Nos. 21A631 and 21-7670

CAPITAL CASE
Execution Scheduled: April 21, 2022 at 7:00 p.m. CDT

IN THE
SUPREME COURT OF THE UNITED STATES

IN RE: OSCAR SMITH,
Petitioner

ON ORIGINAL PETITION FOR WRIT OF HABEAS CORPUS AND APPLICATION FOR STAY OF EXECUTION

RESPONDENT'S BRIEF IN OPPOSITION TO ORIGINAL PETITION FOR WRIT OF HABEAS CORPUS AND APPLICATION FOR STAY OF EXECUTION

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CAPITAL CASE
QUESTION PRESENTED

I. Is the petitioner entitled to a writ of habeas corpus from this Court when his claims are barred from habeas review by any federal court and there are no exceptional circumstances warranting the exercise of this Court's original jurisdiction?

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The April 20, 2022, order of the District Court denying Smith's Emergency Motion for Temporary Restraining Order is included in Smith's appendix. (Pet.'s Appx. A.) The April 14, 2022, judgment and opinion of the Tennessee Court of Criminal Appeals' affirming the denial of Smith's motion to reopen is unpublished and is provided in the attached appendix. *Smith v. State*, No. M2022-00455-CCA-R3-PD, 2022 WL 1115034 (Tenn. Crim. App. Apr. 14, 2022); (Resp. Appx. A.) The April 11, 2022, order of the Davidson County Criminal Court denying Smith's motion to reopen is unpublished and is provided in the attached appendix. (Resp. Appx. B.)

STATEMENT OF JURISDICTION

Petitioner invokes this Court's original jurisdiction to entertain applications for a writ of habeas corpus under 28 U.S.C. § 2241(a) and 28 U.S.C. § 2254(a).

STATUTORY PROVISIONS AND RULE INVOLVED

28 U.S.C. § 2241 provides in pertinent part:

> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

28 U.S.C. § 2254 provides in pertinent part:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in the custody in violation of the Constitution or laws or treaties of the United States.
>
> (b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that —
>
> the applicant has exhausted the remedies available in the courts of the State . . . .

Rule 20.4(a), Rules of the Supreme Court of the United States, provides:

> A petition seeking the issuance of a writ of habeas corpus shall comply with the requirements 28 U.S.C. §§ 2241 and 2242, and in particular with the provision in the last paragraph of § 2242 requiring a statement of the "reasons for not making application to the district court of the district in which the applicant is held." If the relief sought is from the judgment of a state court, the petition shall set forth specifically how and wherein the petitioner has exhausted available remedies in the state courts or otherwise comes within the provisions of 28 U.S.C. § 2254(b). To justify the granting of a writ of habeas corpus, the petitioner must show exceptional circumstances warranting the exercise of the Court's discretionary powers and must show that adequate relief cannot be obtained in any other form or from any other court. These writs are rarely granted.

STATEMENT OF THE CASE

In 1989, Oscar Smith shot and killed his estranged wife, Judy Smith, and her two sons, Jason Burnett, and Chad Burnett. Thirteen-year-old Chad was shot three times after being stabbed in the chest, back, abdomen, and neck. Sixteen-year-old Jason was stabbed and slashed so severely that his small bowel protruded from his body before he died, while Judy Smith was shot in the neck and back at such close range that she was paralyzed before she died. Before he died, Chad was heard on a 911 call shouting Smith's name as the killer.

The jury sentenced Smith to death for all three murders, finding two aggravating circumstances with respect to the murder of Judy Smith, and four aggravating circumstances with respect to the murders of Jason and Chad Burnett. *State v. Smith*, 868 S.W.2d 561, 565 (Tenn. 1993). On direct appeal, the Tennessee Supreme Court affirmed Smith's convictions and sentence for crimes that were "intentional, senseless, brutal, gruesome and violent killing of three helpless people." *Id*. at 583.

