
In the Supreme Court of the United States

KER'SEAN O. RAMEY,

Petitioner,

v.

Texas,

Respondent,

On Petition for a Writ of Certiorari to the Court of Criminal Appeals of Texas

**PETITIONER'S REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI
AND MOTION FOR STAY OF EXECUTION
CAPITAL CASE**

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**PETITIONER'S REPLY IN SUPPORT OF PETITION FOR CERTIORARI
AND MOTION FOR STAY OF EXECUTION**

In the final hours before Mr. Ramey's scheduled execution, the State's position is plain: it relies on unfounded and highly prejudicial allegations of prior bad acts as a basis for death, while failing to confront the constitutional questions at the heart of this case. The State's opposition rests on a false dichotomy. By labeling the TCCA's minimalist order a purely state-law disposition, it ignores the statutory gateways embedded within Texas procedure. To determine whether *Pitchford v. Cain* supplied a previously unavailable legal basis under Article 11.071, § 5, the TCCA was required to evaluate the merits of the underlying federal constitutional claims—specifically, whether a violation would have altered the answers to Texas's capital special issues. Those inquiries are inextricably interwoven with federal law. Accordingly, the adequate-and-independent-state-ground doctrine does not bar review.

A grant of certiorari is warranted here. The constitutional questions presented here are direct and recurring: due process requires a genuine opportunity to expose pretext at *Batson's* "critical" third step; the right to effective counsel requires prejudice to be measured against the mitigation competent investigation would have revealed, not against a false defense presentation; and due process requires federal review when a supposed state ground depends on antecedent federal-law determinations.

In this literal matter of life or death, Mr. Ramey's execution should be stayed pending disposition of these constitutional issues raised in the Petition.

A. The TCCA's Dismissal Does Not Foreclose the Court's Review

1. Section 5(a)(1) is interwoven with federal law.

This Court has always held that "[f]ederal courts, even on habeas, have an independent obligation to say what the law is." *Wright v. West*, 505 U.S. 277, 305 (1992) (O'Connor, J. concurring). A ground is not independent when resolution of the state-law question depends on, is interwoven with, or is influenced by the court's understanding of federal law.

Foster v. Chatman, 578 U.S. 488, 497, 499 n.4 (2016). The State argues the § 5(a)(1) inquiry is independent because the TCCA merely determined “whether there is a new case.” Brief in Opposition (“BIO”) 18. But that is not the statute’s inquiry. Section 5(d) asks whether “the legal basis” of a claim was previously “recognized by or could not have been reasonably formulated from” a final decision of this Court, a federal court of appeals, or a qualifying state appellate court. Tex. Code Crim. Proc. Ann. art. 11.071, § 5(d). Application therefore demanded a substantive comparison between (1) *Pitchford*’s articulation of *Batson* step three, (2) the pre-*Pitchford* federal decisions, and (3) the constitutional defect Mr. Ramey alleged.

The State’s own analysis confirms the point. It argues that *Pitchford* did not supply a new legal basis because this Court, on AEDPA review, applied “already established” *Batson* law. BIO at 19. But the fact that a holding enforces clearly established law for 28 U.S.C. § 2254(d) purposes does not answer whether its legal basis previously could have been “reasonably formulated” for purposes of a state gateway. AEDPA’s clearly-established-law inquiry and Article 11.071’s availability inquiry ask different questions. *Pitchford* could apply *Batson* and still clarify—decisively, and for the first time in the relevant sense—what conduct fails to constitute *Batson*’s essential third step.

The State’s syllogism—that AEDPA relief presupposes established law, therefore *Pitchford* could provide no newly available legal basis—further collapses distinct meanings of “new.” *Pitchford* supplied a materially new and authoritative framework for identifying a missing *Batson* step three, one not reasonably formulable in the same way before this Court applied the governing precedents to the procedural defect *Pitchford* confronted. Whether that contention satisfies § 5(a)(1) could be resolved only by construing federal holdings and comparing their constitutional content. The state gateway is necessarily, then, interwoven with federal law.

The State’s arguments also rest on authorities that either predate the TCCA’s incorporation of a factual-sufficiency requirement into § 5(a) or affirmatively support Mr. Ramey. In a string of cases from 2007, *Ex parte Campbell*, 226 S.W.3d 418, 421 (Tex. Crim.

