Nos. 22-6004 & 22A399

IN THE

Supreme Court of the United States

TRACY LANE BEATTY,
Petitioner,

vs.

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

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI AND APPLICATION FOR STAY OF EXECUTION

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QUESTIONS PRESENTED

1. Does 18 U.S.C. § 3599 independently, in the absence of any pending habeas corpus proceeding, give a federal district court the authority to issue orders requiring state agencies to disregard security protocols and allow an inmate to engage in expert evaluations in the manner he sees fit?

2. Are courts required by *McFarland v. Scott*, 512 U.S. 848 (1994), to enlarge § 3599 beyond the language and purpose of the statute and, if so, did Congress authorize courts to oversee the scope and nature of § 3599 counsel's representation?

3. Is a death-sentenced inmate entitled to a stay of execution so that he may seek a court-ordered, hands-free, in-person, contact visit with a retained expert to prepare for executive clemency proceedings where no litigation is pending, appointed § 3599 counsel represented the inmate for nearly a decade and did not first seek relief in state court, no effort was made to communicate with prison officials in advance, no legal disagreement exists about the language and purpose of § 3599, and where clemency has already been denied?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND APPLICATION FOR STAY OF EXECUTION

Petitioner Tracy Lane Beatty murdered his mother and has pursued his right to appeal and collateral review for eighteen years. After two previous dates were postponed, Beatty's execution is set for November 9, 2022, after 6:00 p.m CST.

Beatty claims that the Fifth Circuit Court of Appeals erroneously affirmed the district court's determination that it lacked jurisdiction under 18 U.S.C. § 3599 to grant Beatty's motion to compel the Texas Department of Criminal Justice (TDCJ) to unshackle his hands during in-person, contact visits with his experts.[1] He argues that under § 3599, in combination with this Court's decision in *McFarland v. Scott*, a federal district court "furnishing services pursuant to section 3599 may address a state's effort to frustrate those services by denying appointed counsel or other service providers with the ability to perform those services." Petition at 12.

Beatty's entire case is built on a mischaracterization of the facts, a figurative reading of the statute, and a willful ignorance of legal avenues available for inmates outside of § 3599. Moreover, his petition is a poor vehicle to decide these issues because the matter is now moot and Beatty was dilatory

[1] "Contact visit" refers to visitation where the inmate is in the same room as the visitor without any physical barrier between the two.

in attempting to pursue his proposed right under § 3599. The petition should be denied. As such, there is no basis for granting a stay of execution.

STATEMENT OF JURISDICTION

The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

I. Facts of the Crime

The Fifth Circuit entered the following summary of the facts presented at Beatty's trial:

> Beatty murdered his mother, Carolyn Click, on November 25, 2003. Beatty and Click had a "volatile and combative relationship." According to witnesses Betty McCarty and Lieanna Wilkerson, each a neighbor and friend to Click, Beatty had assaulted Click several times in the past. Indeed, Wilkerson testified that once Beatty "had beaten [Click] so severely that he had left her for dead."
>
> Nevertheless, Beatty, an adult who had been out on his own, moved back in with his mother in October 2003. The relationship never improved. McCarty testified that Click told Beatty to leave in October 2003. The separation was short, however; Beatty soon returned to his mother's home. McCarty testified that Click again told Beatty to leave on November 25, 2003, the day of Click's murder. At approximately 4:00 p.m. that day, Click said to McCarty: "I told [Beatty] to leave today." According to McCarty, Click said about Beatty: "I put up with all I'm going to put up with."
>
> Wilkerson testified that Beatty and Click fought daily when they lived together and that "[s]everal times[Beatty] had said he just wanted to shut [Click] up, that he just wanted to choke her and shut her up." Wilkerson described a conversation she had with Beatty in which he expressed his anger about Click refusing to drive him to a job interview because "she just didn't feel like it." Beatty told Wilkerson that he had thought about killing Click with

