NOS. 22A332 & 22-5872
CAPITAL CASE

IN THE
Supreme Court of the United States

IN RE BENJAMIN ROBERT COLE, SR.,

On Original Writ of Habeas Corpus

COMBINED BRIEF IN OPPOSITION TO PETITION FOR ORIGINAL WRIT OF HABEAS CORPUS AND RESPONSE IN OPPOSITION TO APPLICATION FOR STAY OF EXECUTION

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Execution Scheduled for October 20th, 2022 at 10:00 a.m. CT

COMBINED BRIEF IN OPPOSITION TO PETITION FOR ORIGINAL WRIT OF HABEAS CORPUS AND RESPONSE IN OPPOSITION TO APPLICATION FOR STAY OF EXECUTION

The State respectfully urges this Court to deny Petitioner Benjamin Robert Cole's Petition for Original Writ of Habeas Corpus and Application for Stay of Execution.

STATEMENT OF THE CASE

A. Factual Background.

The Oklahoma Court of Criminal Appeals ("OCCA") set forth the relevant facts in its opinion on direct appeal:

> [Cole]'s nine-month-old daughter, [B.V.C.], was murdered on December 20, 2002. According to the State Medical Examiner, [B.V.C.]'s spine had been snapped in half, and her aorta had been completely torn through due to non-accidental stretching. The official cause of death was described as a fracture of the spine with aortic laceration.
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> [Cole] eventually admitted causing the fatal injuries. In a statement he gave to police, [Cole] said he'd been trying, unsuccessfully, to get the child, who was lying on her stomach, to stop crying. [Cole] eventually grabbed his daughter by the ankles and pushed her legs toward her head until she flipped over. This action broke the child's back and resulted in fatal injuries.
>
> Evidence was admitted that [Cole] took no remedial action just after this incident happened. He went and played video games, denied anything was wrong with the child when confronted by his wife, and said nothing to rescue or medical personnel about what had happened. (He did, however, attempt CPR when the situation turned grave, before the ambulance arrived.) Only after rescue efforts had failed and an autopsy was performed did the medical personnel learn that [B.V.C.]'s spine had been snapped. The autopsy physician testified that the injury required a great amount of force and would not be the result of normal back-bending by a nine month old. The death was eventually ruled a homicide. When told of this fact by the authorities, [Cole] asked, "How

> many years am I looking at?" At this point, [Cole] confessed his responsibility for the injuries.

Cole v. State, 164 P.3d 1089, 1092-93 (Okla. Crim. App. 2007) (paragraph numbers omitted).

B. Procedural Background.

Cole is scheduled to be executed at 10:00 a.m. (CST) on October 20, 2022, for the murder of his nine-month-old daughter, B.V.C. In a flurry of last-minute filings relating to his alleged incompetence to be executed, Cole has repeatedly attempted to delay his lawful execution.

The OCCA first denied Cole's claim that he is not competent to be executed in 2015, before Cole's execution was stayed pending litigation regarding Oklahoma's execution protocol. *See Cole v. Trammell*, 358 P.3d 932, 936-37 (Okla. Crim. App. 2015). Recently, after his execution date was set, Cole has again challenged his competence. The Pittsburg County District Court (*i.e.*, the state district court) and the OCCA denied Cole's procedural and substantive competency claims and this Court, with no recorded dissents, declined to review those decisions or grant Cole's requested stay of execution. *See Cole v. Farris*, Case No. MA-2022-898, slip op. (Okla. Crim. App. Oct. 17, 2022) (unpublished), *cert. and stay denied*, 598 U.S. ___ (Oct. 19, 2022). Pet. Appx. H1-H4, I1-I24.

Cole then, on October 18, 2022, filed a petition for writ of habeas corpus. This petition included an unexhausted argument that Oklahoma's execution protocol is unconstitutional because it fails to require a competency evaluation on the day of execution. *Cole v. Farris*, Case. No. 15-CV-0049-GKF-CDL, slip op. at 22-23 (N.D.

