

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION AT COLUMBUS**

ROBERT BETHEL,

Petitioner,

-vs-

DAVID BOBBY, Warden,

Respondent.

:

Case No. 2:10-cv-391

:

District Judge Michael R. Barrett
Magistrate Judge Michael R. Merz

:

ORDER TO SUPPLEMENT MOTION

This capital habeas corpus case is before the Court on Petitioner’s Motion for Stay and Abeyance (Doc. No. 8).

The Motion is based on Petitioner’s having filed in the Ohio courts a motion for new trial based on evidence Petitioner’s claims should have been produced to his counsel under *Brady v. Maryland*, 373 U.S. 83 (1963). (Motion, PageID 166.) As Petitioner’s counsel correctly note, the standard for granting a stay under these circumstances was announced in *Rhines v. Weber*, 544 U.S. 269 (2005):

[S]tay and abeyance should be available only in limited circumstances. Because granting a stay effectively excuses a petitioner's failure to present his claims first to the state courts, stay and abeyance is only appropriate when the district court determines there was good cause for the petitioner's failure to exhaust his claims first in state court. Moreover, even if a petitioner had good cause for that failure, the district court would abuse its discretion if it were to grant him a stay when his unexhausted claims are plainly meritless. Cf. 28 U.S.C. § 2254(b)(2) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of

the applicant to exhaust the remedies available in the courts of the State"). . . .

On the other hand, it likely would be an abuse of discretion for a district court to deny a stay and to dismiss a mixed petition if the petitioner had good cause for his failure to exhaust, his unexhausted claims are potentially meritorious, and there is no indication that the petitioner engaged in intentionally dilatory litigation tactics.

Id. at 277-278.

This Court most frequently sees motions to stay and hold in abeyance when the state court remedy has yet to be sought. In this case, however, both the Franklin County Common Pleas Court and the Franklin County Court of Appeals have rendered decisions on Petitioner's Motion for New Trial (Motion, Doc. no. 8, PageID 163). Those decisions are plainly relevant to application of the *Rhines* standard. Accordingly, it is hereby ORDERED that Petitioner file forthwith as supplements to his Motion:

1. His Motion for New Trial as filed in the Franklin County Common Pleas Court.
2. The Common Pleas decision on that Motion.
3. The Petitioner's brief on appeal.
4. The Franklin County Court of Appeals decision.

Petitioner is welcome to file any additional materials from the Motion for New Trial proceedings which would be useful in deciding the instant Motion.

August 26, 2010.

s/ **Michael R. Merz**
United States Magistrate Judge