OCTOBER TERM 2019

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

RAY JEFFERSON CROMARTIE,
Petitioner,
v.

BRADFIELD SHEALY, Southern Judicial Circuit District Attorney;
RANDA WHARTON, Clerk of Superior Court, Thomas County;
GEORGIA DEPARTMENT OF CORRECTIONS; and
BENJAMIN FORD, Warden, Georgia Diagnostic and Classification Prison,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

EMERGENCY APPLICATION FOR STAY OF EXECUTION
EXECUTION SCHEDULED FOR 7:00 P.M., WEDNESDAY NOVEMBER 13, 2019

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November 12, 2019

Petitioner, Ray Jefferson Cromartie, respectfully seeks a stay of execution pending the consideration of his petition for a writ of certiorari. This Motion is being filed concurrently with Mr. Cromartie's Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

INTRODUCTION

Ray Jefferson Cromartie is a Georgia death row inmate who is currently scheduled to be executed on November 13, 2019, at 7:00 p.m. Mr. Cromartie respectfully requests a stay of execution pending consideration of his petition for writ of certiorari to the Eleventh Circuit regarding its affirmance of the dismissal of his complaint filed under 42 U.S.C. § 1983. The State intends to carry out Mr. Cromartie's death sentence in spite of the facts that physical evidence is available that has never been DNA tested, and that such testing could prove that Mr. Cromartie was not the person who shot Richard Slysz, and thus is not guilty of malice murder, the conviction on which his death sentence is based.

Mr. Cromartie filed a complaint under 42 U.S.C. § 1983, alleging that the State's refusal to allow DNA testing denied his rights under the First, Eighth and Fourteenth Amendments. There is subject matter jurisdiction over Mr. Cromartie's complaint and the DNA claim he brings is cognizable under 42 U.S.C. § 1983. *Skinner v. Switzer*, 562 U.S. 521 (2011). The equities favor a stay of execution, and Mr. Cromartie has not been dilatory in seeking relief. Furthermore, the complaint states a cause of action on which relief can be granted. Accordingly, this Court should grant the stay of execution to enable it to consider Mr. Cromartie's certiorari petition. *See Skinner v. Switzer*, 559 U.S. 1033 (2010) (granting stay pending disposition of

petition for writ of certiorari on question whether petitioner could bring action under 42 U.S.C. § 1983 to remedy state's unconstitutional denial of access to DNA testing).

THIS COURT SHOULD GRANT A STAY OF EXECUTION.

The factors to be considered with respect to a request for a stay are as follows:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (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.

Nken v. Holder, 556 U.S. 418, 434 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)).

A. Likelihood of success

In a capital case, the likelihood of success factor is satisfied when the plaintiff makes a "substantial showing of the denial of a federal right." *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983) (citation and quotation marks omitted). That showing is made if the "issues are debatable among jurists of reason; that a court could resolve the issues in a different manner; or that the questions are adequate to deserve encouragement to proceed further." *Id.* at 893 n.4 (citation and quotation marks omitted).

"When non-frivolous issues are presented . . . in a capital case, the Supreme Court has made it clear that a stay of execution should be issued, even if only temporarily, when a stay is needed for the court to address such issues before the appeal becomes moot." *Ford v. Haley*, 179 F.3d 1342, 1345 (11th Cir. 1999), *vacated on other grounds*, 195 F.3d 603 (11th Cir. 1999). Given that Federal Rule of Civil Procedure 12(b)(6) precludes dismissal of a complaint if the plaintiff presents a facially plausible claim, the *Barefoot* standard should be found satisfied when the

complaint states a claim on which relief can be granted. *See Hill v. McDonough*, 547 U.S. 573, 584 (2006) (citing *Barefoot*, 463 U.S. at 895-96).

