No. 22-_____

IN THE
SUPREME COURT OF THE UNITED STATES

In Re:
OSCAR SMITH, Petitioner

ORIGINAL PETITION FOR WRIT OF HABEAS CORPUS FILED PURSUANT TO ARTICLE III § 2 OF THE UNITED STATES CONSTITUTION, THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION, 28 U.S.C. §§ 2241, 2254, AND MOTION FOR STAY OF EXECUTION

*****CAPITAL CASE*****

EXECUTION SCHEDULED FOR APRIL 21, 2022
AT 7:00 P.M (CST)

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*****CAPITAL CASE*****

I. INTRODUCTION

For thirty-two years, Oscar Smith has maintained his innocence. Now, despite DNA proof that he is actually innocent of the crime, he sits on death watch condemned to die for the gruesome murders of his family. New technology not available until earlier this year has established that an unknown perpetrator's DNA is mixed with the victim's blood on the murder weapon found at the scene of the crime. However, because the technology that allowed this DNA to be isolated was not previously available, Mr. Smith did not have this evidence to raise in his first habeas petition. Now, the AEDPA bars Mr. Smith from seeking federal review of his claim of actual innocence, effectively suspending the writ of habeas corpus in violation of the constitution.

II. STATEMENT OF THE CASE

Mr. Smith entered a plea of not guilty on November 8, 1989. Pretrial, he filed a notice of alibi. At his 1990 trial, his counsel countered the state's wholly circumstantial evidence case with proof that he was traveling to Kentucky at the time his family was killed. *See State* v. *Smith*, 868 S.W.2d 561, 566 (Tenn. 1993). A jury nevertheless found him guilty and sentenced him to death. The Tennessee Supreme Court affirmed his convictions and sentences on direct appeal. *Id.*

Mr. Smith's state post-conviction petition was filed in 1997 and was denied by the trial court, and the Tennessee Court of Criminal Appeals affirmed. *Smith* v. *State*,

No. 01C01-9702-CR-0048, 1998 WL 345353 (Tenn. Crim. App. June 30, 1998), *perm. app. denied*, (Tenn. Jan. 25, 1999).

Mr. Smith thereafter filed a timely federal petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The district court dismissed the petition, *Smith* v. *Bell*, No. 3:99-cv-0731, 2005 WL 2416504 (M.D. Tenn. Sept. 30, 2005), and the United States Court of Appeals for the Sixth Circuit subsequently affirmed the judgment, *Smith* v. *Bell*, 381 F. App'x 547 (6th Cir. 2010).

This Court later remanded the case for further consideration in light of *Martinez* v. *Ryan*, 566 U.S. 1 (2012). *Smith* v. *Colson*, 566 U.S. 901, *reh'g denied*, 566 U.S. 1005 (2012). On remand, the district court analyzed Mr. Smith's claims under *Martinez* and once again determined that he was not entitled to relief. *Smith* v. *Carpenter*, No. 3:99-cv-731, 2018 WL 317429 (M.D. Tenn. Jan. 8, 2018). The Sixth Circuit denied him a certificate of appealability and dismissed the case. *Smith* v. *Mays*, No. 18-5133, 2018 WL 7247244 (6th Cir. Aug. 22, 2018), *cert. denied*, 139 S. Ct. 2693 (2019).

On November 3, 2021, the Tennessee Supreme Court entered an order setting an April 21, 2022 execution date for Mr. Smith.

Within three business days of receiving proof establishing his actual innocence, Mr. Smith filed for relief in state court. Without responsive briefing by the state, the state court denied relief on April 11, 2022, finding that Mr. Smith was not entitled to relief. Despite having "no reason to doubt" that the new DNA testing revealed that the DNA on the awl was not Mr. Smith's, the state court denied an evidentiary hearing or any additional process, because Mr. Smith did not satisfy the gatekeeping

technicalities required by the Tennessee statutory procedures. The state trial court nonetheless found that Mr. Smith's filing was not an attempt to unreasonably delay the execution of his sentence or the administration of justice: "[T]his Court has no reason to believe the timing results from an attempt to unreasonably delay the execution of sentence or administration of justice." The court found Mr. Smith had been diligently pursuing this new evidence since learning of the availability of the new technology.

