IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

JOHN BROWN **PETITIONER**
ADC No. 099474

V. **CASE NO: 5:16-CV-00381-BRW-JVV**

WENDY KELLEY, Director,
Arkansas Department of Correction **RESPONDENT**

RESPONDENT'S BRIEF IN SUPPORT OF MOTION FOR A STAY PENDING REVIEW BY THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

On August 21, 2018, the Court entered an order granting Brown's petition for writ of habeas corpus and gave Respondent Kelley thirty days to either release Brown or bring new criminal proceedings against him. Document # 57. Respondent submits this brief in support of her motion for a stay of that order pending resolution of her appeal to the United States Court of Appeals for the Eighth Circuit. In *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987), the United States Supreme Court held that the federal courts should consider the following factors in determining whether to grant a stay pending an appeal of a district court's order granting habeas relief:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Even in the absence of a strong likelihood of success, a stay is warranted when the applicant can "demonstrate a substantial case on the merits[ ]" when factors three and four favor a stay. *Id.*, at 778. Because "the traditional stay factors contemplate individualized judgments in each case, the formula cannot be reduced to a set of rigid rules." *Id.*, at 777. Under these standards, a stay

pending Respondent's appeal should be granted.

1. Respondent has a strong likelihood of success on the merits

The Court held that Brown is entitled to vacatur of his murder and aggravated-robbery convictions. Brown's state-court judgment was handed down on January 10, 1994. Following his state-court direct appeal, Brown took no action until filing his federal habeas petition on December 21, 2016, over 20 years from the AEDPA's effective date.

Respondent Kelley respectfully disagrees with the Court's holdings (1) that the untimeliness of Brown's petition is excused based on either his or his attorneys' purportedly reasonable diligence after almost 22 years of inactivity, and (2) that Brown has sufficiently demonstrated actual innocence based on the latter-day, untrustworthy recantation of his codefendant, Reginald Early, who has, at different times, claimed to be both innocent and guilty of murdering Myrtle Holmes. Respondent Kelley also respectfully submits that Brown failed to demonstrate his entitlement to a hearing under AEDPA and habeas corpus jurisprudence. Finally, Respondent Kelley respectfully submits that she has a strong likelihood of succeeding in an appeal challenging the Court's ruling on *de novo* review.

While the Court's Order finds that neither Brown nor his counsel, using due diligence, could have discovered the factual predicates for the majority of his *Brady*, *Giglio*, *Youngblood*, *Napue*, and actual-innocence claims, until the federal-habeas evidentiary hearing of his codefendant, Tina Jimerson, (*Jimerson v. Kelley*, 5:15-cv-208-BSM-JTK (E.D. Ark.)), this leaves unanswered, and unproven, what, if anything at all, Brown did to exercise due diligence in the two decades after his conviction became final and why diligence could not have uncovered the factual predicates for his claims during that time.

Regarding Brown's additional defaults, "a state prisoner who fails to satisfy state

procedural requirements forfeits his right to present his federal claim through a federal habeas corpus petition, unless he can meet strict cause and prejudice or actual innocence standards." *Clemons v. Luebbers*, 381 F.3d 744, 750 (8th Cir. 2004). "'[T]he existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded ... efforts to comply with the State's procedural rule.'" *Greer v. Minnesota*, 493 F.3d 952, 957 (8th Cir. 2007) (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)). There is no "'exhaustive catalog of [the] objective impediments,'" nor have "the precise contours of the cause requirement been clearly defined." *Ivy v. Caspari*, 173 F.3d 1136, 1140 (8th Cir. 1999) (quoting *Murray*, 477 U.S. at 488). "At a minimum, however, [Petitioner] must show that 'something external to [him], something that cannot be fairly attributed to him,' caused the procedural default." *Id*. (quoting *Coleman v. Thompson*, 501 U.S. 722, 753 (1991)). Contrary to this Court's holding, DN 57, at 7, a petitioner's *pro se* status, lack of education, below-average intelligence, or any unfamiliarity with the intricacies of the law or legal procedure are not sufficiently external to constitute cause excusing a procedural default. *Sherron v. Norris*, 69 F.3d 285, 289 (8th Cir. 1995); *Cornman v. Armontrout*, 959 F.2d 727, 729 (8th Cir. 1992); *Smittie v. Lockhart*, 843 F.2d 295, 298 (8th Cir. 1988).

With regard to Brown's actual-innocence, fundamental-miscarriage-of-justice claim, this exception "is grounded in the 'equitable discretion' of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons." *Herrera v. Collins*, 506 U.S. 390, 404 (1993). It "seeks to balance the societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case." *Schlup v. Delo*, 513 U.S. 298, 324 (1995). The Supreme Court has applied it "to a severely confined category: cases in which new evidence shows 'it is more likely than not

