A07____
No. 07-10988

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2007

KEVIN GREEN,
Petitioner,

v.

GENE M. JOHNSON, DIRECTOR
VIRGINIA DEPARTMENT OF CORRECTIONS,
Respondent.

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

CAPITAL CASE

IMMINENT EXECUTION SCHEDULED
May 27, 2008 at 9:00 p.m.

TO: THE HONORABLE JOHN G. ROBERTS, Jr.
CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES:

Kevin Green, through his attorneys, respectfully requests that this Court stay his execution, currently scheduled to be carried on by the Commonwealth of Virginia on May 27, 2008. October 17, 2007. This application is brought under authority of Supreme Court Rule 23 and 28 U.S.C. §§1651 and 2251. Green very recently filed a petition for a writ of certiorari, *Green v. Johnson*, 07-10988, and he seeks a stay pending this Court's judgment or its disposition of that petition.

Green is concluding his first federal habeas corpus proceedings. The district court denied relief, but it *sua sponte* issued a certificate of appealability on two issues. One

issue was whether Green is mentally retarded, which the lower court considered a "close and difficult" question of fact. The second issue was whether Green's trial attorneys rendered ineffective assistance when they appealed his capital murder conviction but failed appeal the convictions for the noncapital offenses that arose from the same criminal transaction and were adjudicated at the same trial. Green's direct appeal was successful on grounds that would have vacated all of his convictions if they had been appealed. As a result of counsels' error, Green's second trial – limited to the charge of capital murder – was substantially prejudiced by the retrial jurors' knowledge that he already had been convicted of the underlying and associated noncapital offenses and already was serving a sentence of life without parole for one of those crimes.

The district court did not reach the merits of the second issue, concluding that it was time-barred under 28 U.S.C. § 2244(d)(1). The Fourth Circuit found no error in this determination, and it further upheld the district court's determination that Green is not mentally retarded. After the court of appeals' judgment became final, the state trial court issued an expedited writ for Green to be executed on May 27, 2008. Ex. A. Green applied to the Fourth Circuit for a stay of execution, which that court denied. Ex. B.

Statement of the Case

At a single trial, Green was convicted of robbery, capital murder during commission of that robbery, and other related noncapital offenses. The jury recommended, and the court imposed, sentences of death for murder, life imprisonment without parole for robbery, and terms of years for the other offenses. Green's lawyers appealed the capital murder conviction but, for no strategic reason and without informing Green, they did not file a separate notice of appeal on any of the noncapital convictions –

a step that is required by a quirk of Virginia law. The appeal was successful, in part because the trial court had seated a juror who read pretrial newspaper articles and had formed a firm opinion that Green was guilty. Because counsel had appealed only the capital murder conviction, the reversal and remand was limited to that offense. At the retrial, the jurors learned in the guilt phase that Green already had been convicted of the underlying robbery, and they found him guilty of murder during the commission of that robbery. In the penalty phase, they learned that Green already had been sentenced to life without parole for the robbery, and they sentenced him to death for the murder.

In state habeas proceedings, Green challenged the noncapital judgments on the Sixth Amendment ground that counsels' failure to file the notice of appeal deprived him of a new trial on those charges. He also challenged the capital murder conviction on the Sixth Amendment ground that counsels' failure to file the notice of appeal deprived him of a fair retrial. Pet. App. 94a-95a.[1] The retrial jurors' knowledge that Green had been convicted of robbery may have tainted their decision that he was guilty of murder during the commission of that robbery; and their knowledge that Green already had been sentenced to life without parole for the robbery gave them no option but to sentence him to death if they did not want to give him a "free pass" on punishment for the murder. As a remedy for his challenge to the constitutionality of the capital murder conviction, Green asked the court to "vacate the conviction for capital murder." Pet. App. 96a.

The Respondent moved to dismiss Green's petition. He argued in a footnote that Green's challenge to the noncapital convictions was time-barred under the state statute of limitations for noncapital convictions. With respect to Green's challenge to the capital

[1] "Pet. App." refers to the appendix to Green's petition for a writ of certiorari.

murder judgment, he attempted to defend counsels' performance on the merits. Pet. App. 102a-103a.

The Virginia Supreme Court inexplicably dismissed Green's challenges to both the capital and noncapital judgments as time-barred, using the state statute of limitations that exclusively governs *noncapital* judgments. Pet. App. 102a-106a. It did not find any of Green's other challenges to the capital murder judgment to be untimely.

