No. 16a769

IN THE
SUPREME COURT OF THE UNITED STATES

MARK A. CHRISTESON,
Petitioner,

v.

DON ROPER,
Superintendent Potosi Correctional Center,
Respondent.

ON
PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MOTION FOR A STAY OF EXECUTION

This is a Capital Case
Mark A. Christeson is Scheduled to be Executed January 31, 2017 at 6:00 p.m. CST

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January 30, 2017

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To the Honorable Justice Samuel Alito, as Circuit Justice for the United States Court of Appeals for the Eighth Circuit:

Petitioner Mark A. Christeson ("Petitioner") respectfully requests a stay of his execution, presently scheduled for tomorrow, January 31, 2017, after 6:00 p.m. Central Time, pending this Court's disposition of a petition for writ of certiorari, filed today.

PROCEDURAL BACKGROUND

In January of 2015, this Court held that Mr. Christeson's appointed habeas corpus counsel had a conflict of interest, giving rise to a need for substitute counsel. *Christeson v. Roper*, 135 S. Ct. 891, 894 (2015). The conflict arose from original counsel's untenable position of choosing between defending their reputations and defending the interest of their client, and thereby arguing the full extent of their misconduct related to their failure to ensure federal habeas corpus review of Mr. Christeson's case. *Id.* ("Counsel cannot reasonably be expected to make such an argument, which threatens their professional reputation and livelihood.").

Conflicted counsel had failed to meet AEDPA's one-year statute of limitations for filing a petition for writ of habeas corpus, and this Court concluded original counsel could not be expected to argue their own "serious instances of attorney misconduct" related to that failure. *Id.* In light of the "obvious" conflict, the Court summarily reversed the District Court's refusal to appoint substitute counsel. *Id.*

On remand, the Eighth Circuit issued an order directing the District Court to appoint substitute counsel. *Christeson,* No. 14-3389, Entry ID: 4250589 (8th Cir. March 4, 2015) On remand, this Court made clear that, with new counsel, Petitioner should be given a full and fair opportunity to make a claim for equitable tolling and reopening the case. *Christeson*, 135 S. Ct. at 896. The dissent agreed on this point: substitute counsel would be appointed "for purposes of

investigating the facts related to the issue of equitable tolling and presented whatever argument can be mounted in support of a request for that relief." *Id.* at 896 (Alito, J. dissenting).

On March 17, 2015, the district court appointed undersigned counsel, as it was directed to do. (App. 53a). The district court ordered substitute counsel for Petitioner to submit a proposed budget within fourteen days of appointment. (App. 53a). As ordered, counsel submitted an *ex parte* budget that included funds necessary to develop and litigate both counsel's misconduct and their client's own limited capacity to protect his rights. In its remand, this Court noted that Mr. Christeson "appears to have severe cognitive disabilities that lead him to rely entirely on his attorneys, may not have been aware of this dismissal." *Christeson v. Roper*, 135 S. Ct. 891, 892 (2015). Preliminary testing prior to the reopening of the case revealed that Mr. Christeson had an IQ of 74. Thus, client sought funding for further testing and analysis of his significant delays and impairments.

In a public order that revealed the details of the Petitioner's underlying *ex parte* request and, thus, counsel's strategy, the district court denied the request, approving a flat fee constituting 6% of the counsel's request "for the investigation, preparation, filing, and briefing of the Rule 60(b) motion. . . . including any and all attorney/paralegal fees, any and all expert/specialist fees, expenses, and costs." The court represented that he would entertain further funding upon the grant of a hearing. (App. 50a). The court's allotment did not specifically deny the requests for the experts, but also did not make their involvement financially feasible. If counsel chose instead to allocate the amount toward compensation for their time, it would have only provided for less than fifty-five hours[1] at the current rate for capital cases.[2]

[1] Of course, this figure would exclude all costs and expenses.
[2] U.S. Courts, *Defender Services* available at http://www.uscourts.gov/services-forms/defender-services (noting present rate of $183 per hour for counsel in capital cases).