Okla. Oct. 19, 2022). The United States District Court for the Northern District of Oklahoma denied Cole's request for a stay of execution and habeas petition. *Id.*, slip op. at 24. Regarding the challenge to Oklahoma's execution protocol, the court held as follows:

> Lastly, Cole claims the Oklahoma Department of Corrections' execution procedure, set forth in the ODOC's Operation Policy OP-040301, violates the Eighth Amendment because "it contain[s] no procedural safeguards or mechanisms by which the State will ensure that a condemned inmate whose execution is imminent is not incompetent to be executed." Cole appears to argue that the Eighth and Fourteenth Amendments require a state to have a specific procedure in place for prison officials to determine whether a prisoner is competent to be executed "at the time of his execution." According to Cole, this creates a risk the warden will "execute Mr. Cole when he is categorically exempt from execution."
>
> This claim bears little discussion because, as [Respondent, Warden Jim] Farris argues, Cole did not fairly present this claim, in any form, to the OCCA. And, as just discussed, nothing in the supplemental petition, and nothing in Cole's reply to the response to the supplemental petition, demonstrates that this unexhausted claim is properly before the Court in this proceeding. The Court therefore denies the supplemental petition as to claim three.

Id., slip op. at 22-23 (citations omitted).

On October 19, 2022, Cole appealed the Northern District's denial of habeas relief to the United States Court of Appeals for the Tenth Circuit, and he requested that the Tenth Circuit stay his execution. The Tenth Circuit has not yet issued rulings on these matters.

In the meantime, *less than twelve hours* before his scheduled execution, Cole filed another application for a stay of execution in this Court, as well as a petition for an original writ of habeas corpus. In the event the Tenth Circuit denies Cole relief,

the State anticipates that Cole will file a third action in this Court, likely mere hours before his scheduled execution.

REASONS FOR DENYING THE WRIT

Just days ago, Cole, who faces execution today, October 20, 2022, unsuccessfully petitioned this Court for a stay and direct review of the OCCA's decision rejecting his claims related to his alleged incompetence to be executed. *See* Case Nos. 22A317, 22-5848. Cole is back before this Court, but not to challenge the denial of his second federal habeas petition dealing with his competence to be executed. Instead, while his appeal remains pending at the Tenth Circuit, Cole has filed yet a third[1] habeas petition—this one as an original proceeding in this Court.

Cole has obviously known that Oklahoma's execution protocol does not provide for day-of competency evaluations since before he filed his mandamus action in the state district court. Indeed, Cole admits that "[t]his claim was triggered by the duty of zealous representation and the Warden's testimony less than three weeks ago, combined with Mr. Cole's very recent and very irrational conduct in continuing not to fill out his execution packet . . . ."[2] 10/19/2022 *Reply to Respondent's Response in Opposition to Supplemental Petition for Writ of Habeas Corpus* (N.D. Okla. No. 15-

[1] Technically, this is Cole's fourth habeas petition, as he filed petitions in the Northern District in 2009, 2015, and 2022. *Cole*, Case No. 15-CV-0049-GKF-CDL, slip op. at 4-8. However, this is his third petition challenging his competence to be executed.

[2] The reference to Cole's failure to "fill out his execution packet" is misleading. The truth is that Cole simply refuses to permit his counsel to witness his execution. This is consistent with Cole's long history of distrust for his attorneys. *See Cole*, Case No. 15-CV-0049-GKF-CDL, slip op. at 19; *Cole*, 358 P.3d at 936-37.

CV-0049-GKF-CDL) at 1 n.1.[3] Nonetheless, Cole did not raise this claim related to Oklahoma's protocol until October 18, 2022, and he certainly did not exhaust this claim to the state courts. It is clear that Cole has filed the instant original action for no reason other than to delay his *lawful* execution.

In addition to the fact that Cole's newest attempt to delay his execution is unexhausted, Cole further cannot satisfy the requirements for an original writ of habeas corpus per this Court's Rules, as he has failed to demonstrate exceptional circumstances in his case deserving of this Court's review. Moreover, he has failed to demonstrate that he has been deprived of an adequate remedy.