Since "these tragic, brutal and bizarre murders," *id*. at 565, Smith has spent over 30 years contesting his conviction and sentence in state and federal courts.[1]

[1] Smith has launched at least nine attacks on his conviction or sentence, resulting in the following decisions listed in chronological order: *State v. Smith*, 868 S.W.2d 561 (Tenn. 1993); *Smith v. State*, No. 01C01-9702-CR-00048, 1998 WL 345353 (Tenn. Crim. App. June 30, 1998), *perm. app. denied* (Tenn. Jan. 25, 1999); *Smith v. Bell*, No. 3:99-cv-0731, 2005 WL 2416504 (M.D. Tenn. Sept. 30, 2005); *Smith v. Bell*, 381 Fed. Appx. 547 (6th Cir. 2010); *Smith v. Colson*, No. 10-8629, 566 U.S. 901 (May 14, 2012); *Smith v. Colson*, No. 12-390, 569 U.S. 1015 (June 3, 2013); *West v. Schofield*, 468 S.W.3d 482 (Tenn. 2015); *Smith v. State*, No. M2016-01869-CCA-R28-PD (Tenn. Crim. App. Oct. 19, 2016), *perm. app. denied* (Tenn. Feb. 16, 2017); *West v. Schofield*, 519 S.W.3d 550 (Tenn. 2017); *Smith v. Carpenter*, No. 3:99-cv-0731, 2018 WL 317429 (M.D. Tenn. Jan. 8, 2018); *Smith v. State*, No. M2019-01662-CCA-R28-PD (Tenn. Crim. App. Oct. 28, 2019), *perm. app. denied* (Tenn. Jan. 15, 2020); *Abdur'Rahman v. Parker*, 558 S.W.3d 606, 610 (Tenn, *cert. denied sub nom. Zagorski v. Parker*, 139 S. Ct. 11 (2018), and *cert. denied sub nom. Miller v. Parker*, 139 S. Ct. 626 (2018), *and cert. denied*, 139 S. Ct. 1533 (2019); *Smith v. Parker*, No. 3:19-cv-01138, 2020 WL 1853593 (M.D. Tenn. April 13, 2020); *Smith v. State*, No. M2020-00485-CCA-R3-ECN, 2020 WL 5870566 (Tenn. Crim. App. Oct. 2, 2020), *perm. app. denied* (Tenn. Oct. 10, 2020); *Smith v. State*,

On April 4, 2022, Smith filed his fourth motion to reopen post-conviction proceedings in state court, claiming under Tenn. Code Ann. § 40-30-117(a)(2), that new scientific evidence established his innocence. He relied on recently obtained touch-DNA analysis suggesting that an unknown person's DNA was present on an awl found at the crime scene. Smith propounded that this unknown person must have been the killer. (Resp. Appx. C.) The trial court denied Smith's motion, emphasizing the extensive evidence of his guilt and concluding that even considering the DNA evidence in the light most favorable to Smith, it would not establish his innocence. (Resp. Appx. B.) On appeal, the Tennessee Court of Criminal Appeals affirmed the trial court's denial of relief, reasoning that he "has not presented new scientific evidence establishing that he is actually innocent of the murders of the victims." *Smith*, 2022 WL 1115034 at *5. The Tennessee Supreme Court then denied discretionary review.

Most recently, Smith turned to federal court. In the late evening hours on Monday of this week—less than 72 hours before his scheduled execution—he filed a complaint asking the district court to evaluate the "Tennessee courts' interpretation" of Tennessee law in the above case and enjoin Defendants from carrying out the sentence of death "until such time as the State of Tennessee provides a constitutionally adequate hearing." (Resp. Appx. D.) He also claimed that the state courts had somehow barred his access to the courts by resolving his actual innocence claim against him. *Id*. Smith filed a motion for a temporary restraining order, Resp. App. F, and, after ordering the State to respond, district court denied the motion. (Pet.'s App. A.) The district court denied his motion because review of the state-court rulings was barred by the *Rooker-Feldman* doctrine and, regardless, Smith's claims failed on the merits. (Pet's App. A.) The district court also noted that this DNA

