A-_____

No. 14-292

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**In the**
**Supreme Court of the United States**

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LESTER LEROY BOWER, JR.,

*Petitioner*,

v.

STATE OF TEXAS,

*Respondent*

---

**On Petition For A Writ Of Certiorari**
**To The Texas Court Of Criminal Appeals**

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**MOTION FOR STAY OF EXECUTION**

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**THIS IS A CAPITAL CASE**

**MR. BOWER IS SCHEDULED TO BE EXECUTED ON FEBRUARY 10, 2015 AFTER 6:00 P.M.**

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Submitted: February 3, 2015

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## MOTION FOR STAY OF EXECUTION

To the Honorable Circuit Justice for the Fifth Circuit:

Petitioner Lester Leroy Bower, Jr. respectfully submits this motion, asking the Court to stay his execution, which is currently scheduled for February 10, 2015 after 6:00 p.m. The grounds for this motion are as follows:

The state trial court in this case recommended that Mr. Bower receive a new sentencing hearing. The Fifth Circuit previously had recognized that its own 2005 decision in Mr. Bower's case applied an incorrect standard on review of the *Penry* issue raised in Mr. Bower's federal habeas petition. *Pierce* v. *Thaler*, 604 F.3d 197, 208-210 & n.9 (5th Cir. 2010). Mr. Bower brought the Fifth Circuit's decision to the attention of the state trial court, and the court recommended a new sentencing trial. The Texas Court of Criminal Appeals ("CCA"), however, rejected the trial court's recommendation and denied all relief. Ex. A. Shortly thereafter, the state trial court scheduled Mr. Bower for execution on February 10, 2015. Ex. B.

Mr. Bower sought review of the CCA's decision in this Court. That petition is pending (No. 14-292). The petition was distributed for this Court's conferences on January 9, 16, and 23, but the Court has not yet acted on it. Because Mr. Bower's execution date is now only a week away, and because this Court's next scheduled conference will not occur until February 20, 2015, Mr. Bower requests a stay of his execution, so that his sentence will not be carried out until the judicial process has been completed.

In addition to the petition for a writ of certiorari in this Court, two proceedings involving Mr. Bower are pending in the Fifth Circuit. On January 12, 2015, Mr. Bower filed a motion for authorization to file a second federal habeas petition, so that the propriety of his sentencing could be evaluated under the correct legal standard (No. 15-40032). In connection with that motion,

Mr. Bower sought a stay of execution from the Fifth Circuit. At the same time, in an effort to ensure that he invoked the proper procedural vehicle for the relief requested, Mr. Bower moved in the federal district court to reopen the judgment on his first federal habeas petition under Federal Rule of Civil Procedure 60(b)(6). The district court denied relief on January 22, 2015. Ex. C. Seeking to appeal that decision, Mr. Bower submitted an application for a certificate of appealability in the Fifth Circuit (No. 15-70003). Mr. Bower sought a stay of execution in connection with that motion as well. Both of the pending proceedings in the Fifth Circuit relate to the *Penry* issue raised by Mr. Bower's sentencing trial. Those proceedings thus overlap significantly with Mr. Bower's pending certiorari petition.

## I. Legal Issues Before This Court

Mr. Bower's certiorari petition raises several important legal issues.

### A. Mr. Bower's sentencing hearing was unconstitutional under this Court's *Penry* jurisprudence

In 1984, Mr. Bower, then a 36-year-old married man with two children, a full-time job, more than two years of college, and no prior criminal record of any kind, was arrested and convicted for the murders of four men in an airplane hangar in Sherman, Texas. During the punishment phase of trial, Mr. Bower's friends and family members testified about, among other things: Mr. Bower's compassion, his religious devotion, his commitment to his family, his community service, his concern for others in need, his even temperament, his work with young children and church groups, and the complete absence of any violent or criminal behavior in his life. The State presented no evidence at the punishment phase of trial.

Under the former Texas capital sentencing statute in effect in 1984, the jury was asked to answer only two questions:

> (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result; and
>
> (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.

TEX. CODE CRIM. PROC. art. 37.071(b) (Vernon 1981).

The second question—sometimes referred to as the "future dangerousness" issue—was, of course, of limited meaning, because the only available alternative to a sentence of death at the punishment phase of Mr. Bower's trial was a sentence of life imprisonment. Thus, the second question essentially asked the jury whether Mr. Bower would constitute a continuing threat to society while he was serving a life sentence. (After 31 years of Mr. Bower's incarceration, we now know that Mr. Bower has posed no such threat.)

But, whatever meaning or significance the "future dangerousness" issue may have had, there was one thing it clearly did not do: It did not give the jury any opportunity to express a conclusion that death was not an appropriate sentence, taking into account all of the evidence presented at trial, including the mitigating evidence presented at the punishment phase. The trial court gave the jury no guidance as to how it might take into consideration the mitigating evidence Mr. Bower presented. In fact, the trial court's minimal instructions did not even mention the words "mitigation," "mitigating evidence," or any words having similar meaning. Nor did the court ask the jury any question like the one that Texas has required in capital cases since the State's capital sentencing statute was amended in 1991, namely:

> Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed.

