CASE NO. 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

PETITION FOR REHEARING

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INTRODUCTION

Rehearing from the denial of certiorari is an extraordinarily rare occurrence, reserved for situations that present extraordinary circumstances. This is an extraordinary situation.

Mr. Brewer raised a substantial claim of constitutional error in his initial habeas petition – trial counsel's failure to object to the State's introduction and reliance on false and discredited expert testimony about future dangerousness. The expert was, of course, wrong. Mr. Brewer's record of thirty-four years of imprisonment shows no violent, assaultive, or threatening behavior. He has never been a danger. The State's expert lied and declared, without any scientific basis, that Mr. Brewer had no conscience and would be a future danger.

But that reality did not sway the state courts and was ignored by the federal habeas court. Although one state court judge was persuaded that Mr. Brewer should be granted relief, the Fifth Circuit refused to even review the claim on the merits, denying a request for a COA, which allows his execution to proceed on Thursday without any federal appellate review of a potentially meritorious claim that goes directly to the imposition of the death penalty. All Mr. Brewer asks for, in this still initial habeas corpus proceeding, is the opportunity for full appellate consideration of his claim.

Rehearing should be granted because courts are divided on whether a state court dissent indicates that a certificate of appealability should be granted, and because the equities of the extraordinary circumstances favor Mr. Brewer.

Rehearing is appropriate under Rule 44.2 owing to (1) the Texas Board of Pardons and Paroles' decision earlier this afternoon not to recommend that the Governor grant clemency – a failure of the judicial system's "fail safe" – which is an intervening circumstance of substantial effect; and (2) Mr. Brewer's presentation herein of many more circuit and district court decisions granting COA solely because a state court dissent on an issue indicates debate among jurists of reason, which are substantial grounds not previously presented. For these reasons, set out more fully below, the Court should grant this petition for rehearing, grant a writ of certiorari, and place this case on its merits docket; alternatively, the Court should grant certiorari, vacate the decision below, and remand this case to the Fifth Circuit with instructions to grant a certificate of appealability.

STATEMENT

Petitioner Brent Brewer was sentenced to death in 2009. In order to prove future dangerousness, the State relied on the opinion of "expert" witness Richard Coons, M.D., whose so-called methodology for assessing whether a person poses a future danger has been deemed scientifically unreliable and inaccurate by the Texas Court of Criminal Appeals (TCCA). *See Coble v. State*, 330 S.W.3d 253, 277–80 (Tex. Crim. App. 2010). In 2009, as in 1991, Dr. Coons never met Mr. Brewer and knew only the information the State had provided to him about Mr. Brewer. On the witness stand, Dr. Coons repeatedly lied. Petition at 4–5. Dr. Coons testified that Mr. Brewer had no conscience and was not bothered by violence. He claimed that Mr. Brewer's long record of non-violent behavior in prison was meaningless because

"a huge amount" of prison violence is not reported. A325–30, 333.[1] On direct appeal, the TCCA affirmed Mr. Brewer's sentence, finding that Mr. Brewer's appellate challenge to the trial court's error in admitting Dr. Coons' testimony was waived because trial counsel had failed to lodge a proper objection. A311–16.

Accordingly, Mr. Brewer raised trial counsel's ineffectiveness in this regard (as well as a host of other actions by trial counsel related to Dr. Coons' testimony) during state post-conviction proceedings. The state post-conviction court granted an evidentiary hearing solely to address these issues. After this limited hearing, the court ruled that counsel performed deficiently under *Strickland v. Washington*, 466 U.S. 668, 687 (1984), for failing to object to the admission of Dr. Coons' testimony, but that this failure caused no prejudice. A270 ("*Although trial counsel failed to preserve error in regards to the admission of Dr. Coons' testimony*, his actions *did not prejudice* the outcome of the re-sentencing trial.") (emphasis added).

A divided TCCA denied Mr. Brewer's habeas appeal on September 17, 2014, adopting the trial court's findings of fact and conclusions of law, except for two paragraphs not relevant here. A194–95. Judge Johnson not only dissented but would have *granted the writ*. A194.

Mr. Brewer was then denied relief in federal habeas proceedings. Both the district court and the Fifth Circuit declined to issue a certificate of appealability on Mr. Brewer's challenge to Dr. Coons' testimony, despite the disagreement among

[1] Petitioner cites to the Appendix filed with his Petition for Writ of Certiorari.

state court judges regarding whether relief was due. A3–37. Neither court acknowledged that the state courts had found trial counsel performed deficiently. The Fifth Circuit held that "[r]easonable jurists could not debate the district court's conclusion that the state courts did not act unreasonably in holding that trial counsel were not ineffective for failing to make what at that time would have been a futile objection to the introduction of Dr. Coons's testimony." A9.