Finally, Cole is not entitled to a stay of execution, as he fails to fulfill the factors required prior to the grant of a stay of execution. In short, Cole cannot demonstrate a substantial likelihood of success on the merits. Moreover, as every court who has ever addressed Cole's competence (to be tried and to be executed) has found him competent, Cole will not be injured by the denial of his stay application. And, the interests of the State and public weigh very heavily against permitting Cole's blatant attempt at delay to succeed.

Ultimately, the petition for an original writ and application for a stay of execution should be denied.

[3] This citation refers to the electronically stamped CM-ECF header pagination.

COLE'S PETITION FOR AN ORIGINAL WRIT AND STAY OF EXECUTION SHOULD BE DENIED, AS COLE'S ARGUMENTS ARE UNEXHAUSTED, COLE HAS SHOWN NO ENTITLEMENT TO AN ORIGINAL WRIT, AND COLE FAILS TO DEMONSTRATE HE IS ENTITLED TO A STAY.

This Court's "Rule 20.4(a) delineates the standards under which [this Court] grant[s] [original] writ[s] [of habeas corpus]." *Felker v. Turpin*, 518 U.S. 651, 665 (1996). Pursuant to that rule:

> A petition seeking 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, which requires 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 out specifically how and where 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 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. *This writ is rarely granted.*

Sup. Ct. R. 20.4(a) (emphasis added). Furthermore, while the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") "does not preclude this Court from entertaining an application for habeas corpus relief," it does apply to this Court's consideration of such petitions and "affect[s] the standards governing the granting of such relief." *Felker*, 518 U.S. at 654.

Here, applying the restrictions of both Rule 20.4(a) and AEDPA, Cole is clearly not entitled to habeas relief. Nor should he receive a stay.

A. Cole has not exhausted the claim in his third habeas petition and has certainly not shown he lacks any other remedy.

This Court should deny relief because, to begin with, Cole has never presented his current claim to the state courts, including the OCCA. Cole's failure to do so precludes a grant of habeas relief by this Court for two reasons. *First*, as quoted above, under Rule 20.4(a), "[t]o justify the granting of a writ of habeas corpus, the petitioner must show . . . that adequate relief cannot be obtained in any other form or from any other court." Sup. Ct. R. 20.4(a). *Second*, AEDPA prevents this Court from granting habeas relief on an unexhausted claim. Even prior to the enactment of AEDPA, this Court applied the exhaustion requirement in its consideration of original writs. *See Felker*, 518 U.S. at 662 n.4 ("*Ex parte Hawk*, 321 U.S. 114, 64 S.Ct. 448, 88 L.Ed. 572 (1944) (*per curiam*), . . . was one of a series of opinions in which we applied the exhaustion requirement first announced in *Ex parte Royall*, 117 U.S. 241, 6 S.Ct. 734, 29 L.Ed. 868 (1886), to deny relief to applicants seeking writs of habeas corpus from this Court."). In any event, AEDPA's limitations, including the exhaustion requirement, apply to this Court's consideration of original habeas petitions under 28 U.S.C. §§ 2241 and 2254. *See id.* at 658. Accordingly, this Court may not grant relief on Cole's claim "unless it appears that" he "has exhausted the remedies available in the courts of the State"; or "there is an absence of available State corrective process" or "circumstances exist that render such process ineffective to protect [his] rights." 28 U.S.C. § 2254(b)(1).

Here, Cole's failure to even attempt to exhaust his claim in state court precludes him both from showing "that adequate relief cannot be obtained in any

