

No. \_\_\_\_\_

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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RAIS BHUIYAN,  
Plaintiff-Appellant,

v.

RICK PERRY, Governor, State of Texas;

BRAD LIVINGSTON, Executive Director,  
Texas Department of Criminal Justice;

ANGIE McCOWN, Director, Texas Department of  
Criminal Justice, Victim Services Division; and

RISSIE OWENS, Member, Texas Board of Pardons and Paroles,

Defendant-Appellees.

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On Appeal from the United States District Court  
For the Western District of Texas, Austin Division

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**BRIEF OF DEFENDANT-APPELLEES**

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Mark Anthony Stroman was tried, convicted, and sentenced to death for the October 4, 2001, capital murder of Vasudev Patel during the course of a convenience-store robbery in Mesquite, Texas. Nearly a decade later, the 292nd District Court of Dallas County scheduled Stroman's execution for Wednesday, July 20, 2011. A few days before the scheduled date, Plaintiff-Appellee Rais Bhuiyan,<sup>1</sup> an extraneous offense victim who suffered gunshot wounds during Stroman's crime spree, moved for injunctive relief under 42 U.S.C. § 1983 seeking to stay Stroman's impending execution in order that the two might now engage in victim-offender mediation. The district court, the Honorable United States District Judge Lee Yeakel presiding, denied Bhuiyan's motion on July 20th and Bhuiyan's appeal followed.

### STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1292(a)(1) and 5th Cir. R. 8. *See, e.g., Faulder v. Texas Bd. of Pardons & Paroles*, 178 F.3d 343, 344 (5th Cir. 1999).

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<sup>1</sup>

Defendant-Appellants Rick Perry, *et al.*, will be collectively referred to as "the Defendants."

## STATEMENT OF THE CASE

On Thursday, July 14, 2011, Bhuiyan filed his lawsuit in the 353rd District Court of Travis County, Texas, raising various state and federal claims centered around his desire to participate in victim-offender mediation with Stroman and to stay his execution. *Bhuiyan v. Perry, et al.*, No. D-1-GN-11-002118. The cause was removed to federal court on Monday, July 18. *Id.*, No. 1:11-cv-00603-LY (W.D. Tex.). The lower court held a hearing on July 20th and subsequently issued an order denying injunctive relief.

The factual and procedural history of Stroman's capital murder conviction and subsequent appeals is set forth elsewhere and will not be repeated here. *See Stroman v. Quarterman*, No. 3:05-cv-1616 (N.D. Tex. 2009) (unpublished order); *Stroman v. Thaler*, 405 Fed.Appx. 933 (5th Cir. 2010). Notably, Stroman sought a writ of habeas corpus and a stay of execution on the same grounds as Bhuiyan in the Texas Court of Criminal Appeals and in this Court, and was denied relief. *Ex parte Stroman*, No. 62,298-02 (Tex. Crim. App. July 14, 2011) (unpublished order), *pet. for cert. filed* (July 18) (No. 11-5320); *In re Stroman*, No. 11-10659 (5th Cir. July 15, 2011) (unpublished order).

## STATEMENT OF RELEVANT FACTS

Stroman shot Bhuiyan in 2001. Prior to Stroman's capital murder trial, Bhuiyan completed and signed a Victim Impact Statement on December 16, 2001, expressing his wish not to have any contact with Stroman. In July 2002, Bhuiyan was provided information regarding victims' services and victim-offender mediation by the Texas Department of Criminal Justice (TDCJ). This information contained a pamphlet explaining his rights as a victim under Texas law. Further, as a victim of one of Stroman's crimes, Bhuiyan received notice approximately four months ago in March 2011 that Stroman's execution date had been scheduled for today. By his own admission, Bhuiyan never requested that TDCJ arrange mediation between himself and Stroman until June 2011.

## ARGUMENT

### **I. The Lower Court Properly Denied Relief for Lack of Jurisdiction.**

Bhuiyan's civil action is based on several theories, including 42 U.S.C. § 1983. This Court has repeatedly and consistently held that federal courts lack jurisdiction under §1983 to stay executions. *Beets v Texas Board of Pardons & Paroles*, 205 F.3d 192, 193 (5th Cir. 2000);

*Faulder v. Johnson*, 178 F.3d 741 (5th Cir. 1999); *Moody v. Rodriguez*, 164F.3d 893 (5th Cir. 1999). Indeed, the Anti-Injunction Act—28 U.S.C. § 2283—specifically bars federal courts from enjoining state-court proceedings unless the intervention is authorized expressly by federal statute. *McFarland v. Scott*, 512 U.S. 849, 857 (1994). The only statutory authority for a federal court to stay an execution comes from the federal habeas corpus statute which “grants any federal judge ‘before whom a habeas corpus proceeding is pending’ power to stay a state-court action for any matter involved in the habeas corpus proceeding.” *Id.* (quoting 28 U.S.C. § 2251); *see also Rosales v. Quarterman*, 565 F.3d 308, 311 (5th Cir. 2009). If, as here, no habeas petition is pending in the federal courts then “both the district court and [the circuit] court are without jurisdiction to enter a stay of execution.” *Rosales*, 565 F.3d at 311.