> a hammer and shoving her under the house but that he "couldn't do it" because she would have "started stinking." Despite Beatty's obvious troubles, Wilkerson befriended Beatty, sometimes allowing him to stay at her house to give Beatty and Click an opportunity for some time apart. The night of November 25, 2003, Beatty ate dinner at Wilkerson's house, arriving at approximately 6:00 p.m. and leaving at approximately 10:00 p.m.
>
> In the days that followed, Beatty told differing stories about Click's murder. The most succinct version—and the final version put forth in the Texas Court of Criminal Appeals' narrative—came from Wilkerson. Wilkerson testified that the "last thing" that Beatty told her about the night of Click's murder was that "when he left [Wilkerson's] house, he went directly across the street to [Click's] house and that [Click] was waiting for him, and that when he came through the door, they had a horrible fight." Beatty told Wilkerson that he "chok[ed] Click until she fell to the floor" and that he did not realize that she was dead "until he woke up the next morning." Beatty then crudely buried his mother behind the home.
>
> The day after Click's murder, Beatty took a turkey to Wilkerson's house. Beatty told Wilkerson that he had picked up the turkey for Thanksgiving but that he no longer needed it because Click had gone out of town. In the weeks after Click's death, Beatty used Click's credit and debit cards to make purchases and disposed of her belongings.

Beatty v. Stephens, 759 F.3d 455, 458–59 (5th Cir. 2014) (internal citations and quotations omitted).

II. Procedural History

In 2004, Tracy Lane Beatty was found guilty of the capital murder of his mother, Carolyn Click, and sentenced to death. After his state direct appeal and postconviction proceedings proved unsuccessful, Beatty filed a federal petition for writ of habeas corpus in the Eastern District of Texas. *Beatty v.*

State, No. AP-75010, 2009 WL 619191 (Tex. Crim. App. Mar. 11, 2009); *Ex parte Beatty*, No. WR-59,939-02, 2009 WL 1272550, at *1 (Tex. Crim. App. May 6, 2009) (per curiam). In July 2013, the district court denied his petition. Beatty filed a motion for reconsideration and requested a new attorney on appeal. The district court denied the motion for reconsideration but granted the request for a new attorney on the appeal. Beatty's current lead attorney, Scott Smith, was appointed on August 30, 2013. Beatty then sought and was denied a certificate of appealability (COA) from the court below. *Beatty v. Stephens*, 759 F.3d 455, 468 (5th Cir. 2014). Beatty filed a petition for panel rehearing which was denied on November 3, 2014. On Petition for Rehearing at 2, *Beatty v. Stephens* (No. 13-70026) (5th Cir.).

After this Court's decision in *Christeson v. Roper*, 574 U.S. 373, (2015), Beatty filed a motion asking the Fifth Circuit to recall its mandate. Opposed Motion to Recall the Mandate, *Beatty v. Stephens* (No. 13-70026) (Jan. 30, 2015). The court denied the motion. *Beatty v. Stephens*, 759 F.3d 455 (5th Cir. 2015). Beatty petitioned this Court for a writ of certiorari, but that petition was also denied. *Beatty v. Stephens*, 575 U.S. 1011 (2015).

At this point, Beatty's execution was set for August 13, 2015. *See Beatty v. Davis,* 755 Fed. Appx. 343, 346 (5th Cir. 2018). However, despite the fact that the Texas Court of Criminal Appeals (CCA) ultimately dismissed the application as an abuse of the writ, Beatty successfully delayed justice by filing

another state habeas application a mere seven days before he was scheduled to be put to death. *Ex parte Beatty*, No. WR-59,939-03, 2015 WL 6442730 (Tex. Crim. App. Oct. 14, 2015).

In October 2015, Beatty returned to federal court and filed a Rule 60(b) motion. The motion and a COA were denied. Then, Beatty filed a motion in the district court to alter or amend the judgment under Rule 59(e) which was also denied. Beatty sought a COA to appeal the district court's denial of Rule 60(b) relief. The Fifth Circuit denied COA on November 12, 2018. *Beatty v. Davis,* 755 Fed. Appx. 343, 346 (5th Cir. 2018). This Court denied a petition for writ of certiorari on October 7, 2019. *Beatty v. Davis*, 140 S. Ct. 54 (2019).

Then Beatty was given another execution date of March 25, 2020, but, on March 19, 2020, the execution was stayed due to the existing "health crisis and the enormous resources needed to address that emergency." *In re Beatty*, No. WR-59,939-04, 2020 WL 1329145 (Tex. Crim. App. Mar. 19, 2020).

