No. 18-6848

IN THE

Supreme Court of the United States

ROBERT MITCHELL JENNINGS,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari
to the Court of Criminal Appeals of Texas

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI AND APPLICATION FOR A STAY OF EXECUTION

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QUESTIONS PRESENTED

1. Does the state court's reliance on an independent and adequate state law ground preclude this Court's consideration of Jennings's class of one equal protection claim where he does not demonstrate he was similarly situated to petitioners who were granted relief?

2. Does the state court's reliance on an independent and adequate state law ground preclude this Court's consideration of Jennings's successive and abusive claims of *Penry v. Lynaugh*, 492 U.S. 302 (1989) (*Penry I*), and *Penry v. Johnson*, 532 U.S. 782 (2001) (*Penry II*), error?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner Robert Mitchell Jennings was convicted in 1989 of the capital murder of Harris County police officer Elston Howard. Howard was serving a warrant in an adult bookstore when Jennings entered the store and shot Officer Howard four times. Howard had no time to react or draw his weapon as Jennings shot him twice, then Jennings shot him twice more in the back of head as he lay on the ground. In the instant petition, Jennings challenges the dismissal of his abusive habeas corpus applications by the Court of Criminal Appeals. The state court found that Jennings failed to satisfy the statutory requirements that would permit either successive filing. This matter of state law is not subject to this Court's review and fails to present a compelling issue for review. Thus, certiorari review should be denied.

STATEMENT OF THE CASE

I. History of Proceedings

On July 11, 1989, a jury in Harris County, Texas found Jennings guilty of capital murder for shooting a Harris County police officer. SHCR 524.[1] On

[1] "CR" refers to the clerk's record filed in the convicting court. "RR" refers to the reporter's record filed in the convicting court, preceded by the volume number and followed by page number(s). "SHCR" refers to the state habeas corpus record.

direct appeal, the Texas Court of Criminal Appeals (CCA) affirmed his conviction and death sentence. *Jennings v. State*, No. 70,911 (Tex. Crim. App. Jan. 19, 1993) (unpublished) (reprinted in SHCR 443-66), *cert. denied, Jennings v. Texas*, 510 U.S. 830 (1993).

Jennings filed a habeas application in state court. SHCR 2-38. The CCA adopted the trial court's recommendation and denied Jennings's application in an unpublished opinion. *Ex parte Jennings*, Nos. AP- 75806 & AP-75807, 2008 WL 5049911 (Tex. Crim. App. Nov. 26, 2008). Jennings then filed a federal habeas petition. Without conducting a hearing, the district court granted relief. *Jennings v. Thaler*, 2012 U.S. Dist. LEXIS 58148 (S.D. Tex. 2012). The State filed a timely notice of appeal.

The Fifth Circuit heard oral argument and reversed the lower court also holding that Jennings's cross-point raised in his application for COA was dismissed for lack of jurisdiction due to Jennings's failure to file a notice of appeal. *Jennings v. Stephens*, 537 Fed. App'x. 326, 339 (5th Cir. 2013). Jennings filed a petition for writ of certiorari. This Court granted certiorari and reversed the lower court's ruling only on the requirement of the cross-appeal and COA. *Jennings v. Stephens*, 135. S. Ct. 793 (2015). On remand, the Fifth Circuit denied Jennings's remaining unadjudicated claim of ineffective

assistance of counsel. *Jennings v. Stephens*, 617 Fed App'x 315 (5th Cir. 2015). Jennings again petitioned this Court to grant him certiorari, but was refused. *Jennings v. Stephens*, 136 S. Ct. 895 (2016).

Jennings was set for execution on September 14, 2016, but his execution was stayed by the Court of Criminal Appeals when Jennings filed a successive habeas application. Jennings later filed an additional successive habeas application. The state court dismissed both applications as successive. *Ex parte Jennings,* Nos. WR-67,208-03, -04 (Tex. Crim. App. 2018); Pet. Appx. A. Jennings then filed a suggestion for reconsideration which the court denied. Pet. Appx. B. Jennings now petitions this Court for certiorari review.

