IN THE SUPREME COURT OF THE UNITED STATES

MARCELLUS WILLIAMS,	)	
	)	**CAPITAL CASE**
Petitioner,	)	**Execution Set for**
	)	**August 22, 2017**
v.	)	**At 6:00 p.m.**
	)	
STEVE LARKIN, Superintendent, Potosi Correctional Center	)	**Case No. _____**
	)	
	)	
Respondent.	)	

TO: The Honorable Neil Gorsuch, Associate Justice of the United States Supreme Court and Circuit Justice for the Eighth Circuit

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APPLICATION FOR STAY OF EXECUTION PENDING DISPOSITION OF PETITION FOR A WRIT OF CERTIORARI

Petitioner Marcellus Williams, respectfully requests that the Justice Gorsuch in his capacity as Circuit Justice for the Eighth Circuit, pursuant to 28 U.S.C. § 2101(f), stay his execution pending this Court's disposition of petitioner's petition for a writ of certiorari filed contemporaneously with this motion. In support of this application, petitioner states the following grounds.

1. Petitioner is a Missouri death row inmate who is challenging his sentence of death in a certiorari petition that seeks review of the Missouri Supreme Court's judgment denying his petition for a writ of habeas corpus. The procedural history of the case is set forth in the underlying petition for a writ of certiorari. On

April 26, 2017, the Missouri Supreme Court set petitioner's execution for August 22, 2017.

2. As is more fully set forth in the accompanying certiorari petition, petitioner believes that the issues presented here are substantial and would warrant this Court's discretionary review. At the very least, a stay of execution should be granted pending the resolution of this petition.

3. The test for granting a stay of execution in a capital case is governed by the familiar standard set forth by this Court in *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983). In the present context of a pending petition for a writ of certiorari, petitioner is entitled to a stay of execution if there is a reasonable probability that four members of the Court would consider the underlying issues sufficiently meritorious to grant discretionary review. *Id.* The questions raised in Mr. Williams' petition for a writ of certiorari are substantial and meritorious. It also goes without saying that petitioner would suffer irreparable harm if his life is forfeited before this Court can review the claims in the underlying petition in a reasoned and thorough manner.

4. The questions raised in this petition involve due process, equal protection, and Eighth Amendment violations arising from the Missouri Supreme Court's failure to afford petitioner a meaningful review, under existing state law,

of his death sentence in light of new DNA evidence that exonerates him. *See Williams v. Kaiser*, 323 U.S. 363, 365 (1945); *Bunkley v. Florida*, 538 U.S. 835, 840-842 (2003). The petition also advances a free-standing claim of innocence under *In re Davis*, 557 U.S. 952 (2009).

5. Whether claims of innocence of a similar nature are cognizable as constitutional violations has been fiercely debated. This precise issue has not been conclusively resolved by this Court and has created conflicts between inferior state and federal courts in the two decades in the aftermath of this Court's fractured decision in *Herrera v. Collins*, 506 U.S. 390 (1993). The issues in this case present substantial constitutional questions that will undoubtedly arise in future cases, and are, therefore, worthy of discretionary review.

SUGGESTIONS IN SUPPORT OF MOTION FOR A STAY OF EXECUTION

As Justice O'Connor noted in *Herrera*, most fair minded persons, including judges, would agree that "the execution of a legally and factually innocent person would be a constitutionally intolerable event." *Hererra v. Collins*, 506 U.S. 390, 419 (1993) (O'Connor, J., concurring). There can be little dispute, based upon the results of recent Y-STR DNA testing that found another man's DNA on the murder

weapon, that there is a substantial likelihood that Mr. Williams is innocent of the murder for which he has been condemned to die.

The Missouri Supreme Court denied petitioner a full and fair hearing where a trier of fact could hear and consider all of petitioner's evidence of innocence in order to determine whether he deserves a new trial or a commutation of sentence under state law. The manner in which the Missouri Supreme Court summarily denied petitioner's habeas corpus petition barely twenty-four hours after it was filed, without giving petitioner an evidentiary hearing or the opportunity to reply and rebut the state's arguments in opposition, also raises substantial constitutional issues that this Court should address.

Where any litigant requests a stay of a judgment, a reviewing court must engage in a balancing of interests. This analysis necessarily involves the fundamental conflict between the harm to the party seeking a stay versus the prevailing party's interest in the finality of the judgment. In death penalty cases, because the stakes are much higher, any uncertainties should be resolved in the condemned man's favor.

