No. _____

In the Supreme Court of the United States
October Term, 2018

ROBERT MITCHELL JENNINGS,
Petitioner,

v.

LORIE DAVIS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,
Respondent.

APPLICATION FOR STAY OF EXECUTION PENDING FILING AND DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

Capital Case

Execution set: January 30, 2019, 6 p.m.

EDWARD MALLETT
Mallett Saper, LLP
4306 Yoakum Blvd., Suite 400
Houston, Texas 77006
Tel.: (713) 236-1900
Fax: (713) 228-0321
edward@msblawyers.com

MAUREEN FRANCO
Federal Public Defender
Western District of Texas
TIVON SCHARDL*
Chief, Capital Habeas Unit
JOSHUA FREIMAN
Assistant Federal Public Defender
504 Lavaca Street, Suite 960
Austin, Texas 78701
(512) 916-5025
Tivon_Schardl@fd.org
**Counsel of Record*

To the Honorable Justice Samuel Alito, as Circuit Justice for the United States Court of Appeals for the Fifth Circuit:

Petitioner Robert Mitchell Jennings respectfully requests a stay of his execution, presently scheduled for 6:00 p.m. CDT on Wednesday January 30, 2019, pending this Court's disposition of a petition for writ of certiorari, to be filed tomorrow:

INTRODUCTION

Petitioner will present compelling reasons for this Court to exercise jurisdiction by showing that the Court of Appeals' decision below so far departed from the accepted and usual course of judicial proceedings as to call into question the legitimacy of its decision.

State habeas counsel committed an outcome-determinative error when he failed to raise a trial counsel ineffectiveness claim predicated on *Penry* error in Mr. Jennings's state habeas application.

In two, sequential rulings, the Court of Appeals first held that Mr. Jennings's claim was unexhausted and procedurally defaulted, and then—after this Court provided a mechanism to secure review of that defaulted claim in *Trevino v. Thaler*, 569 U.S. 413 (2013)—recast its default holding as a merits adjudication such that Petitioner could not

reopen judgment under Federal Rule of Civil Procedure 60(b). That revisionist procedural holding is of a type with the revisionist procedural holding this Court rejected in *Smith v. Texas*, 550 U.S. 297 (2007).

Furthermore, contrary to this Court's decision in *Johnson v. Williams*, 568 U.S. 289 (2013), the Court of Appeals held that this unexhausted claim was nevertheless adjudicated on the merits in state court.

PROCEDURAL BACKGROUND

But for an improbable succession of bad lawyering, Petitioner's death sentence would have been vacated years ago based on this Court's decisions in *Penry v. Lynaugh*, 492 U.S. 302 (1989) ("*Penry I*"), and *Penry v. Johnson*, 532 U.S. 782, 788 (2001) ("*Penry II*"), like the death sentences of at least 25 other death row inmates in Texas.[1]

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[1] This Court granted "*Penry II*" relief in the following cases: *Penry v. Johnson*, 532 U.S. 782 (2001); *Smith v. Texas*, 543 U.S. 37 (2004) ("*Smith I*"); *Smith v. Texas*, 549 U.S. 1104 (2007) ("*Smith II*").

The federal courts granted *Penry* II relief in the following cases: *Aldridge v. Thaler,* 2010 WL 1050335 (S.D. Tex. Mar. 17, 2010)(unpublished); *Bigby v. Dretke*, 402 F.3d 551 (5th Cir. March 8, 2005); *Blue v. Cockrell*, 298 F.3d 318 (5th Cir. July 16, 2002); *Chambers v. Quarterman*, No. 03-11248, 2007 WL 4553657 (5th Cir. Dec. 27, 2007) (unpublished); *Garcia v. Quarterman*, 2007 WL 3005213 (5th Cir. Oct.