II. Facts of the Crime

On July 19, 1988, at approximately 11:20 p.m., Houston Police Officer Elston Howard entered Mr. Peeper's Bookstore to arrest the clerk for operating a pornographic video arcade without a permit. 33 RR 34-36, 52-56, 78-79, 81, 110. Officer Howard was wearing a blue "Raid Jacket" that bore the words "Houston Police" in "large letters" on both the front and back and that displayed Houston Police Department badges on both shoulders. 33 RR 40-42, 79. While Officer Howard was looking down and completing the paperwork to effectuate the clerk's arrest, Jennings entered the store, went "right toward

Officer Howard," and shot the officer twice in the head with a silver .38-caliber revolver. 33 RR 113, 114-16. The shooting was so sudden, the clerk testified, that Officer Howard could not unholster his weapon and managed only to say "Oh, no" before Jennings shot him. 33 RR 115. Officer Howard staggered toward the front door of the store and fell face down. 33RR117. While Officer Howard was lying face down and "moaning" on the floor, Jennings walked over and fired two more shots into the back of Officer Howard's head, "execution style." 33 RR 119; *Ex parte Jennings*, 2008 WL 5049911, at *3. After shooting Officer Howard the fourth time, Jennings stole the cash from the register, coins from "a little door below the register," and money from the clerk's wallet. 33 RR 120-21. Then Jennings fled Mr. Peeper's Bookstore. 33 RR 124. Three days later, on July 22, 1988, Jennings confessed to murdering Officer Howard in a written statement to police. 35 RR 560-68. The next day, Jennings also confessed in a lengthy, tape-recorded interview with police. 39 RR 125, 131-33, 137-40; SHCR 272-303.

III. Facts Relevant to the Issues

The State's aggravating evidence consisted of a lengthy description of Jennings's life of crime. In 1972, when Jennings was fifteen-years old, he stole a car; a Harris County juvenile court declared him a delinquent and placed him

on probation. 39 RR 265. In 1973, a Harris County juvenile court again declared him a delinquent but remanded him to custody. 39 RR2 66. In 1974, yet another Harris County juvenile court found Jennings engaged in "delinquent conduct" and again remanded him to custody. 39 RR 267. In 1975, four months after he turned eighteen, Jennings committed aggravated robbery and was sentenced to five years in prison. 39 RR 271. On May 2, 1978, Jennings committed another aggravated robbery with a deadly weapon. *Id.* On May 8, 1978, Jennings entered a restaurant, pistol-whipped a restaurant employee with a silver revolver and "knocked [him] out," stole money from the restaurant's cash register and safe, and then locked the restaurant's employees in a freezer. 39 RR 60-65. On the very same day, Jennings also committed "burglary of a habitation with intent to commit theft." 39 RR 182. For the three felonies that Jennings committed in a single week, he received a thirty-year prison sentence. 39 RR 182-83. While in prison, Jennings committed thirteen disciplinary violations. 39 RR 119-22.

Jennings was paroled on May 13, 1988. SHCR 303. According to Jennings's tape-recorded confession to police, he resumed armed robbery approximately two weeks later, and he committed approximately ten armed

robberies in the ensuing two months. SHCR 293-94. A non-exhaustive list of those crimes includes:

> ·Sometime between June 3 and June 7, 1988, Jennings robbed an adult movie theater called Cinema West while wielding a Colt .38-caliber revolver. SHCR 276-77.
>
> ·On July 7, 1988, Jennings robbed Mr. Peeper's Bookstore while wielding a silver .38-caliber revolver; Jennings stole the cash from the register, coins from underneath the register, and cash from the clerk's wallet. 39 RR 24-30.
>
> ·The next day, Jennings robbed a seafood restaurant while wielding a silver .38-caliber revolver. 39 RR 38-40, 53.
>
> · Later the same day, Jennings entered a nightclub, put his arms around two female patrons of the club, and while holding the women hostage with a silver revolver, stole $400 from the club's clerk. 39 RR 72-82.
>
> · On July 17, Jennings robbed a video rental store while wielding "a very large gun with a long barrel." 39 RR 18.
>
> · Two days later, on July 19, Jennings went back to Cinema West and robbed it again while wielding a silver revolver; Jennings stole the cash and coins from the register, and cash from the clerk's wallet. 39 RR 85-116.
> · Less than half-an-hour later, Jennings went to rob Mr. Peeper's Bookstore again and murdered Officer Howard.