TEX. CODE CRIM. PROC. art. 37.071(e)(1) (Vernon Supp. 2005) (the words "without parole" were added in 2005 to the version of the statute enacted in 1991). Instead, the jury was simply asked the two special questions. Indeed, the members of the jury were told repeatedly during voir dire that they would be asked only to answer the two special questions, not to decide directly whether or not the death penalty should be imposed. The jury answered "yes" to both questions, and the trial court automatically, as was required by the statute, imposed the death penalty.

The former Texas special issues required a sentence of death if the jury answered yes to each of the special issues. *Penry* v. *Lynaugh*, 492 U.S. 302, 310 (1989) ("*Penry I*"). Under that scheme, if a defendant presented mitigating evidence that might provide a reason to spare his life (even though the evidence did not negate, in the jury's view, deliberateness or future dangerousness), the jury had no way to give full effect to that evidence. This feature of the pre-1991 Texas capital system violated the Eighth and Fourteenth Amendments. *Id.* at 328; see also *Abdul-Kabir* v. *Quarterman*, 550 U.S. 233, 255 (2007). This Court has reversed several Texas death sentences based on *Penry* error.[1]

Mr. Bower raised a *Penry* claim in his first state habeas proceeding, which the CCA denied in 1991. *Ex parte Bower*, 823 S.W.2d 284, 286-87 (Tex. Crim. App. 1991), *cert. denied*, 506 U.S. 835 (1992). Mr. Bower again raised a *Penry* claim in his federal habeas petition, but the district court and the court of appeals rejected it. *Bower* v. *Dretke*, 145 F. App'x 879, 885 (5th Cir. 2005), *cert. denied*, 546 U.S. 1140 (2006). This is the very decision that the Fifth Circuit has now acknowledged applied an incorrect standard under this Court's decisions. See *Pierce*, 604 F.3d at 210 & n.9.

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[1] See *Brewer* v. *Quarterman*, 550 U.S. 286, 296 (2007); *Abdul-Kabir*, 550 U.S. at 264-65; *Smith* v. *Texas*, 543 U.S. 37, 48-49 (2004); *Penry* v. *Johnson*, 532 U.S. 782, 804 (2001) ("*Penry II*"); *Penry I*, 492 U.S. at 328; see also *Tennard* v. *Dretke*, 542 U.S. 274, 276 (2004).

The evolution of this Court's *Penry* jurisprudence leaves no doubt that the earlier decisions in Mr. Bower's case were incorrect because the jury had no way to give full effect to Mr. Bower's mitigating evidence, which went well beyond the scope of the special issues. This Court's precedents have made clear that when considering the death penalty, decisions must be individualized, based on a reasoned, moral response, after giving "full" consideration and effect to any mitigating evidence. See, e.g., *Abdul-Kabir*, 550 U.S. at 246, 248; *Brewer*, 550 U.S. at 295-96. As such, a jury must be given a vehicle to decide whether, based on mitigating evidence, a defendant should be sentenced to death or shown mercy. See, e.g., *Abdul-Kabir*, 550 U.S. at 246, 252; *Brewer*, 550 U.S. at 289.

This Court repeatedly has taken the CCA and the Fifth Circuit to task for their decisions regarding the constitutionality of death sentences under the former Texas special issues. The Fifth Circuit has changed its approach, in deference to this Court's decisions, but the CCA has not followed suit, as Mr. Bower's case demonstrates.

After *Abdul-Kabir*, the Fifth Circuit recognized that it had been misapplying this Court's *Penry* jurisprudence, stating in *Pierce*, 604 F.3d at 210 n.9, that many of its pre-2007 decisions—*including specifically its decision in Mr. Bower's federal habeas proceeding*—did not apply the proper standard. But the CCA has steadfastly adhered to its previous position, insisting that Mr. Bower's mitigating evidence was not "outside the scope" of the former Texas special issues, and rejecting a recommendation from the state trial court—the court that originally sentenced Mr. Bower—that Mr. Bower be given a new sentencing hearing in light of this Court's recent rulings, as explained in *Pierce*. And Mr. Bower's case provides but one example of the CCA's refusal to give proper consideration to good character mitigation evidence. That is why Mr. Bower requested certiorari review: to require the CCA to align its rulings with this Court's decisions

and to resolve the conflict between the CCA and the Fifth Circuit on the issue of whether good character mitigation evidence is fully comprehended within the scope of the former Texas special issues.

