No. **22A788**

IN THE

# Supreme Court of the United States

---

ARTHUR BROWN, JR.,
*Petitioner,*

v.

STATE OF TEXAS
*Respondent.*

---

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

---

## RESPONDENT'S OPPOSITION TO APPLICATION FOR STAY

---


KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

JOSH RENO
Deputy Attorney General
For Criminal Justice

EDWARD L. MARSHALL
Chief, Criminal Appeals Division

TOMEE M. HEINING
Deputy Chief, Criminal Appeals
*Counsel of Record*

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 936-1400
tomee.heining@oag.texas.gov

**REPONSE IN OPPOSITION**
**TO APPLICATION FOR STAY**

Brown is **scheduled to be executed after 6:00 p.m. on March 9, 2023.** He was convicted and sentenced to death for the June 20, 1992 murders of Jessica Quinones, Jose Guadalupe Tovar, Audrey Brown, and Frank Farias during the same criminal transaction. Brown unsuccessfully appealed his conviction and sentence in state and federal court. On March 1, 2023, eight days before his scheduled execution date, Brown filed a subsequent habeas corpus application in the state court—his third state habeas application—alleging (1) that he is actually innocent; (2) an interrelated *Brady*[1] claim involving a videotaped interview with the Anthony Farias, the son of surviving victim Rachel Tovar as well as Tovar's medical records; (3) Brown is intellectually disabled; and (4) racial bias infected the jury deliberations. The Texas Court of Criminal Appeals (CCA) dismissed his subsequent application pursuant to Texas Code of Criminal Procedure Article 11.071, § 5 "as an abuse of the writ without reviewing the merits of the claims raised." *Ex parte Brown,* No. WR-26,178-04, Order (Tex. Crim. App. March 7, 2023) (per curium). The court below also denied a stay of execution.

Brown now seeks certiorari review of only one claim—the CCA's dismissal of his intellectual disability claim, and concurrently files the instant

---

1 *Brady v. Maryland,* 373 U.S. 83 (1963)

application for stay of his execution pending the outcome of his petition for writ of certiorari. However, as argued in the concurrently filed brief in opposition, Brown is unable to present any special or important reason for certiorari review because he fails to demonstrate a violation of any federal constitutional right. Therefore, the Court should deny his petition for certiorari review and deny this application for stay of execution.

## STANDARD OF REVIEW

Federal precedent does "not for a moment countenance 'last-minute' claims relied on to forestall an execution." *Nance v Ward*, 142 S. Ct. 2214, 2225 (2022). 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) (citing *Nelson v. Campbell*, 541 U.S. 637, 649–50 (2004)). "It is well-established that petitioners on death row must show a "reasonable probability" that the underlying issue is "sufficiently meritorious" to warrant a stay and that failure to grant the stay would result in "irreparable harm." *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983), superseded on other grounds by 28 U.S.C. § 2253(c)(2).

To demonstrate an entitlement to a stay, a petitioner must demonstrate more than "the absence of frivolity" or "good faith" on the part of petitioner. *Id.* at 892–93. Rather, the petitioner must make a substantial showing of the

denial of a federal right. *Id*. In a capital case, a court may properly consider the nature of the penalty in deciding whether to grant a stay, but "the severity of the penalty does not in itself suffice." *Id*. at 893. The State's "powerful and legitimate interest in punishing the guilty," as well as its interest in finality, must also be considered, especially in a case such as this where the State and victims have for years borne the "significant costs of federal habeas review." *Herrera v. Collins*, 506 U.S. 390, 421 (1993) (O'Connor, J., concurring); *Calderon v. Thompson*, 523 U.S. 538, 556 (1998) (both the State and the victims of crime have an important interest in the timely enforcement of a sentence).

Thus, in deciding whether to grant a stay of execution, the Court must consider four factors: "(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." *Nken v. Holder*, 556 U.S. 418, 434 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)); *see also Buxton v. Collins*, 925 F.2d 816, 819 (5th Cir. 1991). None of these factors favor Brown's request.