Green's federal habeas petition again challenged both the capital and noncapital judgments based on trial counsels' unreasonable failure to file the notice of appeal. Pet. App. 118a-123a, 132a. The Respondent acknowledged that Green was challenging, in part, "his second trial," Pet. App. 134a, and he responded to this challenge on the merits, at least as to the effect of counsels' deficient performance on the guilt phase of the retrial, Pet. App. 139a. The magistrate judge and district court agreed that Green's allegations were not procedurally barred because, under the unusual circumstances of this case, enforcement of the state's statute of limitations did not rest on adequate state law grounds. Pet. App. 44a-46a, 27a. They also agreed, in the alternative, that there was cause for any default and that Green was prejudiced. Pet. App. 46a-47a, 271-28a.

The magistrate judge and district court also acknowledged that Green's federal petition as a whole was timely and entitled to statutory tolling during the pendency of state postconviction proceedings. They concluded, however, that the notice-of-appeal allegations within the petition failed to satisfy the federal statute of limitations. First, they decided that Green was not entitled to statutory tolling under 28 U.S.C. § 2244(d)(2) for the claims relating to the notice of appeal. Although Green's state application as a whole had met all the conditions to filing, they held that the notice-of-appeal allegations

were "not properly filed" because Green failed to comply with the state statute of limitations – the same statute the federal courts had just found to be inadequate for purposes of overcoming procedural default. Pet. App. 48a-49, 28a-29a. Second, even if Green qualified for statutory tolling, they concluded that more than one year elapsed before Green filed these claims in his federal petition. In making this computation, the magistrate judge and district court did not start the limitations period on February 23, 2004, when Green's capital murder judgment became final, as 28 U.S.C. § 2244(d)(1)(A) requires. Instead, they applied 28 U.S.C. § 2244(d)(1)(B) and started the limitations period on the *earlier* date of June 26, 2003. Pet. App. 47a-51a, 28a. Even if the earlier date might have been appropriate for starting the clock on Green's parallel challenge to the *noncapital* judgments, which had become final at a much earlier date, it was Green's position that the starting date for challenging the constitutionality of the *capital* judgment was the later date when the *capital* judgment became final under § 2244(d)(1)(A). The district court denied Green's alternate request for equitable tolling.

In his primary brief in the Fourth Circuit, under the heading "Section 2244(d)(1)(A)," Green again argued that he "has consistently asserted that this claim, in part, challenges his conviction and sentence for capital murder. The triggering event . . . was February 23, 2004, when his conviction for capital murder became final."[2] Pet. CA4 Br. at 66. Green not only appealed the district court's failure to start the clock on the date

[2] Green's appellate brief argued, in the alternative, other possible starting dates for the statute of limitations. Some of these alternatives were presented because Green also was challenging the constitutionality of the noncapital convictions, which were on a different timeframe. In any event, each alternative would have produced either a February 23 starting date for the statute of limitations or another date that still would have resulted in the claims being timely. The simplest and most straightforward of these arguments, however, was the one predicated on § 2244(d)(1)(A).

his capital murder judgment became final (which would have made his claim timely if he also met the requirements for statutory tolling), but also appealed the district court's rejection of his request for equitable tolling.

With respect to statutory tolling, Green argued on appeal that the determination of whether a state "application" is properly filed cannot be made on a claim-by-claim basis. *See Artuz v. Bennett*, 531 U.S. 4, 20 (2000) (cautioning against eliding difference between applications and claims, and observing that § 2244(d)(2) "does not contain the peculiar suggestion that a single application can be both "properly filed" and not "properly filed"). Pet CA4 Br. at 58-61. Green further argued that if a state procedural rule does not rest on adequate state law grounds, it cannot be a valid condition to filing. Pet. CA4 Br. at 61-62.

The Fourth Circuit issued a published opinion that did not use the § 2244(d)(1)(A) starting date for the statute of limitations for the challenge to Green's capital murder judgment, but instead used the earlier date based on § 2244(d)(1)(B). It rejected equitable tolling and expressed no view on whether Green would qualify for statutory tolling. Pet. App. 17a-20a. The court of appeals denied Green's timely petition for rehearing or rehearing en banc was denied, and the state promptly issued an order setting Green's execution for May 27, 2008. Green moved the Fourth Circuit for a stay of execution, which it denied.

Although Green pursued challenges to both the capital and noncapital judgments in all prior pleadings, *his petition for a writ of certiorari will address only his challenge to the constitutionality of the capital murder judgment*.