Mr. Bower has raised his post-*Pierce Penry* issue in every possible forum. It was included in his second state habeas petition, and because the petition for a writ of certiorari remains pending and his execution date is fast approaching, Mr. Bower has now raised the issue in further federal court proceedings as well. As set forth above, Mr. Bower moved for authorization from the Fifth Circuit to file a second federal habeas petition on the *Pierce/Penry* issue and requested a stay of execution. At the same time, Mr. Bower moved in the United States District Court for the Eastern District of Texas under Rule 60(b)(6) to vacate the judgment in the first federal habeas proceeding on the *Penry* issue in light of the Fifth Circuit's ruling in *Pierce*. He also requested a stay of execution. The district court denied the motion, denied the stay request, and denied a certificate of appealability ("COA") on January 22. Mr. Bower filed a notice of appeal on January 23, and on January 27, he filed an application for a COA from the Fifth Circuit and again requested a stay of execution. The Fifth Circuit has not yet ruled in either proceeding.

### B. The State secured Mr. Bower's conviction in part based on evidence withheld in violation of this Court's *Brady* jurisprudence

The second issue in Mr. Bower's certiorari petition involves error in the guilt/innocence phase of trial. A key aspect of the prosecution's case rested on an assumption, dressed up as fact, that a certain specific type of ammunition—the subsonic version of ammunition manufactured by Fiocchi—was used in the murders. The fact is, however, that the exact type of ammunition used is unknowable, because the crime scene evidence (consisting of shell casings and bullet fragments) does not enable one to distinguish between supersonic or subsonic

ammunition. The State and its investigators simply assumed that a specific type of ammunition was used—a type that was not dictated by the crime scene evidence—and that assumption shaped the entire investigation and substantially narrowed the suspect pool. The prosecution presented this assumption to the jury as an established fact. Much of the prosecution's theory, evidence, and argument is tied to this precise ammunition, including the State's repeated assertion that it is extremely unique and rare—possessed by at most fifteen people in Texas at the time—and that its only purpose is killing.

This had a huge impact on Mr. Bower because, as a licensed firearms dealer, he previously had purchased this specific type of ammunition (as well as numerous other kinds). At trial, several witnesses testified about this allegedly unique and rare subsonic ammunition whose only purpose supposedly was killing. Most damning of all, the prosecution emphasized the ammunition at least five times during closing argument, stating that Mr. Bower was one of at most fifteen people in the entire state of Texas to have that precise, rare ammunition.

Evidence disclosed during post-conviction proceedings, however, confirms that: 1) there was no way to determine the exact type of ammunition used in the murders; and 2) the particular ammunition that the prosecution assumed was used in the murders was nowhere near as rare as the prosecution represented and had several legitimate uses. The State's entire theory regarding ammunition—a critical aspect of its circumstantial case against Mr. Bower—was false.

Confronted with the previously withheld evidence, the State has begun to backpedal. For the first time in the 30-year history of this case, the State now has contended that the trial evidence showed that the number of people possessing the ammunition supposedly used in the murders was actually in the "low hundreds"—not the maximum of fifteen relied upon to get the original conviction. The State also now claims that the trial evidence showed only that the

ammunition was quieter, not that it was used only for killing, though it told the jury the opposite. The State does not even attempt to square its jury argument with these new positions on the evidence.

It is undisputed that the prosecution withheld documents regarding the ammunition, documents that seriously undermine a significant aspect of the prosecution's case. The prosecution's arguments to the jury were false in light of this withheld evidence. And all of this in a capital case, where the stakes cannot possibly be higher. This conduct violates Mr. Bower's due process rights. See, e.g., *Giglio* v. *United States*, 405 U.S. 150, 153 (1972); *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963); *Napue* v. *Illinois*, 360 U.S. 264, 269 (1959).

### C. Executing Mr. Bower after he has served more than 30 years on death row serves no penological purpose and constitutes cruel and unusual punishment

Mr. Bower has been on death row for more than 30 years. During this time, Mr. Bower has had a legal proceeding pending for all except 132 days. None of Mr. Bower's proceedings has ever been determined to be frivolous, and he has often waited for years at a time for a court to act. He has suffered through six death settings, sometimes with a reprieve coming only hours before execution. His seventh death setting is now only days away. Executing Mr. Bower after he has served on death row for more than 30 years under these circumstances serves no penological purpose and constitutes cruel and unusual punishment.

## II. This Court Should Stay Mr. Bower's Execution to Examine These Important Legal Issues

A stay of execution is warranted where there is: (1) a reasonable probability that four members of the Court would consider the underlying issues sufficiently meritorious for the grant of certiorari; (2) a significant possibility of reversal of the lower court's decision; and (3) a likelihood that irreparable harm will result if no stay is granted. *Barefoot* v. *Estelle*, 463 U.S. 880, 895 (1983).