## ARGUMENT

### I. Brown is Unlikely to Succeed on the Merits.

First, as demonstrated in the State's brief in opposition to Brown's

petition for writ of certiorari, Brown's petition is without merit. He points to no compelling factual or legal issues warranting further review. The CCA correctly dismissed his *Atkins* claim, as contained within his subsequent application, as an abuse of the writ pursuant to Texas Code of Criminal Procedure, Article 11.071, § 5, because he failed to demonstrate prior legal or factual unavailability, but also because he could not demonstrate a prima facie claim for relief. The underlying claim itself is meritless. Therefore, Brown's petition is unlikely to succeed.

## II. Brown Will Not be Substantially Injured.

Second, Brown will not be substantially injured. In a capital case, while a court may properly consider the nature of the penalty in deciding whether to grant a stay, "the severity of the penalty does not in itself suffice." *Barefoot*, 463 U.S. at 893.

## III. A Stay Will Substantially Injure Other Parties, and the Public's Interest Lies in Seeing Sentence Carried Out.

The State, the victims, and the public have a strong interest in seeing Brown's sentence carried out. *See Hill*, 547 U.S. at 584. The public's interest lies in executing sentences duly assessed, and for which years of judicial review have failed to find reversible error. *Martel v. Clair*, 565 U.S. 648, 662 (2012) ("Protecting against abusive delay *is* an interest of justice.") (emphasis in original). The State and crime victims have a "powerful and legitimate interest

in punishing the guilty." *Calderon v. Thompson*, 523 U.S. 538, 556 (1998) (citation omitted). And "[b]oth the State and the victims of crime have an important interest in the timely enforcement of a [death] sentence." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1133 (2019) (quotation omitted); *Nelson v. Campbell*, 541 U.S. 637, 650 (2004) ("a State retains a significant interest in meting out a sentence of death in a timely fashion"); *Gomez v. U.S. Dist. Court*, 503 U.S. 653, 654 (1992) (per curiam) ("[e]quity must take into consideration the State's strong interest in proceeding with its judgment").

Once postconviction proceedings "have run their course . . . finality acquires an added moral dimension." *Calderon*, 523 U.S. at 556. "Only with an assurance of real finality can the State execute its moral judgment in a case" and "the victims of crime move forward knowing the moral judgment will be carried out." *Id*. The State should be allowed to enforce its "criminal judgments without undue interference from the federal courts." *Crutsinger v. Davis*, 936 F.3d 265, 273 (5th Cir. 2019) (citations and internal quotations omitted).

Here, the public's interest lies in executing a sentence duly assessed, particularly where years of judicial review have found no reversible error. Brown—sentenced to death for the 1992 murders of four people, including a pregnant nineteen-year-old—has already passed through state and federal collateral review. The public's interest is not advanced by postponing his execution any further, and the State opposes further delay. *Martel v. Clair*, 565

U.S. 648, 662 (2012) ("Protecting against abusive delay *is* an interest of justice."). The families of Jessica Quinones, Jose Guadalupe Tovar, Audrey Brown, and Frank Farias have waited thirty years for justice. The Court should not further delay this execution to review a claim that could have been raised years before, and that fails to allege any violation of Brown's constitutional rights. His dilatoriness in bringing this claim should not be rewarded. *Hill*, 547 U.S. 585. ("The federal courts can and should protect States from dilatory or speculative suits[.]")

## CONCLUSION

For the foregoing reasons, Brown's petition for a writ of certiorari and application for stay of execution should be denied.

Respectfully submitted,

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

JOSH RENO
Deputy Attorney General
for Criminal Justice

EDWARD L. MARSHALL
Chief, Criminal Appeals Division

Tomee Heining

*TOMEE M. HEINING

*Attorney in charge

Deputy Chief, Criminal Appeals Division
Texas Bar No. 24007052
Office of the Attorney General
Criminal Appeals Division
P. O. Box 12548, Capitol Station
Austin, Texas 78711-2548

tomee.heining@oag.texas.gov

Telephone: (512) 936-1600
Telecopier: (512) 320-8132