No. M2020-00493-CCA-R28-PD (Tenn. Crim. App. May 1, 2020), *perm. app. denied* (Tenn. Aug. 5, 2020); *Smith v. State*, No. M2021-01339-CCA-R3-PD, 2022 WL 854438 (Tenn. Crim. App. Mar. 23, 2022), *perm. app. denied* (Tenn. Apr. 6, 2022).

evidence was "underwhelming," especially in light of the "fairly overwhelming" evidence of Smith's guilty. (Pet's App. A, at A-022 n.10.)

Now, on the day of his scheduled execution, Smith has filed in this Court an original petition for a writ of habeas corpus and an application for a stay of execution. This Court should deny Smith relief as his case presents no exceptional circumstances that would warrant an exercise of this Court's original jurisdiction, and Smith patently does not satisfy the conditions required by 28 U.S.C. §§ 2244(b)(1)-(2) and 2254.

REASONS FOR DENYING THE PETITION AND THE STAY

I. Smith's Eighth Amendment Claim is Time Barred.

Section 2241(a) of Title 28 provides that "[w]rits of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions." Section 2254(a), which specifically governs applications by persons in custody pursuant to a judgment of a state court, likewise provides:

> The Supreme Court, a justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to a judgment of a State court only on the ground that he is in custody in violation of the Constitution or the laws or treaties of the United States.

28 U.S. C. § 2254(a).

While both provisions provide statutory authorization for this Court to entertain "original" petitions for habeas corpus relief by prisoners in state custody, that authority is not unlimited, particularly given the procedural limitations imposed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *See Felker v. Turpin*, 518 U.S. 651, 662 (1996) ("Our authority to grant habeas relief to state prisoners is limited by § 2254, which specifies the conditions under which such relief may be granted to 'a person in custody pursuant to a judgment of a state court.'"). Indeed, this Court's own Rule 20.4, which sets forth the standards under which the Court will grant an original writ of habeas corpus, makes clear that even original petitions must satisfy the exhaustion requirement of § 2254(b).

> A petition seeking the issuance of a writ of habeas corpus shall comply with the requirements of 28 U.S.C. §§ 2241 and 2242, and in particular with the provision in the last paragraph of § 2242 requiring a statement of the "reasons for not making application to the district court of the district in which the applicant is held." If the relief sought is from the judgment of a state court, the petition shall set forth specifically how and wherein the petitioner has exhausted available remedies in the state courts or otherwise comes within the provisions of 28 U.S.C.§ 2254(b). To justify the granting of a writ of habeas corpus, the petitioner must show exceptional circumstances warranting the exercise of the Court's discretionary powers and must

> show that adequate relief cannot be obtained in any other form or from any other court. These writs are rarely granted.

Id.

The procedural and substantive limitations imposed by AEDPA are applicable even to original actions in this Court. Specifically, 28 U.S.C. § 2244(d)(1) provides that "[a] 1-year statute of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to a judgment of a State court." Because § 2244(d) is applicable generally to petitions by state prisoners, it applies equally to habeas actions filed in the district court and in this Court. *Compare with* 28 U.S.C. § 2244(b)(3) (gatekeeping provision for successive habeas applications is specific to petitions "filed in the district court").

Because Smith unquestionably challenges the legality of his confinement "pursuant to the judgment of a State court," s*ee* § 2254(a), he must meet the one-year limitation requirement of § 2244(d)(1). Smith's state-court conviction became final in 2019, when this Court denied certiorari on direct appeal from his convictions and sentence. *Smith v. Mays*, 139 S. Ct. 2693 (2019). Even considering tolling during the pendency of Smith's applicable state court actions, the current petition is far out of time.

