No. 14-292

IN THE

Supreme Court of the United States

LESTER LEROY BOWER, JR.,
Petitioner,

v.

STATE OF TEXAS
Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant Attorney General

DON CLEMMER
Deputy Attorney General for Criminal Justice

STEPHEN M. HOFFMAN
Assistant Attorney General
Counsel of Record

EDWARD L. MARSHALL
Chief, Criminal Appeals Division

OFFICE OF THE ATTORNEY GENERAL OF TEXAS
P.O. Box 12548
Austin, Texas 78711
(512) 936-1400
stephen.hoffman@texasattorneygeneral.gov

Counsel for Respondent

CAPITAL CASE

QUESTIONS PRESENTED

Thirty-one years ago Petitioner Lester Leroy Bower killed four men while stealing an ultralight aircraft. Ample evidence linked Bower to the crime. For instance, Bower possessed distinct .22 caliber ammunition similar to the type used in murders. Bower spoke with one of the victims before the murders to inquire about purchasing the ultralight, and the four victims were to meet with a potential buyer on the day of the murders. Two ultralight tires with a victim's name on them were recovered from Bower's home. There were unidentified blood stains on a pair of Bower's boots and travel bag. Ultralight materials were discovered in Bower's garage area, with a victim's fingerprints on some of the ultralight tubing. A silencer was used during the crime, and Bower possessed a receipt for a silencer. Magazine articles were found in Bower's home related to the commission of murder. In the days preceding the murders, Bower went to a shooting range and practiced firing .22 caliber ammunition. Bower lied to investigators about his involvement with the victims, and he has offered a plainly incredible story about losing his .22 Ruger pistol (the probable murder weapon) while camping due to an attack of kidney stones.

Bower was convicted and sentenced to die in April 1984. In the intervening years, Bower's legal challenges have primarily focused on his alleged innocence, and this claim underlies his instant petition. But both the state and federal courts have rejected Bower's

protestations of innocence after consideration of the "simply overwhelming" evidence against him.

Following state and federal review of his conviction and sentence, the trial court set Bower's execution for July 22, 2008. But the state courts stayed the execution to allow additional forensic testing and the presentation of a second state habeas application. Ultimately, the Texas Court of Criminal Appeals (CCA) refused to grant relief. Bower now challenges the CCA's decision and presents the following claims for review:

> 1. On federal habeas review this Court declined to issue a writ of certiorari on Bower's claim that his jury could not give mitigating effect to good-character evidence under Texas' pre-1991 special issues. Is Bower now entitled to revisit this decision?
>
> 2. During the same federal habeas review, Bower alleged that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), by not disclosing FBI documents relating to the ammunition that Bower used to execute his victims. The Fifth Circuit rejected Bower's *Brady* claim, and this Court refused to grant certiorari. Again, is Bower now entitled to re-review of this Court's earlier decision?
>
> 3. Bower has relentlessly litigated his case over the last thirty years, frustrating the State's numerous attempts to carry out the jury's sentence. Is it cruel and unusual punishment to execute Bower after his lengthy stay on death row, when such delay is largely attributable to Bower's own legal strategy?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES, Continued

Cases **Page**

TABLE OF AUTHORITIES, Continued

TABLE OF AUTHORITIES, Continued

Cases **Page**

TABLE OF AUTHORITIES, Continued

Constitutions, Statutes and Rules **Page**

Miscellaneous

BRIEF IN OPPOSITION

Bower was properly convicted and sentenced to die for the brutal murders of Bobby Tate, Philip Good, Ronald Mayes, and Jerry Brown. Bower now requests that the Court review the CCA's decision to deny/dismiss his subsequent state habeas application.

But this Court has already declined to issue certiorari on Bower's *Penry I*[1] and *Brady* claims, and Bower does not provide any compelling reason to revisit these issues. Moreover, Bower's claim that his execution after thirty-plus years on death row constitutes cruel and unusual punishment is procedurally barred, and this Court has rejected similar requests for certiorari in the past.

Finally, the State notes that Bower's real complaint—indeed, the one that colors his whole petition—is an assertion of actual innocence. But no court has ever given credence to Bower's inconsistent and malleable interpretation of the facts.

In the end, Bower's claims are based on nothing more than his own dissatisfaction with the outcome of the case. This is not a direct appeal, and the Court should decline Bower's invitation to engage in routine error-correction. To grant relief in this case, the Court would have to second-guess the verdict of the jury, disregard the factual findings and holdings of the lower courts, and implicitly negate this Court's very own denial of certiorari on federal habeas. Plainly, there are no important jurisprudential reasons to grant

---

[1] *Penry v. Lynaugh*, 492 U.S. 302 (1989) (*Penry I*).

certiorari, and thus the Court should deny Bower's petition.

OPINION BELOW

The CCA denied/dismissed Bower's successive state writ application on June 11, 2014. *Ex parte Bower*, Nos. 21,005-02, -03, 04, 05 slip op. (Tex. Crim. App. Jun. 11, 2014) (per curiam) (unpublished) (copy included in Petitioner's Appendix (Pet. App.) 1-5).

STATEMENT OF THE CASE

I. THE FACTS OF THE CRIME

Bower provides a statement of the facts that is wholly uncited and unattributed. Petition (Pet.) 3-9. This is likely because no court has ever adopted Bower's version of events. *Id.* The State, on the other hand, relies on the factual summary provided by the CCA in its opinion on direct appeal:

> Testimony at trial showed that one of the victims, Bobby Glen Tate, owned the B&B Ranch which was located near Sherman. Mr. Tate owned an ultralight aircraft which he stored in a hangar located on his property. Another ultralight aircraft owned by David Brady was also stored in the hangar. Evidence was presented to show that Tate had decided to put his ultralight up for sale and his friend, Philip Good, another one of the victims, who

sold ultralights was attempting to find a buyer for the aircraft. A day or two before the commission of the offense, Tate told his wife, Bobbi, that Philip Good had met someone the previous Wednesday who was interested in buying the ultralight.

On October 8, 1983, Mr. Tate went out to his ranch to work on a house he was building. According to Bobbi Tate, he was to return to their home in town around 4:30 p.m. About 7:30 p.m., when he failed to return, Bobbi and her stepson, Bobby Jr., went to the ranch. Outside of the hangar, they saw vehicles belonging to Tate, Philip Good and Ronald May[e]s. However, the hangar was locked and no lights were showing through the windows. Bobbi retrieved a key from her husband's pickup and unlocked the hangar door. Upon opening the door, they saw the body of Ronald May[e]s lying in a pool of blood. Bobbi and Bobby, Jr.[,] went to the nearest phone and called police.

