No. _____

IN THE

Supreme Court of the United States

TRACY LANE BEATTY,

Petitioner,

V.

BOBBY LUMPKIN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPLICATION FOR STAY OF EXECUTION

Mr. Beatty's execution is scheduled for November 9, 2022, after 6:00 p.m.

To the Honorable Samuel Alito, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Fifth Circuit:

Tracy Lane Beatty respectfully requests that this Court stay his execution pending the disposition of his petition for writ of certiorari that he is filing today. That petition presents a narrow but critically important question regarding whether a district court has jurisdiction under 18 U.S.C. § 3599 to enter orders ensuring death

sentenced individuals actually receive reasonably necessary services. A stay is warranted to consider the weighty issues raised. *Lonchar v. Thomas*, 517 U.S. 314, 320–21 (1996); *Barefoot v. Estelle*, 463 U.S. 880, 893–94 (1983).

A court can deny a stay of execution to a prisoner who raises their claim "too late in the day." *Hill v. McDonough*, 547 U.S. 573, 584 (2006). Furthermore, to receive a stay, Mr. Beatty must make a strong showing that he is likely to succeed on the merits of his claim. *Nken v. Holder*, 556 U.S. 418, 426 (2009). This Court also balances the harm to the parties and the public interest. *Id.*

Mr. Beatty did not intentionally delay in bringing this case, despite the lower court's suggestion. *See Beatty v. Lumpkin*, __ F.4th __, 2022 WL 16628396, at *4 (5th Cir. Nov. 2, 2022). That court overlooked the importance of Mr. Beatty's recent mental health crisis earlier this year, which it was aware of. Appellant's Brief at 2–3, *Beatty v. Lumpkin*, No. 22-70010 (5th Cir. 2022). In May, shortly before his execution date was set, Respondent transported Mr. Beatty from the death row facility to a psychiatric unit because he was undergoing a mental health crisis. Respondent's staff observed Mr. Beatty experiencing auditory and visual hallucinations. Mr. Beatty was actively hallucinating about guards—who had not worked at the prison in years—working 96-hour shifts to torment him. Shortly thereafter, Respondent began giving him medication designed to treat schizophrenia.

Counsel has a mandatory duty to represent Mr. Beatty through "all available post-conviction process," including competency proceedings and clemency. 18 U.S.C. § 3599(e). Any reasonably competent counsel attempting to fulfil their § 3599 duties

would seek mental health evaluations of their client's current functioning based on Mr. Beatty's recent mental health crisis. Particularly so because the setting of an execution triggers deadlines for pursuing clemency and makes ripe potential litigation under *Ford v. Wainwright*, 477 U.S. 399 (1986). Previously, Mr. Beatty never had an in-person mental health evaluation by a member of his defense team. Accordingly, counsel requested records, located available mental health experts, and scheduled the expert evaluations. The timing of these actions gave Mr. Beatty ample time to use any resulting information to pursue clemency and other available remedies without the need for a stay.

Every individual executed in Texas who proceeded in the same manner as Mr. Beatty would have been able to use the results of unhandcuffed mental health evaluations to pursue clemency and remaining judicial remedies. Not Mr. Beatty. Despite the lack on any formal policy, Respondent at some point last year began requiring a court order to have handcuffs removed during mental health evaluations. For years, death row prisoners' handcuffs were removed as a matter of course during these evaluations without a court order.

Mr. Beatty sought the newly required court order over two months prior to his execution date. *Beatty v. Director*, No. 4:09-cv-00225 (E.D. Tex. Sept. 2, 2022) (Doc. 72). Prior to this case, such orders were routinely sought by both petitioners and Respondent himself via *pro forma* unopposed motions that cited no law and were a few sentences long. Not for Mr. Beatty, though. Respondent opposed on jurisdictional grounds, *id.* at Doc. 74, leading to this litigation. Mr. Beatty's experts were only able

to complete limited, preliminary evaluations that were significantly hampered by Respondent's refusal to remove his handcuffs. *Beatty v. Collier et al.*, No. 4:22-cv-03658 (S.D. Tex. Oct. 21, 2022) (Doc. 1-1 at 12–20). Mr. Beatty's experts wanted to administer a number of tests based on the signs and symptoms they observed, which could show abnormal brain functions and neurocognitive impairment. *Id.* However, due to Respondent's actions, Mr. Beatty was unable to present this evidence in support of his clemency petition or to pursue remaining judicial remedies.

Mr. Beatty should not be penalized for Respondent's shifting practices, which he had no reason to expect would be applied differently to him than all others executed in Texas. *Cf. NAACP v. State of Ala. ex rel. Patterson*, 357 U.S. 449, 457–58 (1958) ("Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights."). He pursued these unhandcuffed evaluations at a point in time where he would have been able to use the results without the need for a stay of execution.

For the reasons explained in his contemporaneously filed petition, Mr. Beatty has made strong showing that he is likely to success on the merits of his claim. *See Nken*, 556 U.S. at 426. The lower court contravened—indeed wholly ignored—this Court's decision in *McFarland v. Scott*, 512 U.S. 849 (1994), and this Court's mandate to read 18 U.S.C. § 3599 in a manner that gives practical meaning to that statute. Instead, the Fifth Circuit has adopted the statutory analysis suggested by the *McFarland* dissenters. Mr. Beatty incorporates those arguments by reference.

Mr. Beatty will be irreparably injured absent a stay. *See Nken*, 556 U.S. at 426. The harm to Mr. Beatty is not simply that he will be executed. More specifically, the injury is that, due to Respondents' interference, Mr. Beatty was unable to present available information in support of clemency. Allowing his execution to go forward under the current circumstances sanctions a sentence that may have been commuted.

In contrast, granting this application will not substantially harm Respondent. *See Nken*, 556 U.S. at 426. Respondent cannot claim substantial harm for a crisis of his own creation. Respondent (1) recently adopted a rule that he would handcuff prisoners during mental health evaluations absent a court order; and (2) opposed, for the first time, the issuance of any such order based on the court's alleged lack of jurisdiction to supply one. Respondent's actions here threaten to effectively end the utility of § 3599 resources to litigate, *inter alia*, *Ford* claims or pursue mental health evaluations in preparation for clemency proceedings. *See Harbison v. Bell*, 556 U.S. 180, 192 (2009) ("Far from regarding clemency as a matter of mercy alone, we have called it the fail safe in our criminal justice system.") (internal quotation omitted).

Finally, the public interest lies in Mr. Beatty's favor. *See Nken*, 556 U.S. at 426. While the public undoubtably has an interest in seeing sentences carried out, that interest does not include executing Mr. Beatty without providing him the same opportunity that everyone else executed in Texas has received.

CONCLUSION AND PRAYER FOR RELIEF

Mr. Beatty asks that this Court grant this application and stay his execution.

Respectfully submitted this 7th day of November 2022,

JASON D. HAWKINS
Federal Public Defender

by

/s/ Jeremy Schepers
Jeremy Schepers (#304861)
Supervisor, Capital Habeas Unit
Counsel of Record
Office of the Federal Public Defender
Northern District of Texas
525 S. Griffin St., Ste. 629
Dallas, TX 75202
214-767-2746 ♦ 214-767-2886 (fax)
jeremy_schepers@fd.org

Thomas Scott Smith
P.O. Box 354
Sherman, TX 75091-0354
(903) 868-8686
scottsmithlawyer@gmail.com

James William Marcus
Capital Punishment Clinic
University of Texas School of Law
727 E. Dean Keeton Street
Austin, Texas 78705
512-232-1475
512-232-9197 (fax)
jmarcus@law.utexas.edu

Attorneys for Petitioner