## **II. The Lower Court Properly Denied Injunctive Relief Because Bhuiyan Lacked Standing.**

Standing is “an essential and unchanging part of the case-or-controversy requirement of Article III.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). To establish standing, “a plaintiff must

present an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant's challenged action; and redressable by a favorable ruling. [T]he critical question is whether [the] petitioner has alleged such a personal stake in the outcome of the controversy as to warrant his invocation of federal court jurisdiction.” *Horne v. Flores*, 129 S. Ct. 2579, 2592 (2009) (citing *Lujan*, 504 U.S. at 560-61). Here, Bhuiyan's requested relief seeks to alter the status quo by delaying a scheduled execution at a time when the condemned criminal has exhausted all of his own appeals over many years. Bhuiyan's claims have never been acknowledged or recognized as grounds to delay a lawful execution. Bhuiyan's injury, therefore, is not particularized nor is it concrete.

In addition, the “harm” alleged by Bhuiyan, which is the scheduled execution of Stroman, was determined by the 292nd District Court of Dallas County, which is not and cannot be made a party to this case. Bhuiyan had no standing to intervene in the criminal case against Stroman adjudicated by the 292nd District Court of Dallas County. The conviction and sentence of execution was not determined nor imposed by any of the named defendants to this suit. The alleged harm,

therefore, has been caused by a third party and the Defendants are not the “cause” of Bhuiyan’s alleged harm and injury.

The Supreme Court specifically found that where the condemned convict has access to the courts which is entirely unimpeded “a third party has no standing to litigate an Eighth Amendment claim or indeed any other claim on his behalf.” *Gilmore v. Utah*, 429 U.S. 1012, 1017 (1976) (Stevens, J., concurring). Bhuiyan’s attempt to show that he would suffer harm to his own religious beliefs in order to obtain a stay of Stroman’s execution directly benefits Stroman and subverts the standing requirement with regard to persons who may intervene on behalf of a defendant facing execution. It is well settled that victims, like Bhuiyan, lack standing to challenge a criminal sentence. *McClure v. Ashcroft*, 335 F.3d 404, 412 (5th Cir. 2003) (citing *United States v. Mindel*, 80 F.3d 394 (9th Cir. 1996) (beneficiary of criminal restitution order has no standing to challenge modification of sentence to rescind restitution order); *United States v. Johnson*, 983 F.2d 216 (11th Cir. 1993) (beneficiary of criminal restitution order has no standing to challenge revocation of probation when restitution not paid); *United States v. Kelley*, 997 F.2d 806, 807-08 (10th Cir. 1993) (victim has no

standing to appeal denial of motion to intervene in criminal proceeding); *United States v. Grundhoefer*, 916 F.2d 788, 791 (2nd Cir. 1990) (“[t]he direct, distinct, and palpable injury in a criminal proceeding plainly falls only on the defendant who is being sentenced”); *see also Gilmore*, 429 U.S. at 1012-17. (majority held defendant knowingly and intelligently waived all federal rights to challenge conviction and did not address standing; Burger, C.J., and Powell, J., concurring, opined that defendant’s mother lacked standing to seek a stay of execution for her son). The lower court thus properly denied injunctive relief because Bhuiyan had no standing to seek a stay of Stroman’s execution regardless of the statutory or other legal theories he asserts to demonstrate harm.

Additionally, Bhuiyan had no standing to sue under state law. Tex. Code Crim. Proc. Art. 56.02(a)(12) and 56.13 provide:

**Art. 56.02. Crime victims’ rights**

- (a) A victim, guardian of a victim, or close relative of a deceased victim is entitled to the following rights within the criminal justice system:

\* \* \*

- (12) the right to request victim-offender mediation



coordinated by the victim services division of the Texas Department of Criminal Justice.

**Art. 56.13. Victim-Offender Mediation**

The victim services division of the Texas Department of Criminal Justice shall:

- (1) train volunteers to act as mediators between victims, guardians of victims, and close relatives of deceased victims and offenders whose criminal conduct caused bodily injury or death to victims; and
- (2) provide mediation services through referral of a trained volunteer, if requested by a victim, guardian of a victim, or close relative of a deceased victim.