Marlene Good, the widow of Philip Good, reiterated a similar story. She testified that on September 30, 1983, someone called their home and spoke with Philip for ten or fifteen minutes regarding an advertisement Philip had placed in "Glider Rider" magazine regarding the sale of an ultralight. Philip told the caller that he had sold the ultralight advertised in the magazine, but he had another that he could sell. On the

following Monday or Tuesday, the man called again. On Wednesday, October 5, Philip met the man at the Holiday Inn in Sherman and took him out to the B&B Ranch in order to show him Bob Tate's ultralight. When Philip returned at about 4:00 p.m., he told Marlene that he thought he had sold Bob Tate's ultralight and the man was going to pick up the plane on Saturday, October 8. On October 8, Marlene testified that she spent the day with Ronald May[es'] wife. Philip spent the day helping Jerry Brown build an ultralight in Philip's hangar. At 3:30 p.m., Philip called her and told her he was going to meet the man at the hangar on the B&B Ranch at 4:00 p.m. At approximately 4:30 p.m., Ronald Mayes left to go the hangar at the ranch. When he had not returned by 6:30 p.m., Marlene went to the hangar to see what was happening. When she arrived, she too saw all the vehicles parked outside. The door to the hangar was locked and when she looked into the hangar windows, she could see that Bob Tate's ultralight was missing. Seeing that no one was around, she went home.

When investigators arrived on the scene, they discovered a grisly sight. Immediately inside the door of the hangar, they found the body of Ronald May[e]s. Underneath a pile of carpeting, investigators found the bodies of Philip Good, Bobby Tate, and Jerry Mack Brown. Good, Tate, and Brown had each been

shot twice in the head. May[e]s had been shot once in the head, once in the neck, once in the right arm and once in the right side of the chest, and once in the back of the chest. All of the victims still had their wallets and their jewelry. Tate's ultralight which had been in the hangar earlier in the day was missing. A table situated against one wall of the hangar had a large spot of blood on it. Tests showed that this blood matched a sample of blood taken from Tate's body during an autopsy. This, plus the placement of the bodies underneath the carpet, led investigators to speculate that Tate had been shot while sitting at the table and then had been dragged over and placed with the bodies of Brown and Good. Investigators also found eleven spent .22 caliber shell casings which had been manufactured by Julio Fiocc[h]i. The scattered arrangement of the casings on the floor of the hangar indicated that the killer had used an automatic weapon rather than a revolver, since an automatic ejects the cartridges after each shot.

Dr. Charles Petty performed autopsies on the victims. According to Dr. Petty, three of the victims, Good, Brown and Tate all sustained two gunshot wounds to the head. In the cases of Good and Tate, both men had one contact wound. On the other hand, both of Brown's wounds were contact wounds. Mays sustained one contact wound to the head and four other

wounds to the upper part of his body. Dr. Petty further testified that the presence of the contact wounds indicated that when the weapon was fired, the muzzle of the gun was placed directly against the victim's head. In addition, the gunpowder residue left on the victims indicated that in each instance the murder weapon was equipped with a silencer. Dr. Petty testified that he removed eleven bullets and fragments from the victims. All of the bullets appeared to be .22 caliber hollow point bullets.

Larry Fletcher, a firearms examiner with the Dallas County Institute of Forensic Sciences, testified that tests run on both the spent casings and the bullets indicated that the shots were fired from either an AR-7 .22 caliber rifle, a Ruger .22 caliber semi-automatic pistol, or a High Standard .22 caliber semi-automatic pistol. Markings on the bullets indicated that a silencer was used. In addition the ammunition was manufactured by Julio Fiocchi and was A-sonic (traveled at speeds below the speed of sound) and had hollow points. Fletcher testified that A-sonic ammunition had the characteristic of reducing the noise discharge normally heard upon the firing of a weapon. Fletcher also testified that Julio Fiocchi ammunition was unique in that in his nine years as a firearms examiner, he had never encountered it before. Due to the condition of the bullets, Fletcher could positively say that only two of the bullets

were fired from the same weapon. One of these bullets was extracted from the body of Mr. May[e]s and one from the body of Mr. Tate.

Much of Fletcher's testimony was duplicated by the testimony of Paul Schrecker, a firearms examiner with the FBI. Schrecker testified that all eleven casings were fired from a single weapon, and the markings on the casings were all consistent with a Ruger firearm. His examination of the bullets indicated that at least seven of the bullets were fired by the same weapon. He agreed with Fletcher that a silencer was used. As far as the type of ammunition used, Schrecker testified that he had never encountered Fiocchi .22 caliber long rifle ammunition before this case.

Dennis Payne, [Bower]'s supervisor at Thompson-Hayward Chemical Company in Dallas, testified that [Bower] had worked for the company in Colorado until he was laid off in February of 1983. Then in May of 1983, Payne had hired him for a sales position in Dallas. Although [Bower]'s job performance in Colorado had been excellent, his performance in Dallas was poor.

While working in Dallas, [Bower] had been assigned a telephone credit card. A review of the record of the Thompson-Hayward Chemical

phone bills indicated that on Friday, September 30, a call was made and charged to [Bower]'s company credit card. This call was made to Philip Good's residence and the conversation lasted ten minutes. A direct dial call was made to Philip Good's residence again on Monday, October 3. This was a two minute call. Another call was placed on [Bower]'s credit card to Philip Good's residence on Friday, October 7. This call lasted three minutes.

Another one of [Bower]'s coworkers, Randal Cordial, testified that prior to the company sales meeting on January 3, 1984, [Bower] told him that he was building an ultralight airplane and lacked only the engine

FBI Special Agent Nile Duke testified that after they traced the above- mentioned phone calls to the Thompson-Hayward Chemical Company, he began interviewing all the employees of the company in hopes of finding out who had placed the calls. After learning that [Bower] had told Special Agent Jim Knight that he had telephoned Philip Good, he scheduled an interview with [Bower] on January 11, 1984 at the company office. During the two hour interview, [Bower] told Duke that he had seen an advertisement in Glider Rider Magazine regarding an ultralight aircraft that Good had for sale. [Bower] admitted calling the Good residence twice. According to [Bower], during

the first call which he said was the shortest, he had spoken only with Mrs. Good who told him that Mr. Good was not at home. He later called back and spoke with Mr. Good who informed him that the ultralight had been sold. [Bower] told Duke that he had made only two calls and none of the calls had been placed on company credit cards. [Bower] also told Duke that he had never made an appointment to see Good and had only passed through Sherman on his way to Tulsa or Gainesville. When asked his whereabouts on the day of the murders, [Bower] told Duke that he could not account for his whereabouts on October 8, although he did remember that he was sick with a virus on Monday, October 10 and had stayed home from work. Finally Duke testified that [Bower] admitted he owned a .300 Winchester Magnum rifle, a Remington 1100 shotgun, a Savage Model B side-by-side double barrel shotgun, a Ruger 277V .220 caliber rifle, a 6.5 caliber Japanese rifle, a Winchester bolt action .22 caliber rifle, a Marlin lever action .4570 caliber government rifle, a .243 caliber Remington 700 rifle, and a .20-Model 929 Smith and Wesson .44 caliber Magnum revolver. [Bower] also told Duke that he had previously owned a .357 caliber revolver. When asked specifically about a .22 caliber handgun, [Bower] replied that he did not own one.