other form or from any other court" under Rule 20.4(a) and from obtaining habeas relief under § 2254(b)(1). On appeal from the Pittsburg County District Court, before the OCCA—Oklahoma's highest criminal court—Cole could have, but did not, raise this claim. Thus, this claim is unexhausted, *see Picard v. Connor*, 404 U.S. 270, 275 (1971), and the State does not waive exhaustion, *see* 28 U.S.C. § 2254(b)(3) ("A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement."). Cole does not acknowledge his failure to exhaust this claim, let alone attempt to make any showing of cause and prejudice or a fundamental miscarriage of justice. *See Coleman v. Thompson*, 501 U.S. 722, 750 (1991). Rather, he states only in conclusory fashion that "[t]he Oklahoma courts have denied any procedural safeguards" and "[t]here is no other remedy available to Mr. Cole." Pet. Writ 7. But this is simply incorrect—Cole received both an evidentiary hearing in state district court and extensive briefing before both that court and the OCCA. He had every opportunity to raise the present claim but apparently chose not to do so, despite the claim's availability weeks ago, as discussed above. This Court should deny habeas relief on this claim based both on lack of exhaustion and Cole's failure to show a lack of other available remedy.

B. Cole has shown no entitlement to an original writ under the remaining requirements of Rule 20.4(a).

Beyond his failure to demonstrate "that adequate relief cannot be obtained in any other form or from any other court," Sup. Ct. R. 20.4(a), Cole has failed to satisfy the remaining requirements of Rule 20.4(a), both procedural and substantive. He is

therefore not entitled to habeas relief.

Rule 20.4(a) *particularly* requires a statement explaining why the petitioner did not file his or her writ in district court. Cole made no such statement. The Rule further requires the petitioner to "set out specifically how and where" he or she exhausted state court remedies. Again, Cole failed to comply (likely because, as discussed above, he has not exhausted state court remedies).

For these reasons alone, Cole's petition, and application for a stay of execution based thereon, should be denied. However, the State will show Cole also failed to comply with the remaining substantive provision of Rule 20.4(a)—a showing that "exceptional circumstances warrant the exercise of the Court's discretionary powers."

This Court transferred an original habeas action in *In re Davis* to the federal district court for an evidentiary hearing because, according to the concurring opinion, "[t]he substantial risk of putting an innocent man to death clearly provides an adequate justification for holding an evidentiary hearing. Simply put, the case is sufficiently 'exceptional' to warrant utilization of this Court's Rule 20.4(a)." *In re Davis*, 557 U.S. 952 (2009) (Stevens, J., concurring).

Here, in contrast, Cole has not shown a "substantial risk" that an incompetent man will be executed or that some issue with his competency will arise on the day of his execution. A neutral expert at a state-run hospital recently concluded unequivocally that Cole is competent to be executed. Pet. Appx. A11-A22. This expert further concluded that Cole "does not currently evidence any substantial, overt signs of mental illness, intellectual impairment, and/or neurocognitive impairment that

would preclude his ability to rationally understand the reason he is being executed." Pet. Appx. A20-A21. Cole's case is simply not one of the rare, "exceptional" cases justifying this Court's original habeas jurisdiction. *See* Sup. Ct. R. 20.4(a).

C. Cole has not demonstrated he is entitled to a stay.

As a final matter, in addition to failing to demonstrate his entitlement to an original writ under this Court's Rules, Cole also fails to show that he is entitled to a stay of execution mere *hours* before his scheduled execution.

Importantly, an inmate seeking a stay of execution pending appeal must show: (1) that the movant is substantially likely to succeed on the merits; (2) that the movant is likely to suffer irreparable injury if the Court denies the stay; (3) that the threatened injury, absent a stay, outweighs the opposing party's injury from the stay; and (4) that the stay is not adverse to the public interest. *Nken v. Holder*, 556 U.S. 418, 426 (2009); *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *Hill v. McDonough*, 547 U.S. 573, 584 (2006).

"A stay is not a matter of right, even if irreparable injury might otherwise result," and is "instead an exercise of judicial discretion," "dependent upon the circumstances of the particular case." *Nken*, 556 U.S. at 433 (quotation marks omitted). "The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Id.* at 433-34. Moreover, in the execution context, the decision whether to grant a stay "must be sensitive to the State's strong interest in enforcing its criminal judgments." *Hill*, 547 U.S. at 584; *see also Murphy v. Collier*, 139 S. Ct. 1475, 1480 (2019) (Alito, J., dissenting); *Gomez v.*

U.S. Dist. Ct. for N. Dist. of California, 503 U.S. 653, 654 (1992) (*per curiam*) (each state has a "strong interest in proceeding with its judgment"). "Both the State and the victims of crime have an important interest in the timely enforcement of a sentence." *Hill*, 547 U.S. at 584. Last-minute execution stays are especially disfavored. *See Dunn v. Price*, 139 S. Ct. 1312, 1312 (2019); *Bucklew v. Precythe*, 139 S. Ct. 1112, 1133-34 (2019); *Hill*, 547 U.S. at 584.

