

DOCKET NO.:

IN THE SUPREME COURT OF THE UNITED STATES

MARTIN GROSSMAN,
Petitioner

**CAPITAL CASE
DEATH WARRANT SIGNED
EXECUTION SCHEDULED FOR
FEBRUARY 16, 2010 at 6:00 P.M.**

v.

STATE OF FLORIDA,
Respondent

APPLICATION FOR STAY OF EXECUTION

JOHN W. JENNINGS
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-Middle Region

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TO THE HONORABLE JUSTICE CLARENCE THOMAS:

Martin Grossman, by counsel, respectfully applies to this Court pursuant to 28 U.S.C §§ 1651, 2101(f), and 2251(a) for a stay of execution, currently scheduled for February 16, 2010 at 6:00 pm. Mr. Grossman has simultaneously filed his Petition for a Writ of Certiorari in this Court which presents the following question:

Whether a state court's successive rejection of a federal claim bars federal habeas review such that a capital defendant is unable to present to a court evidence of mental mitigation in support of a claim in avoidance of the death penalty.

Relevant factual and procedural history

Present post conviction counsel was preparing a successive post conviction motion when Governor Crist signed a death warrant on January 12, 2010 scheduling Mr. Grossman's execution date for February 16, 2010 at 6:00 pm. Present post conviction counsel then filed Mr. Grossman's successive post conviction motion raising the claim that he was denied the effective assistance of counsel at the penalty phase of his trial. A hearing was held on January 20, 2010 where arguments were presented to determine if an evidentiary hearing would be held.

Counsel argued that based on the late Dr. Henry Dee's findings, which would have shown that trial counsel was ineffective during the penalty phase, Mr. Grossman should be granted a hearing. Dr. Michael Maher interpreted the findings on the late Dr. Dee, and was ready and able to evaluate Mr. Grossman and testify at an evidentiary hearing about trial counsel's ineffectiveness. The trial court issued an order denying the right to a hearing on January 21, 2010.

Mr. Grossman then appealed the denial of the successive post conviction motion to the Florida Supreme Court on January 25, 2010. The Florida Supreme Court affirmed the circuit court's denial of the successive post conviction motion on February 8, 2010. *Grossman v. State*, 2010 WL 424912. On February 10, 2010, Mr. Grossman filed a Rule 9 petition and a Emergency Motion for Stay of Proceedings with the Eleventh Circuit Court of Appeals Mr. Grossman has now filed this present Application For a Stay of Execution along with a Petition for a Writ of Certiorari.

Reasons why Mr. Grossman is entitled to a stay of execution

The traditional standard for granting a stay of execution was articulated in Barefoot v. Estelle, 463 U.S. 880 (1983). Barefoot requires the applicant to show (i) a reasonable probability that four Members of the Court will consider the issues raised in the petition sufficiently meritorious for a grant of certiorari, (ii) the significant possibility that the Court will reverse the decision below, and (iii) that irreparable harm will occur if the execution is not stayed. *Id.* at 895. Mr. Grossman must also establish that he did not unduly delay in the filing of the action in which he now seeks a stay of execution. See, e.g., Nelson v. Campbell, 541 U.S. 637 (2004). The first three standards are established by the contents of the pending petition for a writ of certiorari itself, which are incorporated here. Irreparable harm will occur if the execution is not stayed until the petition is granted and considered. Wainwright v. Booker, 473 U.S. 935 n.1 (1985) (Powell, J., concurring) (recognizing that there is little doubt that a prisoner facing execution will suffer irreparable injury if the stay is not granted); In re Holladay, 331 F.3d 1169, 1177 (2003) (holding in a death penalty case involving a mental retardation claim that "the irreparability of the injury that petitioner will suffer in the absence of a stay to be self-evident").

The recent decisions from the Supreme Court of the United States in Cone v. Bell, 129 S.Ct. 1769 (2009), Porter v. McCollom, 130 S.Ct. 447 (2009) and Wellons v. Hall, 558 U.S. ___ (2010) support the reasons why Mr. Grossman is entitled to relief. Wellons held that "when a state court declines to review the merits of a petitioner's claim on the ground that it has done so already, it creates no bar to habeas review."

Both Cone and Wellons have direct application to Mr. Grossman's situation. In Mr. Grossman's case, the trial court, in denying the initial 3.850 post conviction motion, stated:

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case, the trial court, in denying the initial 3.850 post conviction motion, stated:

The sixth claim presented by the Defendant is that he was denied a competent mental health examination and that counsel was ineffective for failing to investigate and arrange for such an examination in violation of Defendant's constitutional rights under the federal and state constitutions.

A. Defendant's claims here are procedurally barred as a Fla. R. Crim. Proc. 3.850 motion can not be used as a second appeal, or to use a different argument to relitigate the same issue, or to circumvent the rule against second appeals. *Medina v. State*, 573 So.2d 293, 295 (Fla. 1990) (summary denial of similar claims of whether the mental health exam was competently performed, and defendant's competency at sentencing, proper by trial court).

The trial court, in Mr. Grossman's case, by denying his claim without an evidentiary hearing committed a similar error that would be proscribed by Cone and Wellons. The only avenue that Mr. Grossman could take to present his claim that he was denied a competent mental health examination and that counsel was ineffective was through a collateral challenge in post conviction. He would be successful on the merits.

An execution under these circumstances would be arbitrary, cruel, and unusual. The harm to Mr. Grossman if he is executed without a fair and complete review of the merits of his case—according to United States Supreme Court caselaw— would be irreparable. Delaying the death of Mr. Grossman would serve no harm to the State. All members of the Court will see that this issue is meritorious for a grant of certiorari in light of recent SCOTUS caselaw, and there is a significant possibility that the Court will reverse the decision below. Staying this case, so that Mr. Grossman can have the merits of his case decided in an evidentiary hearing will not cause undue delay. In light of recent caselaw, Mr. Grossman's claims have merit, and the court system and lethal injection chamber should still be in working order if the day comes that Mr. Grossman is denied relief on his

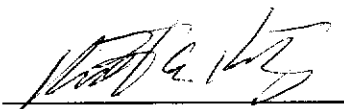
claims. Any delay is not undue, and there is no hardship on the government if this Court were to insure that Mr. Grossman's constitutional rights, and access to be heard in court are preserved.

Also, based on the time-line of the pleadings, from the day the warrant was signed to the date of the present motion, it's clear that there has been no undue delay on Mr. Grossman's side in bringing this current action. Lastly, the stay would serve the public interests because recent United States Supreme Court caselaw supports the notion that Mr. Grossman, like all similarly situated individuals, is entitled to a day in court on his claims.

Conclusion

For the reasons set forth in this application, the Court should grant Mr. Grossman a stay of execution.

Respectfully Submitted,



Richard E. Kiley

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Application for Stay of Execution has been furnished via electronic mail to all counsel of record on this 11th day of February, 2010.



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