Nonetheless, undersigned counsel marshaled their limited time and resource to prepare Petitioner's Rule 60(b) Motion; conducting interviews with Petitioner and his family, as well as others familiar with his condition at the prison, and his relationship with prior attorneys. Counsel also obtained preliminary reports from three experts, which discussed his cognitive impairments, adaptive functioning, and the behavioral and neurobehavioral impact of a life of grave trauma and sexual abuse. Each expert identified relative red flags, offered a preliminary assessment as to the implications of his limitations on his ability to assert his own rights, and outlined the steps (and funding) necessary to conduct a full evaluation. *Christeson v. Roper*, No. 4:04-cv-08004, Doc. 125-2 at 113-143 (Aug. 28, 2015). Undersigned, on August 28, 2015, filed a brief outlining Mr. Christeson's substantial cognitive limitations, severely traumatic upbringing, as well as the serious misconduct, abandonment, and fraud by federal habeas counsel. *Christeson v. Roper*, No. 4:04-cv-08004, Doc. 125 (Aug. 28, 2015). In addition to the preliminary expert reports, he tendered dozens of witness declarations describing both Mr. Christeson's impairments and life long trauma, as well as his interactions with prior counsel during the relevant time period. *Christeson v. Roper*, No. 4:04-cv-08004, Doc. 126 (Aug. 28, 2015). Mr. Christeson argued that he had made his showing for a hearing, and, to the extent that he had not, it was because the district court's arbitrary funding denial had amounted to the constructive denial of counsel, hobbling counsel's ability to effectively represent their client. *Christeson v. Roper*, No. 4:04-cv-08004, Doc. 125 (Aug. 28, 2015). Counsel renewed their request for a hearing as well as their claim of constructive denial of counsel in their reply to Respondent's Opposition. *Christeson v. Roper*, No. 4:04-cv-08004, Doc. 146 (Jan. 14, 2016).

On March 8, 2016, the district court denied the motion without a hearing. (App. 27a). The court largely relied on the dissent from this Court, finding, without having taken any evidence,

that "original counsel miscalculated the filing deadline," in light of "then-existing case law." (App. 40a). The District Court did not address original counsel's conflict of interest related to defending their own interests, their conduct prior to the filing deadline, including their failure to meet with Petitioner, or Petitioner's substantial impediments to acting to protect his own interests. The district court denied a certificate of appealability. (App. 47a). Petitioner's motion pursuant to Rule 59(e) reiterated the need for a hearing, *Christeson v. Roper*, No. 4:04-cv-08004, Doc. 152 (April. 5, 2016), and was denied on June 13, 2016. *Christeson v. Roper*, No. 4:04-cv-08004, Doc. 155 (June 13, 2016).

Petitioner, noticed his appeal and, with the support of substantial amici, on August 16, 2016, sought a certificate of appealability from the Eighth Circuit. Petitioner was awaiting the Attorney General's Reply when, on October 12, the Missouri Supreme Court, set Petitioner's execution date for January 31. (App. 581a). Petitioner immediately filed in the Missouri Supreme Court a motion asking that they reconsider or, in the alternative, appoint a special master to review evidence of *ex parte* communications between the Attorney General's Office and the Clerk and other personnel of the court. (App. 567a). Counsel had learned that such communication routinely occurred and was viewed as "administrative" by the court. Any such communications would be a gross violation of the Separation of Powers and a breakdown of the adversarial process. This was especially true, counsel argued, as the Attorney General represents the opposing party in the federal litigation. In its opposition, Respondent *was* silent as to these allegations. (App. 565a). On January 18, 2017, two hours after the Eighth Circuit remanded the case to the district court, without hearing evidence – or even a denial from Respondent – the Missouri Supreme Court issued an order denying any ex parte contact between the Office of the Attorney General and that court. (App. 540a-41a).

On December 13, 2016, the Eighth Circuit granted Petitioner's application for a certificate of appealability on three questions, and recognized his appeal as a right as to whether he was "entitled to an evidentiary hearing to develop the record." (App. 24a). The Circuit set a briefing schedule, directing Petitioner to file his initial brief on or before January 26. (App. 25a). The State moved to expedite the proceedings, noting that the schedule did not comport with the Missouri Supreme Court's execution warrant, issued months into the pendency of the case in the court of appeals. *Christeson v. Roper*, No. 16-2730, Entry ID: 4480659 (8th Cir. Dec. 16, 2016). Over Petitioner's objection, *Christeson v. Roper*, No. 16-2730, Entry ID: 4480916 (8th Cir. Dec. 19, 2016), on December 22, the court granted the motion ordering Petitioner's brief due in five business days, on January 3, 2017. (App. 23a). The following day, Petitioner sought rehearing en banc, and was joined by representatives for the amici groups, including the President of the American Bar Association, who wrote letters to the court of appeals seeking reconsideration of the decision to expedite this briefing. Over a dissent, the en banc court upheld the expedited briefing schedule. *Christeson v. Roper*, No. 16-2730, Entry ID: 4485853 (8th Cir. Jan. 3, 2017). There would be no opportunity for amici participation or oral argument.