In *Commodity Futures Trading Comm. v. British Am. Comm.*, 434 U.S. 1318 (1977) (Marshall, J., in chambers), Justice Marshall upheld a lower court stay by stressing the "potentially fatal consequences" to the businesses involved. *Id*. at

1321. The destruction of a human life should be undertaken with even more reluctance than the possible bankruptcy of a corporation.

In considering this petition, petitioner's requests in the court below for an evidentiary hearing on the impact of DNA test results and his innocence, discovery regarding the McClain murder, and a stay of execution, this Court should take into account an overriding concern in addition to the obvious fact that Marcellus Williams will be irreparably harmed if he forfeits his life later this month. This Court should also consider the irreparable harm to the public's confidence in the integrity of the criminal justice system if it permits a likely innocent man to be executed where there is compelling DNA evidence exonerating him. *See Hilton v. Braunskill*, 481 U.S. 770, 776 (1987) (The "traditional" standard for a stay also requires a reviewing court to determine "where the public interests lie.") Any countervailing arguments from respondent regarding undue delay and the finality of judgments pale in comparison.

Apart from the constitutional concerns arising from the manner in which the Missouri Supreme Court disposed of petitioner's claim of innocence raised in the court below by summarily denying relief without a hearing, this state court action precluded petitioner from filing a reply that counsel was preparing when the Missouri Supreme Court issued its order summarily denying the petition and a stay

of execution two hours after the state filed its response. (A-3). As a result, petitioner feels it is necessary to present some of the arguments that he was preparing for his habeas reply to rebut several of the misleading factual and legal arguments that respondent advanced in the court below.

A. PETITIONER AND HIS POST-CONVICTION COUNSEL HAVE NOT BEEN DILATORY IN LITIGATING PETITIONER'S CLAIM OF INNOCENCE.

Respondent argued in the court below against granting a stay of execution and giving petitioner a hearing and discovery on the McClain murder that petitioner has been dilatory in not litigating and obtaining this exculpatory DNA testing and evidence sooner and, that he had a tactical reason for doing so. Nothing could be further from the truth.

As noted in the underlying Rule 91 petition, trial counsel, who was admittedly unprepared for numerous reasons, was denied a continuance to conduct further DNA testing. (*See* Pet. Hab. Exh. 10; L.F. 395-396). During Rule 29.15 proceedings, motion court counsel requested further DNA testing, specifically pointing out that they had a reasonable belief that Laura Asaro's DNA might be present at the crime scene. This request was also denied.

29.15 motion court counsel also subpoenaed the Pagedale police records regarding the homicide of Debra McClain. The Pagedale police did not comply

with the subpoena. As a result, petitioner's counsel moved the motion court for a show cause order pursuant to Mo. S. Ct. Rule 57.09(f) as to why the police should not be held in contempt. (29.15 L.F. 502-506). The motion court denied this request. (*Id*. 752).

During his federal habeas corpus proceedings, petitioner also repeatedly and unsuccessfully attempted to obtain the Pagedale police records regarding the McClain murder and further DNA testing. After Judge Sippel granted petitioner penalty phase relief, these DNA testing and discovery requests became moot[1] until the Eighth Circuit's divided decision to reinstate petitioner's death sentence became final when this Court denied certiorari on October 7, 2013.

Respondent's lack of diligence argument also ignores the fact, as set forth in the habeas petition, that petitioner's counsel did not have any funds available for a DNA expert, such as Dr. Hampikian to comprehensively review all of the data and determine whether the Bode Laboratory's test results excluded petitioner as a DNA contributor, until CJA appointed co-counsel Laurence Komp commenced his present position as the Director of the Missouri Capital Habeas Unit on July 24, 2017. Mr. Komp, thereafter, secured federal funding for Dr. Hampikian's services

[1] Petitioner will remain incarcerated on other charges even if he is exonerated of this murder. Thus, respondent's assertion that there was a tactical reason why this DNA litigation was not pursued earlier is misleading and disingenuous.

and all of the data from the DNA testing was promptly provided to him. Because of the volume and complexity of the materials that Dr. Hampikian was provided, he could not complete his report, that was attached to the underlying habeas petition as Exhibit 10, until Sunday August 13, 2017.

It is indeed ironic that the state accused petitioner of having unclean hands and in unduly delaying the present litigation when all of the prosecutors and attorney generals assigned to this case over the years have opposed all of his requests to obtain exculpatory evidence to prove he is innocent of the murder of Felicia Gayle. At trial, the prosecutors vigorously opposed all of trial counsel's requests for continuances to allow them to prepare and obtain evidence to further discredit Henry Cole and Laura Asaro and obtain further forensic evidence of petitioner's innocence. During state post-conviction proceedings, prosecutors also opposed further DNA testing and successfully quashed several subpoenas that petitioner attempted to utilize to obtain further information to attack Cole's and Asaro's credibility. During federal habeas corpus proceedings, the Attorney General's office also vigorously and successfully opposed all of petitioner's requests to receive court authorized discovery to prove his innocence.

