Supreme Court, U.S.
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No. 04-5049/0449

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2003

In re ROBERT KARL HICKS
Petitioner.

ORIGINAL PETITION FOR WRIT OF HABEAS CORPUS, AND MOTION FOR STAY OF EXECUTION

QUESTIONS PRESENTED

CAPITAL CASE

1. Under *Atkins v. Virginia*, 122 S.Ct. 2242, 2252 (2002), a person who suffers from mental retardation cannot be executed. To be mentally retarded, a person must, *inter alia*, have significantly sub-average general intellectual functioning as measured by a standardized, individually administered, IQ test. In Georgia, the warden of the state prison will not allow such testing without a court order. Court orders are routinely granted, but one was not granted in Petitioner's case despite Petitioner having presented a prima facie case of mental retardation and a need for and right to testing.

Under these circumstances, this case presents the following *Atkins* questions under the Eighth and Fourteenth Amendments:

> **Whether the warden of a prison--as the Respondent in a state habeas corpus proceeding--can prevent the Petitioner from demonstrating that he is ineligible for execution under *Atkins v. Virginia* by barring all defense expert psychologists from entering the warden's prison and testing the defendant's IQ once a prima facie case of mental retardation has been established?**
>
> **Whether a warden of a state prison or a state court can allow scores of inmates to be tested by psychologists but prohibit Petitioner Hicks from being tested when no rational -- much less compelling -- basis is asserted for singling Petitioner out?**

2. Whether the State of Georgia's refusal to honor the ruling of the Inter-American Commission on Human Rights, a tribunal to whose jurisdiction the United States must submit due to its status as a signatory nation to the relevant treaties and protocols, violates a capital defendant's right to access to the Courts [redacted] *contrary to the treaty* obligations arising from the Supremacy Clause?

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Petitioner ROBERT KARL HICKS, requests that this Court issue a Writ of Habeas Corpus, pursuant to 28 U.S.C. § 2241, and order that Petitioner be released for his unlawful sentence of death.[1] In addition, Mr. Hicks requests that this Court issue a stay of his execution, which is currently scheduled to be carried out on July 1, 2004.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. §§ 1651, 2241(a).

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[1] Petitioner states, as required by 28 U.S.C. § 2242, that this Petition is addressed to the Supreme Court rather than the district court or the court of appeals due to the imminence of the execution date as well as Petitioner's belief, described more fully below, that no court other than this one has the power to issue the relief he is requesting.

Pursuant to Sup. Ct. 20(4)(a), this Petition is an original application for habeas corpus relief, because Petitioner has already had one habeas application denied by the district court the denial of relief which was affirmed by the Eleventh Circuit. Further, the Eleventh Circuit has denied Mr. Hicks' Application for Permission for to File Successive Petition.

Mr. Hicks is mentally retarded and he has been provided no means to vindicate his rights under this Court's decision in *Atkins v. Virginia*. The Georgia Courts both **required** that Petitioner obtain an actual expert diagnosis of mental retardation before being entitled to any judicial review of whether he actually suffers from it,[2] **and simultaneously *prevented*** Petitioner from obtaining any expert opinion. This is a patent violation of due process and an evisceration **of *Atkins v. Virginia***, 536 U.S. 304 (2002), as duly noted in dissent by Chief Justice Fletcher of the Georgia Supreme Court: "I strongly dissent ....Petitioner makes a substantial and credible claim of mental retardation this Court has never addressed." When this Court in *Atkins* left the development of procedural rules related to claims of mental retardation up to the states it must have intended that

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[2] ***See Fleming v. Zant*, 386 S.E.2d 339 (1989)("the habeas corpus court must first determine whether petitioner has presented sufficient credible evidence, which must include at least one expert diagnosis of mental retardation, to create a genuine issue regarding petitioner's retardation.")**

non-frivolous claims be given a fair hearing. **Further, when Mr. Hicks presented his claim to the Eleventh Circuit in his Application for Permission to File a Successive Petition, the court applied an erroneous *ad hoc* standard in refusing to grant permission. Thus, exceptional circumstances warrant the exercise of this Court's discretion.**

CONSTITUTIONAL PROVISIONS AT ISSUE

The questions presented implicate the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution. The pertinent parts of those provisions are:

> **U.S. Const. Amend. VI: In all criminal prosecutions, the accused shall enjoy the right to . . . the assistance of counsel for his defence.**
>
> **U.S. Const. Amend. VIII: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.**
>
> **U.S. Const. Amend. XIV: [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the**

laws.

STATEMENT OF THE CASE

Robert Karl Hicks is mentally retarded and this Court has said that his execution would be unconstitutional. *Atkins v. Virginia*, 536 U.S. 304 (2002). Mr. Hicks has asserted that he is mentally retarded at every stage of the proceedings after the prohibition against executing the mentally retarded was recognized. However, through no fault of his own, the State of Georgia has refused to allow a mental health expert access to Mr. Hicks in order to conduct psychological testing to support his claim and have thereby deprived him of due process, meaningful access to the courts, and the right to be free from cruel and unusual punishment. Mr. Hicks has petitioned both the state and federal courts for orders directing the State of Georgia to allow a mental health expert to examine him, but to date no court has intervened. Mr. Hicks has presented below compelling evidence to indicate he is mentally retarded - - he has exhibited deficits in adaptive functioning which manifested prior to the age of 18. His academic performance, and anecdotal evidence indicate more than a reasonable probability that he also suffers from significantly subaverage intellectual functioning. This aspect of his retardation, however, cannot be absolutely confirmed without appropriate

psychological testing - - the testing Mr. Hicks has repeatedly requested but has repeatedly been denied by the State of Georgia. This Court must intervene and order that the State of Georgia permit a licensed psychologist be given access to Mr. Hicks so that proper testing can be conducted.

