

CAPITAL CASE

No. A-_____

IN THE
Supreme Court of the United States

BILLY DANIEL RAULERSON, JR.,

Applicant,

v.

WARDEN,

Respondent.

APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH
TO FILE A PETITION FOR WRIT OF CERTIORARI

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November 6, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... ii

**APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE
A PETITION FOR A WRIT OF CERTIORARI.....1**

TABLE OF AUTHORITIES

CASES

Atkins v. Virginia, 536 U.S. 304 (2002)2
Calvert v. Texas, No. AP-77,063, 2019 WL 5057268 (Tex. Crim. App. Oct. 9, 2019)4
Cooper v. Oklahoma, 517 U.S. 348 (1996).....2

STATUTES

28 U.S.C. § 1254(1)1

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To the Honorable Clarence Thomas, Associate Justice of the United States Supreme Court and Circuit Justice for the Eleventh Circuit:

Pursuant to this Court's Rules 13.5, 22, and 30.3, Billy Daniel Raulerson, Jr. ("Applicant") respectfully requests a 60-day extension of time, to and including January 24, 2020, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case. If not extended, the time for filing a petition will expire on November 25, 2019. Consistent with Rule 13.5, this application is being filed at least 10 days before that date.

A copy of the Eleventh Circuit's opinion (reported at 928 F.3d 987 (11th Cir. 2019)) is attached hereto at Tab A. A copy of the Eleventh Circuit's order dated August 27, 2019, denying Applicant's Petition for Rehearing is attached hereto at Tab B. This Court has jurisdiction over this death penalty case under 28 U.S.C. § 1254(1).

1. On June 28, 2019, the Eleventh Circuit affirmed the District Court's denial of Applicant's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, with the Honorable Adalberto Jordan, Circuit Judge, dissenting. Oral argument in the case had occurred more than two years earlier, on May 10, 2017. Among other rulings, the Court held that the State of Georgia did not deprive Applicant of due process by requiring him to prove at trial, beyond a reasonable doubt, that he is intellectually disabled and therefore cannot be executed under the Eighth Amendment and this Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002). Applicant had raised on direct appeal, on state habeas, and on federal habeas the claim that application of this burden of proof to a claim of intellectual disability violated the due process principles set forth by this Court in *Cooper v. Oklahoma*, 517 U.S. 348 (1996) (prohibiting the use of the clear-and-convincing standard to establish lack of competency to stand trial).

2. As Applicant will demonstrate in his petition for a writ of certiorari, this case presents an important question of constitutional law. The decision of the Court of Appeals is irreconcilable with *Cooper*. In *Cooper*, this Court held, prior to Applicant's direct appeal, that the Due Process Clause prohibits a State from requiring a criminal defendant to prove he is not competent to stand trial – an issue involving a constitutional right – by clear and convincing evidence. That standard is *lower* than the one the Court of Appeals upheld here. A capital defendant has a constitutional right not to be executed if he is intellectually disabled, and *Cooper* makes clear that requiring a capital defendant to prove intellectual disability beyond a reasonable doubt is incompatible with basic standards of due process. The issue is also critically important, as experience has shown.

As Judge Jordan noted in his dissent, “[i]n the 30 years since [O.C.G.A.] § 17-7-131(c)(3) was enacted, *not a single capital defendant has succeeded in proving to a factfinder that he or she is intellectually disabled beyond a reasonable doubt.*” Tab A at 60 (Jordan, J., dissenting (emphasis added)). In other States, capital defendants have succeeded in proving intellectual disability, and not infrequently. The contrary experience in Georgia strongly suggests that intellectually disabled persons are being put to death in violation of the Due Process Clause.