Mr. Jennings was tried while this Court was deciding *Penry I*. This Court granted *certiorari* to hear the challenge to Texas's capital sentencing scheme the previous year, at the end of its 1987 Term,[2]

15, 2007) (unpublished); *Nelson v. Quarterman*, 472 F.3d 287 (5th Cir. 2006) (*en banc*); *Goynes v. Dretke*, No. 4:02-cv-02665 (S.D. Tex. Nov. 30, 2004); *Jones v. Thaler*, 2011 WL 1044469 (S.D. Tex. Mar. 3, 2011)(unpublished); *Williams v. Davis*, 192 F.Supp.3d 732, 768-70 (S.D. Tex. 2016); *Rodriguez v. Quarterman*, No. CIV. SA-05-CA-659-RF, 2006 WL 1900630, at *1 (W.D. Tex. July 11, 2006).

The Texas Criminal Court of Appeals granted *Penry* II relief in the following decisions: *Ex parte Alexander*, No. AP-76,818, 2012 WL 2133738, at *1 (Tex. Crim. App. June 13, 2012)(unpublished); *Ex parte Briseno*, No. AP-76,132, 2010 WL 2332150, at *1 (Tex. Crim. App. June 9, 2010)(unpublished); *Ex parte Buntion,* No. AP-76,236, 2009 WL 3154909, at *1 (Tex. Crim. App. Sept. 30, 2009)(unpublished); *Ex parte Davis*, No. AP-76,263, 2009 WL 3839065, at *1 (Tex. Crim. App. Nov. 18, 2009); *Ex parte Hood*, 304 S.W.3d 397 (Tex. Crim. App. 2010)(on reconsideration); *Ex Parte Garcia*, No. WR-78,112-01, 2013 WL 2446468, at *1 (Tex. Crim. App. June 5, 2013)(unpublished); *Ex Parte Greer*, No. AP-76,592, 2011 WL 2581922, at *1 (Tex. Crim. App. June 29, 2011)(unpublished); *Ex parte Lewis*, No. AP-76,334, 2010 WL 1696797, at *1 (Tex. Crim. App. Apr. 28, 2010)(unpublished); *Ex Parte Lim,* No. AP-76,593, 2011 WL 2581924, at *1 (Tex. Crim. App. June 29, 2011)(unpublished); *Ex parte Martinez,* 233 S.W.3d 319 (Tex. Crim. App. 2007); *Ex Parte Mason,* No. AP-76,997, 2013 WL 1149829, at *1 (Tex. Crim. App. Mar. 20, 2013)(unpublished); *Ex parte Moreno,* 245 S.W.3d 419 (Tex. Crim. App. 2008); *Ex Parte Rachal,* No. AP-76,720, 2012 WL 333860, at *1 (Tex. Crim. App. Feb. 1, 2012)(unpublished); *Ex parte Robertson,* No. AP-74,720, 2008 WL 748373, at *1 (Tex. Crim. App. Mar. 12, 2008)(unpublished); *Ex parte Smith,* 390 S.W.3d 53 (Tex. Crim. App. 2010); *Ex parte Wheatfall*, 2015 WL 513388 (Tex. Crim. App. Feb. 4, 2015) (unpublished).

[2] *Penry v. Lynaugh*, 487 U.S. 1283 (June 30, 1988) (mem.).

three weeks before Mr. Jennings's offense. The decision was front-page news throughout Texas.[3] This Court did not issue its opinion until the end of its 1988 Term, on the eve of Mr. Jennings's trial. But Mr. Jennings's trial counsel were unaware of the case until the middle of the punishment phase when the District Attorney told counsel about it. At the same time the District Attorney handed defense counsel a copy of the *Penry I* opinion, he handed him a proposed jury instruction. That instruction—which this Court later referred to as a "nullification instruction," *Penry II*, 532 U.S. at 798—told the jurors to give a false negative answer to one of the special issues that must be answered in the affirmative for a death sentence to be imposed if they had identified a mitigating circumstance that warranted a sentence less than death.

