

CAPITAL CASE

EXECUTION SCHEDULED FOR SEPTEMBER 22, 2020 AT 6:00 P.M. E.D.T.

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM EMMETT LECROY, JR.,

Applicant,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPLICATION FOR STAY OF EXECUTION

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APPLICATION FOR STAY OF EXECUTION

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

Applicant, William Emmett LeCroy, Jr., respectfully applies to this Court for an order staying his execution which is set for September 22, 2020, pending this Court's consideration of his Petition for *certiorari* review of the decision of the United States Court of Appeals for the Eleventh Circuit denying him relief.

INTRODUCTION

Mr. LeCroy seeks a stay pending review of the United States Court of Appeals for the Eleventh Circuit decision affirming the United States District Court for the Northern District of Georgia's Order that denied Petitioner's Motion to Reset or Modify Execution Date in Order to Implement Court's Order Appointing Counsel, *William Emmett LeCroy, Jr., v. United States of America*, No. 20-13353, 2020 WL 5542483 (11th Cir. Sept. 16, 2020). In that motion, Petitioner LeCroy asked the district court to reset or modify his execution date so that his lead counsel could fulfill his appointed duties and attend his execution. As explained in that motion and in the Petition for *Certiorari*, longtime lead counsel will be unable to attend LeCroy's execution due to his chronic illness and his vulnerability to the COVID-19 virus. Although the district court found counsel's arguments sincere and compelling, it found it did not have the power to move the date unless Mr. LeCroy could meet the standards for a Stay of Execution. Because that finding is erroneous, this Court must stay Mr. LeCroy's execution so that the district court can decide the issue.

Because there is a reasonable probability that this Court will grant LeCroy *certiorari* review of his claim that the district court possessed authority to reset his execution date, and there is a fair prospect that he will thereafter prevail on that claim, a stay should issue.

JUDGMENT FOR WHICH REVIEW IS SOUGHT

The opinion of the United States Court of Appeals for the Eleventh Circuit affirming the Order by the United States District Court for the Northern District of Georgia denying Petitioner’s Motion to Reset or Modify Execution Date in Order to Implement Court’s Order Appointing Counsel, *William Emmett LeCroy, Jr., v. United States of America*, No. 20-13353, 2020 WL 5542483 (11th Cir. Sept. 16, 2020), is attached to the Petition for Certiorari as Appendix A.

JURISDICTION

Your Honor and this Court have jurisdiction to grant a stay of execution pending consideration of Mr. LeCroy’s Petition for Writ of *Certiorari*: “In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court.” 28 U.S.C. § 2101(f). Furthermore, the All Writs Act gives your Honor and this Court the power to issue a stay to maintain jurisdiction of the underlying matter. “The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of

their respective jurisdictions and agreeable to the usages and principles of law.” 28 U.S.C. § 1651(a).

STANDARD FOR GRANTING A STAY

Mr. LeCroy meets the standard for granting a stay because there is a reasonable likelihood this Court will grant review and, absent a stay, he will be executed and denied the benefit of this Court’s judgment.

Four factors guide the issuance of a stay: (1) whether the Petitioner makes a strong showing of the likelihood of success on the merits; (2) whether the Petitioner will be irreparably injured absent a stay; (3) whether the issuance of a stay will injure the opposing party; and, (4) whether a stay is in the public interest. *Nken v. Holder*, 556 U.S. 418, 434 (2009). When the Government is the opposing party, assessing the harm to the opposing party and weighing the public interest merge. *Nken*, 556 U.S. at 435. Where a stay is sought pending a Petition for *Certiorari*, the petitioner need only show a “reasonable probability” that this Court will grant *certiorari* and a “fair prospect” that the decision below will be reversed. *Maryland v. King*, 567 U.S. 1301 (2012) (Chief Justice Roberts, as Circuit Justice). In *Barefoot v. Estelle*, 463 U.S. 880 (1983) (superseded on other grounds by 28 U.S.C. § 2253(c)), this Court held that a stay may be granted when there are “a reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the grant of *certiorari* ...; a significant possibility of reversal of the lower court’s decision; and ... a likelihood that irreparable harm will result if that decision is not stayed.” *Barefoot*, 463 U.S. at 895 (quoting *White v. Florida*, 458 U.S.

1301, 1302 (1982)). 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. These factors weigh in favor of a stay in Mr. LeCroy’s case.

REASONS FOR GRANTING A STAY

I. **There is a reasonable probability that this Court will grant *certiorari* and a fair prospect that Mr. LeCroy will succeed on the merits.**

As outlined in Mr. LeCroy’s Petition for Writ of *Certiorari*, there are good reasons for this Court to accept certiorari and review this case. It is also reasonably likely that Mr. LeCroy will prevail on the merits of his claim. For these reasons, a stay should issue from this Court.