On June 10, 2022, the Honorable Jack Skeen, Jr. signed an order setting Beatty's execution for November 9, 2022. At this point lead counsel Scott Smith had been federally appointed to Beatty's case for over nine years, during which Beatty had been set for execution two previous times. Nearly three months elapsed. Then on September 2, 2022, approximately two months before his execution date, Beatty filed an opposed motion to compel TDCJ to unshackle Beatty's hands during in-person, contact visits with defense experts. The

Director responded and Beatty filed a reply. On September 16, 2022, the district court entered an order dismissing Beatty's motion for lack of jurisdiction.[2] *See* Pet. Appx. B; *Beatty v. Lumpkin,* No. 4:09-cv-225, 2022 WL 5417480 (E.D. Tex.). With only fifty-four days remaining before his execution date, Beatty let twelve of those days expire before filing the notice of appeal that initiated proceedings in the Fifth Circuit. Beatty did not use that time to prepare and file a motion to stay his execution pending appeal in the district court. Instead, he waited until October 21, 2022, almost a month later, to file a motion to stay in the Fifth Circuit concurrent with his brief on the merits. The Director filed his brief on appeal and response in opposition to the motion for stay of execution on October 28, 2022. On November 2, the Fifth Circuit issued a published opinion affirming the district court's ruling that it lacked jurisdiction and denying the motion to stay. *See* Pet. Appx. A; *Beatty v. Lumpkin,* — F.4th —, 2022 WL 16628396 (5th Cir. 2022).

However, the same day he filed his brief on the merits and motion for stay of execution, Beatty decided to try his luck with a different federal judge and initiated another lawsuit related to this matter. Beatty filed a civil rights suit pursuant to 42 U.S.C. § 1983, in the Southern District of Texas. *Beatty v. Collier, et al.,* No. 4:22-cv-03685, Complaint Pursuant to 42 U.S.C. § 1983, ECF

[2] The court issued its opinion in advance of both scheduled expert evaluations of September 19 and 22, 2022.

1 (S.D. Tex. Oct. 21, 2022). Four days after that, while his motion for stay of execution was still pending in the Fifth Circuit, Plaintiff filed a motion for preliminary injunction prohibiting TDCJ from carrying out his sentence as scheduled on November 9, 2022. *Beatty v. Collier, et al.,* No. 4:22-cv-03685, Plaintiff's Opposed Motion for Preliminary Injunction, ECF 6 (S.D. Tex. Oct. 25, 2022). After briefing was complete, the court set a hearing to allow counsel to argue the issues. *Beatty v. Collier, et al.,* No. 4:22-cv-03685, Order, ECF 14 (S.D. Tex. Nov. 1, 2022). Two days after the Fifth Circuit issued its opinion in this proceeding, on Friday, November 4, 2022, the Southern District issued its Opinion and Order Denying Preliminary Injunction and Dismissing Action. *See* Resp. Appx. A; *Beatty v. Collier, et al.,* No. 4:22-cv-03685, Order, ECF 20 (S.D. Tex. Nov. 4, 2022). The following Monday, November 7, 2022, Petitioner filed his petition for writ of certiorari and application for stay of execution in this Court. The same day the Texas Board of Pardons and Paroles voted unanimously not to recommend executive clemency. *See* Resp. Appx. B.

REASONS TO DENY THE PETITION

Beatty fails to provide justification for granting a writ of certiorari. The Fifth Circuit's opinion is not "in conflict with the decision of another United States court of appeals on the same important matter." *see* Sup. Ct. R. 10(a). Nor has the Fifth Circuit "so far departed from the accepted and usual course of judicial proceedings...as to call for an exercise of this Court's supervisory

power." *Id.* In short, Beatty presents no compelling reason for this Court to exercise its judicial discretion.

I. Section 3599 Does Not Provide Jurisdiction to District Courts to Issue Orders beyond Those Necessary to Appoint Counsel and Ensure Funding.

A federal court's jurisdiction is limited and extends only as far as the authority granted to it by Congress. *Finley v. United States*, 490 U.S. 545, 550 (1989). If there is any ambiguity in a federal statute, "it is appropriate to refer to basic principles of federalism embodied in the Constitution to resolve [that] ambiguity." *Bond v. United States*, 572 U.S. 844, 859 (2014).

