No. 17A885
CAPITAL CASE
EXECUTION SCHEDULED FOR 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 20, 2018, Branch filed an application for stay of execution in this Court. Currently pending before this Court is a petition for writ of certiorari raising a claim. *Branch v. Florida*, No. 17-7825. Branch seeks review of the Florida Supreme Court's decision in *Branch v. State*, __ So.3d __, 2018 WL 897079 (Fla. Feb. 15, 2018) (SC18-190). The State filed its brief in opposition this morning on February 21, 2018. The execution is currently scheduled for Thursday, February 22, 2018 at 6:00 p.m.

In his motion for stay of execution filed in this Court, Branch is seeking a stay of execution for this Court to decide his pending petition for writ of certiorari. The petition raises a claim that the Eighth Amendment prohibition on executions of minors established in *Roper v. Simmons*, 543 U.S. 551 (2005), should be extended to cognitive

immaturity based on recent brain development studies.

Stays of execution

Stays of executions are not granted as "a matter of course." *Hill v. McDonough*, 547 U.S. 573, 583-84 (2006). A stay of execution is "an equitable remedy" and "equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Id.* at 584. "Both the State and the victims of crime have an important interest in the timely enforcement of a sentence." *Id.* (citing *Calderon v. Thompson*, 523 U.S. 538, 556 (1998)). There is a "strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." *Id.* (citing *Nelson v. Campbell*, 541 U.S. 637, 650 (2004)). "The federal courts can and should protect States from dilatory or speculative suits." *Id.* at 585.

To be entitled to a stay of execution, Branch must establish five factors: 1) he has a substantial likelihood of success on the merits; 2) he will suffer irreparable injury unless the stay issues; 3) the stay would not substantially harm the other litigant; 4) a stay would not be adverse to the public interest; and 5) there was no unwarranted delay in brining the claim. *Hill*, 547 U.S. at 584 (citing *Barefoot v. Estelle*, 463 U.S. 880, 895-96 (1983), and *Nelson v. Campbell*, 541 U.S. 637, 650 (2004)).

As to the first prong, Branch must establish that he has a substantial likelihood of success on the merits. Branch has little chance of this Court granting the petition, much less a substantial one. As the Florida Supreme Court found, the claim is

procedurally barred under state law. This Court normally does not grant review of a claim that is procedurally barred under state law. Furthermore, this Court only rarely grants review of an issue that does not involve a conflict with this Court's jurisprudence or a significant disagreement among the nation's federal and state appellate courts. There is no conflict between the Florida Supreme Court's decision in this case and this Court's decision in either *Roper* or *Moore v. Texas*, 137 S.Ct. 1039 (2017). Nor is there any conflict between the Florida Supreme Court's decision and that of any other federal appellate court or state supreme court. No appellate court has extended *Roper* to adult defendants. Nor is there any reason to extend *Roper*. Age and cognitive immaturity may still be presented at sentencing as mitigation regardless of *Roper*. Under *Lockett v. Ohio*, 438 U.S. 586 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104, 107 (1982), a capital defendant who is over 17 years old can present expert testimony regarding human development and then argue to his jury that he should not be sentenced to death due to his cognitive immaturity. This Court's jurisprudence has long provided for individualized sentencing in capital cases.

As to the third prong, Branch must establish that a stay would not substantially harm the State. There is substantial harm to the State when its executions are cancelled.

As to the fourth prong, Branch must establish that a stay would not be adverse to the public interest. A delay of this execution would be adverse to the public interest in the finality of criminal judgments. Unwarranted delays undermine the deterrent effect of the death penalty. As this Court has observed, without finality, "the criminal

law is deprived of much of its deterrent effect" and only with "real finality can the victims of crime move forward knowing the moral judgment will be carried out." *Calderon v. Thompson*, 523 U.S. 538, 555-56 (1998).

As to the fifth prong, Branch must establish that he did not delay in bringing the claim raised in the petition. 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). This Court has noted that "there is a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." *Nelson*, 541 U.S. at 650. An "unexplained, and seemingly inexplicable, delay" in filing "by itself justifies denying the stay." *Brooks v. Bobby*, 660 F.3d 959, 962 (6th Cir. 2011) (denying a stay of execution where the inmate waited five years to file a 60(b)(6) motion citing *Nelson*).

Here, the Florida Supreme Court found that the claim was procedurally barred because it should have been raised years ago in the state habeas petition. The delay in bringing the *Roper* claim, by itself, justifies denying the motion for a stay.

Branch does not meet the factors for being granted a stay of execution.

ABA resolution

Opposing counsel's reliance on a recent ABA resolution as a basis for any stay is unwarranted. As the four dissenters in *Hall v. Florida*, 134 S.Ct. 1986 (2014), noted, tying Eighth Amendment law to the views of professional associations that often

change leads to "instability" and fuels "protracted litigation." *Hall v. Florida*, 134 S.Ct. 1986, 2006 (2014) (Alito, J., dissenting). The ABA is a private professional association which presents all the problems that the dissenters in *Hall* warned about but additionally presents the problem that it is a private association comprised of lawyers, not scientists, and a very selected group of lawyers at that. Relying on such a resolution is equivalent to putting the Eighth Amendment up for a private, highly-restricted vote. A stay of an execution in a capital case should not be premised on any resolution, much less this type of resolution.

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

Respectfully submitted,

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