

DEATH PENALTY CASE
UNDER WARRANT
EXECUTION SCHEDULED FOR MARCH 15, 2018

NO. 17-8085

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2017

CARLTON GARY
Petitioner,

v.

STATE OF GEORGIA,
Respondent.

MOTION FOR STAY OF EXECUTION
PENDING THIS COURT'S CONSIDERATION OF
PETITIONER'S PETITION FOR WRIT OF CERTIORARI

JOHN R. MARTIN*
Georgia Bar No. 473325
44 Broad Street,
Suite 202
Atlanta, Georgia 30303
(tel) 404-522-0400
(fax) 404-223-6467
jack@martinbroslaw.com

MICHAEL KENNEDY MCINTYRE
Georgia Bar No. 494075
965 Virginia Avenue, N.E.
Atlanta, Georgia 30306
(tel) 404-879-1515
(fax) 404-879-0005
mkm@georgiapostconviction.com

Counsel for Carlton Gary
*COUNSEL OF RECORD

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COMES NOW, CARLTON GARY, the Petitioner in the above-styled case, (hereinafter "Petitioner" or "Mr. Gary"), by and through undersigned counsel, who moves this Court to stay the execution currently scheduled for March 15, 2018 for the reasons stated below.

¹A Motion for Stay of Execution was filed with the Supreme Court of Georgia on March 14, 2018 and at this time is still pending with the Supreme Court of Georgia.

I. THE PREMATURE SETTING OF MR. GARY'S EXECUTION DATE

In an Order dated December 16, 2009, the Supreme Court of Georgia ordered that Mr. Gary be permitted to perform DNA testing pursuant to O.C.G.A. §5-5-41(c). In response to that Order, Mr. Gary filed an Extraordinary Motion for New Trial or in the Alternative New Sentencing (hereinafter "Extraordinary Motion"). Proceedings on the Extraordinary Motion occurred before the Superior Court of Muscogee County (hereinafter "Superior Court"), with the Superior Court denying the Extraordinary Motion on September 1, 2017. The Supreme Court of Georgia affirmed the Superior Court's decision on December 1, 2017, and denied reconsideration on January 16, 2018.

As a consequence of the decision rendered by the Supreme Court of Georgia, Mr. Gary's Petition for Writ of Certiorari to this Court is due on or before April 16, 2018. Despite this fact, the State has prematurely set an execution date of March 15, 2018. On March 9, 2018, Mr. Gary filed his Petition for Writ of Certiorari in this Court and that Petition is presently pending.

This Court should stay the premature execution date in Mr. Gary's case and allow Mr. Gary's Petition before this Court to be thoroughly and thoughtfully considered and not prejudiced by the existence of a premature execution date.

II. MR. GARY'S CLAIMS BEFORE THIS COURT

A. Mr. Gary's Claim of Innocence Based upon the State's theory of prosecution and upon DNA testing

The State's theory of prosecution was that Mr. Gary, an African-American man, was a serial killer, portrayed in the media as the "Columbus Stocking Strangler", who committed the three rape/murders for which he was charged and convicted, as well as five other uncharged attacks.² All of the victims were older white women. The State asserted the attacks were committed in a highly distinctive manner, during a relatively short period of time in 1977 and 1978, in a single neighborhood in Columbus, Georgia, making evidence of these uncharged attacks admissible as "modus operandi" evidence to prove Mr. Gary's guilt and to sentence him to death.

The State's key witness at trial was the only surviving victim of all of these attacks, Ms. Gertrude Miller. Ms. Miller dramatically identified Mr. Gary in court as the individual who attacked and raped her. In relying upon Ms. Miller as their key witness to prove that Mr. Gary was the one and only Columbus Stocking Strangler, the prosecutor proclaimed in his closing argument that Mr. Gary's face is "burned into her memory, it's forged into her memory, she can't put it out of her mind."

² The victims of the three charged attacks were Ms. Florence Scheible, Ms. Martha Thurmond and Ms. Kathleen Woodruff. The victims of the five uncharged attacks were Ms. Mildred Borom, Ms. Janet Cofer, Ms. Jean Dimenstein, Ms. Gertrude Miller, and Ms. Ruth Schwob.

Based upon proceedings in the Superior Court we now know from DNA testing of semen stains on Ms. Miller's clothing that Ms. Miller was wrong in her identification of Mr. Gary and that, contrary to the State's theory, Mr. Gary is not the Columbus Stocking Strangler.

The significance of this fact, given the State's theory of prosecution, cannot be overstated and clearly has enormous federal constitutional significance under the Eighth and Fourteenth Amendments of the United States Constitution.

B. Mr. Gary's Claim of a Constitutional Violation based on the State's Destruction of Evidence

1. The State's Destruction of DNA Evidence in the Thurmond case

Mr. Gary was charged and convicted for the rape/murder of Ms. Martha Thurmond. During the proceedings in the Superior Court, Mr. Gary was able to obtain glass slides of semen found in and on the body of Ms. Thurmond. Based upon previous secretor testing regarding the Thurmond offense, testing of these slides would have certainly exonerated Mr. Gary with respect to the attack on Ms. Thurmond. Incredibly, however, the Georgia Crime Laboratory, which was tasked with conducting the DNA testing, inexcusably contaminated and destroyed this DNA evidence. The State's inexcusable conduct in this life or death situation denied Mr. Gary reliable results from the testing of DNA evidence which would have certainly exonerated him.

