In the Supreme Court of Florida

ERIC SCOTT BRANCH,

Appellant,

v.

CASE NO. SC17-1509
EXECUTION SCHEDULED
THURSDAY, FEBRUARY 22, 2018

STATE OF FLORIDA,

Appellee.
_____/

STATE'S RESPONSE TO MOTION FOR STAY OF THE EXECUTION

On January 31, 2018, Branch, represented by Capital Collateral Regional Counsel - North (CCRC-N), filed a motion to stay his execution in this Court to allow the United States Supreme Court to decide the petition for writ of certiorari he intends to file in the High Court. Branch intends to file a petition regarding this Court's recent decision in *Branch v. State*, 2018 WL 495024 (Fla. Jan. 22, 2018), holding that, under *Hitchcock v. State*, 226 So.3d 216 (Fla. 2017), he was not entitled to retroactive application of *Hurst v. State*, 202 So.3d 40 (Fla. 2016) (*Hurst v. State*). Branch insists that a stay is necessary for the United States Supreme Court to have time to properly consider his petition. There are no substantial grounds in the proposed petition, and therefore, the motion for stay should be denied.

Wrong court

Preliminarily, the motion for stay is being sought in the wrong court. The United States Supreme Court is quite capable of entering a stay of execution if they think one is necessary. While opposing counsel cites the rule regarding seeking relief in the lower court first, opposing counsel does not cite one case where the United States Supreme Court denied a stay of execution in a capital case that the Court otherwise thought was warranted because the same motion to stay was not filed in the state court first. Furthermore, opposing counsel already filed a motion to stay in the trial court, which would suffice if there was such a requirement. Filing a motion to stay in one court for the alleged benefit of another court is a duplicate effort that is a waste of the time and resources of this Court.

Motions to stay executions

A stay of execution is warranted only when there are substantial grounds upon which relief might be granted. *Chavez v. State*, 132 So.3d 826, 832 (Fla. 2014) (citing *Bowersox v. Williams*, 517 U.S. 345 (1996), and denying a stay); *Howell v. State*, 109 So.3d 763, 778 (Fla. 2013) (stating that a defendant must show that there are substantial grounds upon which relief might be granted to obtain a stay of execution and denying a stay). There are no substantial grounds being raised in the proposed petition for writ of certiorari and therefore, there is no need for a stay.

The United States Supreme Court often decides whether to grant petitions on the day of the execution because that is often when the petitions in a warrant case are filed. And they often decided two or more petitions on that last day. As this Court is well aware, all warrant litigation proceeds at a fast pace. All the courts

involved operate under short time frames necessitating long hours. That simply is the nature of warrant litigation, not a reason to stay an execution.

If Branch files his petition for writ of certiorari on Monday, February 5, 2018, the United States Supreme Court will have 18 days to decide the petition, which is 17 days more than they normally have in a warrant to decide whether to grant review. Seventeen days is a cornucopia of time to the High Court.

And it will not be difficult or time consuming for the United States Supreme Court to decide the petition is devoid of any merit, regardless of when the petition is filed. Any petition raising the retroactivity of *Hurst v. State* will be easily decided by the United States Supreme Court without any stay. Contrary to opposing counsel's assertion, there is NOT a "significant chance" the United States Supreme Court will grant review of this Court's decision regarding the retroactivity of *Hurst v. State*.

The United States Supreme Court already decided years ago that state courts are entitled to formulate their own retroactivity standards in *Danforth v. Minnesota*, 552 U.S. 264 (2008). Under the existing precedent, states are not required to adopt the federal test for retroactivity established in *Teague v. Lane*, 489 U.S. 288 (1989). Rather, states are free to have broader retroactive tests; they just may not have narrower tests. *Montgomery v. Louisiana*, 136 S.Ct. 718, 729 (2016) (explaining that the federal Constitution requires state courts to give retroactive effect to new substantive rules). This Court is entitled to use its test in *Hitchcock v. State*, 226 So.3d 216 (Fla. 2017), to decide the retroactivity of its decision in *Hurst v. State.* The United States Supreme Court simply will view the entire issue as a matter of state law over which they lack jurisdiction. *Kansas v. Carr*, 136 S.Ct. 633, 641 (2016) (explaining that when a state court's decision

rests on an adequate and independent state law ground, the United States Supreme Court has no jurisdiction over the claim).