Defense counsel after an extensive mitigation investigation concluded that his best option for a mitigation witness was a Harris County jail chaplain. During its closing argument, the defense urged the jury to impose a life

sentence for two reasons. First, it argued that Jennings was remorseful. *See* 39 RR 230 (arguing that Jennings cried while confessing to the murder); 39 RR 230-31 (expressions of remorse); 39 RR 234-36 (same). That strategy was consistent with, if not dictated by, Jennings's own approach to this case. *See, e.g.*, CR 12-13 (Jennings's letter to the trial judge expressing remorse that "my sins before God and man are many" and "humbly ask[ing] for permission to be married" before standing trial for Officer Howard's murder). Second, and relying on the chaplain's testimony, the defense argued that Jennings could be rehabilitated. *See* 39 RR 228-29 (arguing Jennings is "okay" when "occupied" and turned to violence only because he could not hold a steady job); 39 RR 231-32 (urging rehabilitation); 39 RR 237-38 (same). The jury rejected Jennings's arguments and sentenced him to death. 39 RR 253-56.

REASONS FOR DENYING THE WRIT

The questions that Jennings presents for review are unworthy of the Court's attention. Supreme Court Rule 10 provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for "compelling reasons." But in cases such as this, that assert only factual errors or that a properly stated rule of law was misapplied, certiorari review is "rarely granted." *Id*.

Here, Jennings advances no compelling reason to review his case, and none exists. Indeed, the issue in this case involves only the lower court's proper application of state procedural rules for collateral review of death sentences. Specifically, Jennings was cited for abuse of the writ because he did not meet the subsequent application requirements of Texas Code of Criminal Procedure Article 11.071, Section 5. The state court's disposition, which relied upon an adequate and independent state procedural ground and did not reach the merits of Jennings's claims, forecloses a stay of execution or certiorari review.

Additionally, Jennings appeals from the dismissal of state habeas proceedings but fails to demonstrate that any aspect of those proceedings violated the Constitution. As Justice O'Connor described the role of state habeas corpus proceedings:

> A post-conviction proceeding is not part of the criminal process itself, but is instead a civil action designed to overturn a presumptively valid criminal judgment. Nothing in the Constitution requires the States to provide such proceedings . . . nor does it seem to me that the Constitution requires the States to follow any particular federal model in those proceedings.

Murray v. Giarratano, 492 U.S. 1, 13 (1989) (O'Connor, J., concurring). Similarly, Justice Stevens noted, concurring in the denial of an application for a stay in *Kyles v. Whitley*, 498 U.S. 931, 932 (1990):

> This Court rarely grants review at this stage of the litigation even when the application for state collateral relief is supported by arguably meritorious federal constitutional claims. Instead, the Court usually deems federal habeas proceedings to be the more appropriate avenues for consideration of federal constitutional claims.

Jennings's petition presents no important questions of law to justify this Court's exercise of its certiorari jurisdiction, and there is simply no jurisdictional basis for granting certiorari review in this case.

I. Certiorari Review and a Stay of Execution Are Foreclosed by an Independent and Adequate State-Procedural Bar.

Article 11.071, Section 5(a) of the Texas Code of Criminal Procedure forbids state courts to consider a prisoner's successive state habeas applications unless:

> (1) the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application;
>
> (2) by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt; or
>
> (3) by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have

> answered in the state's favor one or more of the special issues that were submitted to the jury in the applicant's trial under Article 37.071 or 37.0711.

Here, the CCA dismissed the application as "an abuse of the writ without reviewing the merits." *Ex parte Jennings*, No. WR-67,208-03 &-04, Order at 3 (citing Tex. Code Crim. Proc. art. 11.071, § 5(c)); Pet. Appx A, at 3a. Jennings's claims are therefore unequivocally procedurally barred because the state court's disposition of the claims relies upon an adequate and independent state-law ground, i.e., the Texas abuse-of-the-writ statute. *See*, *e.g.*, *Moore v. Texas,* 535 U.S. 1044, 1047-48 (2002) (Scalia, J., dissenting); *Balentine v. Thaler,* 626 F.3d 842, 857 (5th Cir. 2010) (recognizing that Section 5 is an adequate state-law ground for rejecting a claim); *Matchett v. Dretke*, 380 F.3d 844, 848 (5th Cir. 2004) ("Texas' abuse-of-the-writ rule is ordinarily an 'adequate and independent' procedural ground on which to base a procedural default ruling."); *Busby v. Dretke*, 359 F.3d 708, 724 (5th Cir. 2004) ("the Texas abuse of the writ doctrine is an adequate ground for considering a claim procedurally defaulted."); *Barrientes v. Johnson*, 221 F.3d 741, 758–59 (5th Cir. 2000); *Fuller v. Johnson*, 158 F.3d 903, 906 (5th Cir. 1998); *Emery v. Johnson*, 139 F.3d 191, 195–96 (5th Cir. 1997). This Court has held on numerous occasions that it "will not review a question of federal law decided by a state

