Nos. 23A410 & 23-5421

IN THE
Supreme Court of the United States

BRENT RAY BREWER,
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

BRIEF IN OPPOSITION TO APPLICATION FOR A STAY OF EXECUTION AND PETITION FOR REHEARING (EXECUTION SCHEDULED FOR NOVEMBER 9, 2023)

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BRIEF IN OPPOSITION TO APPLICATION FOR A STAY

Petitioner Brent Ray Brewer seeks a stay of his execution, currently scheduled for November 9, 2023. He also seeks rehearing of this Court's denial of certiorari on his claim that the Fifth Circuit should have granted a certificate of appealability (COA) in his federal habeas proceedings. Specifically, he presents additional previously available caselaw and argument in support of his claim that the Fifth Circuit should have granted a COA where a state court judge dissented and indicated she would grant relief—in a state habeas case with a 400-page application containing 29 claims—without explanation. But Brewer's attempt to thwart his execution and present additional caselaw that could have been addressed earlier fails to comply with the Court's rules. Further, he fails to make a strong showing he is likely to succeed on the merits of his previously rejected claim and show that a stay is warranted. Thus, a stay is not appropriate here and Brewer's petition for rehearing should be denied.

REASONS FOR DENYING A STAY OF EXECUTION

I. Standard of review

A stay of execution is an equitable remedy. *Hill v. McDonough*, 547 U.S. 573, 584 (2006). "It 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." *Id.* (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 *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983), superseded on other grounds by 28 U.S.C. § 2253(c)(2). Indeed, "[a]pplications for stays of death sentences are expected to contain the information and materials necessary to make a careful assessment of the merits of the issue and so reliably to determine whether plenary review and a stay are warranted." *Id*. 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*, 52 U.S. 538, 556 (1998) (both the State and the victims have an important interest in the timely enforcement of a

sentence). "Last-minute stays should be the extreme exception, not the norm[.]" *Bucklew v. Precythe*, 139 S. Ct. 1112, 1134 (2019).

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). "A court considering a stay must also 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)); *see Gomez v. United States Dist. Court*, 503 U.S. 653, 654 (1992) (per curiam) ("A court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief.").

II. Brewer has not made a strong showing that he will succeed on the merits.

Brewer's attempt to obtain rehearing and a stay is nothing more than an end run around the Court's rules to present additional cases and argument

that were previously available in support of grounds this Court has already rejected. *See* Sup. Ct. R. 44.2 (the grounds for a petition for rehearing "shall be limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented."); *see also* Sup. Ct. R. 15.8 ("A supplemental brief shall be restricted to new matter" such as "new cases, new legislation, or other intervening matter not available at the time of the party's last fling."). First, the denial of clemency is not an intervening circumstance with a substantial or controlling effect on the grounds raised in his petition for certiorari, so it fails to meet the requirements of Rule 44.2. A clemency decision has no bearing on whether his case was properly decided. Events that meet the standard include the ratification of a relevant constitutional amendment and new, conflicting circuit court decisions. *See Massey v. United States*, 291 U.S. 608, 610 (1934); *Sanitary Refrigerator Co. v. Winters*, 280 U.S. 30, 34 n.1 (1929). Second, all the additional cases and argument presented by Brewer could have been presented in his petition for certiorari or reply, so they should not provide a basis for a stay and rehearing here.[1] *Hill*, 547 U.S. at 584; *see* Sup. Ct. R. 15.8. His additional cases are not a substantial ground not previously presented under Rule 44.2, rather they are just additional, previously available support for the ground he already

[1] One case was decided in 2023, but that was April 12, 2023. *Allen v. Sec'y, Dep't of Corr.*, No. 23-10447, 2023 6182657 (11th Cir. 2023).

presented. Thus, rehearing is not warranted based on a clemency decision or Brewer's additional briefing.

Moreover, given that the Court has already decided to deny certiorari on his claim, there is not a strong showing he will succeed on the merits here simply because he presents some additional cases. Indeed, as noted in the Director's earlier brief in opposition, BIO at 11, this Court has refused to grant certiorari to clarify the COA standard in cases that involved clear divisions among state and federal judges of far more significance. *Netherland v. Tuggle*, 515 U.S. 951, 952 (1995) (to succeed on a stay application, an applicant must show that four members of the Court would vote for certiorari). In *Johnson v. Vandergriff*, 143 S. Ct. 2551, 2551–53, 2555–56 (2023) (Sotomayor, Kagan, and Jackson dissenting), which involved a competency to be executed claim, a state court judge noted his dissent, an Eighth Circuit panel had granted a stay and COA, and three judges dissented when the en banc court vacated the panel's order. In *Jordan v. Fisher*, 135 S. Ct. 2647, 2648–52 (2015) (Sotomayor, Kagan, and Ginsburg dissenting), there was a contrary Ninth Circuit en banc opinion in a similar case, as well as a dissenting state court judge and dissenting Fifth Circuit judge who had both written on the relevant issue. This case does not come close to the clarity and level of dispute in those two cases, and this Court nevertheless denied certiorari in both. Thus, given the unexplained dissent

here, this case is a poor vehicle to decide whether division among judges requires a COA, and there is no strong showing Brewer is likely to succeed.