The procedural history of this case demonstrates that it is the prosecution, not Mr. Williams, who has unclean hands. The prosecuting attorneys in this case

appear to believe that their duty is to secure and protect this tainted conviction and sentence at all costs, rather than follow their overriding duty to seek justice. *See Berger v. United States*, 295 U.S. 78, 88 (1935).

Finally, any argument from respondent about delay or other possible procedural hurdles to this Court's orderly review of this case is trumped by petitioner's substantial claim of innocence. *See Schlup v. Delo*, 513 U.S. 298, 324-326 (1995). And, all of the other relevant factors of irreparable harm and the public's interest weigh heavily in favor of a stay of execution.

B. ANY INTEREST IN FINALITY MUST YIELD TO THE INTERESTS OF JUSTICE AND FUNDAMENTAL FAIRNESS.

In prior pleadings, respondent repeatedly cites "interests of finality." As there is no such recognized principle under Missouri or federal habeas corpus law precluding a court from hearing a claim of innocence, this argument should be emphatically rejected for a number of reasons.

First and foremost, there is no such thing as a finality bar under Missouri law or, for that matter, under federal habeas corpus law. *See State ex rel. Nixon v. Jaynes*, 63 S.W.3d 210, 217 (Mo. banc 2001) (finding no absolute bar to successive habeas corpus petitions); *Rideau v. Whitley*, 237 F.3d 472, 477-479 (5th Cir. 2000) (rejecting government argument that prisoner unreasonably delayed bringing equal protection challenge to a murder conviction that occurred more than

thirty years earlier). More recent Rule 91 litigation both before the Missouri Supreme Court and other Missouri courts underscores this fact.

In 2011, the Missouri Supreme Court granted a new trial to Reginald Griffin in a Rule 91 action vacating a twenty-five year old murder conviction because of governmental misconduct. *State ex rel. Griffin v. Denney*, 347 S.W.3d 73 (Mo. banc 2011). Mr. Griffin was subsequently released from prison after the Randolph County prosecutors elected not to retry him. The court reached this result, notwithstanding arguments made by the same attorney general's office that his claims for relief had previously been advanced and rejected in prior state and federal post-conviction appeals.

In 2011, the Missouri Court of Appeals upheld a grant of habeas relief to Missouri prisoner Dale Helmig, who was released from prison after serving nearly twenty years for the murder of his mother. *State ex rel. Koster v. McElwain*, 340 S.W.3d 221 (Mo. App. W.D. 2011). As in *Griffin*, Mr. Helmig had also previously advanced several of the claims upon which he was subsequently freed in prior state and federal post-conviction appeals. Had the interests of finality been considered paramount in habeas corpus jurisprudence as respondent suggests, Mr. Griffin and Mr. Helmig would still be languishing in prison. As the Missouri Court of Appeals noted in its recent decision ordering a new trial for Mr. Helmig, Missouri courts

have the inherent power to overturn "convictions that violate fundamental fairness." *Id*. at 258.

Respondent is correct in noting that there is a general **federal** judicial policy favoring the finality of state court judgments. As this Court is fully aware, the interests of finality are trumped or superseded by the interests of justice and fundamental fairness. As this Court has pointed out: "Conventional notions of finality of litigation have no place where life or liberty is at stake and the infringement of constitutional rights is alleged…" *Sanders v. United States*, 373 U.S. 1, 8 (1963).

Respondent's finality arguments represent the epitome of the legal system's emphasis upon form over substance. Far too often in the post-conviction process, concern for efficiency in procedure has overshadowed concern for basic fairness and has transformed our fidelity to process into an undue obsession with formalities and technicalities. This obsession for procedure has far too often obscured or eclipsed the more important role in our system of a dedication to do justice. It was, after all, in order to "establish justice" that our Constitution was written. (*U.S. Const. pmbl.*).

It is certainly not a radical notion to propose that Mr. Williams, in the interests of justice, be given a full and fair hearing in a court of law to conclusively prove his innocence. This is all he asks.

C. RESPONDENT'S ARGUMENTS RAISED IN THE COURT BELOW DENIGRATING PETITIONER'S CLAIM OF INNOCENCE ARE MISLEADING AND UNPERSUASIVE.

Respondent advanced an array of misleading factual and legal arguments opposing a stay of execution in the underlying habeas action. For the reasons set forth more fully below, none of these arguments are persuasive.