court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment" because "[the Court] in fact lack[s] jurisdiction to review such independently supported judgments on direct appeal: since the state-law determination is sufficient to sustain the decree, any opinion of this Court on the federal question would be purely advisory." *Sochor v. Florida*, 504 U.S. 527, 533 (1992); *Michigan v. Long*, 463 U.S. 1032, 1042 (1983). There is no jurisdictional basis for granting certiorari review in this case. Accordingly, Jennings's petition presents nothing for this Court to consider.

II. This Court Should Not Ignore the Application of State Law to Revisit Jennings's Claims of *Penry* Error Especially When Jennings's Weak Evidence of Remorse Was Presented to Jury.

Jennings has already litigated multiple claims involving his alleged evidence of remorse which have been rejected by the state and federal courts. But now Jennings argues that his evidence of remorse could not be properly considered under the old Texas sentencing issues. Pet. at 18-20. Jennings also asserts that he deserves relief on his raised and rejected claim of *Penry v. Lynaugh*, 492 U.S. 302 (1989) (*Penry I*), error regarding his drug use. Pet. at 16-18. But as explained above, these claims were properly barred by the lower court as an abuse of the writ. Jennings had previously raised a *Penry* claim

regarding his drug use but since this claim was rejected by state and federal courts, he fails to demonstrate why it should be relitigated. Further, Jennings's new claim of remorse is also properly barred as successive. And it is without merit.[2]

In *Abdul-Kabir v. Quarterman*, 550 U.S. 233 (2007), and *Brewer v. Quarterman*, 550 U.S. 286 (2007), the Court held that *Penry I* error occurs when there is a reasonable likelihood a jury is not permitted to give meaningful effect" or a "reasoned moral response" to a defendant's mitigating evidence. *Brewer*, 550 U.S. at 289; *Abdul-Kabir*, 550 U.S. at 264-65. The Court made it clear that this "firmly established" principle had remained unchanged since 1976. *Abdul-Kabir*, 550 U.S. at 246. But the Court also explained that "[t]he former [Texas] special issues provided an adequate vehicle for the evaluation of mitigating evidence offered to disprove deliberateness or future dangerousness." *Id*. at 256. Similarly, the special issues are satisfactory "when mitigating evidence has only a tenuous connection—'some arguable relevance'—to the defendant's moral culpability." *Id*. at 253 n.14.

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[2] Jennings argues that error occurred under *Penry v. Johnson*, 532 U.S. 782, 802-04 (2001) (*Penry* II), but as this Court held in *Penry II,* the nullification instruction did not add error into the trial but only failed to correct any error that existed under *Penry I.*

In contrast, Abdul-Kabir's "evidence of childhood deprivation and lack of self-control did not rebut either deliberateness or future dangerousness but was intended to provide the jury with an entirely different reason for not imposing a death sentence." *Id.* at 241, 259. Similarly, "Brewer's mitigating evidence served as a 'two-edged sword' because it tended to confirm the State's evidence of future dangerousness as well as lessen his culpability for the crime." *Brewer*, 550 U.S. at 292. But evidence such as good character or remorse "is primarily, if not exclusively, relevant to the issue of future dangerousness" and "could easily have directed jurors towards a 'no' answer with regard to [that] question." *Abdul-Kabir*, 550 U.S. at 251, 262 & n.23 (quoting *Graham v. Collins*, 506 U.S. 461, 275-76) (1993) (emphasis added). Jennings's evidence is precisely this kind. Indeed, if this is not the case in which "the special issues provided for adequate consideration of the defendant's mitigating evidence," then the Court would not have noted the "reassuring" fact that not every case "would require a new sentencing" hearing. *Id.* at 259 n.20. Instead, every case tried under Texas' former special issues would be subject to reversal regardless of the evidence adduced at trial.