Alternatively, even if retroactivity is viewed as a federal question, the controlling precedent from the United States Supreme Court is that Sixth Amendment right-to-a-jury-trial decisions, such as *Hurst*, are not retroactive. *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004) (holding that *Ring v. Arizona*, 536 U.S. 584 (2002), is not retroactive using the federal test of *Teague*); *DeStefano v. Woods*, 392 U.S. 631 (1968) (holding that the Sixth Amendment right-to-a-jury-trial is not retroactive). The *Summerlin* Court reasoned that "if under *DeStefano* a trial held entirely without a jury was not impermissibly inaccurate, it is hard to see how a trial in which a judge finds only aggravating factors could be." *Summerlin*, 542 U.S. at 357. Opposing counsel may view right-to-a-jury-trial claims as substantive but the United States Supreme Court does not. The High Court has repeatedly characterized such decisions as procedural, including in *Montgomery* itself. *Summerlin*, 542 U.S. at 353-54 (stating that "*Ring*'s holding is properly classified as procedural" because the Sixth Amendment's jury-trial guarantee "has nothing to do with the range of conduct a State may criminalize" and explaining that rules that allocate decision-making authority between the judge and the jury "are prototypical procedural rules" and noting that they had classified the right-to-a-jury-trial as procedural "in numerous other contexts" citing cases). If *Teague* applies, then *Hurst v. State* is not retroactive at all.

The argument Branch intends to present to the United States Supreme Court in the proposed petition fundamentally makes no sense. If it is federal law, then Branch loses under *Summerlin*; if it is state law, then this Court's decision in *Branch* stands and Branch loses under *Hitchcock*. It must be one or the other, it cannot be both. And either way, the petition will be denied.

Opposing counsel's reliance on *Correll v. State*, No. SC15-147 (Feb. 27, 2015), is misplaced. In *Correll*, this Court entered a stay in a death warrant case pending the United States Supreme Court's decision in *Glossip v. Gross*, 135 S.Ct. 2726 (2015), a case involving the same drug, midazolam, that was then being used in Florida's protocol, because review of that issue had already been granted. This Court granted a stay of Correll's execution on February 17, 2015, because review of *Glossip* had been granted, just a few days before, by the High Court on January 23, 2015. But, here, unlike the situation in *Correll*, the United States Supreme Court has not granted review of the retroactivity of *Hurst v. State*. Review by the High Court of the issue was a certainty in *Correll*, but it is only an extremely remote possibility here.

There are no substantial grounds being raised in the proposed petition for writ of certiorari and therefore, the motion to stay the execution should be denied.

Accordingly, this Court should deny the motion to stay.

CONCLUSION

The State respectfully requests that this Court deny the motion to stay the execution.

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL

/s/ Charmaine Millsaps
CHARMAINE M. MILLSAPS
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0989134
OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL, PL-01
TALLAHASSEE, FL 32399-1050
(850) 414-3300
primary email:
capapp@myfloridalegal.com
secondary email:
charmaine.millsaps@myfloridalegal.com

COUNSEL FOR THE STATE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing STATE'S RESPONSE TO MOTION TO STAY THE EXECUTION has been furnished via the e-portal to via the e-portal to STACY R. BIGGART, Assistant Capital Collateral Regional Counsel-North, 1004 DeSoto Park Drive, Tallahassee, FL, 32301; phone: (850) 487-0922 x114; email: Stacy.Biggart@ccrc-north.org and KATHLEEN PAFFORD, Assistant Capital Collateral Regional Counsel-North, 1004 DeSoto Park Drive, Tallahassee, FL, 32301; phone: (850) 487-0922; email: Kathleen.Pafford@ccrc-north.org this 1st day of February, 2018.

/s/ Charmaine Millsaps
Charmaine M. Millsaps
Attorney for the State of Florida