On January 13, 1984, [Bower] went to the FBI office in Dallas to take a lie detector test. After talking with the agents there, [Bower] decided not to take the test. According to FBI agent William Teigen, at that point all the authorities knew about [Bower] was that he was employed at Thompson-Hayward, that three telephone calls had been made on the company phone bill to Philip Good's residence and that he was interested in ultralights. [Bower] stayed and talked with the FBI agents some four hours. During this conversation, [Bower] admitted that he had made the calls but that he decided not to buy the ultralight from Good and never had any further contact with him. [Bower] also told the agents of his interest in ultralights. [Bower] related to the agents how he had spent hours researching ultralights and how he hoped someday to build an ultralight. [Bower] went on to tell the agents that he had already obtained a piece of fabric for the covering, a fiberglass boat seat and some aircraft aluminum. Teigen testified at trial that after talking with [Bower] he believed that [Bower] was more than obsessed with the aircraft. When asked specific questions by the agents, [Bower] said that he had never bought an ultralight, that he had not been in Sherman on the day of the murders, that he had not met Philip Good on the day of the murders and had never met him in person, that he did not know where the missing ultralight was, and that he had never seen the missing ultralight.

After further investigation, a search warrant was obtained for [Bower]'s residence. The search was conducted during the evening of January 20, 1984. Among the items seized were various manuals and magazines which were introduced into evidence at trial: a manual on the Cuyuna ultralight aircraft engine, a magazine entitled Glider Rider's Magazine which showed [Bower] as a subscriber, the World Guide to Gun Parts, the Instruction Manual for Ruger Standard Model .22 Automatic Pistols, Vol. II of Firearm Silencer Manual, two Xeroxed pages from Shotgun News depicting silencers and silencer weapons, The AR-7 Exotic Weapons System Book, a manual on explosives entitled High-Low Boom! Modern Explosives, another manual entitled Semi-Full Auto, AR-15 Modification Manual, another weapons manual entitled Rhodesian Leaders Guide, and several catalogs containing ads for military equipment including guns, clothing and numerous publications including books on how to kill. Authorities also found a form letter address[ed] to "Dear Customer" from Catawba Enterprises, indicating that [Bower] had purchased an item from the company. Authorities also found inside a briefcase which was located inside [Bower]'s garage an Allen wrench which could be used to mount a Catawba silencer to a pistol and a packet of materials which included among other things [Bower]'s Federal Firearms Licenses which permitted him to sell firearms,

ammunition and other destructive devices. [Bower]'s own Firearms-Acquisition and Disposition Record which was also seized during the search indicated that he bought a Ruger RST-6- automatic .22 pistol, serial number 17-28022 on February 12, 1982 and sold it to himself on March 1, 1982. Investigation showed that on February 12, 1982, [Bower] also ordered three boxes of Julio Fiocchi .22 ammunition. Perhaps most incriminating were the parts of the ultralight found during the search. In the garage were two ultralight tires and rims with the name "Tate" scratched in each rim. Another ultralight tire and rim were found in [Bower]'s house. Six pieces of aluminum ultralight tubing were found in the garage. Wadded up on top of a box in the garage were warning stickers that had been removed from the aluminum tubing of an ultralight. In addition, an ultralight harness was found in the house and a fiberglass boat seat was found in the garage. Authorities also removed a pair of rubber boots and a blue nylon bag from [Bower]'s garage after noticing what appeared to be blood stains on these items. Also removed was a sledge hammer and some ashlike debris taken from the trunk of [Bower]'s car.

Scientific evidence presented at trial showed that a fingerprint belonging to one of the victims, Jerry Mack Brown, was found on one of the pieces of ultralight tubing found in [Bower]'s garage. In addition, an analysis of the sledge

hammer removed from [Bower]'s garage showed that material present on one side of its head was polypropylene, the same material which was used to make the American Aerolight decals. Metallic smears present on the other side of its head tested out to be of the same type of aluminum alloy as was used to make the Cuyuna engine, the reduction unit for a Cuyuna engine, the crank case and the carburetor used in ultralight aircraft. An analysis of the material taken from the trunk of [Bower]'s car also revealed a fragment of this same aluminum alloy. A forensic metallurgist with the FBI determined that this metal fragment was once a portion of a reduction unit for an ultralight engine and it appeared that the reduction unit was fragmented by a smashing action, consistent with a blow from a sledge hammer. Also found in the debris from the trunk of [Bower]'s car were fragments of an American Aerolights decal. Tests on the boots removed from the garage showed the presence of human blood on the right boot but an attempt to type the blood was inconclusive. Tests on the blue nylon bag found in [Bower]'s garage also indicated the presence of human blood.

Other testimony was presented to show that Catawba Enterprises dealt primarily in silencer parts and that the Catawba silencer could be easily installed on a Ruger RST-6 semi-automatic .22 pistol with an Allen wrench. Ed

Waters, the attorney for Catawba Enterprises testified that ninety-nine per cent of the company's business was selling silencers and thus if [Bower] had one of the company's form letters acknowledging a transaction, [Bower] had probably purchased a silencer from the company.

Sandy Brygider, the owner of Bingham Limited, the sole distributor of Julio Fiocchi ammunition in the United States testified that the .22 sub-sonic Fiocchi ammunition was not sold over the counter but rather was a specialty item used primarily for suppressed weapons. Brygider testified that in the previous three years, his company had sold Fiocchi ammunition to only ten or fifteen dealers in Texas. He further testified that his company records showed that they had shipped three boxes of Fiocchi .22 long rifle sub-sonic hollow point ammunition to [Bower] on February 12, 1982 and five more boxes on December 10, 1982.

Lori Grennan, the customer service coordinator for American Aerolights, testified that her company manufactured the ultralight owned by Bob Tate. She testified that it was possible for the aircraft to be broken down and put into a thirteen foot carrying case and carried by one person. Grennan also testified that every ultralight manufactured by her company bears three company decals, two on

one of the pieces of tubing and one on the engine. However, after examining the tubing removed from [Bower]'s garage, she noted that these stickers decals were not present. She also testified that every ultralight has certain warning stickers. When shown the wadded up stickers found on the box in [Bower]'s garage, Grennan testified that those were the warning stickers that would go on the ultralight manufactured by her company. Finally, Grennan testified that the harness and tire rims found in [Bower]'s garage came from an ultralight manufactured by American Aerolights.