In compliance with the truncated schedule, Petitioner filed his opening brief on January 3. After Respondent had submitted its brief, and only two days before Petitioner's Reply Brief was due, the Eighth Circuit interrupted the briefing schedule with an order remanding "the case to the district court with directions to convene promptly a limited evidentiary hearing on the question of [original habeas counsel's] abandonment." (App. 21a). *Two hours later*, the District Court set a hearing scheduled for forty hours from the entry of the order. (App. 17a). In order to adequately prepare for the hearing, Petitioner filed immediately motions to reschedule the hearing and for leave to conduct discovery related to original counsel's misconduct. Beyond the

need to invoke the court's discovery powers and the need to undertake basic preparations for the hearing, counsel noted that one of its key witnesses, a witness relied upon by both this Court (*Christeson*, 135 S. Ct. at 892) and the Eighth Circuit (App. 21a), was unavailable on such short notice. (App. 516a). Both motions were denied. (App. 16a-17a).

The denial of discovery and adequate time to prepare, effectively precluded counsel from presenting any evidence. The district court noted, however, that prior counsel were on Respondent's witness list and Petitioner would have the opportunity to cross-examine them. That is not, however, how the hearing progressed.

On direct, Respondent lead prior conflicted counsel through their district court pleadings in an effort to establish their basis for their calculation of Petitioner's statute of limitations, testimony that largely mirrored their filings preceding this Court's 2015 opinion and which this Court found to be "directly and concededly contrary to their client's interest, and manifestly served their own professional and reputational interests." (App. 201a-05a).

On cross-examination, the district court placed substantial constraints on counsel's ability to undermine the validity of conflicted counsel's testimony. The district court foreclosed inquiry into conflicted counsel's citation in their motion for appointment to *Snow v. Ault*, a case that had they relied on (as their citation suggested they must have), would have led to an accurate calculation of the statue of limitations. (App. 176a). Upon objection by the Respondent, the district court ruled that inquiry into *Snow* was "going beyond the scope of" the hearing because it had "nothing to do with abandonment." (App. 177a). Undersigned counsel protested that questioning based on *Snow* was well within the scope because "[t]he question is their calculation" and argued that because this "Court has already spoken to the reliability of [prior counsel's] averments with regard to post hoc reasoning of how they calculated. . .it's important

for us to look at the authority that's in the first moving document in this record that points clearly to the prevailing 8th Circuit law that unambiguously answers this question." *Id*. Nonetheless, the district court twice sustained Respondent's objection, admonishing counsel, "I don't care what you what you think it is. You don't render the opinions." (App. 177a).

Undersigned counsel were also foreclosed from asking counsel questions about how they "conducted his practice in this case." (App. 189a). This district court unequivocally held that such inquiries were off limits as irrelevant (*id*.), even though counsel had testified implausibly that they took no notes, conducted no electronic research, sent no e-mails, conferred with no person other than co-counsel, kept no time, did not track billing, and drafted no memos, outlines, or digests in the period leading up to their missed deadline. (App. 157a, 227a, 243a-44a, 247a). Conflicted counsel admitted to conducting no "investigation" beyond obtaining and reviewing the files from prior counsel. (App. 249a). Current counsel were also precluded from cross-examining conflicted counsel about their absence of billing. Prior counsel had averred that they "never" billed in the "vast majority" of capital appointed cases. (App. 160a). Post-hearing investigation by current counsel conclusively demonstrates that counsel each did bill in at least three capital cases. Inexplicably, counsel submitted a budget requesting fifty thousand dollars allotted to attorney time they supposedly had no intention of billing against. Yet the district court deemed these areas irrelevant to the hearing: "It is not [relevant]. It is not. It is not. Listen to me. Go to your next question. Quit challenging me." (App. 134a).

At the close of the January 20th hearing, current counsel moved for expedited production of a transcript, a motion the district Court denied. Despite the fact that Mr. Christeson brought his litigation *before* the State issued its warrant, the court nonetheless accused him of delay: "I don't need this. This is just dilatory conduct on your part trying to stay the execution. I'm not

going to do it. That's the bottom line. You have no basis for it." (App. 276a); *see also* (App. 275a) ("No, sir. You are getting nothing. I'm ruling today."); (*Id.*) ("I'm not delaying it. I don't need a transcript. You don't need a transcript.").[3] Approximately forty-five minutes after the close of the evidence as the hearing, the District Court entered its ruling finding that conflicted counsel had not abandoned Petitioner.