In complete ignorance of the law, Mr. Jennings's trial counsel proposed the District Attorney's nullification instruction as though it were Mr. Jennings's own. Even when the District Attorney made a closing argument nearly identical to the one this Court condemned in *Penry I*, Petitioner's trial counsel made no objection. Petitioner's trial

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[3] *See* Br. for Appellant at 4-5, *Jennings v. Davis*, No. 19-70005 (5th Cir.) (collecting news articles).

counsel also represented him on appeal, and did not assert this *Penry* error.

In Petitioner's application for state habeas relief, filed in 1996, Petitioner's new lawyer asserted that trial counsel was ineffective based on three unreasonable omissions, and one unreasonable act. None of those challenged omissions or actions was the uninformed decision to launder the District Attorney's newly minted nullification instruction.[4] After the state trial court recommended that the Court of Criminal Appeals deny relief, and the appellate court ordered additional briefing, Petitioner's counsel asserted for the first time—in a footnote—that trial counsel was ineffective for failing to "introduce[] mitigating evidence of his mental impairment and disadvantaged background" *and* failing to

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[4] The four deficiencies were:

1. failure to discover and present mitigating evidence of Mr. Jennings's mental impairment;

2. failure to present evidence of applicant's disadvantaged background;

3. failure to move to reopen the voir dire examination or to move for a mistrial when *Penry v. Lynaugh* was decided after completion of the voir dire examination but before commencement of the testimony;

4. arguing during summation that he (defense counsel) could not quarrel with the death sentence.

"object[] to the nullification instruction" which would have led to a different outcome on review of the *Penry* error. Petitioner's state habeas application also raised a freestanding claim of *Penry* error.

When the Texas Court of Criminal Appeals decided the ineffective-assistance claim Mr. Jennings raised in his state habeas application, it said the following regarding its prejudice analysis:

> The question boils down, therefore, to whether there is a reasonable probability that the applicant's jury would have answered any of the statutory special issues, or would have answered a properly formulated *Penry* instruction, in such a way that the applicant would have received a life sentence instead of the death penalty.

Ex parte Jennings, 2008 WL 5049911 at *6 (Tex. Crim. App. Nov. 26, 2008). That is, when deciding Mr. Jennings's ineffective-assistance claim, the state court did not consider how the additional evidence he presented in post-conviction proceedings would have affected the court's assessment of the *Penry* error. Its prejudice analysis assumed there was no instructional error.

When deciding whether the nullification instruction was harmless, the state court expressly refused to consider the additional mitigation evidence that Mr. Jennings's proffered with his ineffective-assistance claim indicating it viewed the two claims as distinct:

> The applicant's *Penry* claim is limited to the evidence actually adduced at his trial, and does not include the jury's ability to render a reasoned moral response to mitigating evidence he now claims *should* have been adduced.

Id. at *8 (emphasis in original). The state court also cited state law limiting *Penry* claims to the evidence presented at trial. *Id.* at *8 n.27 (citing *Ex parte Kunkle*, 852 S.W.2d 499, 504 (Tex. Crim. App. 1993) ("[W]e shall not consider mitigating evidence not presented or proffered at trial in determining the merits of' a *Penry* claim.")).

Mr. Jennings was represented in federal habeas proceedings by the same lawyer who represented him in state habeas. Mr. Jennings combined the two errors of counsel regarding the failure to investigate and present mitigation evidence and the introduction of the nullification instruction, as he had in the footnote,

> [h]ad counsel introduced mitigating evidence of petitioner's mental impairment and disadvantaged background and thereafter objected to the nullification instruction, an appellate court would have reversed the death sentence.

Petition, Dist. Ct. ECF No. 1, at 33-34 (citing *Abdul-Kabir v. Quarterman*, 550 U.S. 233 (2007); *Brewer v. Quarterman*, 550 U.S. 286 (2007); and *Smith v. Texas*, 550 U.S. 297 (2007)).[5]

"The district court did not consider Jennings' *Penry*-based prejudice argument because it found that Jennings failed to exhaust this claim in his state habeas proceeding." *Jennings v. Stephens*, F. App'x 326, 336-37 (5th Cir. Jul. 22, 2013). The district court found "Jennings raised a *Penry* claim in state court but limited it to the evidence he presented at trial." *Jennings v. Thaler*, No. 4:09-cv-219, 2012 WL 1440387 at *7 n.6 (S.D. Tex. Apr. 23, 2012). "That was insufficient to exhaust the claim," *id.*, that "evidence of his low intelligence would have entitled him to state habeas relief after the Supreme Court decided *Penry [II]*." *Id.* at *7.