Mr. Smith immediately filed a notice of appeal and requested expedited briefing on his claim. On April 13, 2022, Mr. Smith filed an application for permission to appeal and requested expedited briefing. The Court of Criminal Appeals issued a memorandum opinion on April 14, 2022. Thereafter, the Tennessee Supreme Court denied review of his claim.

Mr. Smith then initiated an action in the United States District Court for the Middle District of Tennessee, pursuant to 42 U.S.C. § 1983 and the First and Fourteenth Amendments, alleging that the relevant Tennessee post-conviction procedures denied him his constitutional rights to procedural due process and access to courts to vindicate his DNA claim of actual innocence. *Smith* v. *Lee*, M.D. Tenn. Case No. 3:22-cv-00280, D.E. 1, 3. On April 20, 2022, the district court dismissed Mr. Smith's action and denied his request for injunctive relief. *Smith* v. *Lee*, M.D. Tenn. Case No. 3:22-cv-00280, D.E. 17, 18.

III. Newly Discovered Scientific Evidence of Actual Innocence

On March 30, 2022, Serological Research Institute (SERI) reported the presence of unknown DNA—*that does not match Mr. Smith*—on the handle of the murder weapon in this case. Mr. Smith has moved expeditiously to obtain review and relief based upon this new evidence of actual innocence prior to his April 21, 2022 execution.

Earlier this year, Mr. Smith learned that new scientific procedures and technology were available to obtain a DNA profile from an unidentified but identifiable fingerprint left on the awl used in the murders of his family. Though it has been theoretically possible to develop "touch DNA" for several years, the Applied Biosystems™ GlobalFiler™ PCR Amplification Kit was not developed until 2012 and did not become available in most labs until after 2017. Moreover, the fully continuous probabilistic genotyping software program used for analysis on the awl, BulletProof Sentry, was not available until 2022.

Mr. Smith swiftly obtained an agreement from the prosecution to conduct testing on the awl used in the murders. On January 19, 2022, the state court ordered the release of the awl to SERI, a company meeting the standards adopted pursuant to the DNA Identification Act of 1994, as required by Tennessee Code Annotated § 40-30-310. A subsequent order released the known samples to be used for comparison using the new technology.[1]

[1] The re-release of the known samples was required because the known samples were analyzed in 2016, prior to the advent of the new technology used to isolate the perpetrator's DNA.

As Mr. Smith has known it would be, the results of the analysis proved that it was *not* his DNA on the murder weapon. SERI's March 30, 2022 DNA report confirmed that an identifiable DNA profile was found on the awl mixed with one of the victim's blood, but Mr. Smith was *definitively excluded* as the contributor of that DNA—as were the three victims. The SERI report's "Results Summary" reads:

> 7. Awl Handle (Item 17-1): Chad Burnett could be included as a contributor to the DNA results obtained from the item. Oscar Smith, Jason Burnette, and Judy Smith are excluded as contributors to the DNA results obtained from this item.

SERI Report at 1.

The report later elaborates on "Results and Conclusions." In pertinent part it sets out:

> 7. Awl Handle (Item 17-1):
>
> a. A DNA mixture was obtained.
>
> b. The DNA mixture was interpreted as originating from two contributors with a major male contributor. Chad Burnette could be the major contributor to this mixture. The chance that a randomly selected, unrelated person would have the same profile as the major contributor is approximately 1 in 4 octillion.
>
> c. Oscar Smith, Jason Burnette, and Judy Smith are all excluded as contributors to the DNA results obtained from this item.
>
> d. the minor portion of the mixture is suitable for comparison.