On January 24, pursuant to the Eighth Circuit's order, counsel filed a Combined Supplement and Reply Brief, outlining the significant evidentiary and procedural issues with the hearing. *Christeson,* No. 16-2730, Entry ID: 4493728 (8th Cir. Jan. 24, 2017). It also relied on an article from *Missouri Lawyer's Weekly* and a sworn statement from an attorney present for the proceedings, both of which noted that the district Judge grew "increasingly agitated" throughout the hearing, and engaged in "shouting" and "yelling at the defense." (App. 96a-98a). He "telegraphed his intentions clearly." (App. 99a). Counsel requested that the Eighth Circuit remand for a full and fair hearing to a different judge, noting the district Judge's history of partiality. *See, e.g.*, *Sentis Group, Inc. v. Shell Oil Co.*, 559 F.3d 888, 904 (8th Cir. 2009) (same judge's behavior "reveal[ed] such a high degree of favoritism or antagonism as to make fair judgment impossible."). Counsel further supported their briefing reports from ethics expert Lawrence Fox and Regional Habeas Counsel for the 8th Circuit with the Administrative Office of the U.S. Courts, Sean O'Brien,[4] both of whom would have testified for Petitioner if they had

[3] Concerned that they would not get the transcript prior to the execution date, counsel moved in the Eighth Circuit for the transcript, before the court reconvened to make his findings. (*Christeson,* No. 16-2730, Doc. 4492403). The Eighth Circuit granted counsel's request for expedited production of the transcript. *Id*. Doc. 4492435.

[4] In their initial budget, prior counsel included a request for funds for 60 hours of witness interviews, which included "prior counsel, clients and family, expert witnesses, resource counsel and co-counsel." (App. 117a). Professor O'Brien "was the 'resource' counsel they requested funds to consult with." (App. 72a). However, he "never heard from either of them in connection with this case." *Id*.

adequate notice before the limited hearing. Both experts found prior counsel's averments to be implausible and observed the complete absence of any documentation substantiating the work of prior counsel to be not only probative on the narrow question of abandonment, but indicative of prior counsel's professional conduct in Mr. Christeson's case. (App. 56a-68a, 69a-95a).

Three days later, on January 27, the Eighth Circuit affirmed in full. The opinion made not one reference to Petitioner's post-hearing evidence. It held that Petitioner had not established the "extraordinary circumstances" warranting tolling of the statute of limitations or reopening the case. (App. 5a). In so holding, the court focused exclusively on whether conflicted counsel's conduct amounted to abandonment, equating abandonment, and only abandonment, with the "serious instances of attorney misconduct." *Christeson*, 135 S. Ct. at 894 (quoting *Holland v. Florida*, 560 U.S. 631, 651-52 (2010)). The circuit court referenced the district court's findings from its remand "for a limited evidentiary hearing on the issue of abandonment." (App. 3a). Thus, the court affirmed because, in its view, based solely upon the still untested averments of prior counsel, Petitioner had not been abandoned.[5]

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[5] The majority's opinion is also rife with factual errors. Of particular note, it badly mischaracterized the limited inquiry into *Snow v. Ault*, finding that the district court had precluded only the admission of the case as evidence, and not questioning about the case. App. 5a ("Christeson did not propound any question about *Snow* to which an objection was sustained, so he has not preserved any claim of error about limitation of cross-examination on this subject."). The record, however, does not bear out this interpretation. Conflicted counsel read the following from his appointment motion: "In *Snow v. Ault*, the 8th Circuit ruled that under the AEDPA, the time for filing my habeas petition will commence running when rehearing is ruled on." (App. 176a). Petitioner asked whether that was an "accurate statement of the law at the time" and the witness replied that he had not "looked at this case in a long time." *Id*. *Before* Petitioner could present the witness with a copy of the case, Respondent objected, arguing that "it has nothing to do with abandonment. I think he's going to be asked to read a case and then give his legal opinion on what it means." *Id*. Petitioner responded that "the question is their calculation" and then explained the importance of the need to probe counsel's averments. (App. 177a) (emphasis added). Nevertheless, the court *twice* sustained the objection and instructed counsel that he was "going beyond the purpose of the hearing." (App. 178a). The district court

Judge Murphy concurred, proceeding from the same premise of abandonment, and only abandonment constituting "serious instances of attorney misconduct." The concurrence noted conflicted counsel's supposed miscalculation was "unreasonable" and "crossed the line from negligent to deficient representation." (App. 9a). However, concluding that representation did not constitute "abandonment," conducted no further inquiry. (App. 9a).