Recently, in *Shoop v. Twyford* and *Shinn v. Martinez Ramirez*, this Court emphasized the importance of State sovereignty during habeas review of state criminal judgments. *Twyford,* 142 S. Ct. 2037 (2022); *Martinez Ramirez,* 142 S. Ct. 1718 (2022). "[F]ederal habeas review overrides the States' core power to enforce criminal law, it intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority. That intrusion imposes special costs on our federal system." *Martinez Ramirez,* 142 S. Ct. at 1731 (internal quotations omitted). In *Twyford*, the Court noted that the "principles of comity, finality, and federalism" support efforts to reduce delays in the execution of state criminal sentences. *Twyford*, 142 S. Ct. at 2044.

The plain language of the statute and the rules of statutory construction make it clear that a federal court's jurisdiction under § 3599 is limited to issues related to appointing counsel and authorizing funding for indigent inmates.

The title of the statute provides the appropriate context for construing the text—the purpose is to provide "counsel for financially unable defendants." 18 U.S.C. § 3599. Next, it states that "a defendant who is or becomes *financially unable to obtain* adequate representation or investigative, expert, or other reasonably necessary services" is entitled to counsel and, potentially, other investigative services. 18 U.S.C. § 3599(a)(1), (f) (emphasis added); Pet. Appx. A at 2-3 (citing *Ayestas v. Davis,* 138 S. Ct. 1080, 1092 (2018), and *Harbison v. Bell,* 556 U.S. 180, 184 (2009)). The statute addresses financial hurdles to obtaining services, not hypothetical correctional facilities' policies that may render an inmate unable to obtain the psychological evaluation of choice. Furthermore, § 3599 is only applicable to the extent that the inmate requires the court to pay for the services in question.[3]

Only the most convoluted feats of linguistic acrobatics could lead to a conclusion that § 3599 has a purpose beyond ensuring that inmates are not handicapped by their lack of financial resources. By ensuring that inmates are provided the financial resources to obtain representation, Congress was not

[3] If it conveys jurisdiction beyond funding, § 3599 would give indigent inmates rights not available to their more financially able counterparts.

guaranteeing the success of that representation, and Beatty "goes too far" in reading "obtain" to mean courts may "take any and every step that a prisoner may request related to the provision of expert services." Pet. Appx. A at 4. Likewise, obtaining the service of an expert is not the same as obtaining specific evaluations or specific conditions for those evaluations. As the Fifth Circuit noted, in plain language, the phrase "obtain counsel'" or "obtain expert assistance" means to *hire*, purchase, or procure them. Pet. Appx. A at 4-6. "The statute does not create an *independent* enforcement mechanism for an aggrieved, indigent prisoner to seek a remedy from a federal court about the scope of the expert services provided to the prisoner with federal funds." *Id.* at 6.

II. The Circuit Courts Are in Complete Agreement on This Issue.

As the Fifth Circuit noted, several of the circuit courts have opined on the application of 3599 in this context, and "[t]hey are in uniform agreement that section 3599's authorization for funding does not imply an additional grant of jurisdiction to directly oversee the provision of counsel and related services." Pet. Appx. A at 6-7

In *Baze v. Parker*, the Sixth Circuit considered a case where the facts are virtually identical to the present situation. *Baze v. Parker*, 632 F.3d 338, 339-41 (6th Cir. 2011). In *Baze*, as part of an investigation related to his clemency application, the inmate wanted to interview prison personnel at the Kentucky

Department of Corrections (KDOC). *Id.* When the KDOC denied Baze's investigator the requested access to the employees, Baze filed a motion in the federal district court seeking an order to compel the KDOC to permit him to conduct the interviews. *Id.* at 339–40. Like Beatty, Baze argued that § 3599 provided the federal district court with jurisdiction to issue such an order.[4] *Id.* at 340. The Sixth Circuit disagreed stating that § 3599 provided authority "to authorize, for purposes of compensation, an attorney to acquire an investigator's efforts—not his total success." *Baze*, 632 F.3d at 343. The statute does not enable a federal court to order an outside party, even a state actor, to "stand down." [5] *Id.* "Although state interference with a defendant's efforts to obtain evidence in support of a state clemency application could be a problem, a solution is more appropriately fashioned in state court and, in any case, *is nowhere to be found in 18 U.S.C. § 3599*." *Id.* at 345 (emphasis added).