First, respondent contends that the unknown Y-STR profile developed in this case is probably Dr. Picus's (the victim's husband) DNA. This argument is clearly a "red herring." Apart from the fact that it would be much more likely that the unknown male DNA profile would have come from the person who repeatedly stabbed the victim with knife and left it in her body rather than her husband who may or may not have touched the knife on some earlier occasion,[2] this argument ignores the fact that the St. Louis Crime Lab currently has Dr. Picus's genetic profile from the pretrial DNA testing in their possession. (See Exh. 4). If there was any factual basis that this male DNA profile developed by Bode Laboratory

[2] It is also extremely unlikely that Dr. Picus' DNA was on the knife handle from a prior use because any touch DNA would disappear when the knife was washed.

matched the known profile of Dr. Picus, the St. Louis Crime Lab could easily make this determination upon request by the Attorney General. The Attorney General's failure to do so reveals that this argument is utterly without merit.

In opposing petitioner's claim of innocence, respondent had nothing to say about the powerful post-conviction evidence that came to light that thoroughly discredits both Henry Cole and Laura Asaro. (See Exh. 2). Instead, respondent focuses on the circumstantial evidence involving Glenn Roberts' trial testimony that petitioner sold the victim's computer to him. However, this argument ignores other evidence that indicates that petitioner obtained this computer from Laura Asaro. Trial counsel was precluded by the prosecutor's hearsay objection from eliciting from Mr. Roberts that petitioner told him at the time he sold him the computer that he had obtained it from Ms. Asaro. (Tr. 1997, 2027-2030). In short, while the state was able to successfully prevent the jury from considering the whole story, a reviewing court is not so constrained in reviewing a claim of innocence under *Schlup*. Further, as fully explained in his original Rule 91 petition, Asaro's testimony, as well as Cole's testimony, is highly questionable. (See also Exh. 2).

Respondent also emphasized the fact that some of the victim's belongings were found in the trunk of a "derelict car" that was registered to Walter Hill.

Contrary to respondent's assertion that this evidence was damning, there are several unassailable facts developed during the police investigation and during trial that effectively neutralized the incriminating nature of much of this evidence. The police described this car as a derelict vehicle and the owner Walter Hill told police that the car was not in running condition and that Asaro had keys and had previously removed property from it. (Exh. 5). It is also clear that the abandoned car was not always secure and locked and that other persons had access to it. In this regard, it is important to note that Ms. Asaro admitted that she was living in the car and testified that the trunk of the car where the victim's property was found had a popped lock that could be accessed by anyone with a screwdriver. (Trial Tr. 1840-1841, 1936). Asaro also testified that she kept her personal items in the car, which is corroborated by the fact that when the car was searched, the police found a letter in the truck addressed to Ms. Asaro that had no connection to petitioner. (*Id*. 1930, 1943-44, 2300).

There were also no fingerprints found on any of the victim's property. (*Id*. 2317-2318, 2352-2353). A strong argument could be made that petitioner, if he was indeed guilty, would not have bothered to wipe off the prints from these items and then intentionally leave the same items in the trunk of a car he had previously driven. The more likely scenario is, obviously, that some other unknown

individual who actually committed the crime or, at the very least, was involved in receiving this stolen property wiped off the prints and then planted the property in the car to frame petitioner. Ms. Asaro is the most likely culprit under this scenario, because she had 10,000 reasons to do so because she was homeless and destitute. (Tr. 1901, 1904, 1909, 1916).

Respondent's argument that the circumstantial evidence trumps the DNA results also ignores the fact that the circumstantial evidence of a similar nature was much stronger in *Hildwin v. Florida*, 140 So.3d 1178 (Fla. 2014), a DNA exoneration case where Mr. Hildwin had been found in possession of checks belonging to the murder victim. *See Hildwin v. Florida*, 531 So.2d 124, 125-126 (Fla. 1988). There are also two other DNA exoneration cases noted by the Innocence Project where the wrongly convicted man was found with the victim's property after the crime occurred. (See Exh. 3).

In Louisiana, Gene Bibbins was wrongfully convicted of raping a teenage girl when he was found with a radio belonging to her less than an hour after the crime occurred. (*Id*.). In Georgia, Robert Clark was exonerated by DNA evidence for raping a woman despite the fact that he was found driving her stolen car a few days later. (*Id*.). In both of these cases, DNA testing exonerated these two men despite the existence of similar circumstantial evidence involving possession of the

victim's property. In *Clark* and *Bibbins*, the evidence presented at trial was much stronger than the evidence here because the rape victims both positively identified them as the perpetrators. (*Id*.).