Id. That is, the SERI report definitively shows that the DNA on the bloody awl found at the scene is a mixture of two people: the major contributor to the mixture is—almost certainly—Chad Burnette. This makes sense as the awl was found close to Chad's body, and he suffered numerous "puncture" wounds that the medical examiner

described as having come from a weapon similar in type to an icepick or awl. The "minor" contributor to the mixture is an unknown person but is *not* Oscar Smith.

There is DNA on the awl used in the murders that cannot be connected to any individual purported to have been present at the scene of the crime. The only person known to have used the awl was the perpetrator—hence, the DNA on the awl mixed with Chad's is that of the perpetrator—not Oscar Smith. After 32 years of adamantly asserting his innocence, Oscar Smith finally has proof that someone else murdered his family. Indeed, he now has both the perpetrator's fingerprints and DNA.

Despite Mr. Smith's proof of his actual innocence, the state and federal courts have closed their doors to his petitions for relief. The AEDPA bars second or successive petitions unless a petitioner can demonstrate a constitutional error but for which "no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2244(b)(2)(B). For this reason, Mr. Smith did not make application to the district court of the district in which he is held or the court of appeals. Mr. Smith's new DNA proof satisfies 28 U.S.C. § 2244(b)(2)(B)(i): the factual predicate for the claim could not have been discovered previously through the exercise of due diligence. However, because this Court has never established a constitutional right prohibiting the conviction or execution of the actually innocent, Mr. Smith cannot establish the requirements of Section 2244(b)(2)(B)(ii).

IV. CLAIM FOR RELIEF:

Executing Mr. Smith without affording him a full and fair hearing in which he could make a persuasive demonstration of his innocence would violate his federal

constitutional rights to due process and freedom from cruel and unusual punishment as guaranteed by the Eighth and Fourteenth Amendments. *See Herrera* v. *Collins*, 506 U.S. 390, 417 (1993) (assuming a "truly persuasive demonstration of actual innocence made after trial would render execution of a defendant unconstitutional"); *House* v. *Bell*, 547 U.S. 518, 554 (2007) (same). Because this case involves exceptional circumstances and Mr. Smith cannot obtain adequate relief from any other court, as required by this Court's Rule 20.2 and 20.4, this Court should use its discretionary powers to grant Mr. Smith's petition for writ of habeas corpus. *See* 28 U.S.C. § 2241.

A. The Eighth Amendment bars the execution of the innocent.

In *Herrera*, five Justices unequivocally found that the execution of an innocent person violates the Constitution. *See* 506 U.S. at 419 ("[T]he execution of a legally and factually innocent person would be a constitutionally intolerable event.") (O'Connor, J., joined by Kennedy, J., concurring); *id.* at 431 ("[T]he Constitution forbids the execution of a person who has been validly convicted and sentenced but who, nonetheless, can prove his innocence with newly discovered evidence.") (Blackmun, J., joined by J.J. Stevens and Souter, dissenting). Nevertheless, this Court has only "assume[d]," without deciding, that the execution of the innocent is unconstitutional. *Id.* at 417 (opinion of Rehnquist, C.J.).

The Court in *Herrera* based its Eighth Amendment analysis on the idea that "constitutional provisions [] have the effect of ensuring against the risk of convicting an innocent person." *Id.* at 398–99. Since *Herrera* was decided, the country has grown increasingly skeptical of the infallibility of our criminal justice system. When *Herrera*

was decided in 1993, the use of DNA to challenge convictions was in its early days. Today, DNA has been instrumental in exonerating 375 wrongfully convicted men and women, 21 of whom were on death row.[2] In response to the public concern over the ever-increasing number of erroneous convictions, all 50 states have enacted post-conviction DNA analysis statutes. Relatedly, numerous states have abolished the death penalty or passed laws severely limiting its implementation.