On June 12, 2023, prior to Mr. Brewer even seeking review with this Court, the District Attorney for Randall County filed a motion requesting an execution date for Mr. Brewer with the Randall County District Court. That same day, the district court entered an order setting Mr. Brewer's execution for November 9, 2023.

Mr. Brewer filed his Petition for a Writ of Certiorari with this Court on August 21, 2023. The Court denied the petition on October 30, 2023.

GROUNDS FOR REHEARING

I. COURTS ARE DIVIDED ON WHETHER A STATE COURT DISSENT INDICATES THAT A CERTIFICATE OF APPEALABILITY SHOULD BE GRANTED.

The second question presented in Mr. Brewer's petition for a writ of certiorari, whether divided state court rulings alone can establish that an issue is debatable among jurists of reason for the issuance of a COA, has recently been acknowledged as an issue of significance by three justices of this Court. *See Johnson v. Vandergriff*, 143 S. Ct. 2551, 2553 (2023) (Sotomayor, J., joined by Kagan & Jackson, JJ., dissenting from denial of application for stay of execution and denial of certiorari); *see also Jordan v. Fisher*, 576 U.S. 1071, 1076 (2015) (Sotomayor, J.,

joined by Ginsburg & Kagan, JJ., dissenting from denial of certiorari). Mr. Brewer has already detailed a split among circuit courts and district courts in his Petition at 15–17.

In addition to the cases already cited therein, Mr. Brewer notes that the Tenth and Eleventh Circuits have also denied a COA despite a state court dissent, deepening the circuit split on the issue. *Allen v. Sec'y, Dep't of Corr.*, No. 23-10447, 2023 U.S. App. LEXIS 8783, at *11–12 (11th Cir. 2023); *Nickleberry v. Booher*, No. 00-6226, 2000 WL 1763451, at *2 (10th Cir. Nov. 30, 2000) ("[W]e reject Mr. Nickleberry's claim his petition raises issues debatable among jurists because two state appellate court judges dissented from the majority, which affirmed Mr. Nickleberry's convictions on direct appeal.").

Although the Fifth Circuit similarly denied a COA despite the state court dissent in this case, the circuit has ruled otherwise in some earlier cases. The court has at least twice granted a COA because of a divided state court opinion. *See Rhoades v. Davis*, 852 F.3d 422, 428–29 (5th Cir. 2017); *Matamoros v. Stephens*, 539 F. App'x 487, 493–94 (5th Cir. 2013). In *Matamoros*, a COA was granted even though the state court dissent merely noted it would have remanded the case for additional factfinding. *Matamoros*, 539 F. App'x at 493–94; *Ex parte Matamoros*, Nos. WR-50,791-02 & 03, 2012 WL 471356, at *5 (Tex. Crim. App. Oct. 3, 2012) (per curiam) (Price, J., dissenting). Here, a state court judge would have gone further and granted habeas relief.

Additionally, many more district courts than Mr. Brewer cited in his Petition have granted a COA solely because a state court dissent on an issue indicates debate among jurists of reason. *See Farnsworth v. Boe*, No. 3:20-cv-5067, 2022 WL 4598085, at *8 (W.D. Wash. Sept. 30, 2022); *Davidson v. Skipper*, No. 20-cv-13188, 2022 WL 4088177, at *7 (E.D. Mich. Sept. 6, 2022); *Ibrahim v. Schweitzer*, No. 2:21-cv-5065, 2022 WL 2666729, at *8 (S.D. Ohio July 11, 2022); *Pierce v. Brown*, No. 2:20-cv-00177, 2022 WL 2064653, at *4 (S.D. Ind. June 7, 2022); *Jones v. Noble*, No. 3:19-cv-180, 2020 WL 2526384, at *3, *5 (S.D. Ohio May 18, 2020); *Lui v. Obenland*, No. 2:18-cv-00893, 2019 WL 4058947, at *1 (W.D. Wash. Aug. 28, 2019); *Menzies v. Crowther*, No. 03-cv-0902, 2019 WL 181359, at *74 (D. Utah Jan. 11, 2019); *Rice v. Harris*, No. 1:17-cv-293, 2018 WL 4853502, at *3 (S.D. Ohio Oct. 5, 2018); *Hill v. Warren*, No. 5:14-cv-10350, 2016 WL 6441307, at *6 (E.D. Mich. Nov. 1, 2016); *Morva v. Davis*, No. 7:13-cv-00283, 2015 WL 1710603, at *19 n.17 (W.D. Va. Apr. 15, 2015); *Ragan v. Horn*, 598 F. Supp. 2d 677, 687 n.12 (E.D. Pa. 2009); *Carvajal v. Artus*, No. 1:07-cv-10634, 2008 WL 4555531, at *46 (S.D.N.Y. Oct. 10, 2008); *Savage v. Wilson*, No. 02-cv-7854, 2003 WL 22709075, at *5 n.9 (E.D. Pa. Nov. 17, 2003); *Robinson v. Stegall*, 157 F. Supp. 2d 802, 820 n.7, 824 (E.D. Mich. 2001); *see also Seda v. Conway*, 774 F. Supp. 2d 534, 547 (W.D.N.Y. 2011) (granting COA because of state court dissent in another case with the same issue).