Likewise, citing *Baze*, in *Leavitt v. Arave*, the Ninth Circuit Court of Appeals stated the following

[4] Baze also argued that the All Writs Act, 28 U.S.C. § 1651 provided the district court with jurisdiction. This argument failed as well. *Baze*, 632 F.3d at 341, 345–46.

[5] The Sixth Circuit also pointed out that, because § 3599 affected only indigent inmates, to hold that it conferred jurisdiction beyond that necessary to grant funding would give indigent inmates rights beyond those of other death row inmates. *Baze*, 632 F.3d at 344. The court found that it was "implausible that Congress enacted section 3599, not to level the playing field by providing indigent death row inmates with the same access to clemency attorneys available to paying inmates, but to tip the balance in the other direction." *Id.*

> As to clemency, Leavitt argues that the district court has jurisdiction to grant the testing motion under 18 U.S.C. § 3599(f), so he can use it in support of his state clemency petition. But, section 3599(f) provides for "nothing beyond ... funding power" and doesn't "empower the court to order third-party compliance" with Leavitt's attorneys' investigations.

Leavitt v. Arave, 682 F.3d 1138, 1141 (9th Cir. 2012);[6] *see also Rhines v. Young,* 941 F.3d 894, 895-96 (8th Cir. 2019) (recognizing district court holding that it had no authority to order South Dakota prison officials to allow inmate to meet with mental health experts to prepare for state clemency application, but dismissing appeal on mootness grounds because clemency application was already filed).

Beatty points to no contrary authority from any court. As such, he completely fails to demonstrate that there is any compelling reason for review. Instead, he merely disagrees with the lower court's interpretation of § 3599. Beatty's petition is a plea for error correction but, when the courts below properly identified and applied the law to the facts of his case, certiorari review is wholly inappropriate.

[6] The Ninth Circuit recently reaffirmed this in *Pizzuto v. Tewalt*, stating that "18 U.S.C. § 3599. . . does not 'empower the court to order third-party compliance' to aid plaintiff's counsel in seeking clemency. 997 F.3d 893, 908 (9th Cir. 2021) (quoting *Leavitt*, 682 F.3d at 1141).

III. The Fifth Circuit's Interpretation of Section 3599 Is Not in Conflict with *McFarland v. Scott*.

Beatty claims that "*McFarland* held that the legislative intent of § 3599 required courts give meaningful effect to its promise of representation and services." Pet at 9. Petitioner believes this is dispositive of the entire case. Pet. at 9–15. He rails against the Director for not spending enough time explaining to him why it is not. Pet. at 12. He further charges the Fifth Circuit with ignoring this Court's precedent due to its failure to directly address the case. Pet. at 12. But *McFarland* is simply inapplicable in this context.

Stretching the opinion in *McFarland* beyond the breaking point, Beatty alleges that the case held that "the legislative intent of § 3599 require[s] that federal courts give meaningful effect to its promise of representation and services" because a federal district court had authority to appoint counsel under § 3599 "*before* a habeas petition [i]s filed," Pet. at 9 (emphasis in original). Selectively summarizing the procedural history behind this Court's decision in *McFarland*, he suggests that his case arises out of a similar procedural posture. This is not true. In *McFarland*, the petitioner had *never* been appointed habeas counsel in state or federal court. 512 U.S. at 851–52. Because McFarland had *never* been appointed habeas counsel, this Court found that

> A capital defendant may invoke this right to counseled federal habeas corpus proceeding by filing a motion requesting the

> appointment of habeas counsel, and that a district court has jurisdiction to enter a stay of execution where necessary to give effect to that statutory right.

512 U.S. at 859. *McFarland* found that the § 3599 predecessor gave jurisdiction to district courts to enter *stays of execution* so that appointed counsel had some time to research and file a habeas petition. *Id.* at 857-58. It did not grant district courts jurisdiction to micro-manage how the right to representation was carried out. *McFarland* was later codified in 28 U.S.C. § 2251(a)(3) so that first-time federal habeas petitioners would have a few months to prepare for filing with counsel's assistance. The lower court underlined this in *Battaglia v. Stephens*, where it found that, when a defendant has been abandoned by counsel, a federal court has jurisdiction under 28 U.S.C. § 2251 to enter a stay of execution to give effect to the defendant's § 3599 right to federal funding. 824 F.3d 470, 474–75 (5th Cir. 2016) (internal quotation omitted). Finally, § 2251 limits how long a district court's stay of execution is effective dictating that "such stay shall terminate not later than 90 days after counsel is appointed or the application for appointment of counsel is withdrawn or denied." 28 U.S.C. § 2251(a)(3). Petitioner is not a first-time petitioner without counsel. He was appointed counsel, filed a petition, and was denied relief long ago. He has had federally appointed counsel for over thirteen years.

