

Stephens Vs. Kemp

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Appellant : Stephens

Respondent : Kemp

Judgement :

STEPHENS v. KEMP - 464 U.S. 1027 (1983)

U.S. Supreme Court STEPHENS v. KEMP , 464 U.S. 1027 (1983)

464 U.S. 1027

Alpha Otis O'Daniel STEPHENS

v.

Ralph KEMP, Superintendent, Georgia Diagnostic and Classification Center

No. A-455

Supreme Court of the United States

December 13, 1983

The application for stay

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of execution of the sentence of death set for Wednesday, December 14, 1983, presented to Justice POWELL and by him referred to the Court, is granted pending decision of the United States Court of Appeals for the Eleventh Circuit in *Spencer v. Zant*, [715 F.2d 1562](#) (1983), rehearing en banc granted or until further order of this Court.

Justice POWELL, with whom THE CHIEF JUSTICE, Justice REHNQUIST, and Justice O'CONNOR join, dissenting.

This is another capital case in the now familiar process in which an application for a stay is filed here within the shadow of the date and time set for execution.

As summarized by the Court of Appeals the relevant facts are:

"After escaping from county jail, petitioner was interrupted committing a burglary in Twiggs County by his victim whom he and an accomplice robbed, kidnapped, drove into Bleckley County and brutally killed; he was caught the next morning with the murder weapon in his possession. . . . [H]e confessed and pleaded guilty in Twiggs County to armed robbery, kidnapping with bodily injury, and the theft of a motor vehicle . . ."

A jury convicted petitioner of murder and sentenced him to death in early 1975. In the nearly nine years that since have transpired, Stephens has repetitively moved between state and federal courts in pursuing post-conviction remedies. His direct and collateral attacks have taken his case through the state court system three times and through the federal system twice. This Court has considered Stephens' case four times excluding his present proceedings. See ___ U.S. ___ (1983); 454 U.S. 1035 (1981); 439 U.S. 991 (1978); 429 U.S. 986 (1976).

The case before us today commenced with the filing of a federal habeas petition on November 15, 1983, in the United States District Court for the Middle District of Georgia. The State answered the petition and pleaded that Stephens' petition for a writ of habeas corpus was an abuse of the writ. On November 16, 1983, the District Court held a hearing on the abuse question and six days later, on

November 21, 1983, the District Court denied relief. It filed a full opinion in which it concluded that " the claims raised by petitioner in his successive petition under 28 U.S.C . 2254 constitute an abuse of the writ under

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Rule 9(b), Rules Governing 2254 Cases in the United States District Courts,¹ and are hereby dismissed in their entirety." On December 9, 1983, a panel of the Court of Appeals for the Eleventh Circuit considered Stephens' emergency application for a certificate of probable cause to appeal and a stay of execution. Also in a full opinion, the panel found that the District Court had not erred in finding an abuse of the writ.

Today, the Court of Appeals denied Stephens' request for a rehearing en banc by an evenly divided vote. The six judges who dissented from the denial of rehearing filed a brief opinion expressing the view that Stephens had presented a claim that warranted a stay of his execution. The dissent reasoned that Stephens' claim that the Georgia death penalty statute is being applied in an arbitrary and discriminatory manner is identical to the issue in *Spencer v. Zant*, [715 F.2d 1562](#) (CA11 1983). The Court of Appeals-apparently also today-granted a rehearing en banc in *Spencer* and the dissent argued that Stephens should receive like treatment . It was suggested that Stephens had not abused the writ with respect to this issue because the statistical study on which he bases his claim did not become available until after he had filed his first federal habeas petition. The fact that six of the twelve active judges of the Court of Appeals wished to defer action on Stephens' case prompted this Court to grant Stephens' request for a stay. I dissent from this action.

The Court and the judges in dissent in the Court of Appeals apparently misconstrue, as I view it, the posture of this case. We should now be concerned, as was the panel of the Court of Appeals, with whether the District Court erred in its finding that Stephens is guilty of having abused the writ of habeas corpus. In *Sanders v. United States*, [373 U.S. 1](#) (1963), this Court observed that the "abuse of the writ" doctrine should be governed by "equitable principles." *Id.*, at 17. The

Court noted that consideration of abuse normally is left to the "discretion of federal trial

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judges. Theirs is the major responsibility for the just and sound administration of the federal collateral remedies, and theirs must be the judgment as to whether a second or successive application shall be denied without consideration of the merits." Ibid.

In determining whether the District Court properly exercised its discretion in finding an abuse we should look not to the merits of a petitioner's claims but to the petitioner's reasons for not having raised the claims in his first habeas proceeding. As the Court of Appeals noted, " there is no disagreement among the parties as to the standard applicable to second and subsequent petitions for habeas corpus which present wholly new issues. In order to constitute abuse, presentation of such issues must result from (i) the intentional withholding or intentional abandonment of those issues on the initial petition, or (ii) inexcusable neglect." Under this analysis, it is clear that the District Court properly dismissed Stephens claim of discriminatory application of the Georgia death penalty without holding an evidentiary hearing on the merits of that claim.