App. 2007) and *Ex parte Blue*, 230 S.W.3d 151, 163 & n.51 (Tex. Crim. App. 2007), the TCCA confirmed that § 5(a)(1) and § 5(a)(3) require the court to assess whether the applicant has made a *prima facie* factual showing—a determination necessarily implicating the substance of the federal claim. Decisions prior to 2007 treating § 5(a) dismissals as categorically independent are therefore inapt. *See Rocha v. Thaler*, 626 F.3d 815, 835 (5th Cir. 2010) (the view that “a dismissal under § 5(a)(1) always rested on an [adequate and independent state ground] . . . cannot survive *Campbell*” (emphasis omitted)).

The State’s principal authorities confirm the point. *Hughes v. Quarterman*, 530 F.3d 336, 342 (5th Cir. 2008), speaks only to the general adequacy of Texas’s abuse-of-the-writ doctrine—not to its independence in a case where the gateway required the TCCA to determine what *Pitchford* held and whether a federal constitutional violation would alter the capital special issues. BIO at 17–18. *Hughes* also did not address any underlying questions of federal law. It addressed the dismissal of a subsequent habeas application based on Petitioner’s claim of improper jury instructions at the penalty phase – an issue much closer to state law than the issues presented here. 530 F.3d at 342. Petitioner’s only argument was that the abuse of the writ doctrine was formed under federal law guidance. *Id.* And *Kunkle v. Texas*, 125 S. Ct. 2898 (2004), is a denial of a petition for writ of certiorari and therefore has no precedential value here. BIO at 21.

That leaves *Rocha*, the State’s own citation, which decisively supports Mr. Ramey:

If the CCA's decision rests on availability, the procedural bar is intact. If the CCA determines that the claim was unavailable but that the application does not make a *prima facie* showing of merit, a federal court can review that determination under the deferential standards of AEDPA.

Rocha, 626 F.3d at 835; BIO at 19–20, *Rocha* thus recognizes that when the TCCA moves beyond availability to assess the merits of a federal claim—even under the label of a *prima facie* showing—its determination is reviewable. That is precisely what happened here: the TCCA could not dismiss Mr. Ramey’s *Batson* claim without determining whether *Pitchford* supplied a previously unavailable legal basis, and it could not dismiss his

punishment-phase claim without evaluating whether a federal constitutional violation would change the jury's answers. Those determinations are not independent of federal law.

At minimum, the TCCA's unadorned order does not establish the clear separation the State asserts. The TCCA said only that Mr. Ramey failed to satisfy § 5 and that it was dismissing without reviewing the merits. App. 328a. But a state court's characterization cannot alter the federal nature of an antecedent issue its statute makes indispensable. Because the § 5(a)(1) determination turned on the content and availability of a federal constitutional basis, the order does not bar this Court's review.

2. The State mischaracterizes the grounds for dismissal.

The State argues that the TCCA applied a purely state-law procedural bar. BIO at 13–17. Its own defense proves otherwise. To justify the ruling, the State argues that *Pitchford* merely applied “already established” law through 28 U.S.C. § 2254(d), so the decision supplied no previously unavailable legal basis. BIO at 19–20. But that argument necessarily requires a court to identify *Pitchford*'s holding, compare it with pre-*Pitchford* federal law, and decide whether Mr. Ramey's present claim could previously have been formulated. That is a federal merits determination dressed as a procedural defense.

The State's successive-review gateway made the federal inquiry unavoidable. One gateway asked whether the legal basis was previously unavailable under decisions of this Court and other appellate courts. Tex. Code Crim. Proc. art. 11.071, § 5(d). Another asked whether, but for a federal constitutional violation, a rational juror would have answered Texas's capital special issues in the State's favor. A court cannot answer either question without determining what federal law requires and what effect the alleged violation had. The threshold ruling thus turns on the very federal questions the State says the TCCA never reached.

B. *Pitchford* Requires Re-Examination of the *Batson* Violations

The Fourteenth Amendment's guarantees of equal protection and due process are not subordinate to state procedural arrangements. States may enforce reasonable defaults.

But a State may not avoid federal review of substantial constitutional violations through a gateway whose application requires the court to decide what federal law means.

Pitchford reformulated *Batson* step three to require a genuine opportunity for the defense to rebut the prosecutor's proffered reasons before the court decides pretext. 608 U.S. at 394–401. Mr. Ramey's case therefore presents the question *Pitchford* left for application: what makes that opportunity genuine rather than pro forma? The answer matters because step three—not the prosecutor's facially neutral explanation—is where due process is enforced. *Batson v. Kentucky*, 476 U.S. 79, 98 (1986).