3. Capital defendants in Georgia are entitled to a procedurally fair opportunity to prove they are intellectually disabled. At present, that opportunity does not exist. Georgia’s burden of proof is inappropriate and requires “a level of certainty that mental health experts simply cannot provide.” *Id.* at 63 (Jordan, J., dissenting). Under Georgia’s burden, the risk of an erroneous determination of the constitutionally-protected issue of intellectual disability is unacceptably high, just as this Court found in *Cooper* with regard to a clear-and-convincing burden for establishing incompetence to stand trial.

4. Applicant respectfully submits that the requested extension of time is justified for the following reasons.

5. Undersigned counsel for Applicant is handling this matter on a pro bono basis. Since the Court of Appeals denied rehearing on August 27, 2019, counsel has been deeply engaged in multiple matters that have placed extreme demands upon his time. In particular:

a. On September 5, 2019, counsel presented oral argument before the New York Court of Appeals in *Cayuga Nation v. Campbell*, No. 70 (N.Y. 2019). On October 29, 2019, the Court ruled that the New York state courts lack subject matter jurisdiction over the dispute. A motion for reargument of the appeal is due on November 29, 2019.

b. Counsel is lead outside counsel for Exelon Generation in a dispute with the State of Maryland that includes litigation in federal court in the District of Columbia, litigation in the Maryland Court of Specials Appeals, proceedings before the Federal Energy Regulatory Commission (FERC), and administrative proceedings before the Maryland Department of the Environment. After several months of involvement in a court-ordered mediation program, on October 29, 2019, Exelon and the State of Maryland announced a settlement of all pending matters, upon the approval of certain provisions by FERC. As announced by the parties, the settlement includes benefits to Maryland and the Chesapeake Bay that are valued at more than \$200 million over the anticipated 50-year life of a federal license for a hydroelectric facility on the Susquehanna River. Exelon must file reply comments at FERC regarding the settlement on December 2, 2019.

c. Counsel also represents James Calvert on the direct appeal of his conviction and sentence of death to the Texas Court of Criminal Appeals. On October 9, 2019, the Court affirmed the conviction and death sentence. *Calvert v. Texas*, No. AP-77,063, 2019 WL 5057268 (Tex. Crim. App. Oct. 9, 2019) (unpublished). The slip opinion of the Court is 158 pages. Calvert's motion for rehearing originally was due on October 23, 2019. Calvert sought an extension of 45 days, but was granted an extension only to November

25, 2019. Thus, Calvert's petition for rehearing currently is due on the same day that Applicant's petition for writ of certiorari currently is due in the instant case.

d. Counsel also represents Arthur Giles in a death penalty case currently on appeal to the United States Court of Appeals for the Eleventh Circuit. Oral argument in the case was scheduled for October 21, 2019. On September 30, 2019, on the Court's own motion, the argument was rescheduled to February 24, 2020.

e. Counsel has another oral argument scheduled, before the United States Court of Appeals for the Second Circuit, on January 7, 2020, in *Cayuga Indian Nation of New York v. Seneca County, New York*, No. 19-0032-cv (2d Cir.). The case involves a complicated tax foreclosure dispute and issues of sovereign immunity.

f. Counsel is also lead counsel for the University of Michigan and other defendants in the case of *John Doe v. Baum*, Case No. 2:16-cv-13174 (E.D. Mich.). The case is scheduled for a full mediation on Tuesday, November 26, 2019, before a third-party mediator in Birmingham, Michigan.

g. In addition to these matters, counsel is also engaged as lead counsel in other litigation matters, with pending filing and deposition dates during the period prior to, and following, Applicant's present deadline of November 25, 2019, to file the petition for writ of certiorari in the instant case.

8. Counsel has begun work on the petition, but, as a result of the other professional obligations set forth above, and the complexity and importance of the

constitutional issue Applicant seeks to present to the Court, counsel will not be able to complete work on the petition prior to the requested extension date of January 24, 2020.

WHEREFORE, for the foregoing reasons, Applicant respectfully requests that Your Honor grant this Application and extend the time in which to file a petition for a of certiorari to and including January 24, 2020.

Dated: November 6, 2019

Respectfully submitted,



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