Similarly, the Court's recognition that the former Texas special issues are satisfactory "when mitigating evidence has only a tenuous connection—

'some arguable relevance'—to the defendant's moral culpability," wholly invalidates Jennings's argument that his remorse evidence did not receive meaningful consideration within the future-dangerousness issue. *Abdul-Kabir*, 550 U.S. at 253 n.14; *see also Graham*, 506 U.S. at 476 ("virtually any mitigating evidence is capable of being viewed as having some bearing on the defendant's 'moral culpability' apart from its relevance to the particular concerns embodied in the Texas special issues") (emphasis in original). "[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse"; but "the individualized assessment of the appropriateness of the death penalty is a moral inquiry into the culpability of the defendant, and not an emotional response to the mitigating evidence." *See California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring).

Jennings argues that the Fifth Circuit has rejected this approach, setting up a conflict between the CCA and the court of appeals. In support, Jennings cites to a district court case *Williams v. Davis*, 192 F.Supp.3d 732 (S.D. Tex. 2016). Pet. at 18-19. But Jennings ignores the fact that any tension between

the state and federal court rulings has existed for a much greater period of time. *See e.g. Pierce v. Thaler*, 604 F.3d 197, 210 (5th Cir. 2010). Further, lower federal court rulings are not binding on state courts. And this Court has never held that remorse alone is sufficient to grant *Penry* relief. In this case, Jennings attorneys presented their limited evidence of remorse to the jury. And the jury rejected it.

Moreover, one of the state court judges examined Jennings's evidence of remorse and found it lacking in a concurring opinion. As Judge Hervey stated,

> [Jennings] alleges that, he cried during portions of the interview; he said that he was "real upset" because he shot someone and did not know whether that person was alive or dead; when asked at the end of the interview if there was anything else he wanted to say, he responded, "Remorse in the way I feel about the incident that happened"; and that he said he wished he could "take it all back" and that he would "face whatever punishment I have coming."
>
> Having listened to the entirety of Jennings' recorded audio statement and having read habeas counsel's transcript exhibit, it is my opinion that 'neither contains mitigating evidence. With respect to Jennings' claims of crying, it is not clear to me that he actually cried during the interview. But even if he did, I understand him to be saying that he was scared because he had shot someone while perpetrating a robbery, that he did not know if the person was still alive, and that he was "real upset" and "hurting" because his accomplice unexpectedly shot him when he returned to the getaway car. He also explained that, because he was unable to find a permanent job after being released from TDC,

> and "his people" were already "hurting" when he got out, "he started committing robberies so he could provide for them. He claimed that he used the money to buy clothes and other things. While it is true that he used the word "remorse" during his statement, when his comments are considered within the context of the entire interview, it seems he regretted only that the robbery was not routine as usual-meaning that they got the money without anyone getting hurt-and that he will no longer be able to provide for "his people" because he will be in prison.

Pet. Appx. At 8a (Hervey, J., concurring). Judge Hervey then concludes, "In my opinion, the recording contains no evidence that Jennings felt remorse for murdering a police officer. . ." *Id*. at 10a. This view starkly contrasts with the evidence and arguments before the jury and that the jury rejected.

Jennings's *Penry* claim regarding his substance abuse was raised and rejected in prior state and federal proceedings. Jennings does not demonstrate why this Court should address this successive claim. And his remorse evidence was properly considered and rejected by the jury. This Court should respect the jurisdictional bar of Jennings's abusive claims.

III. This Court Should Not Ignore the Application of State Law to Review Jennings's Class of One Equal Protection Claim.

"To state a claim under the Equal Protection Clause," a petitioner "must either allege that (a) 'a state actor intentionally discriminated against [him] because of membership in a protected class[,]' or (b) he has been 'intentionally

treated differently from others similarly situated and that there is no rational basis for the difference in treatment.'" *Gibson v. Texas Dep't Ins.*, 700 F.3d 227, 238 (5th Cir. 2012) (alteration in original) (citations omitted). But Jennings makes no allegation that he is a member of a protected class. Instead, Jennings asserts that he has been treated differently than other similarly situated petitioners. Thus, Jennings advances a "class-of-one" equal protection claim.