In 2013, the Fifth Circuit likewise found the "claim [was] unexhausted and procedurally defaulted":

> Although Jennings established the factual basis to support his *Penry*-based prejudice argument, he did not provide the Texas Court of Criminal Appeals with a fair

[5] On appeal to the Fifth Circuit, Petitioner's counsel dropped the deficient performance argument, and argued only the *Penry*-based theory of prejudice.

> opportunity to consider the substance of his argument—he inserted it in a footnote at the end of his brief.
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> * * *
>
> This argument only vaguely alerted the state habeas court to his *Penry*-based prejudice argument and focused instead on arguing that *Penry II* is not applicable. This passing reference to his *Penry*-based prejudice argument during his state habeas proceedings does not suffice to exhaust his claim. As a result, Jennings is barred from asserting this claim in his federal habeas petition.

Id. And based on those findings, the court held,

> Because this claim is unexhausted and procedurally defaulted, Jennings cannot now rely on it to establish prejudice resulting from the failure to present background and mental-health mitigating evidence during the penalty phase. See 28 U.S.C. § 2254(b)(1).

Id.

In 2019, relying on the district and circuit courts' findings of default, and this Court's decisions in *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013), Mr. Jennings filed a motion for relief from the judgment under Federal Rule of Civil Procedure 60(b). *See* Dist. Ct. ECF No. 52. The district court denied the motion on timeliness grounds alone but found Rule 60(b) motion proper because the claim was defaulted and colorable. Denial of Stay of Execution (Dist. Ct. Op.), *Jennings v. Davis*, No. 4:09-cv-219, 2019 WL

280958, at *2, *3 (S.D. Tex. Jan. 22, 2019). The district court granted a certificate of appealability on timeliness. *Id.* at *3.

The Court of Appeals eschewed the timeliness issue and affirmed on the ground that "the prerequisite for applying *Trevino*, which is 'a procedural default' that would otherwise 'bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial' does not exist in this case." Opinion ("Op.") at 10, *Jennings v. Davis*, No. 19-70005 (5th Cir. Jan. 28, 2019). The court said it had only "discussed procedural default as an alternative ground, but our holding did not depend on that." Op. at 9.

It considered Mr. Jennings's *Penry*-based ineffectiveness claim when determining whether Mr. Jennings had shown prejudice from his mitigation-based claim of ineffectiveness. The court recognized its "holding" that "[federal habeas counsel] 'did not provide the Texas Court of Criminal Appeals with a fair opportunity to consider the substance of his argument [on state habeas review]—he inserted it in a footnote at the end of his brief.'" Op. at 9. But the court stated, "[t]hat additional holding does present an issue of counsel ineffectiveness but

only on a point that was an independent reason for denying relief." Op. at 9.

REASONS MR. JENNINGS IS ENTITLED TO A STAY

A stay of execution is warranted where there is a "presence of substantial grounds upon which relief might be granted." *See Barefoot v. Estelle*, 463 U.S. 880, 895 (1983). To decide whether a stay is warranted, the federal courts consider the petitioner's likelihood of success on the merits, the relative harm to the parties, and the extent to which the prisoner has delayed his or her claims. *See Hill v. McDonough*, 547 U.S. 573, 584 (2006); *Nelson v. Campbell*, 541 U.S. 637, 649-50 (2004). This standard requires a petitioner in this Court to show a reasonable probability that four members of the Court would consider the underlying case worthy of the grant of certiorari, that there is a significant likelihood of reversal of the lower court's decision, and a likelihood of irreparable harm absent a grant of certiorari. *See Barefoot*, 463 U.S. at 895.

