No. 14-292

In the Supreme Court of the United States

LESTER LEROY BOWER,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

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

BRIEF IN OPPOSITION TO MOTION FOR STAY OF EXECUTION

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BRIEF IN OPPOSITION TO APPLICATION FOR STAY OF EXECUTION

Petitioner Lester Leroy Bower is scheduled to be executed after 6:00 p.m., on Tuesday, February 10, 2015, following his conviction almost thirty-one years ago for the quadruple homicide of Bobby Tate, Philip Good, Ronald Mayes, and Jerry Brown. 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 an ultralight aircraft, and the four victims were to meet with a potential buyer of the ultralight 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 materials used to construct 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 likely 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, forensic testing failed to exculpate Bower, and the Texas Court of Criminal Appeals (CCA) refused to grant relief. Bower has now challenged the CCA's decision denying his successive state habeas application with a petition for a writ of certiorari.[1]

Yet, as shown more fully in the State's brief in opposition in this cause, Bower fails to demonstrate any compelling reason for granting certiorari review of the state habeas court's decision. Sup. Ct. R. 10 (West 2011).

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[1] A mere month before his execution, Bower asked the federal district court for relief from its 2002 judgment with a motion for relief from the judgment under Federal Rule of Civil Procedure 60(b)(6). Bower's Rule 60(b) motion raised the same *Penry I* claim presented in his instant petition for a writ of certiorari. The district court rejected Bower's motion and properly refused to grant any certificate of appealability (COA). Following the district court's denial of his motion, Bower filed a request for the Fifth Circuit to grant its own COA so that he could pursue his claims further. *Bower v. Stephens*, No. 15-70003. This request remains pending before the court of appeals, as does a motion for authorization to file a successive habeas petition raising the same *Penry I* claim. *In re Lester Leroy Bower*, No. 15-40032.

Concerning Bower's *Penry I*[2] claim, his good-character evidence could be considered under the pre-1991 special issues. *See* Brief in Opposition at 18-23. This position is supported by the state and federal courts' repeated and categorical denials of Bower's *Penry I* claim on the merits (as acknowledged by Bower). *See* Motion for Stay at 4. Bower's petition for certiorari and the instant motion for a stay argue that a footnote in the Fifth Circuit's 2010 *Pierce*[3] decision demonstrate that his case was decided wrongly. But the *Pierce* footnote merely suggests that Bower's case is distinguishable from Pierce's because it pre-dates *Abdul-Kabir*.[4] Indeed, the Court's decision in Bower's case is fully compatible with *Abdul-Kabir*[5] and *Brewer*[6] and easily distinguishable from *Pierce*. *Abdul-Kabir* and *Brewer* require (among other things) that a capital-sentencing jury be allowed to give full effect to difficult and traumatic upbringings like the one presented in *Pierce*. Bower did not have a troubled childhood and only sought to provide good-character evidence whose import

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

3 *Pierce v. Thaler*, 604 F.3d 197 (5th Cir. 2010).

4 Even if Bower's argument were correct, the Pierce court had no authority to overrule the decision in Bower's case. Absent an intervening change in the law, one panel of the Fifth Circuit may not overrule or disregard another panel's decision. *See, e.g.*, *In re Pilgrim's Pride Corp.*, 690 F.3d 650, 663 (5th Cir. 2012).

5 *Abdul-Kabir v. Quarterman*, 550 U.S. 233 (2007).

6 *Brewer v. Quarterman*, 550 U.S. 286 (2007).

was fully captured by the special issues under *Abdul-Kabir* and *Brewer*. Moreover, the Court has already previously refused to grant certiorari on Bower's *Penry I* issue even following its decisions in *Abdul-Kabir* and *Brewer*.

As with his *Penry I* claim, Bower raised a substantially similar *Brady*[7] claim during federal habeas review. The Fifth Circuit rejected it on the merits. *Bower v. Quarterman*, 497 F.3d 459, 476-77 (5th Cir. 2007). Bower challenged this decision in his petition for certiorari—alleging that the court of appeals employed an improper standard—and this Court declined to review it. *Bower v. Quarterman*, No. 07-8315 (Petition for Certiorari at 37-40); *Bower v. Quarterman*, 553 U.S. 1006 (2008). As explained earlier, the trial court's most recent findings (although not adopted by the CCA) noted that the allegedly withheld evidence was available to Bower at the time of trial. 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 to investigators.

Finally, Bower's claim that his execution after thirty-plus years on death row constitutes cruel and unusual punishment is foreclosed by an independent

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

and adequate state procedural bar. Additionally, this Court has rejected similar requests for certiorari in the past and the vast balance of state and federal precedent on this issue is against Bower. *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). Furthermore, Bower has consistently litigated his case without stop over the last thirty years. Any delay is purely of his own making.

