THIS IS A CAPITAL CASE – EXECUTION SET FOR JUNE 25, 2025

No. 24A1143
No. 24-959 (connected case)

In the
Supreme Court of the United States

RICHARD GERALD JORDAN,

Petitioner,

v.

STATE OF MISSISSIPPI.

Respondent.

On Petition for Writ of Certiorari
to the Supreme Court of Mississippi

REPLY IN SUPPORT OF EMERGENCY APPLICATION FOR STAY OF EXECUTION

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In less than a month, the State of Mississippi intends to execute Petitioner notwithstanding that the proceedings that produced his death sentence were marred by an egregious violation of his clearly established due process rights. *Ake* v. *Oklahoma*, 470 U.S. 68 (1985); *McWilliams* v. *Dunn*, 582 U.S. 183 (2017). The State's response to Petitioner's stay application does little to rebut Petitioner's strong showing that a stay is warranted here given the "presence of substantial grounds upon which relief might be granted." *Barefoot* v. *Estelle*, 463 U.S. 880, 895 (1983). Petitioner relies on his stay application, but takes this opportunity to address three glaring errors in the State's response.

1. In his Petition for Certiorari and in his stay application, Petitioner has amply demonstrated a reasonable prospect that this Court will grant review. Petitioner will not recapitulate those arguments, except to note that the State's stay opposition only reinforces the arbitrariness of the state procedural ground that the Mississippi Supreme Court relied on in refusing to consider Petitioner's due process claim. The State first argues that under "longstanding state precedent," the intervening-decision exception does not cover "application[s] of existing law," and *McWilliams* represented "existing law." Resp. 8. Later—in an effort to minimize the Catch-22 identified in *Cruz* v. *Arizona*, 598 U.S. 17, 29 (2023), and the pending Petition for Certiorari—the State contradicts itself, asserting that the "intervening-decision exception can (and does) apply to decisions that do not trigger *Teague*," because those decisions apply *existing law*. Resp. 10. That contradiction only reinforces that, in Mississippi, sometimes the intervening-law exception applies to "old" rules under *Teague* and sometimes it does not—without any rhyme or reason. Indeed, the Mississippi Supreme Court has never even attempted to explain when decisions of this Court refining or otherwise explicating existing law will justify consideration of a successor habeas petition and when they will not. That practice is anything but "firmly established and

regularly followed" and thus remains inadequate to foreclose review of a federal claim. Pet. 23 (quoting *Lee* v. *Kemna*, 534 U.S. 362, 376 (2002)).

2. Next, the State makes the startling assertion that Petitioner is unlikely to suffer irreparable harm absent a stay of his execution. Resp. 14. That flies in the face of both this Court's jurisprudence, *e.g.*, *Ford* v. *Wainwright*, 477 U.S. 399, 411 (1986) ("[E]xecution is the most irremediable and unfathomable of penalties."), and common sense. The State invents out of whole cloth the theory that a capital petitioner suffers no harm in being executed where "[h]is guilt is not in question," Resp. 14—even where he has meritorious constitutional claims that have not yet been adjudicated, and especially where those claims call into question whether his death sentence was the product of a constitutionally unreliable sentencing process. This Court has long held that guilt or innocence is irrelevant to the equitable considerations attending habeas relief, if the petitioner has demonstrated prejudicial constitutional error. *Cunningham* v. *Neagle*, 135 U.S. 1, 69-71 (1890). It therefore cannot be right to say, as the State does, that a petitioner with meritorious constitutional claims can never obtain a stay of execution to allow an adjudication of those claims, unless he claims (and presumably proves) actual innocence. Under that view, the State would have free rein to execute a defendant whose clearly established due process rights the State has violated—and it could do so without even allowing an adjudication of those rights. But the very point of the constitutional protections afforded to criminal defendants is to ensure that punishment is inflicted only after a *reliable* determination of guilt. That is manifestly not the case here.

3. Finally, the State's response does nothing to rebut Petitioner's showing that he exercised diligence in presenting his claim here. *See* App. 10-11. The State faults Petitioner for not bringing this claim earlier "[o]ver the last thirty years," Resp. 16, but Petitioner's claim rests on

this Court's 2017 decision in *McWilliams*. The State wrongly faults Petitioner for the fact that this Court's consideration of his claim on the merits will require a stay of his execution, Resp. 6, 16, but any fault lies with the State. Petitioner diligently pursued review of his claim, promptly seeking certiorari following the Mississippi Supreme Court's denial of his petition within the time prescribed by this Court's Rule 13. It was the State that sought an extension in its opposition deadline, claiming that the extension "will not prejudice Jordan"—even as it simultaneously sought an execution date that would not allow this Court, in the event of a grant of certiorari, to adjudicate the case on the merits in the normal course. Mot. to Extend Time at 2 (Mar. 13, 2025). On May 1, 2025, a divided Mississippi Supreme Court set the execution date for June 25, 2025. Once that date was set, Petitioner did what he could to expedite this Court's consideration of his Petition by waiving the 14-day waiting period for distribution of the Petition pursuant to Rule 15.5 the day after the State filed its opposition. Petitioner cannot be blamed for any delay.[1]

* * *

The application for a stay of execution should be granted.

[1] The State is mistaken in its invocation (Resp. 6, 16) of the "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* v. *McDonough*, 547 U.S. 573, 584 (2006) (quoting *Nelson* v. *Campbell*, 541 U.S. 637, 650 (2004)). This is not a situation in which Petitioner waited to assert his *McWilliams* claim until an execution date was imminent. To the contrary, he asserted that claim in a successor habeas petition well in advance of the setting of an execution date. Once the Mississippi Supreme Court denied relief, that court was free to set an execution date that would cut off this Court's adjudication of the merits of Petitioner's case, regardless of anything Petitioner did. In other words, there is nothing Petitioner could have done differently to avoid the need for a stay here, making this case nothing like those involving "last-minute" stay applications. *E.g.*, *Gomez* v. *U.S. Dist. Ct. for N. Dist. of Cal.*, 503 U.S. 653, 654 (1992).

Dated: May 29, 2025 Respectfully submitted,

/s/ Donald B. Verrilli, Jr.

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