The denial of a COA here stands in contrast to these cases. The Fifth Circuit's reasoning below is even in conflict with its own earlier rulings. The split on

this issue is well developed, and the decision below aligns with the minority view of district courts that have considered the issue.

II. THE EQUITIES FAVOR MR. BREWER.

The equities favor granting Mr. Brewer's petition and, at a minimum, vacating and remanding to the Fifth Circuit with instructions to issue a COA. This Court has observed that "[l]ast-minute stays should be the extreme exception, not the norm." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1134 (2019). But this is not a last-minute successor petition requesting a last-minute stay long after the initial denial of habeas corpus relief. Rather, though Mr. Brewer is under a warrant with an execution date for Thursday, this is a rare case that arises as part of his initial habeas petition – and represents his last, and only, chance to obtain review of a significant issue that divided the state court. The State rushed to seek an execution date for Mr. Brewer even before he had filed his petition with this Court, and now Mr. Brewer is scheduled to be executed on November 9, fifteen days before the time allowed for filing this Petition for Rehearing under Rule 44 has even elapsed.

Although this Court is not a court of error correction, there is certainly error below. Separate and apart from the important questions presented in his Petition, Mr. Brewer should have been granted a COA on the issue of whether counsel was ineffective for failing to object to Dr. Coons' false testimony.

There should be little doubt that the underlying claim is substantial, i.e., that it has some merit. Texas courts have since repudiated the very type of testimony that Dr. Coons provided in this case. At the time of trial, Texas practitioners had

been objecting to such testimony, and any reasonable capital defense lawyer would have recognized the harm done and tried to keep it out. But Mr. Brewer's lawyer did not. Instead, he allowed the false portrayal of Mr. Brewer's dangerousness to poison the jury.

And history has shown that it was a false portrayal. Mr. Brewer has not been a dangerous inmate. Indeed, the opposite is true. Mr. Brewer has shown himself to be a non-dangerous inmate – one capable of following the rules and being a positive force in the prison community. Yet the Fifth Circuit refused to even consider whether reasonable jurists could debate whether a death sentence based on false expert testimony, junk science, is constitutional. The Fifth Circuit's ready acceptance of discredited expert testimony without even allowing for full appellate consideration should be reviewed.

This Court recognizes that "a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Buck v. Davis*, 580 U.S. 100, 117 (2017) (quoting *Miller-El v. Dretke*, 537 U.S. 322, 338 (2003)). This threshold standard is not unduly burdensome. *See* Petition at 13–14. Yet this Court has had to repeatedly admonish the Fifth Circuit for its overly zealous denials of COAs in capital cases. At least three times this Court has granted relief *on the merits* after the Fifth Circuit initially failed to even grant a COA. *Buck v. Davis*, 580 U.S. 100,

128 (2017); *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 245 (2007);[2] *Miller-El v. Dretke*, 545 U.S. 231, 235 (2005).

Thus, while the Fifth Circuit may claim in theory that "[i]n death penalty cases, any doubts as to whether the COA should issue are resolved in favor of the petitioner," *Moore v. Quarterman*, 534 F.3d 454, 460 (5th Cir. 2008), this Court has repeatedly had to remind the circuit to apply this standard in practice. Here, again, the Fifth Circuit has denied a capital habeas petitioner any opportunity to argue a claim on the merits by imposing too strict a standard at the COA stage, even though the "duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case." *Kyles v. Whitley*, 514 U.S. 419, 422 (1995) (internal quotation marks omitted).