Marjorie Carr, the owner of a fruit stand in Sherman, testified that she had seen [Bower] in the company of Philip Good in Sherman in late September of 1983. According to Carr, Good and [Bower] had come into her stand and [Bower] was interested in buying some oranges. Carr related that she spoke with [Bower] for some ten or fifteen minutes and she remembered [Bower] telling her that he had moved from Colorado several months earlier and was then living in Dallas.

Further testimony showed that [Bower] had gone to the Arlington Sportsman's Club on September 30, 1983 and had spent fifteen minutes firing .22 ammunition.

> During the defense case-in-chief, [Bower] presented several witnesses who testified that [Bower]'s reputation for being a peaceful and law-abiding citizen was good. Evidence was also presented to show that although [Bower] had bought a Ruger RST-6 semiautomatic .22 pistol in 1982, he had lost it in the mountains of Colorado while backpacking alone in August of 1982. Finally, [Bower]'s wife testified that on the morning of the offense, [Bower] left their home around 6:30 a.m. to go bow hunting. He returned home around 6:30 p.m.

Bower v. State, 769 S.W.2d 887, 888-93 (Tex. Crim. App. 1989).

II. Facts Relating to Punishment

"At the punishment phase of the trial, the State produced no additional testimony." *Id.* at 895. However, Bower introduced evidence, "from family and friends," of "his good and non-violent character, his good deeds, and the absence of a prior criminal record." *Bower v. State*, 769 S.W.2d at 895; *Ex parte Bower*, 823 S.W.2d 284, 286 (Tex. Crim. App. 1991).

III. DIRECT APPEAL AND POSTCONVICTION PROCEEDINGS

The CCA affirmed Bower's conviction and death sentence on direct appeal, and this Court refused certiorari review. *Bower v. State*, 769 S.W.2d at 887; *Bower v. Texas*, 492 U.S. 927 (1989). The CCA also denied Bower's initial state habeas application, and this Court again declined to issue a writ of certiorari. *Ex parte Bower*, 823 S.W.2d at 284; *Bower v. Texas*, 506 U.S. 835 (1992).

Bower then began federal habeas proceedings in district court. Following an evidentiary hearing, the district court denied Bower's petition. *Bower v. Director*, No. 1:92cv182 slip op. (E.D. Tex. 2002) (unpublished order of Sept. 6, 2002). The district court did, however, grant Bower a certificate of appealability (COA) on two claims. *Id.* (unpublished order of Feb. 3, 2004).

On appeal, the Fifth Circuit denied Bower's application for an expanded COA and ultimately affirmed the district court's judgment. *Bower v. Dretke*, 145 F. App'x 879 (5th Cir. 2005) (unpublished) (per curiam); *Bower v. Quarterman*, 497 F.3d 459 (5th Cir. 2007). This Court again refused to grant certiorari. *Bower v. Dretke*, 546 U.S. 1140 (2006); *Bower v. Quarterman*, 553 U.S. 1006 (2008).

After the conclusion of federal habeas proceedings the trial court scheduled Bower's execution for July 22, 2008. Bower then filed a subsequent state habeas application and requested additional forensic testing. The trial court granted a stay of execution on July 1, 2008. Eventually, the trial court rejected Bower's

actual-innocence and *Brady* claims, found that the new forensic testing did not exculpate Bower, but nonetheless recommended granting Bower a new punishment hearing. Pet. App. 84-87, 105-28. The CCA declined to adopt these recommendations, however, and instead denied/dismissed Bower's application on its own review. *Ex parte Bower*, Nos. 21,005-02, -03, 04, 05.

Following the CCA's denial of relief, the trial court scheduled Bower's execution for February 10, 2015. The instant petition seeking review of the CCA's decision denying/dismissing Bower's subsequent state habeas application followed.

REASONS TO DENY THE PETITION

The questions presented for review are unworthy of the Court's attention. Review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for "compelling reasons." Sup. Ct. R. 10 (West 2013). Bower advances no compelling reason in this case, and none exists.

I. BOWER'S IMPLICIT ARGUMENT THAT HE IS ACTUALLY INNOCENT HAS BEEN REPEATEDLY REJECTED BY THE COURTS.

Before addressing Bower's explicit claims, the State will address what is implicit throughout Bower's petition—Bower believes that he is actually innocent and the courts which have disagreed are incorrect. But mere disagreement with the legal and factual rulings of

lower courts is hardly worthy of certiorari. Sup. Ct. R. 10.

Review of Bower's guilt was not cursory—both the state and federal courts have rejected his assertions of innocence. The State does not endeavor to identify all of the infirmities in Bower's implicit actual-innocence argument—Bower does not ask for a writ of certiorari on this basis—but the State does note several prior decisions that have rejected Bower's theories. For instance, the CCA's most recent decision summarily denied Bower's latest innocence claim. *Ex parte Bower*, Nos. 21,005-02, -03, 04, 05 slip op. at 3. And, on direct appeal, the CCA likewise denied Bower's challenge to the sufficiency of the evidence, observing that Bower had possession of the types of ammunition and weapon used in the killings, a silencer, literature about committing murders, parts of the victims' ultralight (which he attempted to destroy), and he lied to investigators about his contacts with the victims. *Bower v. State*, 769 S.W.2d at 894.

When denying an expanded COA, the Fifth Circuit found that "the evidence against Bower was simply overwhelming." *Bower*, 145 F. App'x at 884.

> . . . [W]e will briefly reiterate the evidence brought against Bower seriatim: (1) distinct ammunition—Julio Fiocchi .22 caliber ammunition—similar to the type used in the execution style murders was found in Bower's home; (2) Bower had several conversations with one of the murder victims days before the murders, inquiring about purchasing the

> ultralight aircraft; (3) on the day of the murders, the four victims were to meet with a potential buyer, in the hangar owned by Bobby Glen Tate; (4) a subsequent search of Bower's home recovered two ultralight tires and rims that had the name "Tate" scratched in them; (5) during the search of Bower's home, investigators also discovered unidentified blood stains on his boots and travel bag; (6) ultralight aircraft materials were discovered in Bower's garage area; (7) fingerprints of one of the murder victims were found on ultralight tubing found in his garage; (8) he possessed a receipt for a silencer; (9) numerous magazine articles were found within Bower's home related to the commission of murder; and (10) in the days preceding the murders, Bower went to a shooting range and practiced firing .22 caliber ammunition for approximately fifteen minutes.

Id. at 884-85. The Fifth Circuit then held that "Bower has not raised substantial doubt as to his guilt." *Id.* at 885.

Nevertheless, Bower maintains that—by amazing coincidence—he legitimately purchased the victims' ultralight in the same location and on the same day that the victims were brutally murdered by four other men.[2] Pet. 3-7. Yet the district court found "[Bower]'s

---

[2] This is not the only meritless theory of actual innocence pursued by Bower. Bower originally argued that law enforcement planted an ultralight wheel with the word

current version of his activities in the days leading up to the murders and on the day of the murders is not consistent with the version he reportedly gave to FBI agents and other law enforcement agents," and [i]t is also not consistent with the physical evidence." *Bower v. Director*, No. 1:92cv182 slip op. at 43-44 (denying an ineffectiveness claim).