Moreover, even if this case presented the rare circumstance where this Court might permit an "original" writ to proceed, the Eighth Amendment claim he raises is necessarily fact-bound and would require a transfer to the appropriate district court under § 2241(b). Were it so easy to avoid the statute of limitations by filing a petition invoking this Court's "original" jurisdiction to obtain such a transfer, § 2244(d)(1) would be rendered a virtual nullity. This Court should not countenance such a manipulation.

II. This Case Presents No Exceptional Circumstances and Does Not Satisfy the Conditions Imposed by 28 U.S.C. §§ 2244(b)(1)-(2) and 2254 Warranting the Court's Exercise of Discretionary Authority to Grant Habeas Corpus Relief.

An original petition for habeas corpus is "rarely granted." Sup. Ct. R. 20.4(a). A petitioner wishing to invoke this Court's original habeas jurisdiction "must show that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court." *Id.* Moreover, this Court's "authority to grant habeas relief to state prisoners is limited by § 2254" and "inform[ed]" by "the restrictions on repetitive and new claims imposed by §§ 2244(b)(1) and (2)." *Felker v. Turpin*, 518 U.S. 651, 662-63 (1996). This case presents no exceptional circumstances that warrant this Court's intervention, and the statutory restrictions of §§ 2244(b)(1) and (2) and 2254 foreclose Smith from obtaining relief.

Smith contends that newly obtained DNA analysis proves his actual innocence because biological material found on the awl recovered at the crime scene shows a mixture of both the one of the victim's DNA with another "[un]identifiable" DNA profile which does not match Smith. (Pet.'s Br., p. 5.) Smith insists that these facts make his case exceptional because he has not been afforded a "full and fair hearing in which he would make a persuasive demonstration of his innocence" using this newly obtained DNA evidence in violation of the Eighth Amendment's protections barring execution of the innocent. (Pet.'s Br., pp. 6-9.) Both of those assertions are demonstrably incorrect.

Earlier this year, Smith sought, and was granted, additional DNA testing of the awl recovered at the scene of the murders. That testing used "touch DNA" to compare DNA taken from two fingerprints found on the awl to determine whether the DNA profiles of those fingerprints matched either Smith or any of the three victims in this case. Smith had presented this fingerprint evidence—including that one of the prints belonged to a member of the original investigative team and that the other did not match any fingerprints in available databases—to the district court and Sixth Circuit

four years ago. At that time the court found that "[j]urists of reason could not disagree" that the evidence was "insufficient to establish prejudice from counsel's allegedly deficient performance." *Smith v. Mays*, No. 18-5133, 2018 WL 7247244, at *3 (6th Cir. Aug. 22, 2018) (declining to grant a certificate of appealability). Smith's DNA testing merely confirmed what he said years ago: that an unknown person, in addition to the member of the investigative team, at some point touched the awl. Further, the DNA testing results merely reaffirmed what was already presented to the jury—that Smith's fingerprints could not be found on the awl. (Pet's App. A., A-021 n.9.) The testing also confirmed that a major male contributor of the awl's DNA was, in fact, the victim, Chad Burnett.

Regardless, Smith sought relief through the state courts by filing a motion to reopen his state post-conviction proceedings/and or for review under Tennessee's post-conviction DNA Analysis Act of 2001. After thoroughly considering the "new" DNA evidence, and the entirety of the existing record, in the light most favorable to Smith, the trial court denied relief because "there is not a reasonable probability that the recently discovered DNA evidence would have prevented Smith's prosecution or conviction." (Resp. Appx. B.) On appeal, the Tennessee Court of Criminal Appeals affirmed that decision after concluding that the trial court properly analyzed Smith's motion and correctly determined that "there was not a reasonable probability that the DNA evidence would have prevented Smith's prosecution or conviction or would have resulted in a more favorable conviction or sentence." *Smith v. State*, No. M2022-00455-CCA-R3-PD, 2022 WL 1115034, at *5 (Tenn. Crim. App. Apr. 14, 2022). Nothing about the above procedures for consideration of Smith's actual innocence claim based on new DNA profiling offends the Eight Amendment or "increases the public skepticism "of the infallibility of our criminal justice system" as alleged. (Pet.'s Br., p. 7)