Mr. Bower satisfies these criteria. There is a reasonable probability of certiorari being granted and a significant possibility of reversal. For example, as to Mr. Bower's *Penry* issue, there is a conflict between the CCA and the Fifth Circuit on this precise issue, and the Fifth Circuit has acknowledged that its prior approach—to which the CCA continues to adhere—is inconsistent with this Court's precedents. Indeed, two courts—the Fifth Circuit and the state trial court—have now concluded that the wrong standard was applied in evaluating whether the former Texas special issues fully encompassed Mr. Bower's good character mitigation evidence, and the state trial court has recommended that Mr. Bower be afforded a new sentencing trial. As to Mr. Bower's *Brady* issue, the prosecution withheld critical evidence on a topic that was central to its case and relied on false evidence in obtaining Mr. Bower's conviction. This constitutes a significant violation of Mr. Bower's due process rights, as explicated in this Court's *Brady* jurisprudence.

These issues are all the more serious because there remains a substantial lingering doubt regarding Mr. Bower's innocence. Mr. Bower has steadfastly maintained his innocence for more than 30 years, and evidence not available at his trial—either because it was withheld by the prosecution or discovered after trial—casts significant doubt on the prosecution's case, including:

- Based on findings by the State's own firearms examiner, the Ruger pistol once owned by Mr. Bower—which the State theorized could have been the murder weapon—could not have been the murder weapon because it had a firing pin different from the one in whatever gun was used in the killings. The Ruger once owned by Mr. Bower was manufactured several years *after* the Ruger that belonged to one of the victims, and the State's examiner concluded that, if a Ruger had been used in the killings, it would had to have been one made *before* the victim's Ruger.
- The State's claim that the murders were committed using an extremely "rare and exotic" type of subsonic ammunition once

purchased by Mr. Bower was recently admitted by the State to have never been proven. It is simply impossible to know, based on the available evidence, whether the ammunition used in the murders was subsonic. And in any event, as we now know from evidence wrongly withheld before trial, ammunition made by the manufacturer of the ammunition used in the murders was never as rare as the State claimed it was.

- Mr. Bower's post-conviction expert concluded that the central tenet of the State's theory of the case—that a single shooter acting alone killed all four victims (including two former sheriff's deputies)—is inconsistent with the totality of the evidence.
- Mr. Bower has not one but six witnesses who all corroborate portions of each other's accounts that one or more specific other individuals, not Mr. Bower, committed the murders as part of a drug deal gone awry.

Finally, if a stay is not granted, Mr. Bower will suffer the most irreparable of all harms, death. Mr. Bower thus meets all the criteria for granting a stay.

## CONCLUSION

Mr. Bower respectfully requests that this Court stay his execution pending this Court's disposition of the pending petition for certiorari and, if the petition is granted, until this Court's decision of the case.

Dated: February 3, 2015

Respectfully submitted,


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*Counsel for Petitioner,*
*Lester Leroy Bower, Jr.*

**CERTIFICATE OF SERVICE**

I certify on February 3, 2015, I sent a copy of this Motion for Stay of Execution to Stephen Hoffman via email at stephen.hoffman@texasattorneygeneral.gov and by U.S. mail.

Peter Buscemi by permission

Peter Buscemi

# EXHIBIT 1

# IN THE COURT OF CRIMINAL APPEALS OF TEXAS

**NOS. WR-21,005-02, WR-21,005-03, WR-21,005-04 & WR-21,005-05**

**EX PARTE LESTER LEROY BOWER, JR.**

**ON APPLICATION FOR WRIT OF HABEAS CORPUS FROM CAUSE NOS. 33426, 33427, 33428, AND 33429 IN THE 15TH JUDICIAL DISTRICT COURT GRAYSON COUNTY**

***Per Curiam***.

**O R D E R**

This is a subsequent application for writ of habeas corpus filed pursuant to the provisions of Texas Code of Criminal Procedure Article 11.071, § 5.

In April 1984, a jury found applicant guilty of four counts of capital murder. The jury answered the special issues submitted pursuant to Texas Code of Criminal Procedure Article 37.071, and the trial court, accordingly, set applicant's punishment in each case at death. This Court affirmed applicant's convictions and sentences on direct appeal. *Bower v. State*, 769 S.W.2d 887 (Tex. Crim. App. 1989). Applicant filed his initial post-conviction

application for writ of habeas corpus in the convicting court on October 2, 1989, pursuant to Article 11.07 then in effect. The application challenged all four convictions and sentences. This Court filed and set each case and ultimately denied applicant relief. *Ex parte Bower*, 823 S.W.2d 284 (Tex. Crim. App. 1991). Applicant then sought habeas relief in the federal district court. The district court conducted an evidentiary hearing in June 2000 and ultimately denied relief in a series of opinions issued in 2002-2004. The Fifth Circuit affirmed the district court's decision on September 18, 2007, and the United States Supreme Court denied applicant's petition for writ of *certiorari* on April 21, 2008.