ARGUMENT

This Court should exercise its supervisory powers to grant review, reverse the ruling on attorney misconduct and extraordinary circumstances, and order the case assigned to a new district judge so that Petitioner can be afforded, for the first time, discovery and a full and fair opportunity to make his case that he satisfies the capacity for diligence inquiry in this case, *Christeson*, 135 S. Ct. at 892, to warrant tolling the statue of limitations and reopening the case. Such a remand must concern the second element of the equitable tolling inquiry, which regards Petitioner's capacity for diligence because, simply, "the district court did not gather the evidence needed for decision." *Schmid v. McCauley*, 825 F.3d 348, 350 (7th Cir. 2016) (applying *Christeson*) (Easterbrook, J., writing for Posner and Rovner, J.J.). In the alternative, this Court should grant review to resolve a substantial circuit split over whether "serious instances of attorney misconduct" beyond that of abandonment can amount to an extraordinary circumstance in support of tolling or reopening a case. On either issue, Petitioner is likely to prevail.

A stay of execution is warranted where there is a "presence of substantial grounds upon which relief might be granted." *See Barefoot v. Estelle*, 463 U.S. 880, 895 (1983). To decide whether a stay is warranted, the federal courts consider the petitioner's likelihood of success on the merits, the relative harm to the parties, and the extent to which the prisoner has delayed his or

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was very clearly precluding counsel from questioning the witness about this case and prior counsel's "calculation," and not, as the appellate court recast it, introducing an exhibit.

her claims. *See Hill v. McDonough*, 547 U.S. 584 (2006); *Nelson v. Campbell*, 541 U.S. 637, 649-50 (2004). This standard requires a petitioner in this Court to show a reasonable probability that four members of the Court would consider the underlying case worthy of the grant of certiorari, that there is a significant likelihood of reversal of the lower court's decision, and a likelihood of irreparable harm absent a grant of certiorari. *See Barefoot*, 463 U.S. at 895. In light of the stunningly biased behavior of the district court judge and the serious misconduct already present in the record, this Court should grant Petitioner's stay of execution while it resolves his case.

I. THERE IS A REASONABLE PROBABILITY OF BOTH CERTIORARI BEING GRANTED AND SUCCESS ON THE MERITS

A. This Court's Supervisory Powers Are Needed To Ensure Compliance With Its Orders In This Very Case

This Court ruled that Mr. Christeson should be given an opportunity to "investgat[e] the facts related to the issue of equitable tolling and present[] whatever argument can be mounted for that relief. *Christeson*, 135 S. Ct. at 896 (Alito, J. dissenting). From the time of remand to present, the lower courts have obstructed petitioner from making his case. From the forty hours to prepare for an evidentiary hearing to the absurd rulings in advance of (blocking discovery, entering a non-budget) and at that hearing (blocking meaningful cross-examination), the lower courts have been hostile to this Court's authority in this case.

At every step since the Court's remand, the courts below have prevented Mr. Christeson from fairly making his case. The "Court has a special interest in ensuring that courts on remand follow the letter and spirit of our mandates." *Planned Parenthood of Southeastern Pa. v. Casey*, 510 U.S. 1309, 1311 (1994). The proceedings have simply not been consistent with the Court's opinion and have frustrated its remand fundamentally. For that reason, this Court should exercise

its supervisory authority and remand the case for reassignment to a different district court judge. In the alternative, it should exercise the same power to allow Petitioner full appellate review at the Eighth Circuit. His review has been greatly truncated by the break-neck speed of the briefing and utter lack of argument before that court. Despite the complexity of the issues in the case and the significance of the resolution of those issues – a man's life – the courts below allowed him less than two days to prepare for an evidentiary hearing and only days to file a brief after that hearing. The process to date cannot stand.

B. The Eighth Circuit Limited Its "Extraordinary Circumstances" Review To Abandonment, Conflicting With This Court And Deepening A Circuit Split

The process to date has also produced a flawed resolution of the issues, that is at odds with the holdings of this Court and several other circuit courts. In *Holland v. Florida*, 560 U.S. 631 (2010) permits equitable tolling of AEDPA's statute of limitations where a petitioner demonstrates "serious instances of attorney misconduct" that led to having missed the deadline in the first instance. In *Maples v. Thomas*, 132 S. Ct. 912 (2012), the Court held that two attorneys who left their firm and ceased work on the case abandoned their client, warranting tolling the statute of limitations: "Maples was disarmed by extraordinary circumstances quite beyond his control. . . . he was trapped when counsel of record abandoned him without a word of warning." *Id.* at 927. To conclude that abandonment constituted extraordinary circumstances, the Court reasoned that where an attorney abandons her client, she "ceased acting as the client's agent . . . [and principles of agency] no longer support charging the client with the lawyer's mistakes." *Id.* at 930.

