through the Court's system.

/s/ Vicki Ruth Adams Werneke

Vicki Ruth Adams Werneke  
Assistant Federal Public Defender