In fact, Bower's current story is not even internally consistent. The primary individual that Bower relies upon to support his current theory testified that the real killers stole the victims' ultralight. 2 SHRR-02[3] 34, 45-47. Yet there is no evidence more than one ultralight was stolen, and Bower maintains that he legitimately purchased the aircraft found in his garage. *Bower v. Director*, No. 1:92cv182 slip op. at 23 n.10; 4 SHRR-02 22-23.

"Tate" etched into it in his garage. *Bower v. Director*, No. 1:92cv182 slip op. at 40. Of course, this theory was premised on the idea that Bower did not purchase the ultralight from the victims (contrary to his current position). This argument was rebutted at the federal evidentiary hearing by Mrs. Tate. *Id.* at 40-41. Nevertheless, Bower reiterated this inconsistent argument at the state habeas hearing. 4 SHRR-02 43.

[3] "SHRR-02" refers to the reporter's record of the evidentiary hearing conducted during Bower's second state habeas proceeding. "Fed.RR" refers to the reporter's record of the evidentiary hearing conducted in district court during Bower's federal habeas proceedings. "RR" refers to the reporter's record of Bower's trial. All references are preceded by volume number and followed by page number.

Moreover, this witness is simply unreliable. This individual was convicted of felony interference with child custody, was charged with forgery, had a serious drug problem, and her relationship with one of the purported killers ended badly (giving her every reason to fabricate such a story). *Bower v. Director*, No. 1:92cv182 slip op. at 24; 4 Fed.RR 721-23; 2 SHRR-02 19-20. A significant portion of her testimony is hearsay.[4]

Bower's own testimony is similarly implausible. For example, Bower asserts that he legitimately purchased the ultralight, disassembled it in a remote location, and pretended to build the ultralight himself at his own residence in order to mislead his wife—sticking to this deception even when questioned by law enforcement about *a quadruple homicide*. *Bower v. Director*, No. 1:92cv182 slip op. at 26-28. Bower also maintained that he destroyed the ultralight engine because it would not support his weight, but he has no adequate explanation for why he chose to destroy a valuable engine and dump it in a field rather than simply sell it.[5] 4 SHRR-02 46, 63. Finally, Bower's story detailing the

---

[4] Additional witnesses offered during state habeas to bolster this individual's story also provided mostly hearsay and/or lacked credibility due to drug problems and/or criminal records. 3 SHRR-02; 4-38, 6 SHRR-02 9-90; Pet. App. 8-9, 45-49, 69-70.

[5] "[A]t the close of the trial and after the punishment verdict, [Bower] had a strange look in his eyes and smiled and stated 'they never found the rest of the ultralight, it's in the attic at my house.'" *Bower v. Director*, No. 1:92cv182 slip op. at 36-37.

convenient loss of his .22 pistol while camping strains credulity. 4 SHRR-02 55-56.

Because Bower's true complaint is the denial of his actual-innocence claim—a claim that he has not offered as an independent basis for review and which is moreover unsupported by the evidence—a writ of certiorari should be denied.

II. THIS COURT HAS ALREADY REFUSED TO REVIEW BOWER'S *PENRY I* CLAIM, AND BOWER PROVIDES NO REASON TO REVISIT THAT DECISION.

Bower claims that Texas' former special issues precluded the jury from reaching a reasoned moral response to his allegedly mitigating evidence, i.e. evidence of his good character. *See* Pet. 15-21. During the subsequent state habeas proceedings, the CCA noted that it had already rejected this claim and reiterated its opinion that "unlike the double-edged evidence in [*Penry I*]" the mitigating evidence "was not outside the scope of the special issues given, nor did it have an aggravating effect when considered within the scope of the special issues." *Ex parte Bower*, Nos. 21,005-02, -03, 04, 05 slip op. at 4 (citing *Ex parte Bower*, 823 S.W.2d at 286).

Similarly, this Court also declined review of Bower's *Penry I* claim when it was presented on petition for certiorari following federal habeas review. *Bower v. Quarterman*, No. 07-8315 (Petition for Certiorari at 28-37); *Bower v. Quarterman*, 553 U.S. 1006; *Bower v. Dretke*, 546 U.S. 1140; *Bower v. Dretke*, 145 F. App'x at 885-86; *Bower v. Director*, No. 1:92cv182 slip op. at 50.

This denial of certiorari was unencumbered by any procedural defaults and with the benefit of recent decisions in *Abdul-Kabir v. Quarterman*, 550 U.S. 233 (2007), and *Brewer v. Quarterman*, 550 U.S. 286 (2007).[6] Bower does not acknowledge this Court's refusal to grant certiorari on this virtually identical claim and provides no intervening decision by this Court that would warrant a second look at his argument.

Even so, as previously asserted during federal habeas, it is clear that the good-character evidence presented by Bower can be considered under the Texas' pre-1991 special issues. This view does not conflict with *Penry I* and is, in fact, reinforced by the Court's decisions in *Abdul-Kabir* and *Brewer*.

In *Abdul-Kabir* and *Brewer*, the Court held that *Penry I* error occurs when there is a reasonable likelihood a jury is not permitted to give "meaningful effect" or a "reasoned moral response" to a defendant's mitigating evidence. *Brewer*, 550 U.S. at 289; *Abdul-Kabir*, 550 U.S. at 264-65. The Court made it clear that this "firmly established" principle had remained unchanged since 1976. *Abdul-Kabir*, 550 U.S. at 246. But the Court also explained that "[t]he former [Texas] special issues provided an adequate vehicle for the

---

[6] In fact, Bower's *Penry I* claim during federal habeas review was governed by the COA requirement of 28 U.S.C. § 2253(c). Consequently, the lower courts' denial of relief and this Court's refusal to grant certiorari reflect a view that the resolution of this claim adversely to Bower is not debatable among jurists of reason. *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003).

evaluation of mitigating evidence offered to disprove deliberateness or future dangerousness." *Id.* at 256. Similarly, the special issues are satisfactory "when mitigating evidence has only a tenuous connection—'some arguable relevance'—to the defendant's moral culpability." *Id.* at 253 n.14.

In contrast, Abdul-Kabir's "evidence of childhood deprivation and lack of self-control did not rebut either deliberateness or future dangerousness but was intended to provide the jury with an entirely different reason for not imposing a death sentence," i.e., Abdul-Kabir's "violent propensities were caused by factors beyond his control—namely, neurological damage and childhood neglect and abandonment." *Id.* at 241, 259. Similarly, "Brewer's mitigating evidence served as a 'two-edged sword' because it tended to confirm the State's evidence of future dangerousness as well as lessen his culpability for the crime." *Brewer*, 550 U.S. at 292.

