

**UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT**

CASE NUMBER.

MARTIN GROSSMAN,

v.

Appellant/Petitioner,

**CAPITAL CASE-DEATH WARRANT
SIGNED Execution Scheduled: February 16,
2010**

WALTER A. McNEIL.

Secretary, Florida Department of Corrections,

BILL McCOLLUM,

Attorney General of the State of Florida,

Appellee/Respondents.

EMERGENCY MOTION FOR STAY OF EXECUTION

Pending Consideration Application for Leave to File a
Second or Successive Habeas Corpus Petition
Pursuant to 28 U.S.C § 2244 (B)
By a Prisoner in State Custody

Martin Grossman, by counsel, respectfully applies to the Court pursuant to 28 U.S.C § 2251 and 11th Cir. R. 27-1(b) for a stay of execution, currently scheduled for February 16, 2010 at 6:00 p.m. Petitioner seeks a stay of execution so that this Court may consider an Application for Leave to File a Second or Successive Habeas Corpus Petition Pursuant to 28 U.S.C. § 2244 (B).

Grossman's Application for Leave to File was filed February 10, 2010. It contains statements regarding the procedural history and present posture of this case, along with allegations and argument in support of the relief sought therein.

This Court reviews motions to stay execution to determine whether:

(1) there is a substantial likelihood of success on the merits;

- (2) the requested action is necessary to prevent irreparable injury;
- (3) the threatened injury outweighs the harm a stay would inflict upon the non-movant; and
- (4) the requested action would serve the public interest.

Mr. Grossman's request satisfies these criteria. 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 case. In Mr. Grossman's case, the court, in denying the initial 3.850 post conviction motion, stated:

V. 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. 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.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing A Motion for Stay of Execution has been furnished via electronic mail to all counsel of record on this 10th, day of February, 2010.



JAMES VIGGIANO
Florida Bar No. 0715336
Assistant CCC
CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE REGION
3801 Corporex Park Drive
Suite 210
Tampa, Florida 33619
813-740-3544
813-740-3554 (Facsimile)