And, even if this Court were inclined to exercise its original jurisdiction in this case, the

statutory constraints on federal review of state-court convictions set out in 28 U.S.C. § 2254 would prevent Smith from obtaining relief. This Court's "authority to grant habeas relief to state prisoners is limited by § 2254, which specifies the conditions under which such relief may be granted to 'a person in custody pursuant to the judgment of a State court.'" *Felker*, 518 U.S. at 663 (quoting 28 U.S.C. § 2254(a)). Among other restrictions, a federal court may not grant habeas relief to a state prisoner on "any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

As conceded by Smith, his petition does not satisfy the strict requirements of § 2254 because it fails to establish that the state court's adjudication of his DNA based actual innocence claim was unreasonable in any respect. For that reason alone, his petition must be denied. Smith offers no "reason to question" the trial court's findings, let alone "compel the conclusion that the trial court had no permissible alternative" but to make different ones. *Rice v. Collins*, 546 U.S. 333, 341 (2006). A "state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Wood v. Allen*, 558 U.S. 290, 301 (2010).

To understand why the state court's adjudication of this claim was reasonable, it is helpful to consider the weakness of his innocence claim.[2]

First, Smith's motion mistakenly refers to the awl as the "murder weapon" when, in actuality,

[2] Not to mention the fact that *Cullen v. Pinholster*, 563 U.S. 170 (2011), bars consideration of evidence outside the state court record—directly undermining Smith's request for a remand for further evidentiary development.

the murder weapons in this case, a .22 caliber handgun and a knife, were never recovered. (Pet.'s Appx. A, p. 22.) The awl only made puncture wounds to the bodies of two of the victims and, as stated above, the jury was made aware that Smith's prints were not found on the awl.

Second, the DNA evidence proffered by Smith fails to undermine or contradict any of the extensive evidence establishing his guilt. Prior to the murders, Smith and the victim, Judith, separated after a violent confrontation between the Smith and Judith's thirteen-year-old son, Jason, where Smith had put a gun to Jason's head during an argument and proceeded to fire a shot into the air. (Resp. Appx. E, Trial Transcript at pp. 1868-71.) After this incident a warrant was sworn out against Smith by Judith. A short time later, a second incident occurred which led to Judith swore swearing out a second warrant against Smith for aggravated assault. (*Id*. at p. 2191.) In sum, Smith had two warrants pending against him at the time of the murders.

Additionally, Smith threatened to kill the victim, Judith, multiple times, including mere weeks before the murders. (*Id*. at pp. 1808-09, 2309, 2317-18.) He also solicited multiple people to kill Judith prior to her murder. (*Id*. at pp. 2264-65, 88-89.) Then, 8 eight months before the murders (February 1989), Smith took out multiple life insurance policies against for the victims, including a $20,000 policy for Judith and $5,000 policies for both Chad and Jason. (*Id*. at pp. 2207-08.) In March of 1989, Smith took out additional life insurance policies with a separate life insurance company, insuring Judith again for $20,000, but this time insuring Chad and Jason for $10,000 each. (*Id*. at p. 2199.) These policies were in addition to the life insurance for each victim that had been in effect since 1985 with yet another life insurance company. (*Id*. at p. 2248.)