Evidence such as good and non-violent character offered to prove that Bower's "brief spasm of criminal activity" was "an aberration that was not likely to be repeated"—"is primarily, if not exclusively, relevant to the issue of future dangerousness" and "could easily have directed jurors towards a 'no' answer with regard to [that] question." *Abdul-Kabir*, 550 U.S. at 251, 262 & n.23 (quoting *Graham v. Collins*, 506 U.S. 461, 275-76) (1993) (emphasis added). Bower's evidence is precisely this kind. Indeed, if this is not the case in which "the special issues provided for adequate consideration of the defendant's mitigating evidence," then the Court would not have noted the "reassuring" fact that not

every case "would require a new sentencing" hearing in *Id.* at 259 n.20. Instead, every case tried under Texas' former special issues would be subject to reversal regardless of the evidence adduced at trial.

Similarly, the Court's recognition that the Texas special issues are satisfactory "when mitigating evidence has only a tenuous connection—'some arguable relevance'—to the defendant's moral culpability," wholly invalidates Bower's suggestion that his good-character evidence did not receive meaningful consideration within the future-dangerousness issue. *Abdul-Kabir*, 550 U.S. at 253 n.14; *see also Graham*, 506 U.S. at 476 ("virtually any mitigating evidence is capable of being viewed as having some bearing on the defendant's 'moral culpability' apart from its relevance to the particular concerns embodied in the Texas special issues") (emphasis in original). "[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse"; but "the individualized assessment of the appropriateness of the death penalty is a moral inquiry into the culpability of the defendant, and not an emotional response to the mitigating evidence." *See California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring).

Bower correctly acknowledges the lower court's decisions reflecting the CCA's opinion that good-character evidence is encompassed by the pre-1991 special issues. Pet. 21 (citing *Ex parte Hughes*, No.

76869, 2012 WL 3848404, at *2 (Tex. Crim. App. Aug. 29, 2012) (unpublished); *Ex parte Campbell*, No. 76907, 2012 WL 5452200, at *2 (Tex. Crim. App. Nov. 7, 2012) (unpublished); *Ex parte Jones*, No. 75896, 2009 WL 1636511, at *7 (Tex. Crim. App. June 10, 2009) (unpublished)). However, Bower argues that the Fifth Circuit has rejected this approach, setting up a conflict between the CCA and the court of appeals. In support, Bower cites to *McGowen v. Thaler*, 675 F.3d 482, 494-95 (5th Cir. 2012), and *Pierce v. Thaler*, 604 F.3d 197, 210 (5th Cir. 2010). Pet. 20.

But Bower's reliance on *Pierce* and *McGowen* is misplaced, since the two cases are readily distinguishable. Pierce and McGowen both presented evidence of good-character evidence *and* a difficult upbringing, whereas Bower only presents good-character evidence. For instance, McGowen's sisters testified that McGowen bounced from living with his mother, to his father, to his grandmother, and at age sixteen he was living on his own, with a mother on welfare. *McGowen*, 675 F.3d at 492. And Pierce presented "his mother's testimony that he was a good boy until falling in with the wrong crowd when he was thirteen or fourteen years old, and that he spent much of his young life 'locked up' during two extended stays in juvenile detention[]." *Pierce*, 604 F.3d at 208. Bower had no such troubled history.

Evidence of a defendant's difficult background must have a meaningful vehicle for consideration. *See, e.g.*, *Eddings v. Oklahoma*, 455 U.S. 104, 107, 113-15 (1982) (evidence showed that the defendant's parents separated when he was young and that he bounced

between parents because of discipline problems); *Abdul-Kabir*, 550 U.S. 239-40 (evidence showed that defendant's parents were "off and on" and that he lived with his father, his mother, his grandparents, and then at an orphanage); *Smith v. Texas*, 543 U.S. 37, 46 (2004) (evidence showed that defendant's father stole from his family). The evidence of an unstable family background in *Abdul-Kabir*, *Smith*, and *Eddings* may be similar to the evidence McGowen and Pierce presented. It is not similar to the evidence that Bower presented.

The CCA correctly held that Bower's good-character evidence was fully encompassed by the special issues submitted at trial. Accordingly, this Court should deny certiorari review of this claim.

III. AS WITH BOWER'S *PENRY I* CLAIM, THE COURT HAS ALREADY DECLINED ONCE BEFORE TO ISSUE CERTIORARI ON BOWER'S *BRADY* CLAIM, AND BOWER FAILS TO JUSTIFY REVISITING THAT DECISION.

Bower complains that the State suppressed various FBI documents relating to the investigation of Bower's crime. *See* Pet. 21-27. Bower alleges that the withheld FBI materials indicate a greater availability of, and different uses for, the specialty ammunition that Bower used to execute his victims than the State's witnesses acknowledged at trial. *Id.* The CCA summarily denied relief on this claim based on its own review. *Ex parte Bower*, Nos. 21,005-02, -03, 04, 05 slip op. at 3-4.

As with his *Penry I* claim, Bower raised his *Brady* claim during federal habeas review. The Fifth Circuit rejected it on the merits. *Bower v. Quarterman*, 497 F.3d at 476-77. Bower challenged this decision in his petition for certiorari—alleging that the court of appeals employed an improper standard—and the Court declined to review it. *Bower v. Quarterman*, No. 07-8315 (Petition for Certiorari at 37-40); *Bower v. Quarterman*, 553 U.S. 1006. This claim was not procedurally barred on federal habeas review, and Bower fails to demonstrate how his argument has matured into a viable claim during his subsequent state writ proceedings. Simply put, Bower does not deserve a second bite at the apple.

Moreover, as previously argued, these FBI documents provide minimal support for Bower's theories. As a result, it cannot be plausibly argued that a jury would have decided this case any differently had the FBI turned over any of the information in question.

This Court held in *Brady* that the suppression by the prosecution of evidence favorable to an accused after a request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution. 373 U.S. at 87. Therefore, to establish a *Brady* violation, a defendant must establish: (1) the evidence at issue was favorable, either because it is exculpatory, or because it is impeaching; (2) that evidence was suppressed by the State, either willfully or inadvertently; and (3) the evidence was material, i.e., prejudice ensued from its nondisclosure. *Banks v. Dretke*, 540 U.S. 668, 691 (2004).

However, "[t]he mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." *United States v. Agurs*, 427 U.S. 97, 109-10 (1978). Instead, the evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *United States v. Bagley*, 473 U.S. 667, 682 (1985). A "reasonable probability" is a probability sufficient to undermine confidence in the outcome of the trial. *Id.*

Here, the trial court's findings (although not adopted by the CCA) noted that the allegedly withheld evidence was available to Bower at the time of trial. Pet. App. 58, 99-105. But even assuming arguendo there was nondisclosure, there is nonetheless no reasonable probability that result of the proceeding would have been different given that the instant documents would not have called into question the evidence that Bower possessed the stolen ultralight, attempted to destroy all traces of its origin, and then lied about his activities.