Apparently Stephens concedes that the equal protection issue is being raised for the first time, but he alleges that a 1980 study by a Dr. David Baldus supports the claim that Georgia's death penalty statute is discriminatorily administered against black citizens. As his excuse for not having raised this issue in his first habeas petition, Stephens states that the study was not made available to the public until 1982.

Stephens' argument side-steps the crucial issue. The state having alleged that he had abused the writ, the burden rests on Stephens to explain why he did not raise the constitutionality of the application of the death penalty statute in his earlier petition. See *Stephens v. Zant*, [631 F.2d 397](#) (CA5 1980), modified on rehearing, [648 F.2d 446](#) (5 Cir.1981). He did not satisfy this burden in the District Court, in

the Court of Appeals, or here. Although it is possible that Stephens did not know about the Baldus study even though it was published in 1982,² this does not explain his

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failure to raise his equal protection claim at all. The availability of such a claim is illustrated by the procedural history in *Spencer v. Zant*, [715 F.2d 1562](#) (CA11 1983). In *Spencer*, the defendant raised this constitutional challenge to the application of the Georgia death penalty statute in 1978 in his state habeas proceeding and pursued that claim in his first federal habeas petition. *Id.*, at 1579. See also *Ross v. Harper*, 538 F.Supp. 105, 107 (1982), reversed and remanded, [716 F.2d 1528](#) (CA11 1983).

Stephens simply failed to explain his failure to raise his claim in his first federal habeas petition, and therefore his case comes squarely within Rule 9(b). In addition, Stephens made no factual showing to the District Court that the statistics contained in the Baldus study supported his allegation of particularized discrimination in the imposition of the death penalty in Georgia.

This Court has now stayed Stephens' execution until the Court of Appeals has decided *Spencer*. In my view, for the reasons noted below, I am satisfied that the Court will conclude that *Spencer*-however it may come out-will not control this case. [[Footnote 3](#)] It should be apparent from the decisions of this Court since *Gregg* was decided that claims based merely on general statistics are likely to have little or no merit under statutes such as that in Georgia.

That Stephens is innocent of the brutal, execution style murder, after kidnapping and robbing his victim, is not seriously argued.

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This is a contest over the application of capital punishment-a punishment repeatedly declared to be constitutional by this Court. In the nearly nine years of repetitive litigation by state and federal courts there has been no suggestion that

the death sentence would not be appropriate in this case. Indeed, if on the facts here it was not appropriate, it is not easy to think of a case in which it would be so viewed. Once again, as I indicated at the outset, a typically "last minute" flurry of activity is resulting in additional delay of the imposition of a sentence imposed almost a decade ago. This sort of procedure undermines public confidence in the courts and in the laws we are required to follow.

In conclusion, I reiterate what the Court said in the concluding paragraph in our recent Per Curiam in Sullivan: We recognize, of course, as do state and other federal courts, that the death sentence is qualitatively different from all other sentences, and therefore special care is exercised in judicial review. In this case, it is perfectly clear to me that this care has been exercised in abundance. Accordingly, I would deny the application for a stay. Footnotes

[Footnote 1](#) Rule 9(b) provides:

"Successive petitions. A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ."

[Footnote 2](#) The Baldus study, relied upon by Stephens, has not been presented to us. It was made in 1980 and apparently has been available at least since 1982. Although characterized by the judges of the Court of Appeals who dissented from the denial of hearing en banc, as a "particularized statistical study" claimed to show "intentional race discrimination", no one has suggested that the study focused on this case. A "particularized" showing would require-as I understand it-that there was intentional race discrimination in indicting, trying, and convicting Stephens, and presumably in the state appellate and state collateral review that several times followed the trial. If the Baldus study is similar to the several studies filed with us in Sullivan v. Wainwright, ___ U.S. ___, 77 L.Ed.2d ___ (1983), the statistics in studies of this kind,

many of which date as far back as 1948, are merely general statistical surveys that are hardly particularized with respect to any alleged "intentional" racial discrimination. Surely, no contention can be made that the entire Georgia judicial system, at all levels, operates to discriminate in all cases. Arguments to this effect may have been directed to the type of statutes addressed in *Furman v. Georgia*, [408 U.S. 238](#) (1972). As our subsequent cases make clear, such arguments cannot be taken seriously under statutes approved in *Gregg*.

[Footnote 3](#) With all respect, I disagree with the judges on the Court of Appeals who say that this case presents the "identical issue" to be considered in *Spencer*. That case is readily distinguishable. As noted above, the discriminatory application of capital punishment-the equal protection issue-was raised in the first habeas petition in *Spencer*, and has been pressed at all subsequent stages. In this case, it was not raised until last month. In a fundamental sense, therefore, there could have been no abuse of writ issue in *Spencer*. There are other distinguishing factors, but these need not be stated here.