Bower fails show any reasonable probability that his underlying claims are sufficiently meritorious to warrant a stay of execution. Accordingly, the Court should deny Bower's instant motion for a stay.

REASONS FOR DENYING THE STAY

A stay of execution is an equitable remedy. *Hill v. McDonough*, 547 U.S. 573, 584 (2006). "It is not available as a matter of right, and equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Id. (citing Nelson v. Campbell*, 541 U.S. 637, 649-50 (2004)). It is well-established that petitioners on death row must show a "reasonable probability" that the underlying issue is "sufficiently meritorious" to warrant a stay and that failure to grant the stay would result in "irreparable harm." *Barefoot v. Estelle*, 463 U.S. 880, 895

(1983), superseded on other grounds by 28 U.S.C. § 2253(c)(2). Indeed, "[a]pplications for stays of death sentences are expected to contain the information and materials necessary to make a careful assessment of the merits of the issue and so reliably to determine whether plenary review and a stay are warranted." *Id*. In order to demonstrate an entitlement to a stay, a petitioner must demonstrate more than "the absence of frivolity" or "good faith" on the part of petitioner. *Id*. at 892-93. Rather, the petitioner must make a substantial showing of the denial of a federal right. *Id*. In a capital case, a court may properly consider the nature of the penalty in deciding whether to grant a stay, but "the severity of the penalty does not in itself suffice." *Id*. at 893.

Bower has relentlessly litigated his case over *thirty years*, raising meritless claim after meritless claim, unnecessarily delaying justice for the four families of the men that Bower slaughtered in cold blood. Bower's motion for a stay alleges that he is actually innocent of the crime of conviction, claiming that there is a substantial lingering doubt as to his guilt. *See* Motion for a Stay at 8-9. But every court that has looked at Bower's claims have emphatically disagreed with him. No court has ever accepted or given any credence to Bower's fanciful theories that other individuals committed the quadruple murder, despite multiple reviews on the merits. No court has adopted as true the facts set forth in his motion for stay. *Id*.

Indeed, the CCA's most recent decision summarily denied Bower's latest innocence claim after DNA testing failed to exculpate him. *Ex parte Bower*, Nos. 21,005-02, -03, 04, 05 slip op. at 3. On direct appeal, the CCA denied Bower's challenge to the sufficiency of the evidence. *Bower v. State*, 769 S.W.2d 887, 888-94 (Tex. Crim. App. 1989). And when denying an expanded COA, the Fifth Circuit found that "the evidence against Bower was simply overwhelming." *Bower v. Dretke*, 145 F. App'x 879, 884 (5th Cir. 2005) (unpublished) (per curiam).

> . . . [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.

As noted in the State's brief in opposition, Bower has maintained 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.[8] Yet the district court previously found "[Bower]'s 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 (E.D. Tex. 2002) (unpublished order of Sept. 6, 2002) (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[9] 34, 45-

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[8] 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 "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.

[9] "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 where applicable.

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.

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.[10]

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

[10] 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; Petitioner's Appendix 8-9, 45-49, 69-70.

it in a field rather than simply sell it.[11] 4 SHRR-02 46, 63. Finally, Bower's story detailing the convenient loss of his .22 pistol while camping strains credulity. 4 SHRR-02 55-56. Bower's actual-innocence claim—a claim that he has not offered as an independent basis for review—is therefore unsupported by the evidence.

In fact, Bower fails to advance any valid claim for relief. Therefore, a stay of execution is unwarranted, and his request should be denied. The State acknowledges that the harm to Bower would be irreparable should the Court refuse to grant the stay. But there is simply no reasonable probability that the Court will grant certiorari, let alone reverse the prior rulings of the state habeas court and grant Bower's state application for a writ of habeas corpus.[12] The State's strong interest in the timely enforcement of a sentence is therefore not outweighed by the ever more unlikely possibility that habeas relief will be granted. Bower's claims are nothing more than a meritless attempt to postpone his execution. The families of the victims of Bower's quadruple murder have been waiting to see Bower's sentence carried out for over thirty years now.

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[11] "[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.

[12] Again, the CCA, district court, and the Fifth Circuit have already denied relief on the merits of Bower's *Penry I* claim, and this Court has previously denied certiorari review. The courts have also already denied a substantially similar *Brady* claim, with this Court likewise denying certiorari review.

Under these circumstances, a stay of execution would be inappropriate, and Bower's motion should be denied.

CONCLUSION

For the foregoing reasons, as well as those asserted in the State's brief in opposition to Bower's petition for a writ of certiorari, Bower's request for a stay of execution should be denied.

Respectfully submitted,

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