Clearly, it was the evidence showing Bower's possession (and subsequent destruction) of the stolen ultralight, as well Bower's lies to investigators that were the most damaging evidence against him.[7]

---

[7] And while *Brady* materiality is not a sufficiency-of-the-evidence test, it is worth noting again that the Fifth Circuit observed that "the evidence against Bower was simply overwhelming." *Bower*, 145 F. App'x. at 884.

Because FBI reports about the ammunition and silencers do not undermine this evidence, there is no reasonable probability of a different result if such evidence had been presented at trial. *Edmond v. Collins*, 8 F.3d 290, 293 (5th Cir. 1993) ("The materiality of *Brady* material depends almost entirely on the value of the evidence relative to the other evidence mustered by the state."); *Kopycinski v. Scott*, 64 F.3d 223, 226-27 (5th Cir. 1995) (rejecting a habeas petitioner's *Brady* claim where the suppressed impeachment evidence was immaterial in light of the other, corroborated testimony and physical evidence supporting petitioner's conviction); *Monroe v. Blackburn*, 607 F.2d 148, 152 (5th Cir. 1979) ("It is necessary for us to consider [alleged *Brady* material] in light of the other evidence of guilt offered by the prosecutor."), cert. denied, 446 U.S. 957 (1980).

Moreover, evidence concerning larger availability of Fiocchi ammunition in question would not have usefully impeached the testimony of the State's firearms examiners that such ammunition was rare. As noted by the Fifth Circuit, "[t]he evidence in the FBI files concerning the availability of Fiocchi ammunition is also not material because the information does not contradict the state's expert testimony. Although the files contain information regarding numerous individuals who had purchased Fiocchi ammunition for various purposes, they do not directly contradict the state's evidence that the ammunition was not widely available." *Bower v. Quarterman*, 497 F.3d at 477. And additional evidence that a person might use subsonic ammunition for other than homicidal purposes is similarly meaningless. That subsonic ammunition

(designed to be quiet) could be used to allow for any quiet shooting is self-evident. Nevertheless, upon questioning by the district court, Bower's own expert acknowledged that there are "only two reasons to buy subsonic ammunition"; for "noise abatement" or for "use in a silenced weapon." *Bower v. Director*, No. 1:92cv182 slip op. at 21-22. Bower's expert further testified that "there is no reason to have either subsonic ammunition or a silencer for hunting or use at a shooting range." *Id.* at 22.

Finally, Bower contends that the FBI withheld information indicating that there is no discernible difference between subsonic and supersonic Fiocchi ammunition casing and bullet fragments. Pet. 22. But Bower's petition does not provide any record citations to support this claim, and his excerpted tables do not provide further illumination. Pet. App. 129-40 This argument is inadequately briefed, and review of it should be summarily denied.

Yet, even if this argument was properly briefed, two firearms examiners testified for the State concerning the ammunition used and their relevant forensic methods. *Bower v. State*, 769 S.W.2d at 890-91. A medical examiner further testified that a silencer was used (which would suggest the use of subsonic ammunition). *Id.* And to the extent that Bower's argument refers to the testimony of expert witness Edward Hueske, (4 SHRR-02 75-102; 2 Fed.RR 288-320), Hueske acknowledged that he did not look at the wounds which the medical examiner relied upon in determining that a silencer was used (which can suggest use of subsonic ammunition). 2 Fed.RR 313-14.

Hueske conceded that he was not in a position to disagree with that professional's determinations. 4 SHRR-02 135-36. He further admitted that he could not say whether the ammunition used during the crime was actually supersonic rather than subsonic, but simply that a determination could not be made.[8] *Id.* at 141. Hueske's testimony does not therefore refute the testimony of the State's witnesses at trial, especially since firearms examiner Fletcher acknowledged Hueske's concerns on cross-examination. 12 RR 72-74. Furthermore, the State notes again that the State's most probative evidence was Bower's lies to investigators and his possession of the victims' stolen ultralight, not the ammunition.

Bower's *Brady* claim is meritless, and he therefore fails to raise a compelling issue worthy of this Court's limited time. Certiorari review of this claim should be denied.

IV. BOWER'S EIGHTH-AMENDMENT CLAIM IS PROCEDURALLY BARRED. ALTERNATIVELY, BOWER'S EXECUTION DOES NOT CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT.

In his third claim for relief, Bower asserts that his execution after more than thirty years on death row

---

[8] Given that Hueske's conclusions were derived from the physical properties of the ammunition and thus available at trial, it is unclear from Bower's briefing how this information was suppressed pursuant to the second *Brady* prong.

constitutes cruel and unusual punishment. *See* Pet. 27-32. The CCA dismissed Bower's claim. *Ex parte Bower*, Nos. 21,005-02, -03, 04, 05 slip op. at 4 ("[Bower's] fourth allegation is dismissed.) This dismissal[9] was presumably on the basis of Article 11.071 Section 5 of the Texas Code of Criminal Procedure, i.e., the Texas abuse-of-the-writ statute. Consequently, certiorari review is foreclosed by an independent and adequate state procedural bar. Alternatively, Bower fails to demonstrate that his execution would constitute cruel and unusual punishment. Either way, certiorari review should be denied.

A. Certiorari Review Is Foreclosed by an Independent and Adequate State-Procedural Bar.

Bower's claim is procedurally barred because the state court's disposition of the claims relies upon an adequate and independent state-law ground. *See, e.g.*, *Moore v. Texas*, 122 S. Ct. 2350, 2352-53 (2002) (Scalia, J., dissenting); *Emery v. Johnson*, 139 F.3d 191, 195-96 (5th Cir. 1997). This Court has held on numerous occasions that it "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment" because "[the Court] in fact lack[s]

---

[9] "Dispositions relating to the merits should be labeled 'denials' while dispositions unrelated to the merits should be labeled 'dismissals[.]'" *Ex parte Torres*, 943 S.W.2d 469, 474 (Tex. Crim. App. 1997).

jurisdiction to review such independently supported judgments on direct appeal: since the state-law determination is sufficient to sustain the decree, any opinion of this Court on the federal question would be purely advisory." *Sochor v. Florida*, 504 U.S. 527, 533 (1992); *Michigan v. Long*, 463 U.S. 1032, 1042 (1983).

Bower fails to acknowledge his default and therefore does not make any effort to show how Section 5 does not apply. Bower thus cannot avoid the jurisdictional bar imposed by the adequate-and-independent-doctrine.