that no reasonable juror would have convicted [the petitioner].'" *McQuiggin v. Perkins*, 569 U.S. 383, 395 (2013) (alteration in original) (quoting *Schlup*, 513 U.S. at 329). "Put differently, the exception is only available when a petition presents 'evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error.'" *Coleman v. Greene*, 845 F.3d 73, 76 (3d Cir. 2017), citing *McQuiggin*, 569 U.S. at 401, (quoting *Schlup*, 513 U.S. at 316). In *Schlup*, the Supreme Court emphasized that "[w]ithout any new evidence of innocence, even the existence of a concededly meritorious constitutional violation is not in itself sufficient to establish a miscarriage of justice that would allow a habeas court to reach the merits of a barred claim." 513 U.S. at 316. While a petitioner alleging actual innocence need not prove diligence in order to assert a claim of actual innocence, "[u]nexplained delay in presenting new evidence bears on the determination whether the petitioner has made the requisite showing." *Id*. at 1935. In this case, the timing submission and the likely credibility of petitioner's affiant bears on the probable reliability of his evidence of actual innocence. *Schlup*, 513 U.S. at 332 ("A court may consider how the timing of the submission and the likely credibility of [a petitioner's] affiants bear on the probable reliability of ... evidence [of actual innocence.]").

Finally, the proof presented in support of Brown's actual-innocence gateway exception, has been rejected by two judges that heard the testimony in person and made findings of fact as to the credibility of Reginald Early, notwithstanding this Court's apparent acceptance of the facts, set out by both courts, while, at the same time, rejecting the conclusion drawn from those facts.[1] *See United States v. Robinson*, No. 1:07–CR–1, 2007 WL 2138635, at *1 (E.D.Tenn. July

[1] "Mr. Brown's newly discovered evidence – Reginald Early's confession – is simply not reliable." DN 45, at 23 (Report and Recommendation) (emphasis in original).

23, 2007) (citations omitted)("Credibility determinations of the magistrate judge who personally listened to the testimony of a witness should be accepted by a district judge unless in his de novo review of the record he finds a reason to question the magistrate judge's assessment.") Thus, Respondent Kelley has a strong likelihood of success, or, at the very least, a substantial case on the merits of her appeal. A stay should be granted pending her appeal.

2. Respondent will be irreparably injured absent a stay pending appeal

Respondent is appealing, as of right, this Court's order and judgment granting habeas relief, and that appeal, if successful, will obviate the need for the release or retrial contemplated by the court's order. The order, however, fixed an unusually short period of time – one that overlaps precisely with the time Respondent has under court rules for evaluating the matter of an appeal and filing a notice of appeal – to release Brown or else institute proceedings to retry him. Consequently, absent a stay of the Court's judgment, the federal appellate process will barely have even begun before Respondent would be forced to comply with the Court's judgment directing her to release him or institute new proceedings. It, therefore, is evident that the appeal in this matter will not be completed before the State of Arkansas would be required to release or institute a new trial for petitioner. Forcing the State to commence the retrial of Brown will require the State to devote valuable resources and time to the retrial, to say nothing of any potentially "mooting" effect that the retrial could have on Respondent's appeal. The State should not be required to choose between releasing Brown from a conviction and sentence which Respondent reasonably believes will be redeemed on appeal or undertaking the admittedly

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"The "new evidence" relied upon here does not affirmatively demonstrate Jimerson's innocence. Moreover, the timing of Early's confession is questionable." *Jimerson v. Kelley*, No 5:15-cv-208-BSM, DN 61, at 44 (Report and Recommendation).

"Credibility determinations of the magistrate judge who personally listened to the testimony of a witness should be accepted by a district judge unless in his de novo review of the record he finds a reason to question the magistrate judge's assessment." *United States v. Robinson*, No. 1:07–CR–1, 2007 WL 2138635, at *1 (E.D.Tenn. July 23, 2007) (citations omitted).

onerous measures required by this Court's order while Respondent's good-faith appeal of that order remains pending. Accordingly, because the State will be irreparably injured absent a stay, the second factor in the analysis favors Respondent.

3. Brown will not be substantially injured if a stay pending appeal is granted

Brown's lengthy sentence for the violent crimes he committed counsels in favor of a stay. *Cf. Braunskill*, 481 U.S. at 777. As a convicted murderer in a separate case to which he pleaded guilty in Nevada and his subsequent extradition from Nevada back to Arkansas from whence he fled after participating in the murder of Myrtle Holmes, Brown, as both a convicted murderer and flight risk, will remain in custody pending any retrial of this matter. *See* Arkansas Rule of Criminal Procedure 8.5. Brown thus will not be substantially injured by the entry of a stay, and this factor weighs in favor of granting one.

4. The public interest favors a stay pending appeal

A jury found Brown guilty of murder and aggravated robbery in 1992, and his conviction has long been final. The public has a strong interest in permitting Respondent's appeal in this case to be resolved before commencing new criminal proceedings in state court for Brown that may prove to be unwarranted if Respondent prevails on her appeal to the Eighth Circuit. The public's interest weighs in favor of the granting of a stay.

CONCLUSION

For the reasons set forth above, respondent respectfully requests that the Court issue a stay of its August 21, 2018, order and judgment directing Respondent Kelley to release Brown or institute new criminal proceedings against him, and to do so within 30 days of entry of the order—that is, by September 20, 2018. Respondent further requests that the requested stay of the Court's order remain in effect through the duration of Respondent's appeal to the United States

Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Kent G. Holt, hereby certify that on August 29, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which shall send notification of its filing to counsel for petitioner, Tricia J. Bushnell, Rachel K. Wester, and Erin Cassinelli, who are CM/ECF participants.

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