03A397

Supreme Court, U.S.
FILED
NOV - 6 2003
CLERK

No. 03-___

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2003

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JOSEPH TIMOTHY KEEL,

Petitioner,

V.

STATE OF NORTH CAROLINA

Respondent.

****

MOTION TO STAY EXECUTION
28 U.S.C. § 2251

(Execution Date: November 7, 2003 at 2:00 a.m.)

****

TO THE HONORABLE WILLIAM H. REHNQUIST, CHIEF JUSTICE:

NOW COMES Joseph Timothy Keel, by his undersigned counsel, pursuant to Title 28 U.S.C. § 2251 and United States Supreme Court Rule 23, and prays the Court stay his execution, now scheduled for November 7, 2003 at 2:00 a.m.

Contemporaneously with the filing of this motion, Mr. Keel is filing in this Court a Petition for Writ of Habeas Corpus seeking relief from his death sentence. Petitioner's stay of execution has been dissolved by the North Carolina Supreme Court and his execution is scheduled for November 7, 2003 at 2:00 a.m .

No. 03-7330

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2003

JOSEPH TIMOTHY KEEL,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

ON PETITION FOR WRIT OF HABEAS CORPUS
and MOTION FOR STAY OF EXECUTION

RESPONDENT'S BRIEF IN OPPOSITION

ROY COOPER
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**Counsel of Record

No. _____

**IN THE
SUPREME COURT OF THE UNITED STATES
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JOSEPH TIMOTHY KEEL,

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STATE OF NORTH CAROLINA,

Respondent.

**ON PETITION FOR WRIT OF HABEAS CORPUS
and MOTION FOR STAY OF EXECUTION**

RESPONDENT'S BRIEF IN OPPOSITION

NOW COMES respondent, the State of North Carolina [hereinafter ▒ the State▒], by its counsel, the Honorable Roy Cooper, Attorney General of North Carolina, and Valérie B. Spalding, Special Deputy Attorney General, and requests this Court to deny the PETITION FOR WRIT OF CERTIORARI and MOTION FOR STAY OF EXECUTION filed by petitioner Joseph Timothy Keel [hereinafter ▒ Keel▒], on 6 November 2003.

03-7330

No. 03-___

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2003

****

JOSEPH TIMOTHY KEEL,

Petitioner,

v.

STATE OF NORTH CAROLINA

Respondent.

****

PETITION FOR WRIT OF HABEAS CORPUS
Title 28 U.S.C. § 2254
(EXECUTION DATE - NOVEMBER 7, 2003 2:00 a.m.

****

NOW COMES Petitioner, Joseph Timothy Keel, (hereinafter "Mr. Keel" or "Petitioner"), by his undersigned counsel, and represents to the Court that he is illegally detained, under sentence of death, in the custody, control and confinement of the Respondent and his agents and employees of the North Carolina Central Prison, located in Raleigh, North Carolina, and that his confinement and sentence of death are in violation of the Constitution of the United States. Petitioner seeks relief pursuant to 28 U.S.C. § 2254.

INTRODUCTION

Petitioner is entitled to a writ of *habeas corpus* for the following reason:

Mr. Keel is ineligible for the death penalty pursuant to Atkins v. Virginia, 536 U.S. 304 (2002)(execution of mentally retarded persons violates the Eighth Amendment). The evidence

developed by the petitioner in state court establishes that he was mentally retarded at the time of the crime.

A. The state court adjudication of the whether Mr. Keel was mentally retarded at the time of the crime was an unreasonable application of clearly established Federal law in Atkins v. Virginia.

1. North Carolina's strict limitation of mental retardation to offenders with intelligence quotients (IQ) of 70 or below is an unreasonable application of Atkins because individuals with IQ scores higher than 70 may satisfy the medical and psychological definitions of mental retardation and are therefore ineligible for the death penalty.

2. Assuming *arguendo* that Atkins allows the application of a strict limitation of an IQ of 70 or below, the petitioner met this limitation and definition of mental retardation when he presented evidence from a psychologist admitted as an expert witness that Mr. Keel's IQ at the time of the crime was 69 - 70 (T p. 110)1; that he had significant deficits in the areas of functional academics (T p. 125), social skills (T p. 121) and work skills (T p. 126) which manifested before the age of 18; and that he was mentally retarded (T p. 127).

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[1] All documents in support of this Petition for Writ of Habeas Corpus have previously been filed with the Court on October 31, 2003 as an Appendix to Petition for Writ of Certiorari. References to "T p." within this petition are references to the transcript from the state court's Atkins hearing found as Appendix J to the Appendix to Petition for Writ of Certiorari, A-281.

B. The state court's denial of Mr. Keel's request for a jury determination of the question of his mental retardation was an unreasonable application of clearly established Federal law in Atkins v. Virginia, Ring v. Arizona, 536 U.S. 584 (2002) and Apprendi v. New Jersey, 530 U.S. 466 (2000).