The State treats two words uttered by the judge as dispositive and distinguishes *Pitchford* on that basis. BIO at 25 (“Anything else?”). But a perfunctory post-ruling formality is not a genuine opportunity to rebut pretext—it is an invitation to move on. A rule permitting the court to announce acceptance, then ask a generic closing question, would reproduce *Pitchford's* defect while supplying a verbal escape hatch. The doctrinal line between genuine and pro forma opportunity warrants this Court's review.

Finally, the State asserts that every prior reviewing court accepted its reasons. BIO at 26–27. Conveniently, the State ignores that every such review predated *Pitchford* or operated through a deferential lens, and none tested whether this post-ruling question supplied a genuine third step. Due Process does not become less important because the constitutional error escaped earlier review. No court has yet to examine Mr. Ramey's claim under *Pitchford*. This Court should do so before Texas carries out a judgment returned by a jury from which every Black prospective juror was excluded.

C. Dr. Willie's Deficient Counsel Warrants Review

In response to Mr. Ramey's ineffectiveness of counsel claim at the punishment phase, the State primarily relies on the assertion that Dr. Willie “put before the jury the very mitigation theories [Mr.] Ramey now pushes.” BIO at 28. But this “duplicative evidence” framing mischaracterizes the record. To be clear, Dr. Willie conducted *no mitigation investigation whatsoever*. This was not a limited-but-debatable investigation due deference

under *Strickland*'s reasonableness standard. And precedent does not protect counsel who made no choice at all because they never looked: courts "may not justify a complete failure to investigate as an objectively reasonable tactical choice." *Richards v. Quarterman*, 566 F.3d 553, 564 (5th Cir. 2009); *U.S. v. Mohammed*, 863 F.3d 885, 890 (D.C. Cir. 2017); *Trevino v. Davis*, 829 F.3d 328, 348 (5th Cir. 2016). Dr. Willie simply signed an Open File Agreement with the State and proceeded to treat the prosecutor's file as gospel. App. 209a. Accordingly, Dr. Willie was incapable of challenging any of the State's proffered narratives about Mr. Ramey's upbringing, alleged criminal history, or his social and emotional development. This was not an instance of the *degree* to which Dr. Willie presented evidence, as the State suggests. Indeed, Dr. Willie's sole expert, Kunik—a geriatrics psychiatrist who had never previously encountered the concept of future dangerousness—made affirmative *misrepresentations* to the jury as a result. App. 218a, 273a (stating Mr. Ramey came from a "stable upbringing" with "no physical violence at home.").

To put a finer point on it: the omitted mitigation evidence that could have readily been derived from investigation, bears directly on whether a rational juror would have found future dangerousness. A jury does not simply "answer the future dangerousness issue in the affirmative" and preemptively "negate the mitigating effect" of unrepresented evidence just because the State declares it so. BIO at 33. It is not surprising, then, that the State provides no authority for this assertion. Unsurprisingly, the State provides no legal authority in support of such grandstanding. The State's rendition of aggravation evidence went virtually unchecked and unchallenged, which proves the point: Dr. Willie's failure to investigate or cross-examine was constitutionally deficient counsel.

Wiggins further mandates that a reviewing court "reweigh" the totality of omitted mitigation evidence against the aggravation actually presented. 539 U.S. 510, 521–23, 527–38 (2003). The State skips over this analysis in its resuscitation of aggravation evidence, but it does not address how the truth about Mr. Ramey's childhood—that his "stable upbringing" and the absence of "physical violence at home" were anything but—would affect

the balance. The speed of the jury's deliberation in Mr. Ramey's case underscores the point: it returned a death sentence in less than fourteen minutes. An unsurprising result for a jury with virtually nothing to weigh on the mitigation side.

All considered, Dr. Willie's counsel was tragically deficient and a gross departure from the constitutional standards this Court is charged to protect.

D. Mr. Ramey Has Well-Established the Appropriateness of a Stay

The stay standard under *Barefoot* requires only a "reasonable probability" that the underlying claims are "sufficiently meritorious"—not the conclusive showing of ultimate success the State demands. 463 U.S. 880, 895 (1983). In other words, Mr. Ramey need only show his claims are substantial; he is not required to prove his entire case on the merits to warrant a stay.

Moreover, the State's accusation that Mr. Ramey's claims are "meritless" (BIO at 36) is directly contradicted by its acknowledgement that the TCCA "did not reach the merits" of any of the claims raised in his Subsequent Application. BIO at 12. The State attempts to have its cake and eat it too: it cannot dually claim to defeat threshold review on procedural grounds, and claim that the merits have been conclusively disproved.

