CASE NOS. 23A410 & 23-5421 (CAPITAL CASE)

IN THE SUPREME COURT OF THE UNITED STATES

BRENT BREWER,
Petitioner,

v.

BOBBY LUMPKIN, DIRECTOR,
Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals for the Fifth Circuit

Execution Scheduled for November 9, 2023

REPLY IN SUPPORT OF APPLICATION FOR A STAY OF EXECUTION AND PETITION FOR REHEARING

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ARGUMENT

The State's suggestion that Mr. Brewer's Petition for Rehearing is "an abusive attempt to circumvent the Court's rule," BIO at 9, is wrong. Mr. Brewer filed his Petition for Rehearing well within the twenty-five-day period allowed by Rule 44 – he could not wait any longer, lest the State kill him before the conclusion of his initial habeas proceedings. Mr. Brewer has not filed any last-minute petition with this Court to "deliberately engage in dilatory tactics to prolong [his] incarceration and avoid execution of a sentence of death." *Rhines v. Weber*, 544 U.S. 269, 277–78 (2005); BIO at 9. This is Mr. Brewer's only petition for a writ of certiorari from his initial habeas proceedings regarding his 2009 sentence of death. The litigation is ongoing so close to Mr. Brewer's execution date of November 9 only because the State presumed this Court's indifference and requested the date before Mr. Brewer had even filed his petition for a writ of certiorari.

At any rate, intervening circumstances justify rehearing. Clemency "is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted." *Herrera v. Collins*, 506 U.S. 390, 412 (1993). It is the "fail safe" of the criminal justice system. *Id.* at 415. It exists as a safety net for exceptional cases that did not obtain relief from the courts.

When that safety net fails, as it has here, this Court can act to provide the protection justice allows. In denying certiorari, some justices may have considered that clemency would act as such a fail safe to correct the error in presenting false and discredited testimony from Dr. Coons, so that the grant of certiorari was

unnecessary. Now that clemency has been denied, that fail safe no longer exists. This is an intervening change of circumstances that renders this Court the last resort to ensure that a man is not executed based on false and discredited expert testimony concerning his alleged future dangerousness. And, as much as the State argues that the additional caselaw presented by Mr. Brewer cannot constitute "substantial grounds not previously presented" to justify rehearing, it does not cite a single case that endorses this argument. *See* BIO at 4.

The State certainly has a strong interest in enforcing its criminal judgments. But that interest is minimized where, as here, the State is attempting to execute Mr. Brewer before his initial federal habeas proceedings are complete. Remember, at this point, Mr. Brewer is seeking only the certificate of appealability from the Fifth Circuit to which he is certainly entitled under the arguments and standards articulated in his Petition for a Writ of Certiorari and Petition for Rehearing. That is, the underlying question on the merits here is only whether Mr. Brewer should be granted a certificate of appealability and even allowed to argue his substantial constitutional claim on the merits at the Fifth Circuit. The State's rush to execute Mr. Brewer should not change this threshold consideration into a consideration of the merits of the claim itself.

When the State does turn to arguing the merits, it relies on the Fifth Circuit's approval of the state habeas court's finding that other evidence "independently supported the jury's verdict on the future dangerousness special issue." BIO at 7. This evaluation of *Strickland* prejudice, based on whether there remained sufficient

evidence to support the jury's finding on future dangerousness despite Dr. Coons' testimony, is clearly contrary to this Court's prejudice standard from *Strickland* of whether there "is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 695 (1984). In capital sentencing proceedings, that standard is met if there is a reasonable probability that a single juror might have voted differently but for the error. Mr. Brewer need show only a reasonable probability that *one juror* would have viewed the evidence favorably. *See Andrus v. Texas*, 140 S. Ct. 1875, 1886 (2020) (prejudice requires only a reasonable probability that a single juror would weigh all the evidence and strike a different balance) (citing *Wiggins v. Smith*, 539 U.S. 510, 536 (2003)). The state court's substitution of a sufficient-evidence standard in place of the one-juror standard required by this Court is contrary to *Strickland* and *Andrus*. This misapplication of this Court's law reinforces the need for a full merits review of the issue below.

The State recognizes the important question presented in this case and that three of the Court's justices have recently dissented from the denial of certiorari in cases with similar issues. BIO at 5. Of course, Petitioner acknowledges that a fourth justice would need to vote to grant certiorari on the issue and is asking for such here. Contrary to the State's argument that this case "does not come close to the clarity and level of dispute in those two cases," *id.* at 5, Mr. Brewer contends that this case is the proper vehicle to resolve the question – an unexplained state court dissent presents the issue in its simplest and most straightforward form. The State

continues to fault Mr. Brewer for "fail[ing] to prove the unexplained [state court] dissent is even related to the claims he sought a COA on," BIO at 6, but Mr. Brewer contends that the dissent is obviously related to the issue presented in his Petition for Writ of Certiorari, as that was the only issue allowed any evidentiary development in state habeas court. At any rate, the argument that a certificate of appealability should not be granted on any issue at all because a state court would have granted relief on an allegedly unknowable issue is grotesque and contrary to the threshold standard this Court has set for determination of whether to grant a certificate of appealability.

Mr. Brewer's Petition for Rehearing is not, as the State alleges, an "end run around the Court's rules." BIO at 3. Mr. Brewer has only followed this Court's rules in seeking the certificate of appealability and asking for this Court's review of the Fifth Circuit's unjustified denial. His petition for rehearing is appropriate because he "suggest[s] . . . new reason[s] why [the] initial decision to deny certiorari was wrong." *Richmond v. Arizona*, 434 U.S. 1323, 1325 (1977). Even if Mr. Brewer's petition for rehearing were somehow inappropriate, this Court should still apply "the established doctrine that 'the interest in finality of litigation must yield where the interests of justice would make unfair the strict application of our rules.'" *Gondeck v. Pan. Am. World Airways*, 382 U.S. 25, 26–27 (1965) (per curiam) (quoting *United States v. Ohio Power Co.*, 353 U.S. 98, 99 (1957)).

Clemency's fail safe has failed Mr. Brewer. False and discredited expert testimony has no place in capital sentencing. Even if this Court is not interested in

either question presented in this case, it should still correct the Fifth Circuit's error below, and grant the petition, vacate the opinion below, and remand to the Fifth Circuit with instructions to grant the certificate of appealability. This Court has repeatedly had to admonish the Fifth Circuit for the same reasons and should do so again now. Mr. Brewer's claim deserves appellate consideration on the merits in federal habeas, and the State's rush to execute Mr. Brewer should not blind the Court to this consideration.

CONCLUSION

For these reasons, the Court should grant Mr. Brewer's petition for rehearing, grant a writ of certiorari, and place this case on its merits docket. In the alternative, this Court should grant certiorari, vacate the decision below, and remand this case to the Fifth Circuit with instructions to grant a certificate of appealability.

Respectfully submitted,

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