C. In the event this Court declines to grant relief to petitioner for the reasons stated above, Mr. Keel is entitled to an evidentiary hearing in federal court on the question of whether he was mentally retarded at the time of the crime because the fact finding proceeding by the state court did not constitute a full and fair fact hearing under Townsend v. Sain, 372 U.S. 293 (1963).

PROCEDURAL HISTORY

1. Joseph Timothy Keel was convicted of capital murder and sentenced to death on August 19, 1991. The Supreme Court of North Carolina awarded Mr. Keel a new trial on the basis of an erroneous jury instruction in the guilt phase. State v. Keel, 333 N.C. 52, 423 S.E.2d 458 (1992). At retrial in Edgecombe County Superior Court before the Honorable Frank R. Brown, Mr. Keel was again convicted of capital murder and sentenced to death on March 30, 1993. Mr. Keel appealed to the North Carolina Supreme Court, and his conviction and sentence were affirmed. State v. Keel, 337 N.C. 469, 447 S.E.2d 748 (1994).

2. The United States Supreme Court denied certiorari review, Keel v. North Carolina, 513 U.S. 1198, 115 S.Ct. 1270, 131 L. Ed.2d 147 (1995), and Mr. Keel's execution was scheduled for July 21, 1995.

3. On July 13, 1995, on motion of Mr. Keel, the North Carolina Supreme Court stayed execution for sixty days and ordered that any appropriate motions be filed within that time.

4. Mr. Keel's counsel failed to file his Motion for Appropriate Relief (hereinafter "MAR") until December 21, 1995, and the Supreme Court set Mr. Keel's new execution date for January 2, 1996.

5. The Honorable Terrence W. Boyle, Judge of the United States District Court for the Eastern District of North Carolina, granted a stay of execution on December 28, 1995.

6. On January 3, 1996, the State of North Carolina filed a motion to declare Mr. Keel's MAR procedurally barred. On January 18, 1996, Judge Frank Brown granted the State's motion to procedurally bar Mr. Keel's MAR.

7. Mr. Keel filed a Petition for Writ of Habeas Corpus in the United States District Court for the Eastern District of North Carolina on January 29, 1996.

8. While the habeas petition was pending in this Court, Mr. Keel petitioned the North Carolina Supreme Court for a writ of certiorari to review Judge Brown's order procedurally barring the MAR. The North Carolina Supreme Court denied that petition on July 30, 1996 and the United States Supreme Court denied *certiorari* review on February 18, 1997. Keel v. North Carolina, 519 U.S. 1137 (1997).

9. The United States District Court for the Eastern District of North Carolina granted the State's motion for summary judgment on Mr. Keel's petition for writ of habeas corpus on December 10, 1997, filing an amended order on February 12, 1998. The Fourth Circuit affirmed. Keel v. French, 162 F.3d 263 (4th Cir. 1998). On June 14, 1999, the United States Supreme Court denied certiorari review. Keel v. French, 527 U.S. 1011 (1999).

10. On January 31, 2002, Mr. Keel filed a Motion for Imposition of Life Sentence in Edgecombe County File Number 90 CRS 8033 pursuant to newly-enacted N.C. Gen. Stat. § 15A-2006 (and Atkins v. Virginia) on the basis of his mental retardation. Appendix I, A-119.

11. On October 8, 2002, the Superior Court held a hearing on the above-referenced motion before the Honorable Frank R. Brown. By Order dated January 27, 2003, Judge Brown denied the motion. Appendix L, A-641.

12. On March 28, 2003, Mr. Keel filed a petition for writ of certiorari in the North Carolina Supreme Court seeking review of the denial of the Motion for Imposition of Life Sentence (Atkins claim).

13. On August 21, 2003, the Supreme Court denied the petitioner's petition for writ of certiorari.

14. The Department of Correction has set Mr. Keel's execution date for November 7, 2003 at 2:00 a.m.

15. On October 20, 2003, petitioner filed a motion pursuant to 28 U.S.C. § 2244 for authorization to file a successive habeas corpus petition in the United States Court of Appeals For the Fourth Circuit. This motion was denied on November 4, 2003.

16. Petitioner has exhausted all available remedies in the state court on this claim.

STATEMENT OF THE FACTS

17. On January 31, 2002, Mr. Keel filed Defendant's Motion for Imposition of Life Sentence Pursuant to N.C. Gen. Stat. §15A-2006 in Edgecombe County Superior Court alleging he was mentally retarded at the time of the commission of the capital offense. Attached to the motion were the following documents:

a. Psychological Evaluation and Affidavit by Evans E. Harrell, Ph.D. which verified that at the time of the commission of the crime, there was a reasonable probability that Mr. Keel's IQ was at 70 or below (as required under the North Carolina mental retardation statute). The affidavit also verified significant limitations in adaptive functioning in the areas of social skills, communication skills and self-care skills. (The North Carolina mental retardation statute requires limitations in two areas.)