1. Mr. Ramey's filing was anything but "dilatatory."

The State faults Mr. Ramey for waiting until after his execution date was set to bring his claims. But the State glosses over a critical fact: *Pitchford* was decided after Mr. Ramey's execution date was scheduled, and long after his prior state and federal proceedings had concluded. The legal basis for Mr. Ramey's *Batson* claim—as reframed by *Pitchford*'s newly articulated rule—simply did not exist earlier. The equitable presumption against late-filed claims presupposes that the petitioner *chose* to delay; it does not apply where the claim is predicated on recent legal development.

Moreover, because the TCCA dismissed his Subsequent Application just two days before his scheduled execution, Mr. Ramey had no choice but to seek emergency relief. Mr.

Ramey filed his Petition *on the same day* as the TCCA's dismissal. To characterize such immediate action as "dilatory" ignores the very definition of the word.

The State's reliance on *Bucklew v. Precyth*, 587 U.S. 119, 150 (2019) and *Barr v. Lee*, 591 U.S. 979, 981 (2020) is entirely inapposite. Both involved applicants challenging their respective methods of execution—not the constitutionality of their underlying death sentences. Regardless, and unlike Mr. Ramey, the petitioner in *Bucklew*, for example, was given *years* to litigate his Eighth Amendment claim on the merits. 587 U.S. 119 at 149 (observing that after two stays of execution and five years of litigation, the claim "amount[ed] to little more than an attack on settled precedent.").

Mr. Ramey acted without delay at every step and he cannot now be punished for the machinations of justice external to his control.

2. Execution prior to judicial review of constitutional injuries inflicts irreparable harm.

The irreparable harm to Mr. Ramey, ultimate as death is, is not merely the severity of the penalty in the abstract as the State supposes. BIO at 36. Execution will extinguish any possibility of correcting the myriad constitutional violations that were infused throughout Mr. Ramey's trial and have never been adjudicated on the merits. As the State tacitly admits, the TCCA dismissed Mr. Ramey's claims under the procedural bar of § 5—it never reached the substance of either Mr. Ramey's *Batson* or IATC claims. Carrying out the sentence before this Court can review his Petition in due course would render Mr. Ramey's constitutional injuries irremediable.

3. The balance of equities and public interest favor a stay.

The public interest not only encompasses the enforcement of judgments (BIO at 37), but also the assurance that the death penalty—a punishment "qualitative[ly] differen[t] from all other[s]"—be carried out only after constitutionally adequate proceedings. *California v. Ramos*, 463 U.S. 992, 998–99 (1983) (recognizing "the qualitative difference of death from all other punishments," and that it "requires a correspondingly greater degree of

scrutiny.”). Neither the public interest, nor the integrity of the justice system, is served by executing a person whose trial was infected by racial discrimination in jury selection and tainted by ineffective assistance of counsel.

Mr. Ramey does not dispute that the State and the victims’ families hold an interest in finality. But that interest peaks only when a case has concluded its substantive review and the constitutional questions have been genuinely resolved. Finality acquires its “added moral dimension” (BIO at 37) from the fairness of the underlying process, not merely from the passage of time. Where, as here, the constitutional violations remain unreviewed on the merits, insistence on finality over accuracy undermines public confidence in the administration of justice. *Welch v. Vannoy*, 637 F. Supp. 3d 406, 417 (E.D. La. 2022) (“[T]he interest in deciding Petitioner’s case on the merits outweighs the interest in finality of the judgment.”) (citing *Leonard v. Deville*, 960 F.3d 164 (5th Cir. 2020)); *Ex parte Yerger*, 8 Wall. 85, 95 (1869) (the writ “has been for centuries esteemed the best and only sufficient defence of personal freedom”). “[J]ustice on the fly” is indeed not justice at all. *Nken v. Holder*, 556 U.S. 418, 427 (2009).

Finally, the “[t]wenty-one years” of delay the State touts as delay are reflective of the ordinary pace of the multi-tiered post-conviction process the State itself maintains; purportedly so in the name of justice. Constitutional interest in the guarantees of a fair trial does not decay with time. Mr. Ramey’s execution should therefore be stayed pending the disposition of his Petition for a Writ of Certiorari.

CONCLUSION

Mr. Ramey’s execution should be stayed and his Petition for a Writ of Certiorari should be granted.

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