Additionally, if executed on November 9, Mr. Brewer will have spent more time on death row than anyone else *ever* in the State of Texas.[3] Although this length of time prior to execution alone may not constitute cruel and unusual punishment, this length of time prior to execution in the absence of any meaningful review of the merits of his substantial federal habeas claims is cruel and unusual. Delays in the execution of death sentences are in part due to "federal courts providing additional layers of review" to "apply legal requirements punctiliously when the consequence

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[2] *Abdul-Kabir* was the companion case to this Court's opinion vacating Mr. Brewer's first death sentence. *See Brewer v. Quarterman*, 550 U.S. 286, 288 (2007).

[3] Texas Department of Criminal Justice, Death Row Facts, https://www.tdcj.texas.gov/death_row/dr_facts.html (last visited Nov. 6, 2023) (listing 11,575 days (thirty-one years) as the longest time on death row prior to execution).

of failing to do so may well be death." *Glossip v. Gross*, 576 U.S. 863, 938 (2015) (Breyer, J., dissenting). But Mr. Brewer received no such punctilious review below.

The state habeas court's findings of fact and conclusions of law, though drafted by the prosecution, still recognized that trial counsel was deficient for failing to properly preserve a challenge to the admission of Dr. Coons' testimony, bound by the TCCA's holding on direct appeal. *See* A201, 203–04, 270, 311–16. The State had even conceded as much in its briefing on direct appeal. *See* Brief for the State of Texas, *Brewer v. Texas*, No. AP-76,378, 2011 WL 5295103, at *55 (Sept. 12, 2011) ("[T]he State concedes that under the recent *Coble* case (if appropriate objections had been made at trial) the trial judge would have abused his discretion by admitting Dr. Coons' testimony into evidence at the new sentencing trial . . . ."). Except for one judge who would have granted relief, the TCCA then simply adopted the opinion authored by the State. A194–95. The federal courts failed to even acknowledge this dissent or the state courts' finding of deficient performance under *Strickland*. A9, 14–37. And the federal courts both refused to allow Mr. Brewer to even argue the merits of this claim on appeal. A9, 37.

Such paltry review is hardly the purpose of "the Great Writ, the only writ explicitly protected by the Constitution, Art. I." *Holland v. Florida*, 560 U.S. 631, 649 (2010). "Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."

Woodson v. North Carolina, 428 U.S. 280, 305 (1976). Mr. Brewer asks only for the reliable determination of his sentence that he is due under AEDPA.

Clemency is no "fail safe" for Mr. Brewer. *See Herrera v. Collins*, 506 U.S. 390, 415 (1993). Since 1976, Texas has executed 584 prisoners and granted clemency to three.[4] The clemency board unanimously voted against recommending clemency to Mr. Brewer earlier today.

Finally, the reality of who Mr. Brewer is as a human being weighs in favor of granting his petition. Dr. Coons was demonstrably wrong about Mr. Brewer being a future danger. During his time in TDCJ custody, Mr. Brewer has received seven disciplinary infractions. That is the full extent of his misbehavior in prison – one mistake for every five years in prison. None involve violence. In 1996, Mr. Brewer was written up for refusing to get a haircut. In 1997, he used vulgar language towards a prison guard. Then, in 2000, he received his most serious (and only level one) violation, for use of marijuana. In 2003, Brent received a disciplinary for possessing contraband – an extra towel. He was written up twice in 2012, once for giving an unnamed "commodity" (presumably a commissary food item) to another death row prisoner, and once for being out of place. The last write-up Brent received was in May of 2014, for letting another prisoner borrow a set of headphones. He has

[4] Texas Department of Criminal Justice, Executed Inmates, https://www.tdcj.texas.gov/death_row/dr_executed_offenders.html (last visited Nov. 6, 2023); Death Penalty Information Center, List of Clemencies Since 1976, https://deathpenaltyinfo.org/facts-and-research/clemency/list-of-clemencies-since-1976 (last visited Nov. 6, 2023).

had no disciplinary infractions since 2014, and no trace of any violence against others anywhere in his time on Texas's death row.

CONCLUSION

For these reasons, the Court should grant this 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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Dated: November 7, 2023

CERTIFICATE OF COUNSEL

Pursuant to Rule 44.2, this petition for rehearing is restricted to grounds of intervening circumstances of a substantial or controlling effect and other substantial grounds not previously presented and is presented in good faith and not for delay.

/s/ Shawn Nolan
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