The instant application attacking all four convictions and sentences was received in this Court on June 25, 2008, along with a motion to stay his execution.[1] However, before this Court ruled on the application, we received notice that the trial court had withdrawn the execution date pending its determination on applicant's motion for forensic testing. In an attempt to avoid piecemeal litigation in the case, this Court issued an order on July 21, 2008, stating that the Court would refrain from acting on the current writ application until the results of the forensic testing litigation were complete. *Ex parte Bower*, No. WR-21,005-02 (Tex. Crim. App. July 21, 2008)(not designated for publication). The trial court subsequently granted forensic testing, and the testing proceeded.

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[1] Because applicant had previously filed an application under Article 11.07, and because this Court had denied relief on that application prior to September 1, 1995, when Article 11.071 became effective, applicant was not entitled to file an initial application under Article 11.071. By the terms of the statute, this application is to be considered a subsequent application which must meet the dictates of Article 11.071 § 5 before the merits may be addressed by any court.

Applicant raised four issues in the instant application: (1) actual innocence based upon newly discovered evidence; (2) *Brady* violations; (3) a claim that Article 37.071 operated unconstitutionally because his jury did not have a vehicle to properly consider mitigating evidence; and (4) a claim that executing him after twenty-four years on death row amounts to cruel and unusual punishment. We held that applicant met the dictates of Article 11.071 § 5 with relation to his first two allegations and remanded those for the trial court to investigate the claims and develop the record. We made no decision regarding whether the third allegation met the Section 5 bar, but because the law had evolved with regard to mitigating evidence, we ordered the trial court to review the third allegation under the prevailing law and make appropriate findings and conclusions. *Ex parte Bower*, No. WR-21,005-02 (Tex. Crim. App. June 13, 2012)(not designated for publication). We did not dispose of the fourth allegation at that time in order to address all allegations together in a concise fashion.

Following the completion of the requested forensic testing, holding a live hearing, and considering the arguments by applicant and the State, the trial court entered findings of fact and conclusions of law recommending that applicant's first and second claims be denied. After reviewing recent case law, the trial court recommends that the relief sought in applicant's third claim be granted.

We have reviewed the record and the trial court's findings of fact and conclusions of law. Based upon our own review, we deny relief on applicant's first two claims regarding

actual innocence and *Brady* violations. We reject the trial court's findings and conclusions recommending relief on applicant's third claim. We have previously held that, unlike the double-edged evidence in *Penry v. Lynaugh*,[2] the mitigating evidence presented by applicant during the punishment phase of his trial – evidence of his good and non-violent character, his good deeds, and the absence of a prior criminal record – 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*, 823 S.W.2d at 286. The promulgation of more recent case law by the United States Supreme Court has not changed the definition or nature of what is considered mitigating evidence; thus, applicant was not constitutionally entitled to a separate jury instruction at the punishment phase of trial. *See, e.g., Penry*, 492 U.S. 302 (1989), and *Ex parte Jones*, No. AP-75,896 (Tex. Crim. App. June 10, 2009)(not designated for publication)(holding positive personal characteristics are the sorts of evidence that can be considered within the scope of the former special issues – no *Penry* issue required). Accordingly, the relief applicant seeks is denied.

Applicant's fourth allegation is dismissed.

IT IS SO ORDERED THIS THE 11th DAY OF JUNE, 2014.

Do Not Publish

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

# EXHIBIT 2

**IN THE DISTRICT COURT OF GRAYSON COUNTY**
**15TH JUDICIAL DISTRICT OF TEXAS**

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| | | |
|---|---|---|
| **THE STATE OF TEXAS** | } | |
| | } | |
| **v.** | } | **033426, 033427, 033428 & 033429** |
| | } | |
| **LESTER LEROY BOWER, JR.** | } | |

## ORDER SETTING EXECUTION

This Court, having received the order denying habeas corpus relief in the above styled and numbered cause, and the Defendant, LESTER LEROY BOWER, JR., having been sentenced to death in the presence of Defendant's attorneys, and on the 20TH day of January, 1984, in Cause Numbers 033426, 033427, 033428 and 033429 in the 15th District Court of Grayson County, Texas in accordance with the findings of the jury and the judgment in said cause adjudging said defendant guilty of capital murder; and the Texas Court of Criminal Appeals in cause numbers AP-69,333, AP-69, 334, AP-69,335 and AP-69,336 having affirmed said conviction with the mandates being returned to said 15th District Court on June 8, 1989; and the Texas Court of Criminal Appeals in cause numbers AP-70,995, AP-70,996, AP-70,997 and AP-70,998 having denied habeas corpus relief with the mandates being returned to said 15th District Court on February 14, 1992; and the Texas Court of Criminal Appeals in cause numbers WR-21,005-2, WR-21,005-3, WR-21,005-4 and WR-21,005-5 having denied habeas corpus relief June 11, 2014; and there being no other stays of execution in effect on this case, the court now enters the following ORDER:

IT IS HEREBY ORDERED that the defendant, LESTER LEROY BOWER, JR., who has been adjudged to be guilty of capital murder as charged in the indictment and whose punishment has been assessed by the verdict of the jury and judgment of the Court at Death, shall be kept in custody by the Director of the Texas Department of Criminal Justice -- Institutional Division, at Huntsville, Texas, until the 10th day of February, 2015, upon which day, at the Texas Department of Criminal Justice -- Institutional Division, at some hour after 6:00 p.m., in a room arranged for the purpose of execution, the said Director, acting by and through the executioner designated by said Director as provided by law, is hereby commanded, ordered and directed to carry out this sentence of death by intravenous injection of a substance or substances in a lethal quantity sufficient to cause the death of the said LESTER LEROY BOWER, JR. and until the said LESTER LEROY BOWER, JR. is dead, such procedure to be determined and supervised by the said Director of the Texas Department of Criminal Justice -- Institutional Division.

The Clerk of this Court shall issue and deliver to the Sheriff of Grayson County, Texas, a Death Warrant in accordance with this Order, directed to the Director of the Texas Department of Criminal Justice -- Institutional Division, at Huntsville, Texas, commanding him, the said Director, to put into execution the Judgement of Death against the said LESTER LEROY BOWER, JR..

The Sheriff of Grayson County, Texas is hereby ordered, upon said receipt of said Death Warrant, to deliver said Death Warrant to the Director of the Texas Department of Criminal Justice -- Institutional Division, Huntsville, Texas.

SIGNED AND ENTERED this 18 day of June

DISTRICT COURT GRAYSON COUNTY, TEXAS

20 14.

HON. JIM FALLON,
JUDGE PRESIDING
15TH JUDICIAL DISTRICT COURT
GRAYSON COUNTY, TEXAS

FILED FOR RECORD
2014 JUN 19 PM 1:26
KELLY ASHMORE
DISTRICT CLERK
GRAYSON, TX
BY

STATE OF TEXAS
COUNTY OF GRAYSON
I, Kelly Ashmore, District Clerk in and for Grayson County Texas, do hereby certify that the above and foregoing is a true and correct copy of the original document as the same appears on the file in the District Court, Grayson County, Texas. Witness my hand and seal of the Court, this the 19 day of Jan A.D., 20 15

KELLY ASHMORE, DISTRICT CLERK
GRAYSON COUNTY, TEXAS

DISTRICT COURT
GRAYSON COUNTY, TEXAS

# EXHIBIT 3

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

| | | |
|---|---|---|
| LESTER LEROY BOWER, JR., #000764 | § | |
| | § | |
| Petitioner, | § | |
| | § | |
| v. | § | CIVIL ACTION NO. 1:92cv182 |
| | § | |
| DIRECTOR, TDCJ-CID, | § | |
| | § | |
| Respondent. | § | |

MEMORANDUM OPINION AND ORDER
DENYING RELIEF FROM JUDGMENT

Petitioner Lester Leroy Bower, Jr., is a death row inmate confined in the Texas Department of Criminal Justice, Correctional Institutions Division. On September 6, 2002, the court denied his petition for a writ of habeas corpus challenging his conviction. Before the court at this time is Petitioner's emergency motion to vacate and set aside the judgment pursuant to Rule 60(b)(6) and a request for stay of execution. He is scheduled to be executed on February 10, 2015. For reasons set forth below, the court finds that the motion should be denied.

Background

On April 28, 1984, Petitioner was convicted and sentenced to death in the 15th Judicial District Court of Grayson County, Texas, for the murder of four individuals in connection with the theft of an ultralight aircraft. The conviction was affirmed on direct appeal. *Bower v. State*, 769 S.W.2d 887 (Tex. Crim. App.), *cert. denied*, 492 U.S. 927 (1989). Petitioner's first state application for a writ of habeas corpus was denied by the Texas Court of Criminal Appeals. *Ex parte Bower*, 823 S.W.2d 284 (Tex. Crim. App. 1991), *cert. denied*, 506 U.S. 835 (1992).

The present habeas corpus proceedings were begun in this court over twenty years ago on April 14, 1992. An evidentiary hearing was conducted over a five day period between June 12 and 16, 2000. The petition was denied on September 6, 2002. Petitioner was granted a certificate of appealability (COA) on his ineffective assistance of counsel and cumulative *Brady*[1] claims. He sought a COA on the remaining claims in his petition, which was denied by the Fifth Circuit. *Bower v. Dretke*, 145 F. App'x 879 (5th Cir. 2005), *cert. denied*, 546 U.S. 1140 (2006). The Fifth Circuit affirmed the decision of this court with respect to the ineffective assistance of counsel and *Brady* claims. *Bower v. Quarterman*, 497 F.3d 459 (5th Cir. 2007), *cert. denied*, 553 U.S. 1006 (2008).