Application of the Barefoot Standard

Because this is Green's first federal habeas petition, the merits of his application for a stay are governed by the criteria in *Barefoot v. Estelle*, 463 U.S. 880 (1983). Barefoot requires an applicant to show (i) a reasonable probability that four Members of the Supreme Court will consider the issues raised in the petition sufficiently meritorious for a grant of certiorari, (ii) a significant possibility that the Supreme Court will reverse the decision below, and (iii) that irreparable harm will occur if the execution is not stayed. *Id*. at 895.

Green's petition for a writ of certiorari presents the following closely interconnected questions:

1. Did the Fourth Circuit commit egregious error requiring summary correction when it failed to start the federal limitations period on the date when Green's capital murder judgment became final, as mandated by Congress and by this Court's precedents, and instead dismissed his claim as untimely by using an earlier limitations date not authorized by Congress?

2. In the alternative, did the Fourth Circuit err in denying equitable tolling for the eight months that elapsed prior to the date when Green's capital murder judgment became final?

3. In determining whether a petitioner's state application was "properly filed" for purposes of statutory tolling under § 2244(d)(2):

    a. Must federal habeas courts base their decision on whether the application as a whole was properly filed, as the Court suggested in Artuz v. Bennett, or must the determination be made on a claim-by-claim basis, as the Court suggested in Pace v. DiGuglielmo?

    b. Can a state court's procedural rule constitute a valid condition to filing if the federal court determines that the procedural rule, when applied to the applicant's claim (or application), did not rest on adequate state law grounds?

These interrelated questions satisfy the first two prongs of the *Barefoot* test for the

following reasons:

First, there is a reasonable probability the Court will grant certiorari and summarily correct the Fourth Circuit's failure to use latest starting date for the statute of limitations, which is "the date on which the judgment became final by the conclusion of direct review." The "judgment" at issue is the judgment Green challenges, which is the judgment of capital murder. Both the plain language of the statute and this Court's precedents defining the terms "judgment," "final," and "direct review" make it indisputable that the federal limitations period for this claim began to run on February 23, 2004, which is the date this court denied certiorari following direct appeal.

The Fourth Circuit wrongly accepted the June 26, 2003, date the magistrate judge had computed under § 2244(d)(1)(B) – which might have been an appropriate date for Green's challenge to the *noncapital* judgment but not to the *capital* judgment. The Fourth Circuit accepted even this starting date grudgingly, intimating that it might have chosen an even earlier one. Pet. App. 19a (stating that limitation period began to run "*no later than* June 26, 2003, when habeas counsel was appointed for Green") (emphasis in original); *id*. (noting that "[t]he alleged ineffective assistance of counsel . . . occurred in November 2000," as if to suggest that the date of counsels' misconduct might have started the limitations period). [3]

One the considerations for certiorari review is the need for the Supreme Court to exercise its supervisory power when a lower court has indefensibly departed from the accepted course of judicial proceedings. Sup. Ct. R. 10(c). There is a reasonable

[3] This Court never has held that the date of counsel's deficient performance is relevant to determining the starting point for running the habeas limitations period, and in practice it would be unworkable to do so.

probability the Fourth Circuit's failure to give Green the benefit of the statutorily required limitations date comes within the scope of that rule.

Second, if the Court does not correct the starting date for the statute of limitations, there is a reasonable probability it will grant certiorari to consider whether Green is entitled to equitable tolling. The Fourth Circuit based the denial of equitable tolling on Green's purported lack of diligence during the ten months that elapsed between the appointment of state habeas counsel and the filing of the state habeas petition. There is a reasonable probability the court will review that question and grant relief because Green could not have "timely" filed his state petition without running afoul of the firmly established state rule prohibiting a second habeas petition. At the time of Green's state habeas proceedings, Virginia ruthlessly enforced this rule: no matter what the circumstances, an applicant could not present new claims in a second habeas petition if the facts supporting those claims were known at the time he filed his first habeas petition. *See, e.g., Dorsey v. Angelone*, 544 S.E.2d 350 (Va. 2001); *Daniels v. Warden*, 588 S.E.2d 382 (Va. 2003). If Green had filed a "timely" first state habeas petition alleging that his capital murder retrial was tainted as a result of trial counsel's failure to appeal the noncapital convictions, that act would have precluded Green from filing a second petition containing his additional challenges to the capital murder conviction, once the capital murder judgment became final. Green's decision to wait until all of his challenges to the capital murder judgment were ripe before he filed his one-and-only state habeas petition was evidence of prudence, not evidence of a failure to pursue his rights diligently.