There is no question that Mr. Jennings will suffer irreparable harm absent this Court entering a stay of execution. *See Wainwright v. Booker*, 473 U.S. 935, 935 n.1 (1985) (Powell, J. concurring) (irreparable

harm "is necessarily present in capital cases."). Petitioner has diligently pursued relief since the appointment of conflict-free counsel to investigate and develop his Rule 60(b) motion. Petitioner addresses the remaining, dispositive factor below.

I. The Fifth Circuit's surprise about-face on its procedural default holding insulates Mr. Jennings's substantial claim from review.

The Fifth Circuit's sole reason for denying Mr. Jennings's Rule 60(b) motion is that the claim it had treated as procedurally defaulted in 2013 was actually not a procedurally defaulted claim. This reversal of position cannot be squared with this Court's exhaustion law, the doctrine of the law of the case, or with common sense. This egregious error prevents meaningful review of even the merits of a Rule 60(b) motion—let alone the merits of a substantial underlying claim of constitutional error in a death-penalty sentencing.

Mr. Jennings properly sought review of a defaulted claim of trial counsel's ineffectiveness by asking to reopen judgment under Rule 60(b). *See* Dist. Ct. ECF No. 52; *Gonzalez v. Crosby*, 545 U.S. 524, 532-33 (2005) (recognizing that petitioners may properly bring Rule 60(b) motions for review of claims previously dismissed on procedural

grounds). He re-alleged the claim that the district court and Fifth Circuit had previously found procedurally defaulted. Dist. Ct. ECF No. 52 at 25-35. And he now argued that the claim could be reviewed because *Martinez* and *Trevino* permitted him to show cause—his state habeas counsel's ineffectiveness in failing to raise the substantial claim—which would permit merits review. *Martinez*, 566 U.S. at 13-14.

The Fifth Circuit in 2013 treated the claim as procedurally defaulted. The district court treated the claim as defaulted in denying relief. Denial of Stay of Execution (Dist. Ct. Op.), *Jennings v. Davis*, No. 4:09-cv-219, 2019 WL 280958, at *2 (S.D. Tex. Jan. 22, 2019). Both parties on appeal treated the claim as defaulted. *See* Brief for Appellant at 1, *Jennings v. Davis*, 19-70005 (5th Cir.); Appellee's Brief at 11, 29 (conceding the claim was defaulted; assuming *Martinez* & *Trevino* apply).

So it came as a surprise when the Fifth Circuit affirmed the denial of the Rule 60(b) motion on the sole basis that the procedurally defaulted claim was not a procedurally defaulted claim. Op. at 10. The Fifth Circuit sidestepped the single debatable issue on which the district court had granted COA, whether the Rule 60(b) motion was

made "within a reasonable time." Fed. R. Civ. P. 60(c)(1); *see* Dist. Ct. Op. at *2. The Fifth Circuit also sidestepped the numerous "potentially credible" arguments in favor of granting Mr. Jennings's Rule 60(b) motion. Op. at 6.

In this sudden reversal of procedural grounds, the opinion resembles nothing so much as the state court decision rebuked in *Smith v. Texas* (*Smith II*), 550 U.S. 297, 313 (2007). In LaRoyce Smith's case, this Court reviewed the decision of the Texas Court of Criminal Appeals on direct review, found *Penry* error, and remanded for further proceedings consistent with that conclusion. *Smith v. Texas* (*Smith I*), 543 U.S. 37 (2004). On remand, the Texas court found LaRoyce Smith had not preserved the *Penry* error in the first place. *See Smith II*, 597 U.S. at 300 (noting that, on remand, the TCCA "held, for the first time, that Smith's pretrial objections did not preserve the claim of constitutional error he asserts.") This Court took up the case again and held, *inter alia*, the Texas court was wrong to have imposed the procedural bar on remand. *Id.* at 313 (holding application of procedural rule was "based on a misinterpretation of federal law").

The common theme in this case and *Smith* is a lower court revising its prior holding on the procedural posture of a claim after a decision of this Court breathed new life into the merits.