The significance of the fact that the State destroyed a key piece of exonerating evidence in a death penalty case cannot be overstated and clearly has enormous federal constitutional significance under the Eighth and Fourteenth Amendments of the United States Constitution.

2. The State's Destruction of DNA Evidence Within the Context of the State's Extensive Misconduct in Mr. Gary's Case

The State's recent destruction of DNA evidence in Mr. Gary's case should not be viewed within a vacuum. Rather, it should be viewed within the context of numerous instances of misconduct by the State in Mr. Gary's case. Specifically:

- It was the State which failed to disclose at trial the secretor work papers regarding the attacks on Ms. Thurmond and Ms. Scheible, which exonerates Mr. Gary;

- It was the State which, having not disclosed the secretor work papers, relied upon false purported expert testimony with respect to the secretor evidence in Mr. Gary's case;

- It was the State which concealed at trial the bitemark evidence regarding the attack on Ms. Cofer, which exonerates Mr. Gary;

- It was the State which concealed at trial its consultation with a forensic dentist about the bitemark evidence, which exonerates Mr. Gary;

- It was the State which concealed at trial the shoeprint evidence regarding the attack on Ms. Schwob, which exonerates Mr. Gary;

- It was the State which failed to preserve the rape kit in Ms. Miller's case, which would have exonerated Mr. Gary;

- It was the State which obtained a purported confession by another suspect, which was proven to be fabricated by the State;

- It was the State which obtained a DNA sample from Mr. Gary, violated its own procedures for retaining that sample, and then could not provide an explanation for the disappearance of Mr. Gary's DNA sample; and

- Finally, it was the State which falsely claimed during postconviction proceedings that there was no biological evidence to test in Ms. Thurmond's case and then, of course, destroyed that DNA evidence after it had been found by counsel for Mr. Gary.

III. MR. GARY'S CASE SHOULD BE STAYED SO THAT HE CAN RECEIVE THE FIRST FEDERAL REVIEW OF HIS NEW CONSTITUTIONAL CLAIMS

The constitutional claims described above and the facts underlying those claims have arisen only recently and have only been reviewed by the Superior Court and by the Supreme Court of Georgia. Due to no fault of Mr. Gary, these new constitutional claims have never been reviewed by a federal court. The review which is ongoing at the present time in this Court represents the first federal review of these new constitutional claims in Mr. Gary's case.

It is axiomatic that a defendant under a death sentence has the right to have his timely raised constitutional claims reviewed not only in state court, but in federal court. Precedent is replete with cases where a death sentence was affirmed by a state's highest court and then reversed by this Court. (See *Wiggins v. Smith*, 539 U.S. 510 (2003); *Atkins v. Virginia*, 536 U.S. 304 (2002); *Parker v. Duggar*, 498 U.S. 308 (1991); *Johnson v. Mississippi*, 486 U.S. 578 (1988); *Skipper v. South Carolina*, 476 U.S. 1 (1986); and *Eddings v. Oklahoma*, 455

U.S. 104 (1982)). Of course, the same can be said for death penalty cases from the State of Georgia. (See *Tharpe v. Sellers*, 138 S.Ct. 545 (2018); *Foster v. Chatman*, 136 S.Ct. 1737 (2016); *Amadeo v. Zant*, 486 U.S. 214 (1988); and *Furman v. Georgia*, 408 U.S. 238 (1972)).

Mr. Gary's Petition in this Court was timely filed on March 9, 2018. Of course, as has been stated earlier, the due date for said Petition is April 16, 2018. It is respectfully submitted that Mr. Gary is entitled to a thorough and careful review of his new constitutional claims during the first review of those claims in federal court. This review should not be conducted and need not be conducted while Mr. Gary is under an execution date of March 15, 2018. This Court should stay that execution date and allow Mr. Gary's case to proceed pursuant to regular order of this Court.

IV. MR. GARY'S CASE SHOULD ALSO BE STAYED BECAUSE HE MEETS THE STANDARD FOR GRANTING A STAY OF EXECUTION

Mr. Gary meets the standard for granting a stay of execution. In order to be granted a stay of execution, Mr. Gary must satisfy a four-part test: (1) whether there is a substantial likelihood of success on the merits; (2) whether the requested action is necessary to prevent irreparable injury; (3) whether the threatened injury outweighs the harm the stay or injunction would inflict upon the non-movant; and (4) whether the requested action would serve the public interest. *Rutherford*

v. McDonough, 466 F.3d 970, 979 (11th Cir. 2006) (Wilson, dissenting); *Barefoot v. Estelle*, 463 U.S. 880, 895-96 (1983). Mr. Gary satisfies all four prongs and should be granted a stay of execution.