Under *Skinner v. Switzer*, 562 U.S. 521 (2011), a prisoner who has been denied access to DNA testing under a state statute may bring an action under 42 U.S.C. § 1983, alleging that the state statute, as "authoritatively construed" by the state courts, denied him procedural due process. *Id.* at 530-32. While claims that attack a state court's judgment are barred by the so-called *Rooker-Feldman* doctrine, *see id.* at 531-33, that doctrine "does not preclude plaintiff's facial challenge to [Georgia]'s DNA law both directly, and as that statute has been authoritatively construed by [Georgia] courts in cases that are unrelated to [his] motion for DNA testing." *Wilson v. Marshall*, No. 2:14-cv-1106-MHT-SRW, 2018 WL 5074689, at *11 (M.D. Ala. Sept. 14, 2018), *adopted*, 2018 WL 5046077, at *1 (M.D. Ala. Oct. 17, 2018).

Assuming that such a complaint states a claim on which relief can be granted, that should ordinarily be enough of a showing of likelihood to succeed on the merits to justify a stay of execution. *Barefoot*, 463 U.S. at 893. Applying the *Barefoot* standard to an action under 42 U.S.C. § 1983, the standard should ordinarily be met where the complaint states a claim on which relief can be granted. After all, such a complaint necessarily raises debatable issues and "deserve[s] encouragement to proceed further." *Id.* at 893 n.4.

As set forth in detail in the petition for writ of certiorari, the complaint states a cause of action on which relief can be granted and should have survived the Defendants' motion to dismiss. It is premature to address the merits of the complaint

further. Under *Barefoot*, Mr. Cromartie has made a showing that the "issues are debatable among jurists of reason"; therefore, the likelihood of success factor favors Mr. Cromartie.

B. Irreparable injury

Mr. Cromartie's execution is scheduled for November 13. The death penalty is precisely the type of irreparable harm that must "weigh[] heavily" towards the granting of a stay. *O'Bryan v. Estelle*, 691 F.2d 706, 708 (5th Cir. 1982); *see also Barefoot*, 463 U.S. at 893. In a capital case, the court "must be particularly certain that the legal issues have been sufficiently litigated, and the criminal defendant accorded all the protections guaranteed him by the Constitution of the United States." *O'Bryan*, 691 F.2d at 708 (internal quotation marks omitted (citing *Shaw v. Martin*, 613 F.2d 487, 491 (4th Cir. 1980))). Therefore, a stay is appropriate in a capital case when, as here, the legal issues present "serious questions that can be neither ignored nor brushed aside." *Bundy v. Wainwright*, 808 F.2d 1410, 1422 (11th Cir. 1987).

C. The stay will not harm other parties.

If a stay of execution is granted, "no substantial harm . . . will flow to the State of [Georgia] or its citizens from postponing petitioner's execution to determine whether that execution would violate the Eighth Amendment." *In re Holladay*, 331 F.3d 1169, 1177 (11th Cir. 2003). The reasoning of *Holladay* applies equally here: no substantial harm will flow to the State of Georgia or its citizens from postponing Mr. Cromartie's execution to determine whether the denial of access to DNA testing that could prove him innocent violated his right to due process.

D. The public interest

The public interest is "in having a just judgment," *Arizona v. Washington*, 434 U.S. 497, 512 (1978), not simply in having an execution, particularly of a man who could be proved innocent by DNA testing. *See Schlup v. Delo*, 513 U.S. 298, 324-25 (1995) ("The quintessential miscarriage of justice is the execution of a person who is entirely innocent."). Given these stakes, the balance of harms weighs in Mr. Cromartie's favor.

E. Delay

As part of the equitable factors to be considered, courts will also examine whether there was any unreasonable delay on the part of the plaintiff. *Nelson v. Campbell*, 541 U.S. 637, 650 (2004). Mr. Cromartie sought DNA testing in state court in December 2018. His request was denied by the state trial court, after a hearing, on September 16, 2019. He sought a discretionary appeal in the Georgia Supreme Court on October 11. While that request was pending, on October 16, the State scheduled his execution for the week starting October 30. The Georgia Supreme Court granted a stay of execution on October 30, and the State then conceded that it had planned to execute Mr. Cromartie with an execution order that was void. The State then immediately sought and obtained a new order of execution scheduling Mr. Cromartie's execution for November 13, 2019.