First, in his Petition for Writ of *Certiorari*, Mr. LeCroy has shown that the district court possessed the discretion to reset the execution date and that such a reset would not constitute a stay of execution. This is because district courts retain discretion to modify execution dates in the same manner they modify other orders such as the date on which a convicted defendant will self-surrender to the Bureau of Prisons or modify a scheduling order. Because the district court ordered the execution and because it has the jurisdiction to see that it is carried out according to the law, it retained the jurisdiction to reset the date if it found that circumstances required it.

Second, even if this Court were to consider Mr. LeCroy’s motion as a request for an injunction, the district court has the discretion to consider it under the All

Writs Act, 18 U.S.C. § 1651(a). The All Writs Act gives the court jurisdiction to “issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.” *Id.* Thus, where the ends of justice so require, the court had the power to reset the execution date so that its earlier order appointing lead counsel under 28 U.S.C. § 3599 could be given full effect. In this case where the extraordinary circumstances of a world-wide pandemic and lead counsel’s medical vulnerability lead to his inability to fulfill his appointed duties, the All Writs Act gives district courts discretion to fashion an appropriate remedy. Here, that remedy was to simply reset the date of the execution so that counsel could meet their obligations.

These points are more fully briefed in Mr. LeCroy’s Petition for Writ of *Certiorari* that is being filed concurrently with this Application. In that Petition, Mr. LeCroy sets out his legal arguments more fully, and those arguments mandate that this Court find that he is likely to succeed on the merits of his underlying claims. For that reason, this Court must issue a Stay of Execution in order to fully consider his claims.

II. Without a stay of execution, Mr. LeCroy will be irreparably injured pending this Court’s decision on his petition.

Absent a stay, Mr. LeCroy plainly faces irreparable injury, his death. Further, Mr. LeCroy will be prejudiced by the denial of a stay because he would not receive the benefit of a decision on the meritorious issues raised in his petition for certiorari.

III. The public interest lies in favor of granting a stay and issuance of a stay will not substantially prejudice the State.

While the public may have an interest in seeing judgments carried out, it also has an interest that its citizens not suffer punishment in violation of their due process rights. “[I]t is always in the public interest to prevent violation of a party’s constitutional rights.” *G & V Lounge, Inc. v. Michigan Liquor Control Comm’n*, 23 F.3d 1071, 1079 (6th Cir. 1994) (citing *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 383 (1979)); *see also In re Morris*, 328 F.3d 739, 741 (5th Cir. 2003) (the public interest is served when an applicant for a stay makes a showing of a likelihood of success on the merits).

Likewise, the United States suffers no substantial harm when, as in this case, an execution is delayed in order to determine whether the very sentence that it seeks to carry out on September 22, 2020, can be constitutionally imposed when it frustrates the order appointing Mr. LeCroy’s legal counsel and interfering with Mr. LeCroy’s meaningful access to the courts under the Fourteenth Amendment. *In re Holladay*, 331 F.3d 1169, 1177 (11th Cir. 2003); *In re Morris, supra*. And “if the plaintiff shows a substantial likelihood that the challenged law is unconstitutional, no substantial harm to others can be said to inhere in its enjoinder.” *Deja Vu of Nashville, Inc. v. Metro. Gov’t of Nashville & Davidson Cty., Tennessee*, 274 F.3d 377, 400 (6th Cir. 2001).

Mr. LeCroy seeks a stay of execution for a prompt and accurate determination as to whether the district court may reset or modify an execution date that was set by the executive branch that would frustrate the district court’s

purposes when it issued an order appointing counsel for all proceedings including clemency and possible execution. Because of appointed counsel's health issues, the date chosen interferes with Mr. LeCroy's access to the courts and counsel. The Fourteenth Amendment guarantees prisoners meaningful access to the courts. *See Bounds v. Smith*, 430 U.S. 817, 822 (1977). An inmate's opportunity to confer with counsel is a particularly important constitutional right which the courts will not permit to be unnecessarily abridged. *Dreher v. Sneloff*, 636 F.2d 1141, 1146 (7th Cir. 1980). It is through counsel's presence that the inmate has access to the courts until his life is over. The district court's order of appointment ensures the inmate's access to counsel. These legal principles are rendered meaningless when the Government insists, after nearly 20 years, that Mr. LeCroy be executed now, in the middle of a deadly global pandemic. Resetting the date will ensure that Mr. LeCroy's rights are protected.

Without a stay, Mr. LeCroy's will not have access to the courts and to meaningful legal counsel during the most critical stages of his case as the United States government prepares and implements his execution. Finally, it must be remembered that a stay serves the interests of the United States government, and the public's interest, in ensuring that the penalty of death is imposed in compliance with the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, the Court should grant this Application and stay Mr. LeCroy's execution pending disposition of his Petition for Writ of *Certiorari*.

This 22nd day of September, 2020.

Respectfully submitted,

BY: /s/ John R. Martin

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