Moreover, Green's state habeas petition complied in every respect with the statute of limitations for petitions in capital cases. At the time Green purportedly was dilatory,

no petitioner could have foreseen that the Virginia Supreme Court would dismiss an applicant's challenge to his *capital* conviction as untimely by applying the statute of limitations that applies exclusively to *noncapital* convictions. The state court never did so before, and it never has done so since. In that context, Green could not have foreseen that this claim in his state petition would be deemed untimely, or that extraordinarily diligence would be required to comply with the federal habeas statute of limitations.

Third, although the Court may prefer to remand the issues of statutory tolling to the court of appeals if it rules in Green's favor on either of the first two questions, there also is a reasonable probability it will grant certiorari to decide those issues. The first statutory tolling issue involves a conflict between two recent decisions of this Court – *Artuz v. Bennett*, 531 U.S. 4 (2000), and *Pace v. DiGuglielmo*, 544 U.S. 408 (2005) – that cannot authoritatively be resolved by any lower court. In *Artuz*, 531 U.S. at 10, the Court suggested that in determining whether there has been "a properly filed application for State post-conviction or other collateral review," § 2244(d)(2), courts must look at the "application" as a whole because an application cannot simultaneously be properly filed and not properly filed. *See also Carey v. Saffold*, 536 U.S. 214, 229 (2002) (Kennedy, J., dissenting) ("*Artuz* . . . recognized that an 'application' is a 'document' distinct from the legal claims contained within it"). In *Pace,* 544 U.S. at 415-16, the Court suggested that claim-by-claim examination is appropriate. If the Court grants review, there is a significant possibility it will resolve this conflict in Green's favor because, as Justice Scalia correctly recognized in Artuz, "The statute, however, refers only to 'properly filed' applications and does not contain the peculiar suggestion that a single application can be both 'properly filed' and not 'properly filed.'" Artuz, 531 U.S. at 10.

The second statutory tolling issue also is one that the Court may decide to resolve on its own rather than remand. Whether a state's procedural rule can be a valid condition to filing, even if that rule has been determined not to rest on adequate state law grounds, is an issue that has divided the lower courts. The Eleventh Circuit repeatedly has held that compliance with a state procedural rule cannot be a condition of filing under § 2244(d)(2) if that rule is not firmly established and consistently applied.[4] *See, e.g., Siebert v. Campbell*, 334 F.3d 1018, 1025 (11th Cir. 2003), *rev'd on other grounds, Allen v. Siebert*, 128 S.Ct. 2 (2007) (per curiam).[5] *See also Evans v. Chavis*, 546 U.S. 189, 206 (2006) (Stevens, J., concurring) (suggesting that "application of AEDPA's tolling provision is analogous to the question whether denial of a state postconviction petition rested upon an adequate and independent state ground").

Other courts have determined that they cannot consider the inadequacy of the state's procedural rule because this Court said in *Pace*, 544 U.S. at 414, that "[w]hen a postconviction petition is untimely under state law, 'that [is] the end of the matter' for

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[4] The Eleventh Circuit's rule is based on inadequacy under *Ford v. Georgia,* 498 U.S. 411 (1991), while Green's case involves inadequacy under *Osborne v. Ohio*, 495 U.S. 103, 124-25 (1990), and *Lee v. Kemna,* 534 U.S. 362 (2002). In Green's view, the distinction between species of inadequacy is not material to the question presented. If this is a debatable question, however, it simply indicates further the need for this Court to address and clarify the issue.

[5] The Court's *per curiam* reversal in *Siebert* does not address, and does not undermine, the portion of the Eleventh Circuit's decision on which Green relies. The words "adequate" and "firmly established" appear nowhere in the Court's opinion. Rather, in *Siebert*, the Eleventh Circuit found that the "jurisdictional nature" of the procedural bar at issue was not firmly established at the relevant time. This Court reversed because the question of whether a state's timeliness rule is jurisdictional or is subject to exceptions is immaterial to the question of whether a state application was "properly filed." Notably, unlike in Green's case, the procedural rule at issue in *Siebert* has been found to be adequate under this Court's precedents. *Hurth v. Mitchem*, 400 F.3d 857 (11th Cir. 2005).

purposes of § 2244(d)(2)." *See, e.g., Foley v. Evans*, 2006 WL 191946 at *2 n.4 (E.D. Cal. Jan. 19, 2006) ("[F]or purposes of federal limitations tolling purposes, and specifically, whether a state petition was properly filed, respondent bears no burden of showing that the state law was adequate and consistently applied as he would in the separate procedural bar analysis"). There is a significant possibility the Court would rule in Green's favor because his position appears to be more consistent established principles of comity and federalism. Moreover, the close relationship between inadequacy and caprice may raise due process concerns if federal courts must defer to state action that is arbitrary or, in a particular case, serves no legitimate purpose.