In concluding that "serious instances of attorney misconduct" is limited to "abandonment," the Eighth Circuit joined several other circuits that have unduly limited the equitable inquiry at the heart of this Court's tolling jurisprudence. *See Thomas v. Atty. Gen.,*

Florida, 795 F.3d 1286, 1293 (11th Cir. 2015); *Mack v. Falk*, 509 Fed.Appx. 756, 759 (10th Cir. 2013) (identifying abandonment under *Maples* as providing the extraordinary circumstances for tolling); *United States v. Wheaton*, 826 F.3d 843, 852 (5th Cir. 2016) (finding no abandonment and thus no extraordinary circumstances for tolling). In doing so, it deepened a circuit split. *Luna v. Kernan*, 784 F.3d 640, 648 (9th Cir. 2015) (recognizing split of authority and concluding a range of attorney misconduct may qualify); *Martinez v. Superintendent E. Corr. Facility*, 806 F.3d 27, 29-31 (2d Cir. 2015) (holding that "attorney negligence may constitute an extraordinary circumstance when it is so egregious as to amount to an effective abandonment of the attorney-client relationship"); *Ross v. Varano*, 712 F.3d 784, 800 (3d Cir. 2013) (recognizing "an attorney's malfeasance" may warrant tolling); *Whiteside v. United States*, 775 F.3d 180, 184 (4th Cir. 2014) (characterizing *Holland* as a case of extraordinary negligence); *Robertson v. Simpson*, 624 F.3d 781, 783-84 (6th Cir. 2010) (finding, in pre-*Maples* case, that attorney drug abuse may provide extraordinary circumstances for tolling); *Schmid v. McCauley*, 825 F.3d 348, 350 (7th Cir. 2016) (applying *Christeson*, holding that abandonment "is one potentially extenuating circumstance" supplying requisite extraordinary circumstances).

This is a split with life and death consequences for Petitioner and other federal habeas petitioners closed out from all federal merits review because of their attorney's misconduct. In light of the clear guidance from this Court, both in *Christeson* and *Holland* that serious instances of attorney misconduct includes, but is not limited to, abandonment, Petitioner is likely to prevail on this question upon this Court's grant of review.

II. THE RELATIVE HARM TO THE PARTIES WEIGHS HEAVILY IN PETITIONER'S FAVOR.

There is no question that Petitioner's death, which will result absent a stay, necessarily constitutes irreparable harm. "The third requirement—that irreparable harm will result if a stay is

not granted—is necessarily present in capital cases." *See Wainwright v. Booker*, 473 U.S. 935, 935 n.1 (1985) (Powell, J. concurring) ("irreparable harm is necessarily present in capital cases").

Though a stay would result in some delay, such a delay will not substantially injure the State, and the threatened injury to Appellant outweighs any such potential damage to Appellee. To permit Petitioner's execution to go forward despite the apparent gamesmanship of the State in seeking an execution date in the midst of the appeal, and the District Court's grossly one-sided hearing, would be particularly troublesome. In light of the State's interest that "justice shall be done," a stay to permit this Court's review and a full and fair hearing, *Berger v. United States*, 295 U.S. 78, 88 (1935), the State's overall interests should be promoted, not disserved, by staying Petitioner's execution. Even if the State professes a profound interest in finality or retribution, those needs surely pale in comparison to the stakes at hand for Petitioner.

III. PETITIONER HAS NOT DELAYED

Within one month of substitute counsel's involvement in the case, they moved to substitute and, upon appointment, made a timely motion to Reopen. During this Court's original review of the case, it found that Petitioner's conduct did not amount to undue delay. *Christeson*, 135 S. Ct. at 895. He has since only acted with diligence, filing his Motion to Reopen in the time previously noted by this Court, and the timing of this Motion is no exception. Petitioner has not delayed.

CONCLUSION

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

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify a true and correct copy of the foregoing was forwarded via electronic mail and U.S. First Class Mail, postage prepaid, to the following address on this the 30th day of January 2017:

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