While *Hildwin* involved a theory of conviction based on scientific evidence, that fact does not lessen its impact upon this case. In petitioner's case, the state's case relied upon a demonstrably less reliable category of evidence – paid informant/snitch testimony. Further, petitioner's point in citing to *Hildwin* is to emphasize that possessing a victim's belongings well after the crime occurred, as in petitioner's case, is not sufficiently incriminating to overcome exculpatory DNA test results.

Petitioner's case is also similar to *State v. Ott*, 763 N.W.2d 248, 2008 Wisc. App. LEXIS 1014 (Wisc. App. 2008). In *Ott*, the court found a new trial was warranted when DNA testing excluded Ott and matched the DNA profiles in two other murders, despite the fact that two witnesses testified at trial that they were present when Ott allegedly committed the crime. The court in *Ott* noted:

> Although the State presented two witnesses who claimed to have been present when Ott killed Payne, each witness' credibility was called into doubt, and the new DNA evidence excludes Ott as a source of the semen retrieved from Payne's body. Moreover, the same DNA profile

> was found on two other murder victims in the same geographical area, and any other men known to have been in Payne's presence on the night she was killed have been excluded as possible sources of that DNA. Thus, the newly discovered DNA evidence potentially links someone other than Ott or anyone else identified in this case to Payne's murder.

Id. at *10-*11.

Finally, respondent misleadingly suggested that Dr. Hampikian's recent report adds nothing to the case beyond the previously submitted report of Dr. Rudin in prior state habeas litigation. Had petitioner been given an evidentiary hearing or at least been given the opportunity to file a reply in the court below, this argument could have been proven to be conclusively false. Unlike Dr. Rudin, Dr. Hampikian more extensively reviewed all of the Bode lab's extensive reports and data before issuing his report. (See Hab. Pet. Exh.'s 10, 15).

If he had been given the opportunity to reply, petitioner could have pointed out to the court that Dr. Hampikian's report that exclusions can be made on alleles with a threshold RFU between fifty and two hundred is in line with established DNA protocols adopted by the FBI, the Royal Canadian Mounted Police, and the State of Washington. (See Exh. 1). The attached declaration from Dr. Randell

Libby, that was filed in an Idaho capital case involving George Porter, who is now a free man based upon DNA evidence, clearly indicates that DNA exclusions can be made based on similar data and below a three hundred RFU threshold such as those profiles developed from the Y-STR testing of the knife in this case. (*Id*.). Since a scientifically valid exclusion can be made in such circumstances, the Missouri Supreme Court's failure to fully and fairly consider this information and grant petitioner a full and fair hearing on his claim of innocence did not comport with due process or Eighth Amendment standards. *See In re Davis*, 557 U.S. 952 (2009).

CONCLUSION

Several legal commentators have advocated that the death penalty cannot be constitutionally imposed and certainly cannot be carried out unless the evidence forecloses all reasonable doubts of guilt. Any neutral observer in looking at the current record in this case cannot possibly conclude that petitioner is clearly guilty. As a result, it would be a reasonable and logical extension of this Court's *Herrera* decision, to review this case and hold that no death sentence can be constitutionally carried out where there are substantial and reasonable doubts that the condemned man is guilty.

In conclusion, the interests of justice and the demonstrated fallibility of our justice system as evidenced by numerous DNA exonerations in the post-*Furman* era, strongly dictate that this Court intervene and ultimately decide whether a death sentence can be carried out where there is DNA or other credible evidence that the condemned man is innocent. This case presents an ideal vehicle for this Court to address this important question.

For all the foregoing reasons, as well as those reasons advanced in the underlying petition, this Court should grant a stay of execution.

Respectfully submitted,

/s/ Kent E. Gipson
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COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that I am a member in good standing of the bar of this Court and that two true and correct copies of Petitioner's Application for Stay of Execution Pending Disposition of Petition for a Writ of Certiorari and Suggestions in Support of Motion for a Stay of Execution in the case of *Williams v. Larkin* were forwarded pursuant to Supreme Court Rule 29.5(b), postage prepaid, to:

Stephen Hawke
Assistant Attorney General
P O Box 899
Jefferson City, MO 65102

One copy in PDF format was electronically mailed to the Danny Bickell and, one copy of Petitioner's Application for Stay of Execution Pending Disposition of Petition for a Writ of Certiorari were mailed, postage prepaid, to:

Scott Harris, Clerk
United States Supreme Court
One First Street N.E.
Washington, DC 20543

and

Danny Bickell
dbickell@supremecourt.gov

pursuant to Supreme Court Rule 39.5, this 18th day of August, 2017.

/s/ Kent E. Gipson
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