

No. _____ (CAPITAL CASE)

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

**In re
RICHARD ALLEN MASTERSON,
Movant.**

MOTION FOR A STAY OF EXECUTION

**THIS IS A DEATH PENALTY CASE
EXECUTION SCHEDULED January 20, 2016**

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Petitioner Richard Allen Masterson respectfully asks this Honorable Court to stay his execution currently scheduled for January 20, 2016, after 6:00 p.m. Contemporaneous with this motion, Mr. Masterson has filed a motion for authorization to file a successor petition for a writ of habeas corpus under 28 U.S.C. § 2244(b). He incorporates by reference the facts and arguments in that motion and the attached petition. Through his motion, Mr. Masterson asks this Court to permit him to litigate constitutional violations uncovered when he discovered new evidence of State fraud, misconduct, and his actual innocence. Given the strong showing of actual innocence in his Second Petition for a Writ of Habeas Corpus, Mr. Masterson deserves a chance to litigate the underlying claims, including his innocence, to vindicate his rights. Indeed, nothing is more important when considering a stay than actual innocence.

The same standard of review applies to both requests for certificate of appealability (“COA”) and applications for a stay of execution:

This court reviews an application for a CPC using the same standard as that used by the district court in the first instance. That is, we will grant a CPC to appeal only if the applicant can make a substantial showing of a denial of a federal right. *Barefoot v. Estelle*, 463 U.S. 880, 893, 103 S.Ct. 3383, 3394, 77 L.Ed2d 1090 (1983); *Drew v. Collins*, 5 F.3d 95 (5th Cir. 1993), *petition for cert. filed* (Jan. 4, 1994). This standard does not require the applicant to show that he would prevail on the merits, but it does require him to show that the issues he presents are debatable amongst jurists of reason. *Barefoot*, 463 U.S. at 893 n.4, 103 S.Ct. at 3395 n.4; *Drew*, 5 F.3d at 95. The same standard essentially applies to an application for a stay of execution. *Drew*, 5 F.3d at 95 (citing *Delo v. Stokes*, 495 U.S. 320, 321, 110 S.Ct. 1880, 1881, 109 L.Ed. 325 (1990) (“A stay of execution pending disposition of a second or successive federal habeas petition should be granted only when there are ‘substantial grounds upon which relief might be granted.’” (quoting *Barefoot*, 463 U.S. at 895, 103 S.Ct. at 3395))).

Barnard v. Collins, 13 F.3d 871, 875 (5th Cir. 1994).

In *Herrera v. Collins*, 506 U.S. 390 (1993), a majority of the Supreme Court found that persons who are actually innocent of capital murder enjoy the constitutional right not to be executed. And the majority opinion simply assumed the existence of this constitutional right. As

discussed in the contemporaneously filed motion and petition, Mr. Masterson has satisfied that requirement. He has made a strong showing that he is actually innocent of any murder and therefore actually innocent of the death penalty. Directly, Mr. Masterson has shown that the complainant in this case died of a heart attack, making his death accidental and not a homicide at all.

CONCLUSION

Given the scientific basis for Mr. Masterson's actual-innocence claim, and the State's misconduct in this case, Mr. Masterson respectfully requests that this Court stay his imminent execution pending the disposition of his Motion for Order Authorizing Filing and Consideration of Second Petition for a Writ of Habeas Corpus Under 28 U.S.C. § 2254 and ultimately, his attached second petition.

Respectfully submitted,
RICHARD ALLEN MASTERSON

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CERTIFICATE OF CONFERENCE

I certify that I conferred with Assistant Attorney General W. Erich Dryden on January 12, 2016, who states that Respondent is opposed to this motion.

/s/ Gregory W. Gardner
Gregory W. Gardner

CERTIFICATE OF SERVICE

I certify that on January 12, 2016, I electronically filed this motion with the clerk of the United States Court of Appeals for the Fifth Circuit using the electronic case filing system of the Court. The electronic case filing system sent a notice of electronic filing to the following attorney of record, who has consented to accept this service by electronic means:

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