

No. 17A865
CAPITAL CASE
EXECUTION SCHEDULED FOR THURSDAY, FEBRUARY 22, 2018,
AT 6:00 P.M.

*In the
Supreme Court of the United States*

ERIC SCOTT BRANCH, *Petitioner*,

v.

STATE OF FLORIDA, *Respondent*.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE FLORIDA SUPREME COURT*

RESPONSE TO APPLICATION FOR STAY OF EXECUTION

On February 14, 2018, Branch filed an application for stay of execution in this Court. In his motion, Branch seeks a stay of execution for this Court to decide his pending petition for a writ of certiorari. He points to the scheduled execution and believes this Court should not have to decide the matter under the constraints of a death warrant.

Currently pending before this Court is a petition that Branch filed on February 12, 2018, raising a claim that the Florida Supreme Court's partial retroactivity analysis violates the Eighth Amendment and the Supremacy Clause. *Branch v. Florida*, No. 17-7758. Branch asserts that the Florida Supreme Court's refusal to apply

their decision in *Hurst v. State*, 202 So.3d 40 (Fla. 2016) (*Hurst v. State*), retroactively to all capital cases violates the federal constitution.

In *Rodriguez v. Texas*, 515 U.S. 1307 (1995), Justice Scalia denied an application for stay of execution where there was no reason to believe that the execution date would interfere with the orderly processing of the pending petition for a writ of certiorari. Rodriguez filed his petition on August 15, 1995, but his execution was scheduled for November 8, 1995, which was 85 days in the future. While Justice Scalia had a standard policy of staying executions of every capital case on direct review to prevent the execution date from interfering with this Court's orderly processing of a petition on direct review, he denied the stay in that particular case because he saw no reason to believe the execution would interfere with this Court's deciding the petition in its normal manner and pace. "Staying the hand of state justice is no small matter, and should not be considered when no need exists." *Id.* at 1308.

Here, as in *Rodriguez*, there is no reason to believe that execution would interfere with orderly processing of the pending petition for certiorari. This Court will have nearly a week after the State's brief in opposition is filed to decide the pending petition in this case. This Court normally decides petitions during warrant litigation in much shorter time frames and often decides multiple petitions on the same day as the execution. Furthermore, unlike *Rodriguez*, this is not a petition from a direct appeal. As this Court can see from the State's brief in opposition detailing the procedural history of this case, Branch has been litigating his conviction and death sentence for over two decades in both state and federal courts, including filing a § 1983

action in federal court challenging Florida's system for providing state postconviction attorney while being represented by a *pro bono* attorney from Brady & Quarles.

Nor does Branch's petition raise a particularly complicated claim. Indeed, the sole issue being raised is both a matter of state law under this Court's decision in *Danforth v. Minnesota*, 552 U.S. 264 (2008), and one that there is no conflict in the courts regarding. There is no conflict between the Florida Supreme Court's decision and any decision of this Court, or any decision of any federal appellate court or any decision of any state supreme court. Indeed, the sole circuit court to have addressed the precise issue raised in the petition agrees that the Florida Supreme Court's partial retroactivity analysis does not violate the federal constitution. *Lambrix v. Sec'y, Fla. Dept. of Corr.*, 872 F.3d 1170 (11th Cir. 2017), *cert. denied*, *Lambrix v. Jones*, 138 S.Ct. 312 (2017) (No. 17-6290).

Opposing counsel points to the numerous petitions raising the same issue that will shortly be filed in this Court by the Florida capital defense bar. But the sheer number of petitions in other cases is not a reason to grant a stay of execution in this case.

Furthermore, this Court has denied review of this exact claim twice before. *Hitchcock v. State*, 226 So.3d 216 (Fla. 2017), *cert. denied*, *Hitchcock v. Florida*, 138 S.Ct. 513 (2017) (No. 17-6180); *Lambrix v. State*, 227 So.3d 112, 113 (Fla. 2017), *cert. denied*, *Lambrix v. Florida*, 138 S.Ct. 312 (2017) (No. 17-6222). This Court denied review in *Hitchcock* without the constraints of a death warrant.

Stays of executions

A “stay of execution is an equitable remedy” that is “not available as a matter of right.” *Hill v. McDonough*, 547 U.S. 573, 584 (2006). Equity “must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts.” *Hill*, 547 U.S. at 584; *see also Gomez v. United States Dist. Court*, 503 U.S. 653, 654 (1992) (observing that equity “must take into consideration the State's strong interest in proceeding with its judgment . . .”). A Court “must consider not only the likelihood of success on the merits and the relative harms to the parties, but also the extent to which the inmate has delayed unnecessarily in bringing the claim.” *Nelson v. Campbell*, 541 U.S. 637, 649-50 (2004).

Branch has little likelihood of this Court granting review of the petition that raises an issue that is purely a matter of state law under this Court's controlling precedent, which raises an issue where there is no conflict among the courts, and that concerns an issue that this Court recently denied review of in two other cases.

Furthermore, Branch “delayed unnecessarily” in bringing the petition in this case. The warrant was signed on January 19, 2018. The Florida Supreme Court denied the claim on January 22, 2018. On January 31, 2018, Branch filed a motion to stay in the Florida Supreme Court based on his intention of filing this petition in this Court. *Branch v. State*, SC17-1509. Instead of filing a motion to stay in the Florida Supreme Court, Branch should have filed the actual petition in this Court on that date. Branch has three sets of attorney representing him, two from Capital Collateral Regional Counsel - North (CCRC-N), and two attorneys from the Capital Habeas Unit

of the federal public defender's office (CHU) as well as pro bono counsel, S. Douglas Knox from Quarles & Brady, all of whom have been his attorneys for some time. Nine days to prepare a petition given is the number of attorneys involved is more than sufficient time. Given the extent of his representation, the petition should have been filed earlier in this Court. On the basis of the delay alone, the motion should be denied.

Accordingly, the application for stay of execution should be denied.

Respectfully submitted,

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