These exonerations and the resulting legislative actions demonstrate the post-*Herrera* consensus that the Constitution's procedural protections are insufficient to avoid the execution of the innocent. This Court has often looked to state statutes to determine contemporary values for purposes of Eighth Amendment analysis. *See, e.g., Kennedy* v. *Louisiana*, 554 U.S. 407, 434 (2008). A consensus of state laws on the issue "is entitled to great weight." *Id*. *Herrera*'s assumptions that "our society has a high degree of confidence in criminal trials" and that existing constitutional protections "have the effect of ensuring against the risk of convicting an innocent person" are plainly contrary to the large number of recent exonerations and contemporary norms. *Herrera*, 506 U.S. at 398, 420.

Because the Court in *Herrera* assumed but did not hold that the Eighth Amendment prohibits the execution of the innocent, lower courts have not recognized such executions as constitutional violations. Given the clarity of the post-*Herrera*

[2] *See* Innocence Project, *DNA Exonerations in the United States* (last visited Apr. 20, 2022), https://innocenceproject.org/dna-exonerations-in-the-united-states/.

consensus, the Court should recognize and hold that the Eighth Amendment prohibits the execution of the innocent.

B. The AEDPA requires both innocence and a constitutional violation for second or successive habeas petitions.

AEDPA limits second or successive habeas corpus applications under section 2254 to situations in which "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence" and "the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for *constitutional error,* no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2244(b)(2)(B)(i), (ii) (emphasis added).[3] That is, subsection (B)(i) requires new facts, while (B)(ii) requires both actual innocence *and* constitutional error—meaning an individual who can establish new facts and actual innocence is barred from bring a second or successive habeas petition unless she can also demonstrate constitutional error.

C. The AEDPA prevents Mr. Smith from bringing his claim, resulting in suspension of the writ.

Mr. Smith has produced DNA evidence that was not previously available and that establishes his innocence. This is precisely the case for which habeas relief is intended. However, the AEDPA creates a procedural barrier to relief. Because

[3] Separately, Section 2244(b)(2)(A) permits second or successive petitions on a showing "that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." This is not relevant to Mr. Smith's case.

§ 2244(b)(2)(B)(ii) requires not only a showing of innocence but also a showing of constitutional error, Mr. Smith is out of luck. Because courts have not recognized the execution of the innocent as a constitutional violation, Mr. Smith cannot show that his execution would violate the constitution—and he is therefore barred from filing a second or successive habeas petition.

It is "uncontroversial . . . that the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law." *Boumediene* v. *Bush*, 553 U.S. 723, 746 (2008) (quoting *INS* v. *St. Cyr*, 533 U.S. 289, 302 (2001)). This is because "[t]he Framers viewed freedom from unlawful restraint as a fundamental precept of liberty, and they understood the writ of habeas corpus as a vital instrument to secure that freedom." *Id.* at 739.

Because courts have not recognized a constitutional bar on the execution of the innocent, the AEDPA closes the courthouse door to death row inmates who (like Mr. Smith) have produced evidence establishing their innocence. So long as this is the case, the AEDPA operates to suspend the privilege of the writ of habeas corpus in violation of Article I, Section 9 of the Constitution.

V. MOTION FOR STAY OF EXECUTION

Mr. Smith requests a stay of execution to permit this Court sufficient time to consider the meritorious arguments raised in this Petition for Writ of Habeas Corpus. For the reasons stated herein, Mr. Smith has met the standard warranting a stay of execution under 28 U.S.C. § 2251, 28 U.S.C. § 1651, and Supreme Court Rule 23.

This Court must consider four factors in evaluating whether to grant a stay pending appeal: "(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, 426 (2009); *see also Hill* v. *McDonough*, 547 U.S. 573, 584 (2006) (similar). In the present context, there must be "a reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari . . . ." *Barefoot* v. *Estelle*, 463 U.S. 880, 895 (1983) (citation omitted).