Cole has not demonstrated the above factors, nor has he even discussed them. *First*, Cole has not shown a substantial likelihood of success on the merits for all the above-listed reasons in subsections A and B. Moreover, in addition to the aforementioned deficiencies, the actual *factual* merits of Cole's claim—which essentially boil down to his repeatedly-rejected claim that he is incompetent to be executed—are wholly unsupported. As the state district court, the OCCA, and the Northern District determined, Cole has *failed* to make a substantial threshold showing that he does not rationally understand his execution or the reasons therefore.[4] *See generally* Pet. Appx. H1-H4, I1-I24; *Cole*, Case. No. 15-CV-0049-GKF-CDL, slip op.; *see also Panetti v. Quarterman*, 551 U.S. 930, 949 (2007). Moreover, the apparent gist of Cole's current claim before this Court—that Cole is likely to be incompetent when executed because Oklahoma has no protocol[5] for determining

[4] Considering these rulings on the merits of Cole's competence claim, Cole's claim that "[c]ounsel for Mr. Cole have diligently litigated Mr. Cole's incompetency to be executed," but "[t]he Oklahoma state court and the federal district court have denied relief at every turn on procedural grounds—not on the important question of Mr. Cole's level of rational understanding of his current fate," Pet. Writ 2, is absolutely disingenuous.

[5] Cole's argument is unsupported by law and blatantly ignores the clear mandate of Okla. Stat. tit. 22, § 1005 (2021)—based on the plain language of § 1005, Oklahoma law would

competence immediately prior to execution—flies in the face of the presumption of competence that is well-established by this Court's precedent. *See Ford v. Wainwright*, 477 U.S. 399, 426 (1986) (Powell, J., concurring) (a state "may properly presume that petitioner remains sane at the time sentence is to be carried out").[6]

Second, Cole has not shown a likelihood of irreparable harm if he is not granted a stay. *Nken*, 556 U.S. at 426. Presumably, Cole asks for a stay because he claims he is incompetent (although he does not actually engage with the stay factors, as noted), and he asks for a full federal evidentiary hearing during the pendency of such stay. Pet. Writ 3. However, Cole's argument assumes (wrongly) that he is incompetent to be executed. But, as the state district court, the OCCA, *and* the Northern District determined, Cole entirely failed to present a substantial threshold showing of incompetence to the state and federal courts, and, *to this day*, he has zero evidence that he currently does not rationally understand his execution or the reasons for it. *Panetti*, 551 U.S. at 958-60; *Ford*, 477 U.S. at 410. Considering his failure to meet the required threshold burden of incompetence, Cole fails to show that there is a likelihood of irreparable harm if he is not granted a stay. *Cf. Ramirez v. Collier*, 142 S. Ct. 1264, 1282 (2022) (inmate demonstrated likelihood of irreparable harm without

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actually require the Warden to halt the execution and notify the District Attorney of Pittsburg County if he had "good reason" to believe a prisoner became incompetent even on the day of his execution.

[6] Although this language stems from Justice Powell's concurrence, this Court has already determined that since there was no majority opinion in *Ford*, Justice Powell's concurrence, "which also addressed the question of procedure, offered a more limited holding," and therefore controls. *Panetti*, 551 U.S. at 949; *see also Cole v. Roper*, 783 F.3d 707, 711 (8th Cir. 2015) (presumption of competence exists per *Ford*); *Barnard v. Collins*, 13 F.3d 871, 876 (5th Cir. 1994) (adopting the "standard as enunciated by Justice Powell as the *Ford* standard").

a stay (to challenge Texas's act of barring his spiritual advisor from laying hands on him during the execution), "because he w[ould] be unable to engage in protected religious exercise in the final moments of his life").