Mr. Cromartie filed his complaint in the district court on October 22, while his state proceedings were still pending. In these circumstances, there was no unreasonable delay on Mr. Cromartie's part. *See Murphy v. Collier*, 139 S. Ct. 1475, 1477 (2019) (Kavanaugh, J., statement respecting grant of stay) (no unreasonable

delay where plaintiff requested Buddhist priest in execution chamber a month before scheduled execution); *Nelson v. Campbell*, 541 U.S. 637, 650 (2004) (the unreasonable delay factor applies when the claim "could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay").

The district court ruled that Mr. Cromartie had unreasonably delayed his filing, but the Eleventh Circuit did not reach this issue. *Cromartie v. Shealy et al.*, -- F.3d --, 2019 WL 5588745, at *10 n.10. The district court's ruling was an abuse of discretion, as it steadfastly ignored the specifics of Mr. Cromartie's claim, and the reasons why he could not have sought the requested relief earlier:

(1) The district court said that Mr. Cromartie could have sought the testing pretrial. *Cromartie v. Shealy*, No. 7:19-CV-181. 2019 WL 5553274, *5 (M.D. Ga. Oct. 28, 2019) (hereafter "DCO"). This ignores that the testing techniques that could reveal Mr. Cromartie's innocence were not available until years later, while attempts to perform the testing earlier would have consumed the material to be tested. App. 62-63, 83, 96.[1]

(2) The district court said that Mr. Cromartie waited until fifteen years after Georgia adopted its DNA testing statute to seek testing, while acknowledging that DNA testing has changed dramatically in recent years. DCO at *5. The district court even acknowledged that aspects of the necessary testing have only become available in the last two years. *Id.* The notion that Mr. Cromartie sat on his hands thus

[1] Citations to "App." refer to the Appendix that was filed in the district court.

evaporates. In the past two years, Mr. Cromartie investigated, obtained experts, put together a compelling case for the need for DNA testing, and litigated it in the state courts. He filed his complaint in federal court while his state court appeal of the denial of DNA testing was pending. Notably, the time available for review of Mr. Cromartie's claim was compressed when the State scheduled Mr. Cromartie's execution while his state appeal was still pending.

(3) The district court said that Mr. Cromartie could have brought a facial challenge to the statute at any time since the statute was enacted. DCO at *5. But again, this ignores the fact that Mr. Cromartie could not make any showing that he was entitled to testing under the statute until the necessary testing procedures were available. And it ignores the fact that Mr. Cromartie was required to use those state procedures before he could bring a meaningful claim under 42 U.S.C. § 1983. *See Skinner*, 562 U.S. at 530 n.8 (contrasting Skinner, who had used the state's procedure and therefore was "better positioned" to urge the inadequacy of those procedures with Osborne, who had failed to do so). And it also ignores that Mr. Cromartie is not just challenging the statute on its face but, as permitted by *Skinner*, *id.* at 532-33, challenging the statute as it has been "authoritatively construed" by the Georgia courts.

Mr. Cromartie sought DNA testing under state law long before the issuance of an execution order. The execution order was issued while his state court appeal was still pending. He filed his complaint under 42 U.S.C. § 1983 within days of the issuance of the execution order, while his state appeal was still pending. This is not

a case in which an applicant waited until the last minute and then ran into court attempting to force the courts into granting a stay. Mr. Cromartie did not "delay unnecessarily in bringing the claim." *Nelson*, 541 U.S. at 650.

Applying the district court's crabbed analysis, in order not to "unreasonably delay," Mr. Cromartie would have had to seek unavailable testing, risk destruction of the remaining biological evidence, forego use of the procedures provided by the state statute, and raise a meaningless facial challenge to the statute. The district court's contrary decision, DCO at *6, was legal error and an abuse of discretion.

CONCLUSION

For the foregoing reasons, Mr. Cromartie requests that the Court grant his motion for stay of execution pending consideration of his petition for writ of certiorari to the Eleventh Circuit regarding its denial of his appeal.

Respectfully submitted,

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