PROCEDURAL HISTORY[3]

Mr. Hicks was convicted of malice murder in the Superior Court of Spalding County on January 16, 1986. On January 17, the jury found three aggravating circumstances – the murder was committed by a person with a prior conviction for rape; it was committed while the offender was engaged in the commission of the offense of aggravated battery; and the murder was outrageously or wantonly vile, horrible, or inhuman in that it involved an aggravated battery to the victim – and Mr. Hicks was sentenced to death. The Georgia Supreme Court affirmed the conviction and death sentence, *Hicks v. State*, 256 Ga. 715, 352 S.E.2d 762 (1987), and this Court denied *certiorari*, *Hicks v. Georgia*, 482 U.S. 931 (1987).

On September 4, 1987, Mr. Hicks filed a state habeas corpus petition in the Superior Court of Butts County. An evidentiary hearing was held on

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[3] Petitioner will more fully, at the conclusion of this procedural history of the case, the reasons that this Court should grant the writ of

December 12-13, 1988. On December 28, 1988, the state habeas court denied relief. On October 5, 1989, the Georgia Supreme Court denied an application for a certificate of probable cause to appeal. This Court again denied *certiorari*. *Hicks v. Kemp*, 494 U.S. 1074 (1990).

Mr. Hicks filed a federal habeas petition on November 21, 1990. It was dismissed without prejudice on February 22, 1991 to permit exhaustion of state remedies on certain claims. A second state habeas petition raising the unexhausted claims was filed on May 31, 1991. A motion by the state to dismiss the petition was heard on November 23, 1992, and the petition was ultimately dismissed on March 3, 1994. The Georgia Supreme Court denied a certificate of probable cause to appeal, and this Court denied *certiorari*. *Hicks v. Thomas*, 514 U.S. 1020 (1995).

A federal habeas corpus petition was filed in the United States District Court for the Northern District of Georgia on April 24, 1997. The district court denied Mr. Hicks' motion for an evidentiary hearing, and, on September 5, 2000, denied the petition in its entirety. After the district court denied a certificate of appealability, Hicks requested a certificate from the Court of Appeals for the Eleventh Circuit on both of the *Ake* issues and

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habeas corpus under *Felker v. Turpin* and Rule 20 of this Court's rules.

others. The Court of Appeals granted a COA only on the issue of the harmlessness *vel non* of the *Ake* error involved in eve-of-trial appointment of the defense psychiatrist (App. A2), and it went on to find that error harmless (App. A2-A6). Certiorari was denied in this Court on June 14, 2004.

On June 17, 2004, the Superior Court of Spalding County scheduled Petitioner's execution for the week of June 29- July 6, 2004. Respondent scheduled Petitioner's execution for Wednesday, June 30, 2004, at 7:00 p.m. Petitioner filed a petition for writ of habeas corpus June 28, 2004 in Butts County, Georgia. That Petition was denied on June 30, 2004

Mr. Hicks appealed this decision to the Georgia Supreme Court and also requested a stay of execution. On June 30, 2004, the Georgia Supreme Court stayed Mr. Hicks' execution until July 1, 2004, at 3:00 p.m. In there interim, the Georgia Supreme Court affirmed the Superior Court of Butts County and vacated the stay of execution. At that time Mr. Hicks filed a Petition for Writ of Certiorari with this Court and an Application for Permission to File a Successive Petition for Writ of Habeas Corpus with the Eleventh Circuit Court of Appeals. The Eleventh Circuit denied Mr. Hicks' Application.

Reasons for Requesting Extraordinary Relief

In *Felker v. Turpin*,[4] this Court concluded that the Antiterrorism and Effective Death Penalty Act (AEDPA), does not deprive this Court of jurisdiction to entertain original habeas applications.[5] The *Felker* Court concluded that although the restrictions on successive habeas applications delineated in 28 U.S.C. § 2254 "inform [this Court's] consideration of original habeas petitions," this Court may not be bound by the restrictions identified in 28 U.S.C. § 2254.

There is a split in the Circuits concerning the standards by which a habeas corpus petitioner in Mr. Hicks' posture is to be judged when exercising, for the first time, his federal right not to be executed because he is mentally retarded. *See Atkins v. Virginia*, 536 U.S. 394 (2002). In the Fourth and Fifth Circuits the if there is a reasonable probability the petitioner is mentally retarded the Application for Permission to File a Successive Petition is Granted. In the Eleventh Circuit, be denial of Petitioner's Application, a standard that is significantly higher is applied. This Court should grant this Petition for an Original Writ and announce a

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[4] **518 U.S. 651 (1996).**

[5] **518 U.S. at 662-63.**