The Fifth Circuit had found Mr. Jennings's *Penry*-based ineffectiveness claim was not fairly presented to the state courts, and was procedurally barred. *Jennings*, 537 F. App'x 336-37. In *Trevino v. Thaler*, 569 U.S. 413 (2013), this Court breathed new life into Mr. Jennings's defaulted claim by allowing him to allege his state habeas counsel's inadequate presentation constituted ineffective assistance of counsel, however, the Fifth Circuit changed its position: where there was a "defaulted" "claim" in 2013, in 2019, there was—to take the opinion at face value—a defaulted "argument" and an already adjudicated claim.

The Fifth Circuit decision to *retract* a mandatory procedural default that bars federal review of a claim has an obvious problem under appellate practice. It contravenes the doctrine of the law of the case. That doctrine holds that, barring some exception, "[w]hen a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.'" *Musacchio v.*

United States, 136 S. Ct. 709, 716 (2016) (quoting *Pepper v. United States,* 562 U.S. 476, 506 (2011)).

Take 2254(d)'s "adjudication on the merits" requirement. The Fifth Circuit's decision cannot be squared with this Court's in *Johnson v. Williams*, 568 U.S. 289 (2013). In *Williams*, this Court considered the presumption of a merits adjudication from *Harrington v. Richter*, 562 U.S. 86 (2011), that operates when a federal habeas petitioner asserted a federal claim in state court, and the state court's decision does not mention the claim. *Williams* held the *Richter* presumption is rebuttable in a narrow range of circumstances. One of them was this: "when a defendant does so little to raise his claim that he fails to 'fairly present' it in 'each appropriate state court,' *Baldwin v. Reese*, 541 U.S. 27, 29 (2004), the *Richter* presumption is fully rebutted." 568 U.S. at 302 n.3.

By purporting to adjudicate a claim it had found defaulted, the opinion under-protected federalism interests expressed through the procedural default doctrine, which ordinarily imposes an absolute bar to review of defaulted claims unless certain exceptions are met. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). But it also had the effect of vastly overprotecting the same federalism interests in contravention of

Coleman: Mr. Jennings alleged that he could overcome the procedural default with a showing of cause under *Martinez* and *Trevino*, but the decision to find the claim not procedurally defaulted barred that otherwise permissible review under the *Martinez* exception to *Coleman*.

It is likely that when this Court receives Petitioner's petition for writ of *certiorari* this Court will agree that the sudden about-face on the procedural default question impermissibly foreclosed review of Mr. Jennings's Rule 60(b) motion and underlying claim. Just as in *Smith II*, this Court may allow Mr. Jennings to overcome this whipsaw change in law to allow a Texas prisoner with a viable *Penry*-based claim to get the unencumbered review he seeks. And this Court may find that *Williams* requires in the Rule 60(b) context the same thing it and decades of exhaustion cases require in the context of an initial petition, and conclude that Mr. Jennings should have received an opportunity—at a minimum—to demonstrate "extraordinary circumstances" sufficient to reopen judgment and obtain merits review under *Strickland v. Washington*, 466 U.S. 668 (1984), and *Penry II*, 532 U.S. 782.

Therefore, this Court should issue a stay of execution pending review of Mr. Jennings's petition.

CONCLUSION

For the foregoing reasons, this Court should grant Mr. Jennings a stay of execution.

Respectfully submitted,

/s/ Tivon Schardl
TIVON SCHARDL
Chief, Capital Habeas Unit
JOSHUA FREIMAN
Assistant Federal Public Defender
Federal Defender Office
Western District of Texas
504 Lavaca Street, Suite 960
Austin, TX 78701
Tel.: 512-916-5025
Fax: 512-916-5035
Tivon_schardl@fd.org

EDWARD MALLETT
Mallett Saper, LLP
4306 Yoakum Blvd., Suite 400
Houston, Texas 77006
Tel: (713) 236-1900
Fax: (713) 228-0321
edward@msblawyers.com

Counsel for Petitioner

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