The Fifth Circuit subsequently decided *Pierce v. Thaler*, 604 F.3d 197 (5th Cir. 2010). A finding was made that the statutory special issues presented at Pierce's sentencing did not give meaningful consideration and effect to all of his mitigating evidence, as required in *Penry v. Lynaugh*, 492 U.S. 302 (1989). The present Rule 60(b)(6) motion focuses on footnote 9 of the opinion:

> The State cites several cases from this circuit that cite *Graham*[2] for the proposition that "because 'the principal mitigating thrust of good character evidence is to show that the defendant acted atypically in committing the capital crime, *this evidence can find adequate expression under the second special issue.*'" *Bower v. Dretke*, 145 Fed. Appx. 879, 885 (5th Cir. 2005) (per curiam) (quoting *Barnard v. Collins*, 958 F.2d 634, 640 (5th Cir. 1992)); *see also Coble v. Dretke*, 417 F.3d 508, 525 (5th Cir. 2005) ("'Evidence of good character tends to show that the crime was an aberration, which may support a negative answer to the special issue regarding the future dangerousness of the defendant.'" (quoting *Boyd v. Johnson*, 167 F.3d 907, 912 (5th Cir. 1999)), *withdrawn and superseded on rehearing*, *Coble v. Quarterman*, 496 F.3d 430. But these cases predate *Abdul-Kabir*[3] and fail to recognize that *Graham*'s "some effect" language was dicta that the Supreme Court identified as such in *Abdul-Kabir* and this court has since similarly distinguished. *See Nelson*,[4] 472 F.3d at 298, 303.

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[1] *Brady v. Maryland*, 373 U.S. 83 (1963).

[2] *Graham v. Collins*, 506 U.S. 461 (1993).

[3] *Abdul-Kabir v. Quarterman*, 550 U.S. 233 (2007).

[4] *Nelson v. Quarterman*, 472 F.3d 287 (5th Cir. 2006).

*Pierce*, 604 F.3d at 210 n.9. Petitioner argues that the reference to the Fifth Circuit's decision in his case in footnote 9 stands for the proposition that the decisions regarding mitigating evidence issued by this court and the Fifth Circuit were incorrectly decided.

Petitioner raised his arguments based on *Pierce* in state court by filing a second application for a writ of habeas corpus. The state trial court recommended a new sentencing hearing. The Texas Court of Criminal Appeals, however, rejected the recommendation. *Ex parte Bower*, No. WR-21,005-02, 2014 WL 2601725 (Tex. Crim. App. June 11, 2014). Petitioner's *Pierce* arguments were presented in his third claim, wherein he alleged "that Article 37.071 operated unconstitutionally because his jury did not have a vehicle to properly consider mitigating evidence." *Id.* at *1. The Texas Court of Criminal Appeals rejected the claim as follows:

> We reject the trial court's findings and conclusions recommending relief on applicant's third claim. We have previously held that, unlike the double-edged evidence in *Penry v. Lynaugh*, the mitigating evidence presented by applicant during the punishment phase of his trial - evidence of his good and non-violent character, his good deeds, and the absence of a prior criminal record - was not outside the scope of the special issues. *Ex parte Bower*, 823 S.W.2d at 286. The promulgation of more recent case law by the United States Supreme Court has not changed the definition or nature of what is considered mitigating evidence; thus, applicant was not constitutionally entitled to a separate jury instruction at the punishment phase of trial.

*Id.* at *2. Petitioner then proceeded to file a petition for a writ of certiorari, which is pending at this time. In addition to the present motion, he has also filed a motion with the Fifth Circuit seeking authorization to file a second or successive federal habeas proceeding.

Applicable Legal Standards

Rule 60(b)(6) provides for relief from a judgment for "any . . . reason that justifies relief." This court can consider the motion if it "attacks, not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings." *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005). A "movant seeking relief under Rule 60(b)(6) [must] show

'extraordinary circumstances' justifying the reopening of a final judgment." *Id.* at 535 (citations omitted). "Such circumstances will rarely occur in the habeas context." *Id. See also Trottie v. Stephens*, 581 F. App'x 436, 438 (5th Cir. 2014).

Discussion and Analysis

In the present case, Petitioner is trying to persuade the court to reconsider its decision on the merits as to whether the jury had a vehicle to properly consider all of his mitigating evidence. The challenge to the court's decision is based on footnote 9 in *Pierce.*

The Director filed a response in opposition to the Rule 60(b) motion (docket entry #110) on January 20, 2015. He argues that the Rule 60(b)(6) motion is impermissibly late and that it amounts to an impermissible successive petition. He alternatively argues that the motion lacks merit.

Petitioner has filed a reply (docket entry #111) to the Director's response.

