SCALIA, SCOTUS & TROY DAVIS' LAST GASP

Late yesterday afternoon, the Supreme Court of the United States stayed the execution, set for Tuesday night, of Cleve Foster in Texas. The words of the order were simple:

> 11-6427 FOSTER, CLEVE V. TEXAS (11A302)
> The application for stay of execution of sentence of death presented to Justice Scalia and by him referred to the Court is granted pending the disposition of the petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for a writ of certiorari is granted, the stay shall terminate upon the issuance of the mandate of this Court.

But there is way more than meets the eye here, because this is not Foster's first time to the Supreme Court stay rodeo. From a CBS News report earlier in the day before the stay was issued:

> Cleve Foster, a Texas inmate sentenced to die for the rape-slaying of a Fort Worth woman nearly a decade ago, is scheduled to be executed tonight – he has been spared from the death chamber twice this year amid appeals.
> Foster, 47, is set to die Tuesday evening for fatally shooting 30-year-old Nyaneur Pal, whose body was found in a ditch by pipeline workers on Valentine's Day 2002. Foster's execution would be the 11th this year in Texas.

That is what is unusual here. Foster has been up to the Supremes twice and was bounced back the last time without even reaching the merits. Yet here he is again – with a stay – a stay in which

the process was initiated by Antonin Scalia. Now the truth of the matter is Scalia is the designated on call judge, what we in the criminal defense bar colloquially term the “hot judge”, for the 5th Circuit, so it would go through Nino. But, still, it is fascinating to see two death cases in five days stayed out of Texas, the death penalty capital of the world, with Scalia’s name on the order.

> Foster won his first pardon in January from the U.S. Supreme Court, which halted his execution again in April when it agreed to reconsider an appeal that raised claims of innocence and poor legal assistance early on in his case.
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> His execution was rescheduled for Tuesday after the high court turned down that appeal.

I was half convinced the Court might even lift the new Foster stay Tuesday night, but I am on the after hours contact list, and have received no such notice as of the time of the instant posting and it is now into Wednesday morning.

Remember, I said this was the second such instance in the last five days? The other one was Duane Buck late last Thursday, which was also somewhat unexpected, although, perhaps, less so than Foster.

Still, that is two surprising instances of death stays by the Supremes in a very short time. Which brings us back to the most talked about execution case in recent memory, Troy Davis in Georgia. Is it a sign or signal from the Supreme Court to Troy Davis’ attorneys and/or the Georgia Clemency Board? Well, probably not literally, no; it would be pretty hard to make that case.

But, figuratively, maybe the case could be made. If a man in the two time strike out posture of Cleve Foster can obtain a stay on application as he did yesterday, the day of his putative execution, why cannot Troy Davis still approach

the Supreme Court?

This is the man we are talking about:

> Troy has refused to have a “last meal.” He has faith his life will be spared.
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> In the past, his tremendous faith has been rewarded. The last time Troy faced execution, in 2008, the warden brought in what was to be his last meal. But Troy refused to eat. Looking the prison staff in their eyes, he explained this meal would not be his last. He was vindicated when he received a last minute stay. Guards still remember this as a haunting moment, one rooted in Troy’s deep faith.
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> Still, there is every sign the state of Georgia intends to execute Troy this time—despite calls for them to stop by everyone from the former head of the FBI, William Sessions, to former US President Jimmy Carter.
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> Troy has prepared himself, and to the extent anyone can, his family, for either outcome.
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> As he has said many times “They can take my body but not my spirit, because I have given my spirit to God.”

The common wisdom, and repeated meme in the press, is that there is no remaining available judicial path for Troy Davis. But this may not necessarily be true. There are paths left to be pursued, even if narrow and dimly lit. And in an imminent execution situation, anything and everything must, and will, be pursued. The dedication, intensity, selflessness and never say die, literally, attitude of death penalty lawyers is legendary. If you have not seen them in action, you don’t know, but it is a thing of beauty.

Here is but one possible path, among many, which could possibly be attempted in one form or

another by the Davis defense team. There has just, quite recently, been a fairly landmark study released on the unreliability of eyewitness testimony. Granted, the AJS study pertains to eyewitness testimony as related though police lineups, but it is further concrete evidence of a changing landscape in how the unreliability of eyewitness identification in general is treated, and the picture is quite disturbing as to lack of reliability and veracity.

Now the issue of eyewitness identification infirmity has been reviewed before in the case of Troy Davis, but not in the bright new light emerging recently. And there is one other important difference now. The Supreme Court has scheduled for oral argument on November 2, 2011 the seminal eyewitness ID case of *Perry v. New Hampshire*.

Here is how SCOTUSBlog summarizes the germane issue in *Perry v. New Hampshire*:

> In a criminal case, is a court required to exclude eyewitness identification evidence whenever the identification was made under circumstances that make the identification unreliable because they tended to suggest that the defendant was responsible for the crime, or only when the police are responsible for the circumstances that make the identification unreliable?

Well then, there is your potential hook, because in the case of Troy Davis there is simply a boatload of issues within the ambit of the eyewitness issue framed in *Perry*. As related in a nice article in Time dated yesterday:

> “Seven of the nine witnesses have recanted at this point. That in and of itself is problematic,” says Mary Schmid Mergler, Senior Counsel for the non-profit Constitution Project, whose high-profile advisers (a mix of abolitionists

> and death penalty supporters) have come out in favor of clemency for Davis. “But the most troubling thing is just the fact that a death penalty conviction rests solely on eyewitness testimony to begin with.”

So, there is but one potential cognizable issue; however, the better question may be how to successfully plead it, or any other devised on behalf of Davis. One path might be to file what is known as a “state court successor” action, which will be denied, and then try to piggy back an appeal from that onto a certiorari question present in another case the Supreme Court already seems interested in addressing. Say, for instance, *Perry v. New Hampshire*. This is what was done in the Cleve Foster case described at the beginning of this post. Another alternative might be to try to fashion a new federal habeas out of the issue. You need some constitutional error to do so and, again, it is a bit weak perhaps, but *Perry* could arguably be attached as a basis.

Now the bad news. Pretty much every conceivable issue, including general forms of eyewitness arguments, have been made and denied before in the case of Troy Davis. Any new attempt will have to go through the same brutal gauntlet of southern courts in Georgia and/or the 11th Circuit. There is little hope there, any potential meaningful stay, much less real relief, will have to come from the Supreme Court. Nino Scalia has already once called Troy Davis’ case a “fools errand” as did his acolyte Clarence Thomas. But that was before many of the incredible amount of infirmities were made of record in the convoluted case procedural history. Maybe, just maybe, Scalia and the Court’s conservative bloc love their precious death penalty enough to keep it clean from the taint the wrongful and unjust execution of Troy Davis would bring.

This is but a glimpse of the kind of desperate ends death penalty certified specialists will go

to in defense of their clients on the line. The chances may be slim to none, but you try everything. Because nothing less is acceptable. Thankfully, the Davis team will have a lot more, and a lot better, theories than the above. It ain’t over until it’s over.

I want to thank my friend Dahlia Lithwick of Slate Magazine, and my new friend, David Dow of the University of Houston Law Center, Texas Innocence Network and author of *The Autobiography of an Execution*. The somewhat goofy thoughts here are mine, and Dahlia and David should not be blamed for them; however they gave me great feedback and discussion on this most depressing and critical case in American jurisprudence.