Beatty argues that to uphold the Fifth Circuit's interpretation, and every other court of appeals that has considered the matter, would render § 3599

"meaningless as a practical matter." Pet. at 15. This is hyperbolic and undoubtedly false.

In Beatty's exaggerated telling, inmates deprived of the jurisdictional power of § 3599 will languish in prisons, unable to contact counsel due to draconian rules established by correctional facilities. According to Beatty, "in the Fifth Circuit, the § 3599 right counsel now means only that death sentenced prisoners may have a lawyer, but if the prison refuses to allow counsel to meet with them, § 3599 is powerless to remedy that obstruction." Pet. At 16. Beatty does not allege that he has ever been denied a meeting with his lawyer or anyone else.

Beatty continues to assume that § 3599 is the only possible route to protect inmates' rights. This is not so. Inmates do not need to invoke § 3599 to ensure access to counsel. If this were the case, inmates with private counsel would be without any recourse. "If a state official violates a prisoner's right to counsel, and that prisoner's counsel is being paid for by the federal government instead of the prisoner himself, then that prisoner must avail himself of the same recourse as a prisoner who is paying for counsel." Pet. Appx. A at 6. Moreover, § 3599 is not the only statute authorizing appointment of counsel. Texas affords counsel and investigative and expert assistance to indigent capital inmates for initial postconviction proceedings, authorized successive postconviction proceedings, postconviction DNA testing, and incompetency-to-

be-executed proceedings. Tex. Code Crim. Proc. Art. 11.071, §§ 2, 2A, 3, 5(b-1) & (b-2); Art. 46.05(f); Art. 64.01(c). Further, Texas has established a statewide public defender—the Office of Capital and Forensic Writs—for the purpose of providing representation and investigative and expert assistance for death-sentenced inmates. Tex. Gov't Code § 78.052. Beatty does not claim to have availed himself of any of these resources before resorting to a federal district court with no jurisdiction to hear his complaints. Resp. Appx. A at 8.

IV. This Case Is a Poor Vehicle for Addressing These Issues.

A. Any issue related to clemency is moot.

Petitioner's clemency efforts were not "severely hampered" by the limited evaluations. Petitioner filed a clemency application and included the preliminary findings of his experts. The Board of Pardons and Paroles voted to recommend denial of Beatty's clemency application on Monday, November 7, 2022. Resp. Appx. B. In so doing, the Board also voted to recommend denying a reprieve to allow Beatty to continue his pursuit of certain psychological testing. *Id.* It stands to reason that if the Board felt that the results of such testing would have been helpful in making a decision, it would have recommended a reprieve so that Beatty would have more time to pursue his hypothetical claims. It did not. Regardless, any justification for finding that the issue is not moot that existed prior to the Board's ruling has been fully extinguished by the denial of the application.

B. Petitioner has been dilatory in pursuing relief.

Beatty's original motion to compel indicated that counsel sought the evaluations "in preparation for seeking clemency and assessing the viability of other potential litigation." In his reply in support of the motion filed in the district court, Beatty stated that the evaluations were reasonably necessary for the preparation of Mr. Beatty's clemency proceedings and other potentially available judicial remedies contemplated under § 3599. Later, Beatty asserts that his "mental health history and recent decompensation are relevant to whether he is competent to be executed under *Ford v. Wainwright*." Presumably to address the timing of his request, Beatty notes that competency for execution only becomes ripe "when an execution is imminent." In that same document Beatty goes on to say that his mental health history raises "red flags" related to a possible claim of intellectual disability under *Atkins v. Virginia*.[7] In his opening brief in the Fifth Circuit, Beatty continued to argue the need for unhandcuffed evaluations to evaluate possible *Atkins* and *Ford* claims in addition to his preparation for applying for clemency. At 19-20, 22-23.