A. Timeliness

Rule 60(c)(1) requires that any motion brought under Rule 60(b) "be made within a reasonable time . . . ." *See Tamayo v. Stephens*, 740 F.3d 986, 991 (5th Cir. 2014) (holding that waiting eight months after relevant change in law to bring a 60(b) motion was not within a reasonable time). The present motion was filed more than twelve years after this court denied Petitioner's petition and more than nine years after the Fifth Circuit denied his request for a certificate of appealability. To the extent that the motion is based on *Pierce*, it should be noted that *Pierce* was decided in 2010 and the present motion was not filed until January 2015. Petitioner did not bring his motion "within a reasonable time," and he has not shown good cause for the delay. *See, e.g., In re Osborne*, 379 F.3d 277, 283 (5th Cir. 2004) ("Motions under Rule 60(b) must be made 'within a reasonable time,' unless good cause can be shown for the delay."). Therefore, the motion is untimely and should be denied.

B. Availability of Rule 60(b)(6) Relief

Timeliness notwithstanding, Petitioner's motion amounts to a disagreement with this court's analysis and resolution of his claims. He seeks to persuade the court to reconsider its decision on the merits regarding whether his jury had a vehicle to properly consider all of his mitigating evidence. As was previously noted, the Fifth Circuit denied his application for a certificate of appealability, thus finding that this court's resolution of the claim was correct. Petitioner's current motion in essence asks the court to overrule the Fifth Circuit's denial of his application for a certificate of appealability. This court lacks the authority to do so.

Moreover, Petitioner's motion attacks the substance of this court's resolution of his claim regarding whether the jury had an avenue to consider all of his mitigating evidence. As noted above, the Supreme Court has held that a court can entertain a motion under Rule 60(b) only if the motion "attacks, not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings." *Gonzalez*, 545 U.S. at 532. In his reply to the response, Petitioner erroneously argues that the court did not consider the substance of his claim, but the memorandum denying the petition clearly considered the claim and the impact of *Penry* (docket entry #93, pages 49-50). In both the present motion and his reply to the Director's response, Petitioner repeatedly argues that footnote 9 in *Pierce* supports his claim that this court's legal analysis was wrong. Petitioner's argument clearly goes directly to "the substance of [this] court's resolution [of Petitioner's habeas petition] on the merits . . ." *Gonzalez*, 545 U.S. at 532. Relief is thus unavailable.

Petitioner also argues that extraordinary circumstances exist entitling him to relief under Rule 60(b)(6). His arguments are based on changes in decisional law. The Fifth Circuit has specifically found that "[u]nder our precedents, changes in decisional law . . . do not constitute the 'extraordinary circumstances' required for granting Rule 60(b)(6) relief." *Hess v. Cockrell*, 281 F.3d 212, 216 (5th

Cir. 2002). *See also In re Paredes*, ____ F. App'x ____, 2014 WL 5420533, at *5 (5th Cir. Oct. 25, 2014). Most recently, the Fifth Circuit reiterated that a "Rule 60(b) motion is not a proper mechanism to re-litigate the merits of [previously litigated claims] and surely not a proper vehicle for doing so when the judgment from which [a petitioner] seeks relief has been confirmed on appeal." *Trottie*, 581 F. App'x at 439. *See also Hall v. Stephens*, 579 F. App'x 282, 283 (5th Cir. 2014) (same); *Adams v. Thaler*, 679 F.3d 312, 319 (5th Cir. 2012) (recognizing that a Rule 60(b) motion is proper only to challenge a procedural, not a substantive error). Petitioner discussed several additional equitable factors in an effort to demonstrate extraordinary circumstances, but the Fifth Circuit rejected such arguments in the context of a Rule 60(b)(6) motion based on mere changes in decisional law. *Diaz v. Stephens*, 731 F.3d 370, 376-79 (5th Cir. 2013). Petitioner has not demonstrated extraordinary circumstances entitling him to relief under Rule 60(b)(6).

C. Stay of Execution

Petitioner also requests a stay of execution. He is scheduled for execution on February 10, 2015. A stay is an equitable remedy. *Nelson v. Campbell*, 541 U.S. 637, 649 (2004). Because he plainly is not entitled to relief on his Rule 60 motion, and no stay is necessary to allow time to adjudicate that motion, Petitioner's request for a stay of execution is denied. *See Trottie*, 581 F. App'x at 440.

Conclusion and Order

Petitioner seeks to relitigate, on the eve of his execution, claims denied by this court over twelve years ago and by the Fifth Circuit more than nine years ago. His motion is untimely under the facts and circumstance of the case, and he fails to demonstrate grounds for relief under Rule 60(b)(6). It is accordingly

**ORDERED** that Petitioner's emergency motion to vacate and set aside the judgment pursuant to Rule 60(b)(6) and request for stay of execution (docket entry #108) is **DENIED**. It is further

**ORDERED** that a certificate of appealability is **DENIED**. It is finally

**ORDERED** that all motions not previously ruled on are **DENIED**.

**SIGNED this the 22nd day of January, 2015.**

Richard A. Schell

RICHARD A. SCHELL
UNITED STATES DISTRICT JUDGE