First, there is a substantial likelihood that Mr. Gary will succeed on the merits of his Petition which is pending before this Court. What is before this Court in Mr. Gary's case is the following question:

"Do the Eighth and Fourteenth Amendments of the United States Constitution prohibit the execution of an actually innocent defendant, where the case for innocence is based on physical evidence of innocence, including DNA evidence, not available at the time of trial?"

Based upon the previous jurisprudence of this Court, there is a substantial likelihood that the Court will find that it is unconstitutional to execute an innocent defendant. See *Herrera v. Collins*, 506 U.S. 390, 419, 430 (1993), where the concurring and dissenting opinions, constituting a majority of the Court, suggested that the execution of an innocent person would violate the Constitution. Justice O'Connor, joined by Justice Kennedy, opined, "I cannot disagree with the fundamental legal principle that executing the innocent is inconsistent with the Constitution." 506 U.S. at 419. Justice Blackmun, joined by Justices Stevens and Souter, in dissent proclaimed, "Nothing could be more contrary to contemporary standards of decency, or

more shocking to the conscience than to execute a person who is actually innocent." 506 U.S. at 430 (citation omitted).

Also before this Court in Mr. Gary's case is the following question:

"If such an execution is unconstitutional, what standard should govern the determination of whether a defendant is innocent of the offense for which he is to be executed?"

Based upon the facts in Mr. Gary's case, there is a substantial likelihood that Mr. Gary will meet the constitutional standard for innocence which would bar his execution. This likelihood of success is based upon the State's theory of prosecution and the physical evidence of innocence which exists in Mr. Gary's case. Specifically,

- The DNA evidence regarding the attack on Ms. Miller, which exonerates Mr. Gary;
- The secretor evidence regarding the attack on Ms. Thurmond, which exonerates Mr. Gary;
- The secretor evidence regarding the attack on Ms. Scheible, which exonerates Mr. Gary;
- The bite mark evidence regarding the attack on Ms. Cofer, which exonerates Mr. Gary; and
- The shoeprint evidence regarding the attack on Ms. Schwob, which exonerates Mr. Gary.

Finally, also before this Court in Mr. Gary's case is the following question:

"When a State provides a defendant under a death sentence the right to DNA testing of evidence that can prove that the defendant is innocent and then, in the process of testing, the State contaminates and

destroys the DNA evidence, does this destruction constitute a violation of the Eighth and Fourteenth Amendments of the United States Constitution so as to bar a defendant's execution, especially when prior secretor testing indicated that the DNA results would exonerate the defendant?"

Based upon the facts in Mr. Gary's case, there is a substantial likelihood that this Court will find that it is unconstitutional to execute a defendant when the State has destroyed DNA evidence as it did in Mr. Gary's case. The State's conduct was inexcusable and for the State to seek the execution of Mr. Gary before that conduct is reviewed by this Court is particularly egregious.

Second, obviously a stay is necessary to prevent irreparable injury in that if a stay is not granted Mr. Gary will be executed prior to a proper initial review of his new constitutional claims by this Court.

Third, clearly, the threatened injury to Mr. Gary clearly outweighs any harm that would be inflicted upon the State. Mr. Gary cannot be brought back to life, but the State can seek another execution date after Mr. Gary has received the review of his new constitutional claims to which he is entitled by this Court.

Fourth, there is no doubt that a stay of Mr. Gary's execution would serve the public interest. The public has no interest in the premature execution of an arguably innocent defendant who has never had his new constitutional claims

reviewed in federal court, due to no fault of his own. Finally, the public has an interest in not rewarding the State for destroying critical DNA evidence in a death penalty case by executing the defendant prior to any federal court reviewing the State's conduct.

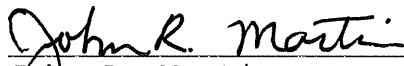
V. CONCLUSION

As has been stated above, there are a multitude of reasons that Mr. Gary should not be executed on March 15, 2018. It is respectfully requested that this Court acknowledge those reasons and stay Mr. Gary's execution at this time.

This 15th day of March, 2018.

Respectfully submitted,

Martin Brothers P.C.
202 The Grant Building
44 Broad Street, N.W.
Atlanta, Georgia 30303
(tel) 404-522-0400
(fax) 404 223 6467
jack@martinbroslaw.com



John R. Martin
Counsel for Mr. Gary

McIntyre & Associates
965 Virginia Avenue, N.E.
Atlanta, Georgia 30306
(tel) (404) 879-1515
(fax) (404) 879-0005
mkm@georgiapostconviction.com



Michael K. McIntyre
Counsel for Mr. Gary

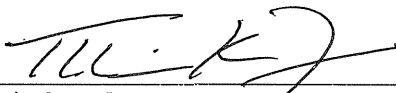
CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the within and foregoing **MOTION FOR STAY OF EXECUTION PENDING THIS COURT'S CONSIDERATION OF PETITIONER'S PETITION FOR WRIT OF CERTIORARI** via e-mail to:

jslater@columbusga.org

sgraham@law.ga.gov

This 15th day of March, 2018.



Michael K. McIntyre