Third and finally, Cole fails to show that a balancing of the equities and harms weighs in his favor. Again, Cole appears not to engage whatsoever with the stay factors. Nonetheless, the balance of equities and harms weighs in the State's favor, as this Court "must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Hill*, 547 U.S. at 584. Cole's victim, B.V.C., and those that survive her, have been waiting nearly two decades for justice. Thus, "[t]he people of [Oklahoma], the surviving victims of Mr. [Cole]'s crimes, and others like them deserve better," especially when Cole's justifications—or lack thereof—for a stay are entirely without merit. *Bucklew*, 139 S. Ct. at 1134. *Cf. also Ramirez*, 142 S. Ct. at 1282 (the "balance of equities and public interest" weighed in the inmate's favor, especially when he made a "tailored" request and did "not seek an open-ended stay of execution" (quotation marks omitted)).

Relatedly, the balance of equities and harms also weighs against Cole because the present petition for an original writ and stay of execution, brought on the literal eve of Cole's execution, is nothing more than a thinly veiled attempt to delay Cole's *lawful* execution. And, notably, this Court "must [] 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.'" *Hill*, 547 U.S. at 584 (quoting *Nelson v. Campbell*, 541 U.S. 637, 650 (2004)). This

Court must further take into consideration "the State's strong interest in proceeding with its judgment," and any "obvious attempt at manipulation." *Gomez*, 503 U.S. at 654. *See also Bucklew*, 139 S. Ct. at 1134; *Dunn v. Ray*, 139 S. Ct. 661 (2019).

Here, the timing of this original action is highly suspect and clearly manipulative or abusive. For the second time in a matter of days, Cole returns to this Court to seek to delay his execution—even after this Court already denied his requests for a stay of execution and for direct *certiorari* review of the OCCA's decision on the merits of Cole's competency claim. And, it is extremely likely that Cole will return to this Court a third time, mere hours before his execution, to challenge the Tenth Circuit's denial (assuming there is a denial) of a certificate of appealability concerning Cole's federal habeas proceedings. The apparent basis of Cole's current claim before this Court—that Cole is likely to be incompetent when executed because Oklahoma has no protocol for determining competence immediately prior to execution—was not raised to the state courts despite the fact that competency litigation has been ongoing in the state courts since August. Indeed, not only that, but Cole did not raise this current claim until the filing of his most recent habeas petition in the Northern District on October 18, 2022. In other words, Cole *waited until two days before his scheduled execution* to raise his current claim to any court.

Contrary to Cole's claim that he has "diligently litigated" in state and federal court, Pet. Writ 2, the fact that Cole waited until two days before his scheduled execution to raise this claim in any court should weigh heavily against Cole. *Gomez*, 503 U.S. at 654 ("There is no good reason for this abusive delay, which has been

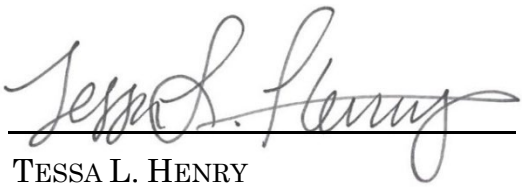
compounded by last-minute attempts to manipulate the judicial process. A court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief."); *see also Bucklew*, 139 S. Ct. at 1134 ("we have vacated a stay entered by a lower court as an abuse of discretion where the inmate waited to bring an available claim until just 10 days before his scheduled execution for a murder he had committed 24 years earlier" (citing *Dunn*, 139 S. Ct. 661)); *Nelson*, 541 U.S. at 650 (noting that "there is 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"). Considering the timing of the filing of this petition for original writ and stay of execution, the balance of equities weighs against Cole.

Cole is not entitled to a stay of execution.

CONCLUSION

For the reasons set forth above, the State respectfully requests that this Court deny the petition for an original writ of habeas corpus and application for a stay of execution.

Respectfully submitted,



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