On the night of the murders, and contrary to his alibi, Smith's car was observed at the victim's house between 11 and 11:15 pm. (*Id*. at pp. 2150, 2253, 2651, 2871-72.3.) A 911 call was also

[3] The victims were killed between 11:20- and 11:30 pm. (App. F., pp. 2559-2623).

received that night by the Metro-Nashville Police Department where one of the victims, later identified as Jason, can he heard yelling "Help me!" as a second victim, identified as Chad, screams Smith's name in the background saying, "Frank, no, God, help me!" (*Id*. at pp. 1812, 1880.)[4]

Following, the discovery of the victims' bodies the next day, police noted that there was no sign of forced entry, indicating that the victims knew the assailant. (*Id*. at p. 1944, 1970.) During the investigation of the house, a leather awl was recovered at the scene along with a cotton work glove. (*Id*. at p. 1954-55, 1962.) Leather-working tools were recovered from Smith's trailer during a search conducted on Oct. 13, 1989 (less than two weeks after the murders,) and Smith admitted that he was a leather crafts enthusiast. (*Id*. at pp. 2367-70, 2253.) Similarly, a live .22 caliber cartridge was found in Smith's house, although the .22 caliber weapon that was used was never recovered. (*Id*. at pp. 2019, 2366.) Evidence also showed that Smith owned a .22 caliber pistol that he presented to a co-worker, and was seen firing at a local shooting range before the murders. (*Id*. at pp. 2230-31.) And a palm print made in blood was found on the sheet near the victim's body which showed the same two missing fingers that Smith is missing on his left hand. (*Id*. at p. 1947, 1992.)

Later, after the discovery of the bodies, when Detectives confronted Smith at his home, he never asked why they wanted to talk with him, nor did he ever ask why he was being questioned. (*Id*. at pp. 2334, 2338, 2349, 2648.) During questioning Smith also referred to victims in the past tense repeatedly before being told they had been killed. (*Id*. at pp. 2353, 2648.) Even after being informed of the murders Smith never asked officers logical questions such as where, when, how, or by whom. (*Id.* at pp. 2354, 2649.) Smith also had noticeable abrasions to his right hand, right elbow,

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[4] Smith's middle name is Frank which is the name Petitioner always went by to friends and family. (Appx. E, pp. 1808, 1868). In fact, two leather belts were recovered inside Smith's home after the murders, both with the name "Frank" on them. Smith also testified that he went by the name Frank. (*Id*. at p. 2857.)

left back and shoulder blade—which were photographed and shown to the jury. (*Id*. at pp. 1992, 2355-57.)

Simply put, that some unknown person, at some point in time, touched the awl (as the original fingerprint analyst had), leaving behind touch DNA, does not establish Smith's innocence and this is not an extraordinary case where a constitutional violation has resulted in the conviction of an innocent person.[5] And Smith certainly cannot overcome the required AEDPA deference to the state court's adjudication of the issue.

Furthermore, the limitations on second or successive habeas petitions imposed by 28 U.S.C. § 2244(b)(2), which must "inform [this Court's] consideration of original habeas petitions," *Felker*, 518 U.S. at 662-63, also foreclose Smith from obtaining relief. That provision requires dismissal of a second or successive habeas petition unless certain conditions are met, including (1) that "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence," and (2) that "the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the [prisoner] guilty of the underlying offense." 28 U.S.C. § 2244(b)(2)(B)(i)-(ii). In other words, Smith would have to satisfy both a reasonable-diligence and an actual-innocence requirement, but, as shown above, Smith cannot satisfy those conditions, because he cannot show that the facts underlying his actual innocence claim, "if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for the constitutional error, no reasonable

[5] It is notable that district court judge who has presided over all of Smith's federal habeas filings concluded most recently, after reviewing the DNA evidence at issue here, that Smith's assertions of innocence are wholly undermined by the "overwhelming" evidence showing his guilt and the rather "underwhelming" DNA evidence presented. (*See* Pet.'s App. A. at p. 22.)

factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2244(b)(2)(B)(ii)).6

Nor can Smith show that "the factual predicate for his claim could not have been discovered previously through the exercise of due diligence." 28 U.S.C. § 2244(b)(2)(B)(i). The awl tested by Smith has long contained the biological material used to obtain the DNA profile comparisons, as Smith concedes. However, while Smith insists that he only learned about the "probabalistic genotyping software program [], BulletProof Sentry" earlier this year, that particular software has been available since at least 2019. (See Resp. App. F.) Petitioner's chosen analysis lab only offered the particular software in 2022, but nothing prevented Smith from obtaining these same results from another lab earlier. Smith's failure to request the DNA testing at issue until three months prior to his execution date demonstrates his failure to exercise due diligence in this matter.