Concerning the first requirement, there is a reasonable probability the Court will grant certiorari to review this case and answer the question presented. First, a "reasonable probability" is usually understood as describing a likelihood lower than "more likely than not[.]" *Smith* v. *Cain*, 565 U.S. 73, 75 (2012) (discussing "reasonable probability" of a different outcome in the context of *Brady* materiality). Thus, to be entitled to a stay of execution until the Court can review his petition in due course, Mr. Smith need not demonstrate a high likelihood that the Court will decide to hear his case, but only a reasonably good chance of that outcome.

Considering that the *Herrera* Court tacitly recognized that the execution of the innocent violates the Eighth Amendment, and as the post-*Herrera* consensus has only solidified this understanding, there is a reasonable probability the Court will grant certiorari to review Mr. Smith's case. It is unthinkable that, as DNA analysis

continues to overturn hundreds of convictions, the Constitution would permit the state-sanctioned killing of those who can demonstrate their innocence. It is equally unthinkable that federal law could effectively suspend the writ of habeas and bar the innocent from even accessing the courtroom.

The second factor—whether the applicant will be irreparably injured absent a stay—weighs in Mr. Smith's favor. Mr. Smith will undeniably suffer irreparable harm without a stay of execution. Denying a stay risks "foreclos[ing] . . . review," which constitutes "irreparable harm." *Garrison* v. *Hudson*, 468 U.S. 1301, 1302 (1984). Allowing the state to execute Mr. Smith before proceedings have concluded will "effectively deprive this Court of jurisdiction." *Id.* A stay is generally warranted when, as here, mootness is likely to arise during the pendency of the litigation—as it will if Mr. Smith is executed April 21, 2022. *See Chafin* v. *Chafin*, 568 U.S. 165, 178 (2013); *see also Wainwright* v. *Booker*, 473 U.S. 935, 935 n.1 (1985) (Powell, J., concurring in decision to vacate stay of execution) (noting that the irreparable harm requirement "is necessarily present in capital cases").

Turning to the third factor, a stay will not substantially injure the opposing party. The relative harm to the state in terms of delaying Mr. Smith's execution is negligible. There can be no question that Mr. Smith actively avoided delay. This is not a case where a death row prisoner is bringing a last-minute motion for stay of execution as a tactical step. *See Gomez* v. *U.S. Dist. Court*, 503 U.S. 653, 654 (1992) (per curiam) (noting that the balancing of the parties' interests should include considering whether a stay application is last-minute or otherwise manipulative of

the habeas process). Mr. Smith has pursued this issue diligently. Indeed, the procedural underpinnings of this petition were brought as expeditiously as possible.

Finally, the community as a whole will suffer harm if no stay is granted. The public interest is not served by executing Mr. Smith before he has the opportunity to avail himself of the legal process to challenge the legality of his sentence. "[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *In re Ohio Execution Protocol*, 860 F.3d 881, 901 (6th Cir. 2017) (cleaned up). Indeed, allowing government misconduct to go unremedied will erode the public's confidence that the court system offers a level playing field, providing a forum to redress grievous wrongs. And there is an "overwhelming public interest" in "preventing unconstitutional executions." *Bronshtein* v. *Horn*, 404 F.3d 700, 708 (3d Cir. 2005) (citation omitted). A stay of execution, in fact, will serve the strong public interest—an interest the government shares—in administering capital punishment in a manner consistent with the Constitution.

VI. CONCLUSION

WHEREFORE, this Court should order a stay of execution, order further briefing on this case, remand the case to the Middle District of Tennessee to conduct and evidentiary hearing on Smith's claim, and order any other relief just and necessary.

Respectfully submitted this 20th day of April, 2022.

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CERTIFICATE OF SERVICE

I, Amy D. Harwell, certify that a true and correct copy of the foregoing was served via email on April 20, 2022 to opposing counsel, Samantha Simpson, Assistant Attorney General, P.O. Box 20207, Nashville, Tennessee, 37202.

BY: 
Counsel for Oscar Smith