The fact remains that Brewer fails to prove the unexplained dissent is even related to the claims he sought a COA on. Here, Court of Criminal Appeals Judge Cheryl Johnson merely indicated she would have granted habeas relief; she did not author a dissenting opinion or otherwise explain what claim she would have granted relief on and why. ROA.18045; *Ex parte Brewer*, No. WR-46,587-02, 2014 WL 5388114, at *1 (Tex. Crim. App. Sept. 17, 2014). Yet Brewer's state habeas application was over 400 pages and raised 29 claims in all, including sub-claims.[2] ROA.5125–535. Therefore, the basis for Judge Johnson's decision is unknown and Brewer relies only on speculation that her dissent is relevant to the claims raised in his COA application. COA is not warranted on this basis.

Additionally, Judge Johnson was also not reviewing this case through the lens of AEDPA's[3] deferential standard of review, 28 U.S.C. § 2254(d). *See Brewer v. Lumpkin*, 66 F.4th 558, 562–63 (5th Cir. 2023). Consequently, her ruling does not even fully address the issue before the Fifth Circuit.

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[2] Brewer later dropped part of one subclaim, two other subclaims, and claims seventeen and eighteen. ROA.21293.

[3] The Antiterrorism and Effective Death Penalty Act of 1996.

Finally, Brewer has attacked the testimony of Dr. Coons that is the basis for his underlying claim throughout his state and federal appeals, and not one court has found Brewer could show prejudice, materiality, or harm from Dr. Coons's testimony. As the state habeas court explained, and the Fifth Circuit reiterated, the brutal facts of the offense, violent episodes from Brewer's adolescent and adult years, and eyewitness testimony from Brewer and his girlfriend "independently supported the jury's verdict on the future dangerousness special issue." *Brewer*, 66 F.4th at 565. Combined with fact that Dr. Coons's testimony was not powerful or strong, not backed by data or research, and effectively challenged by the defense, the federal magistrate judge and district court judge properly found the state court's rejection of the claim was reasonable. *Id.* Based on these facts, the Fifth Circuit determined a COA was not warranted. *Id.* Brewer's claim lacks merit and does not warrant a stay based on a speculation about an unexplained dissent.[4]

For these reasons, Brewer cannot demonstrate a strong likelihood of success on the merits. Under the circumstances of this case, a stay of execution would be inappropriate.

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[4] Indeed, only a week ago Brewer filed a subsequent habeas application in the Court of Criminal Appeals raising a due process claim based on the very same testimony from Dr. Coons. Yesterday the state court dismissed the claim as an abuse of the writ and denied a stay of execution without dissent. *See* Appendix A1 (per curiam order in *Ex parte Brewer,* No. WR-46,587-05 (Tex. Crim. App. Nov. 7, 2023)).

III. The State and the public have a strong interest in seeing the state court judgment carried out.

The State and crime victims a "powerful and legitimate interest in punishing the guilty." *Calderon*, 523 U.S. at 556 (citation omitted). And "[b]oth the State and the victims of crime have animportant interest in the timely enforcement of a [death] sentence," *Bucklew*, 139 S. Ct. at 1133 (quotation omitted); *see Nelson*, 541 U.S. at 650 ("a State retains a significant interest in meting out a sentence of death in a timely fashion"); *Gomez*, 503 U.S. at 654 ("[e]quity must take into consideration the State's strong interest in proceeding with its judgment"). Once post-conviction 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 pursue its "strong interest in enforcing 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, Brewer has already passed through the state and federal collateral review process multiple time over the last thirty-two years. The public's interest is not advanced by further postponing Brewer's execution, and the State opposes any action that would cause further delay. *Martel v. Clair*, 565

U.S. 648, 662 (2012) ("Protecting against abusive delay *is* an interest of justice.") (emphasis in original).

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 v. Weber*, 544 U.S. 269, 277–78 (2005). The fact that Brewer's additional caselaw and argument were not raised until the last minute even though previously available must inform the Court's analysis. He was not timely and diligent in presenting the additional support for his claim. "A court considering a stay must also 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*, 541 U.S. 650). Here, Brewer's petition for rehearing is an abusive attempt to circumvent the Court's rules and practice and does not warrant staying his execution.

CONCLUSION

For all these reasons, the application for a stay and petition for rehearing should be denied.

Respectfully submitted,

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