A class-of-one equal protection claim requires allegations that (1) the plaintiff "was treated differently from others similarly situated and (2) there was no rational basis for the disparate treatment." *See Stotter v. Univ. of Tex. at San Antonio*, 508 F.3d 812, 824 (5th Cir. 2007). Successful class-of-one equal protection cases are typically marked by "the existence of a clear standard against which departures, even for a single plaintiff, [can] be readily assessed." *Engquist v. Oregon Dep't of Agr.*, 553 U.S. 591, 602 (2008). But this Court has "long held the view that there is a crucial difference, with respect to [this] constitutional analysis, between the government exercising 'the power to regulate or license, as lawmaker,' and the government acting "as proprietor, to manage [its] internal operation.'" *Id.* at 598 (quoting *Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 886, 896 (1961)). There are some forms of state action, however, which by their nature involve discretionary decision making

based on a vast array of subjective, individualized assessments. In such cases the rule that people should be "treated alike, under like circumstances and conditions" is not violated when one person is treated differently from others, because treating like individuals differently is an accepted consequence of the discretion granted. In such situations, allowing a challenge based on the arbitrary singling out of a particular person would undermine the very discretion that such state officials are entrusted to exercise. *Engquist*, 553 U.S. at 603.

Jennings premises his equal protection claim not only on the basis of a change in federal decisional law and cites to *Williams*, 192 F.Supp.3d at 768-70, Pet. at 11, but on Texas's decision not to appeal. *Id*. This is precisely the kind of discretionary decision, premised on a vast array of subjective, individualized litigation assessments, and made in the defense of a different lawsuit, discussed in *Engquist*. 553 U.S. at 603. Moreover, in the *Williams* litigation the State was not functioning as a "lawmaker," but as a *defendant*. And because Jennings can establish no set of facts that would overcome the rationale for the categorical bar in *Enquist*, he fails to state a claim upon which relief can be granted. And even if *Enquist* did not create a categorical ban to Jennings's claim, he fails even to allege that "the defendant deliberately sought

to deprive [Jennings] of the equal protection of the laws for reasons of a personal nature unrelated to the duties of the defendant's position," which is what is required for a "class of one" claim. *Mata v. City of Kingsville*, 275 F. App'x 412, 415 (5th Cir. 2008) (unpublished).

Finally, Jennings citation to four cases where the state court has granted *Penry* relief are inapposite. Jennings argues that the petitioners in *Ex parte Moreno*, 245 S.W.3d 419 (Tex. Crim. App. 2008); *Ex parte Martinez*, 233 S.W.3d 319 (Tex. Crim. App. 2007); *Ex parte Hood*, 304 S.W.3d 397 (Tex. Crim. App. 2010) and *Ex parte Smith*, 309 S.W.3d 53 (Tex. Crim. App. 201), were all similarly situated to him. Pet at 12-13, 16. But as Jennings admits the various issues put forth in these cases are distinct and none of these cases rely solely on evidence of remorse. Pet. at 13. Thus, Jennings fails to show that any similarly situated petitioner presented an abusive claim of remorse and received relief even with a suggestion for reconsideration.

For these reasons, Jennings's equal protection claim fails. Thus, this Court should not ignore the jurisdictional hurdle created by the state court's ruling to review Jennings facially invalid claim.

IV. Jennings Is Not Entitled to a Stay of Execution.

The party requesting a stay bears the burden of showing that the circumstances justify an exercise of [judicial] discretion." *Nken v. Holder*, 556 U.S. 418, 433–34 (2009). Before utilizing that discretion, a court must consider:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Id. at 434 (citations omitted) (internal quotation marks omitted). A stay of execution "is not available as a matter of right, and equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Hill v. McDonough*, 547 U.S. 573, 584 (2006). "A court considering a stay must also apply 'a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay.'" *Id.* (quoting *Nelson v. Campbell*, 541 U.S. 637, 650 (2004)).

As discussed above, Jennings cannot demonstrate a strong likelihood of success on the merits. He has not preserved any claim alleging a violation of his constitutional rights. And even if his claims were preserved, they are unworthy of this Court's attention.

CONCLUSION

For the foregoing reasons, the Court should deny Jennings petition for writ of certiorari and his application for stay of execution

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