

OCTOBER TERM 2017

No. _____

IN THE
Supreme Court of the United States

In re William Earl Rayford, Petitioner

ON PETITION FOR A WRIT OF HABEAS CORPUS

Application for Stay of Execution

Capital Case

Execution Scheduled for Tuesday, January 30, 2018

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January 26, 2018

To the Honorable Samuel A. Alito, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Fifth Circuit:

The State of Texas has scheduled for **January 30, 2018**, the execution of William Earl Rayford, a 64-year-old man who has been on Texas's death row for over seventeen years. With this Application for Stay of Execution, Mr. Rayford submits to this Court a petition for an original writ of habeas corpus, contending that his trial counsel provided ineffective assistance by eliciting false or misleading testimony linking race to the likelihood that Mr. Rayford would be a future danger. Mr. Rayford has no other forum in which he can raise this claim; the petition for a writ of habeas corpus he has filed in this Court is his only opportunity to obtain merits review of this claim, which goes to the legitimacy of his capital-sentencing proceeding. The critical issue presented in Mr. Rayford's habeas petition will become moot, if Mr. Rayford is executed as scheduled. *See Wainwright v. Booker*, 473 U.S. 935, 936 (1985) (Powell, J., concurring). Mr. Rayford therefore moves this Court to stay his execution, so that it may give due consideration to the substantial question—whether it is appropriate to grant an original writ of habeas corpus or transfer Mr. Rayford's petition to the district court, when Mr. Rayford's counsel elicited false testimony linking race and future dangerousness and thereby violated Mr. Rayford's rights under the Sixth and Fourteenth Amendments.

BACKGROUND

Mr. Rayford was convicted of capital murder in 2000. Before deciding which sentence to impose, Mr. Rayford's jury had to consider two issues: (1) whether there

was a probability that Mr. Rayford would constitute a continuing threat to society—a future danger, and (2) whether mitigating circumstances existed. If the jury concluded that he would constitute a future danger and that there was insufficient mitigation to warrant a life sentence, the jury had to impose a sentence of death. And, because Mr. Rayford’s trial counsel presented next to no mitigating evidence, the jury’s focus during the sentencing phase was on Mr. Rayford’s future dangerousness.

During the sentencing phase, Mr. Rayford’s trial counsel argued that his client would not be dangerous in a prison setting, offering in support the testimony of psychologist Gilda Kessner, Psy.D.

In rebuttal, the State called Royce Smithey, the chief investigator of the unit that prosecutes felonies committed in Texas prisons. Smithey informed the jury of the prevalence of inmate-on-inmate and inmate-on-staff assaults in Texas Department of Criminal Justice prisons in 1999—the year before Mr. Rayford’s trial. Smithey also testified that there had been murders on, and escapes from, death row.

On cross-examination, defense counsel steered the testimony toward variations across prison units in their levels of violence. Trial counsel pointed out—and Smithey agreed—that these differences could be explained by such factors as gang members in different units. Then trial counsel turned to the issue of race:

[Trial counsel]: The racial makeup of the unit is also something that goes to the number of assaults or what have you, is that correct?

[Smithey]: It has a factor on it, even though under general Federal guidelines the racial breakdown of the units are predominantly the same or as close as they can get to it.

(47 RR 131.) Moreover, and as outlined in the petition, this testimony was false.

Smithey thus testified, at trial counsel's prodding, that the racial makeup of a prison unit affects the amount of violence in that unit. In effect, Smithey led the jury to infer that Mr. Rayford's race—he is black—meant that he was more likely than others to present a threat of future danger. Especially given that trial counsel failed to offer much mitigation and that the jury's answer to the future-dangerousness question was likely dispositive of its ultimate sentence, such testimony was damning. Shortly after hearing this testimony—Smithey was the final witness to testify—the jury sentenced Mr. Rayford to death.

ARGUMENT

Mr. Rayford requests that the Court grant him a stay of execution, and grant his petition for a writ of habeas corpus or remand his case to the district court for further proceedings.

This Court is empowered to grant a petitioner a stay of execution in order to adjudicate his constitutional claims. In deciding whether to grant a stay of execution, the Court balances several considerations, including (1) the likelihood of success on the merits, (2) the likelihood that the petitioner will suffer irreparable harm absent a stay, (3) the potential for harm to the State during the stay, and (4) the public interest in a stay. *See, e.g., Hill v. McDonough*, 547 U.S. 573, 584 (2006); *Barefoot v. Estelle*, 463 U.S. 880, 888–89 (1983), *superseded on other grounds by* 28 U.S.C. § 2253(c). Further, a stay should be granted when necessary to “give non-frivolous claims of constitutional error the careful attention that they deserve” and when a court cannot “resolve the merits [of a claim] before the scheduled date of execution

. . . to permit due consideration of the merits.” *Barefoot*, 463 U.S. at 888–89. In this case, each of these considerations counsels in favor of a stay.

For the reasons in his petition for writ of habeas corpus, filed herewith, Mr. Rayford has a likelihood of success on the merits of his claims. There is no question that he would suffer irreparable injury if he were to be executed in violation of the Sixth Amendment. *See Gregg v. Georgia*, 429 U.S. 1301, 1301 (1976) (Powell, J., staying issuance of mandate). There is likewise no question that a temporary stay of execution, pending resolution of the important question presented in his habeas petition, would cause no substantial harm to the State of Texas. Indeed, given the time that has elapsed since Mr. Rayford’s death sentence was imposed, the State of Texas cannot plausibly maintain that it would suffer any meaningful harm if Mr. Rayford’s execution were stayed now. Finally, while the State of Texas has an undeniable interest in enforcing its judgments, that interest is outweighed by the fact that executing someone in violation of the Constitution runs counter to public interest. Allowing an unconstitutional execution to proceed would undermine public confidence in the justice system.

A stay is particularly appropriate in this case, as this Court has recently—and forcefully—criticized the injection of race-based prejudice into capital sentencing as toxic to the justice system and has recognized it as an exceptional circumstance that demands rectification. *See Buck v. Davis*, 137 S. Ct. 759, 775 (2017) (concluding that the insertion of race into the jury’s determination of future dangerousness was noxious and deeming it an “extraordinary circumstance”); *see also, e.g., Tharpe v.*

Sellers, — S. Ct. —, 2018 WL 311568, at *1 (2018) (per curiam) (holding that a “remarkable” juror affidavit evincing prejudice against a black defendant warranted further court review); *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 878 (2017) (proclaiming that “discrimination on the basis of race . . . is especially pernicious in the administration of justice” (internal quotation marks omitted)). No court has previously considered the merits of Mr. Rayford’s claim. This Court should do so, to eliminate the stain of racial prejudice on Mr. Rayford’s case.

CONCLUSION

For these reasons, Mr. Rayford respectfully requests that this Court stay his scheduled execution and consider his petition for writ of habeas corpus in order to address the critical question whether executing Mr. Rayford, whose death sentence was based at least in part on his race, violates the Constitution.

Respectfully submitted this 26th day of January, 2018.

/s/ Nadia Wood
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