In his civil rights suit filed in the Southern District of Texas, Beatty again vaguely stated that he "has mental health and cognitive issues that require exploration via expert evaluations for purposes of clemency and other

[7] "The available record suggests that TDCJ lists Beatty's IQ in the average range." Resp. Appx. A at 8.

potential habeas litigation." Complaint at 7. However, in argument, Beatty made clear that a *Ford* claim was not under consideration. ("Counsel confirmed at hearing that Beatty doesn't anticipate (at least at present) raising any incompetency- to-be-executed claim under *Ford v Wainwright*, 477 US 399 (1986)." Resp. Appx. A at 3. The changing basis of Beatty's possible future litigation is a consequence of his need to retroactively justify his long delay in seeking mental health evaluations. However, whether Beatty wanted to pursue an intellectual disability claim or a competency to be executed claim, his delay in seeking expert evaluations was inexcusable. As the Southern District noted, "throughout his extensive state and federal litigation—including last-minute litigation when facing two previous execution dates—he never raised any claim relating to his mental health." Resp. Appx. A at 8. This issue is discussed further in the section addressing Beatty's motion for stay below.

V. Petitioner's Application for Stay of Execution Should Be Denied.

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). Both the lower court and the Southern District of Texas found that Beatty was dilatory in seeking relief and that the equities weigh against delaying his execution any longer. Pet. Appx. A at 9; Resp. Appx. A at 7-11, 19. This Court should also deny Beatty's request for a stay of execution.

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 Beatty's request.

First, as demonstrated above, Beatty's petition is without merit. He points to no compelling factual or legal issues warranting further review and he has already sought and been denied executive clemency.

Second, Beatty 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. Moreover, this is a highly unusual case where Beatty is not actually challenging the validity of his conviction or sentence. An incursion on the right to access counsel, or other services, does not call into question the constitutionality of Beatty's death sentence. Essentially, Beatty is asking this Court to stay his execution without alleging that the sentence is illegal in *any* way and in the absence of any pending habeas corpus litigation. Such a request

is beyond the power of a federal court to grant. *See* 28 U.S.C. § 2251(a) (for purposes of federal authority to stay an execution, an application for habeas corpus *is not pending until the application is filed*).

The State, as well as the public, has a strong interest in carrying out Beatty's sentence. *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).

Moreover, it bears repeating it is no secret that "capital petitioners might deliberately engage in dilatory tactics to prolong their incarceration and avoid execution of a sentence of death." *Rhines*, 544 U.S. at 277–78. Thus, "[t]he federal courts can and should protect States from dilatory or speculative suits[.]" *Hill*, 547 U.S. 585.

The procedural history in this case demonstrates the dilatory nature of Petitioner's claim. Convicted and sentenced in 2004, Petitioner has spent the past eighteen years actively challenging his conviction and sentence. Beatty has had federally appointed counsel for the past thirteen years and has been represented by current lead counsel the past nine years. During this time,

Petitioner has had two previous execution dates stayed at the last minute.[8] However, in well over a decade, Beatty's counsel has never believed it important to have him evaluated by mental health experts.

Now, facing his third execution date, Beatty approached the district court only forty-eight days before the deadline to file his clemency application, asking for an order requiring TDCJ to comply with his demand to be unhandcuffed during a contact expert evaluation. Perhaps more significantly, there were only thirty-one days between the days the evaluations had already been scheduled for and the due date for his application. While Beatty blames the Director's "shifting practices" for the last-minute nature of this case, as the Southern District court noted, Beatty bears the responsibility for waiting until now to address his "long history of mental illness." Resp. Appx. A at 8. In keeping with his shift from possible *Atkins* claim to a possible *Ford* claim, Petitioner now gives greater emphasis to "recent" mental health events. However, these events occurred in May 2022. Again, as the Southern District noted,

> even when the state district court soon thereafter set the pending execution date, Beatty didn't schedule any mental-health evaluation until barely a month before his clemency petition was due. Again, this means that Beatty's legal team waited until only shortly before his execution date to begin investigations which he could—and should—have commenced and completed long before.

[8] Both executions were stayed after the deadline to file a clemency application.

Resp. Appx. A at 9. Petitioner provides "no legitimate justification as to why this appeal is anything but a delay tactic." Pet. Appx. A at 9. The application for stay should be denied on this basis alone.

CONCLUSION

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

Respectfully submitted,

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