B. Bower's Execution Does Not Constitute Cruel and Unusual Punishment.

In support of his argument that his execution would violate the Eighth Amendment, Bower cites to a district court decision that recently held that the Californian capital-punishment system is unconstitutional, for—among other things—the length of time that inmates remain incarcerated before execution. Pet. 30-31 (citing *Jones v. Campbell*, No. CV 09-02158-CJC, 2014 WL 3567365 (C.D. Cal. Jul. 16, 2014)). But the ruling of a district court does not bind this Court. Moreover, Texas is not California. The *Jones* court's decision relied primarily on factors peculiar to its own state. *Jones* held that systemic inefficiencies in California's appeal and collateral review process rendered it "so inordinately and unnecessarily delayed that only an arbitrarily selected few of those sentenced to death are executed," and that

the state's death-penalty system thus violates the Eighth Amendment. *Jones*, 2014 WL 3567365, at *13.

Plainly, it is difficult to imagine two states with more different approaches to capital punishment than California and Texas. According to readily accessible information, California has executed only fourteen[10] inmates since 1978, whereas Texas has executed 518[11] inmates since 1982. In California the average length of time spent on death row before execution is 17.5[12] years, whereas in Texas it is 10.74[13] years. California has not executed anyone since 2006, whereas Texas has executed ten offenders this year.[14]

---

[10] California Department of Corrections & Rehabilitation, Capital Punishment, at http://www.cdcr.ca.gov/Capital_Punishment/Inmates_Executed.html (last visited Nov. 5, 2014).

[11] Texas Department of Criminal Justice, Executed Offenders, at http://www.tdcj.state.tx.us/death_row/dr_executed_offenders.html (last visited Nov. 5, 2014).

[12] California Department of Corrections & Rehabilitation, Capital Punishment, at http://www.cdcr.ca.gov/Capital_Punishment/Inmates_Executed.html (last visited Nov. 5, 2014).

[13] Texas Department of Criminal Justice, Death Row Facts, at http://www.tdcj.state.tx.us/death_row/dr_facts.html (last visited Nov. 5, 2014).

[14] This further skews the average time comparison. If California executed more of its long-serving inmates, the average time on death row would likely be longer.

As noted by a district court in Tennessee when rejecting the argument that *Jones* had application to that state:

> [. . .] [M]ost California death row inmates wait three to five years just for appointment of counsel to handle their automatic direct appeal to the state supreme court and another two to three years waiting for oral argument to be set after the issues are briefed. It takes at least eight to ten years for counsel to be appointed to handle an inmate's state habeas proceeding, and after those claims are finally investigated and briefed, another four years for the state supreme court to deliver a conclusory "lack of reasoned opinion" that further delays federal habeas adjudication. The court found that in total "[t]hese delays—exceeding 25 years on average—are inherent to California's dysfunctional death penalty system, not the result of individual inmates' delay tactics, except perhaps in isolated cases."

Duncan v. Carpenter, 2014 WL 3905440, *15 (M.D. Tenn. Aug. 11, 2014) (citations omitted); *see also e.g. Hulett v. State* --- S.E.2d ---, 2014 WL 5313977 (Ga. 2014).

Moreover, this Court has previously denied certiorari on similar claims. *See, e.g., Johnson v. Bredesen*, 558 U.S. 1067 (2009) (denying certiorari on claim of a twenty-nine year delay); *Knight v. Florida*,

528 U.S. 990 (1999) (nearly twenty years or more); *Elledge v. Florida*, 525 U.S. 944 (1998) (twenty-three years); *Lackey v. Texas*, 514 U.S. 1045 (1995) (seventeen years). Numerous other state and federal courts have also rejected Bower's claim. *See e.g. Reed v. Quarterman*, 504 F.3d 465 (5th Cir. 2007) (twenty-four years); *Smith v. State*, 74 S.W.3d 868, 869, 875-76 (Tex. Crim. App. 2002) (thirteen years); *Moore v. State*, 771 N.E.2d 46, 54-55 (Ind. 2002) (twenty years); *Johns v. Bowersox*, 203 F.3d 538, 547 (8th Cir. 2000) (fifteen years); *People v. Sims*, 736 N.E.2d 1092, 1040-41 (Ill. 2000) (fifteen years); *State v. Moore*, 591 N.W.2d 86, 93-95 (Neb. 1999) (twenty years); *Carter v. Johnson*, 131 F.3d 452, 466 (5th Cir. 1997) (fourteen years); *Lackey v. Johnson*, 83 F.3d 116, 117 (5th Cir. 1996) (nineteen years); *White v. Johnson*, 79 F.3d 432, 439-40 (5th Cir. 1996) (seventeen years); *Bell v. State*, 938 S.W.2d 35, 53 (Tex. Crim. App. 1996) (twenty years); *Stafford v. Ward*, 59 F.3d 1025, 1028 (10th Cir. 1995) (fifteen years); *McKenzie v. Day*, 57 F.3d 1493, 1494 (9th Cir. 1995) (twenty years); *Fearance v. Scott*, 56 F.3d 633, 638-40 (5th Cir. 1995) (eighteen years); *Free v. Peters*, 50 F.3d 1362 (7th Cir. 1995) (twenty years); *Richmond v. Lewis*, 948 F.2d 1473, 1492 (9th Cir. 1990) (sixteen years); *Hitchcock v. State*, 578 So.2d 685, 693 (Fla. 1990) (twelve years), rev'd on other grounds, 505 U.S. 1215 (1992); *People v. Chessman*, 341 P.2d 679, 699-700 (Cal. 1959) (eleven years), overruled on other grounds, *People v. Morse*, 388 P.2d 33 (Cal. 1964)).

As the CCA explained in *Smith*, "[t]he present standards of decency do not deem cruel and unusual the delay occasioned while a condemned prisoner pursues direct appeals and collateral relief." *See Smith*,

74 S.W.3d at 875; *see also Chambers v. Bowersox*, 157 F.3d 560, 569-70 (8th Cir. 1998) ("Delay has come about because Chambers, of course with justification, has contested the judgments against him, and, on two occasions, has done so successfully. If it is not cruel and unusual punishment to execute someone after the electric chair malfunctioned the first time, *see Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 [] (1947), we do not see how the present situation even begins to approach a constitutional violation.") (footnote omitted).

Bower has relentlessly litigated his case through three decades, including direct appeal, federal habeas, and two rounds of state habeas. Any delay is largely of his own making. His lengthy stay on death row therefore does not constitute cruel and unusual punishment, and this Court should deny certiorari review.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant Attorney General

EDWARD L. MARSHALL
Chief, Criminal Appeals Division

OFFICE OF THE ATTORNEY GENERAL OF TEXAS
P.O. Box 12548

DON CLEMMER
Deputy Attorney General
for Criminal Justice

STEPHEN M. HOFFMAN
Assistant Attorney General
Counsel of Record

Austin, Texas 78711
(512) 936-1400
stephen.hoffman@texas
attorneygeneral.gov

Dated: November 13, 2014