The final *Barefoot* requirement – irreparable harm – is indisputable because an execution is a harm that the legal system cannot repair. *See, e.g., Wainwright v. Booker,* 473 U.S. 935, 935 n.1 (1985) (Powell, J. concurring) (requirement of irreparable harm if stay is not granted "is necessarily present in capital cases").

Conclusion

For the foregoing reasons, Green respectfully requests that this Court issue an order staying his imminent execution.

Respectfully submitted,

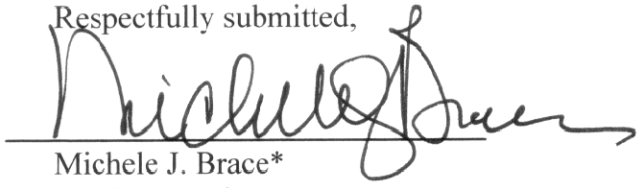

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EXHIBIT A

VIRGINIA:

IN THE CIRCUIT COURT OF BRUNSWICK COUNTY

COMMONWEALTH OF VIRGINIA

v. CR 98-141-06

KEVIN GREEN,

Defendant.

ORDER

Pursuant to Section 53.1-232.1 of the Code of Virginia, having determined that the United States Court of Appeals for the Fourth Circuit has denied habeas corpus relief to the defendant, this Court hereby ORDERS that the death sentence of Kevin Green be carried out on the 27th day of May, 2008, at such a time of day as the Director of the Department of Corrections shall fix.

It is further ORDERED that at least ten (10) days before May 27, 2008, the Director shall cause a copy of this Order to be delivered to the defendant and, if the defendant is unable to read it, cause it to be explained to him. The Director shall make return thereof to the Clerk of this Court.

The Clerk is directed to promptly furnish certified copies of this Order to the following persons:

Gene M. Johnson, Director
VIRGINIA DEPARTMENT OF CORRECTIONS
P.O. Box 26963
6900 Atmore Drive
Richmond, Virginia 23261;

The Honorable Lezlie Smith Green
COMMONWEALTH'S ATTORNEY FOR BRUNSWICK COUNTY
P.O. Box 797
Lawrenceville, VA 23868;

Michele J. Brace, Esquire,
VIRGINIA CAPITAL REPRESENTATION RESOURCE CENTER
2421 Ivy Road, Suite 301
Charlottesville, Virginia, 22903-4971;

Timothy M. Richardson, Esquire
HUFF, POOLE & MAHONEY, PC
4705 Columbus Street, Suite 100
Virginia Beach, Virginia 23462; and

Matthew P. Dullaghan
Senior Assistant Attorney General
OFFICE OF THE ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219.

Pursuant to Rule 1:13 of the Rules of the Supreme Court of Virginia, the Court hereby dispenses with endorsements by counsel.

Entered on March 28, 2008.

William Shane
Judge

EXHIBIT B

FILED: May 19, 2008

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 07-9
(2:05-cv-00340-RBS)

KEVIN GREEN,

Petitioner - Appellant

v.

GENE M. JOHNSON, Director of the Virginia Department of Corrections,

Respondent - Appellee

THE AMERICAN ASSOCIATION ON INTELLECTUAL AND DEVELOPMENTAL DISABILITIES; THE ARC OF THE UNITED STATES; THE ARC OF VIRGINIA,

Amici Supporting Appellant

O R D E R

Upon review of submissions relative to the motion to recall the mandate and to stay the execution, the Court denies the motion.

Entered at the direction of Judge Shedd with the concurrence of Judge Wilkinson and Judge Motz.

For the Court

/s/ Patricia S. Connor, Clerk

A07____
No. 07-10988

IN THE
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OCTOBER TERM, 2007

KEVIN GREEN,
Petitioner,

v.

GENE M. JOHNSON, DIRECTOR
VIRGINIA DEPARTMENT OF CORRECTIONS,
Respondent.

Certificate of Service

I certify that I am a member of the Bar of this Court; that I am counsel for Kevin Green; that on May 21, 2008, I caused the foregoing Application for a Stay of Execution to be served by electronic and first-class mail on Matthew P. Dullaghan, Senior Assistant Attorney General, 900 East Main Street, Richmond, VA 23219, telephone (804) 786-2071; mdullaghan@oag.state.va.us.

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