In sum, Smith's utter failure to satisfy any of the conditions that would ordinarily justify a second or successive habeas petition is a compelling reason for this Court to deny review.

III. A Stay Is Not Warranted Because Smith Cannot Succeed on the Merits and Unreasonably Delayed in Bringing His Claim.

A "stay of execution is an equitable remedy." *Hill v. McDonough*, 547 U.S. 573, 583 (2006). That remedy "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"—an interest that is shared by "the victims of crime." *Id.* Accordingly, an inmate seeking to stay his

[6] This Court has emphasized that demonstrating actual innocence is only a gateway to allow federal habeas review of a procedurally defaulted claim and is not itself a constitutional claim upon which habeas relief may be granted. The Court has, however, indicated that a truly persuasive showing of actual innocence may allow for federal habeas relief in a death penalty case. *See House v. Bell*, 126 S. Ct. 2064 (2006); *Herrera v. Collins*, 506 U.S. 390 (1993).

execution "must satisfy all of the requirements for a stay, including a showing of a significant possibility of success on the merits." *Id.* And 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.*

Smith is plainly not entitled to a stay of his execution. As explained above, he cannot succeed on the merits of his original habeas petition because this case presents no exceptional circumstances that would warrant an exercise of this Court's original jurisdiction and fails to satisfy the conditions imposed by 28 U.S.C. §§ 2244(a)(1)-(2) or 2254.

If that were not reason enough to deny Smith a stay, the last-minute nature of his request creates a "strong equitable presumption against" a stay. *Hill*, 547 U.S. at 583. And this Court has instructed that "[l]ast-minute stays should be the extreme exception, not the norm." *Bucklew,* 139 S. Ct. at 1134.

Smith's case has been thoroughly litigated over a span of three decades. He committed triple murder nearly 33 years ago. *Smith*, 868 S.W.2d at 565. His conviction became final almost 28 years ago. *Smith v. Tennessee*, 513 U.S. 960 (1994) (certiorari denied October 31, 1994). His federal habeas proceedings finally ended nearly three years ago. *See Smith*, 2018 WL 7247244, at *1.

Given these decades of litigation, the State's interests in finality are now "all but paramount." *Calderon v. Thompson*, 523 U.S. 538, 557 (1998). The State's significant interests in enforcing its criminal judgments and the victims' compelling interest in finality weigh heavily against granting a stay of execution. *Id.* at 556.

Further, "[b]oth the State and the victims of crime have an important interest in the timely enforcement of a sentence." *Bucklew,* 139 S. Ct. at 1133. To protect this interest, this Court has

held that "[l]ast-minute stays [to executions] should be the extreme exception, not the norm, and 'the last-minute nature of an application' that 'could have been brought' earlier . . . 'may be grounds for denial of a stay.'" *Id*. at 1134 (quoting *Hill v. McDonough*, 547 U.S. 573, 584 (2006)); *Nelson v. Campbell*, 541 U.S. 637, 650 (2004). Even though the Tennessee Supreme Court denied discretionary review of Smith's latest reopening bid on April 18, 2022, he comes to this Court seeking a stay mere hours before his execution. The last-minute nature of his stay application combined with the State's interest in the timely enforcement of its sentence weigh heavily against granting a stay of execution.

CONCLUSION

Petitioner's Original Petition for Writ of Habeas Corpus and Application for Stay of Execution should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Response was forwarded by United States mail, first-class postage prepaid, and by email on the 21st day of April 2022, to the following:

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