Although Art. 56.13 suggests that TDCJ “shall . . . provide mediation services” as described in Art. 56.02, it is undeniable that a crime victim such as Bhuiyan has a right to *request* victim-offender mediation; he does not have a right to actually *participate* in victim-offender mediation. In any case, the “right” is essentially symbolic where Art. 56.02(d) effectively eliminates any recourse in the event the “right” is denied.

**Art. 56.02. Crime victims’ rights**

- (d) A judge, attorney for the state, peace officer, or law enforcement agency is not liable for a failure or inability to provide a right enumerated in this article. The failure or inability of any person to provide a right or service

enumerated in this article may not be used by a defendant in a criminal case as a ground for appeal, a ground to set aside the conviction or sentence, or a ground in a habeas corpus petition. A victim, guardian of a victim, or close relative of a deceased victim does not have standing to participate as a party in a criminal proceeding or to contest the disposition of any charge.

The Fourteenth Court of Appeals of Texas considered the scope of the foregoing provisions and held that:

The statute clearly provides [the victims] may not be parties to a criminal proceeding and they may not challenge the disposition of the defendant's case. In addition, if non-compliance with victim impact statement provisions does not provide a ground for a defendant to set aside his sentence, such non-compliance surely provides no ground for the victims to challenge the sentence.

*In re State ex rel. Sistrunk*, 142 S.W.3d 497, 502 (Tex. App.—Houston [14 Dist.], 2004, no pet.) (citing Tex. Code Crim. Proc. Art. 56.02(d) and Art. 26.13(f)). The court of appeals further wrote that:

The [family members] recognize that the law does not provide a remedy for victims when their rights are violated. They concede in their response to this petition that “[The trial court's order] to set a hearing on July 2, 2004, was not sanctioned within the Rules of Appellate Procedure and the Code of Criminal Procedure; however, the family feels that a hearing, whether ordered by this Court or the trial court, would be an appropriate measure.” Neither this court nor the trial court have the power to order such a hearing.

*Id.* at 503.

If adopted, the remedy sought by Bhuiyan would turn the criminal justice system on its head. As the El Paso Court of Appeals noted, “We concur with the State’s suggestion of the symbolic and substantive importance of the Crime Victims’ Bill of Rights. We agree that its philosophical direction is essential to restoring and maintaining the public’s faith in the criminal justice system. The introductory phrase of Article 56.02(a), however, states that the enumerated victims’ rights are to be effectuated ‘*within* the criminal justice system,’ not by superseding or overriding it.” *Jimenez v. State*, 787 S.W.2d 516, 523 (Tex. App.–El Paso 1990) (emphasis in original).

In sum, Bhuiyan has no right and no remedy under Art. 56.02 to obtain injunctive relief or a stay of Stroman’s execution. He therefore had no standing to bring this suit. *M.D. Anderson Cancer Ctr. v. Novak*, 52 S.W.3d 704, 710-11 (Tex. 2001). Because standing is a component of subject-matter jurisdiction, a plaintiff’s lack of standing deprives the court of jurisdiction over the claims asserted in plaintiff’s petition. *See Texas Ass’n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 443 (Tex. 1993). The Court should therefore affirm the district court’s decision denying injunctive relief.

### III. The Lower Court Properly Denied Relief Because Bhuiyan Waited Too Long to Bring His Claims.

Even if the district court or any other court had authority to grant Bhuiyan's request to stay Stroman's execution, Bhuyain was never entitled to equitable relief because his request was dilatory.

Bhuiyan expressed his wish not to have any contact with Stroman in 2001 when he completed and signed a Victim Impact Statement. In July 2002, Bhuiyan received information from TDCJ about victim-offender mediation. Also, as a victim of one of Stroman's crimes, Bhuiyan received notice of the scheduled execution approximately four months ago in March 2011 and, inexplicably, did not act to start the victim mediation process if that was his need. Because Bhuiyan waited until Stroman's execution was imminent before seeking relief, Circuit and Supreme Court precedent compels that his suit be dismissed and equitable relief be denied. *See Harris v. Johnson*, 376 F.3d 414, 417 (5th Cir. 2004) (noting that where prisoner waited years on death row but sought relief 10 weeks before execution, prisoner's real goal was not to change method of execution but to delay execution).

Furthermore, where a litigant waits until an execution is

imminent before seeking a remedy, relief is precluded. *See Gomez v. U.S. Dist. Ct. for the N.D. Calif.*, 503 U.S. 653, 654 (1992) (precluding equitable relief for inmate who waited until his execution was imminent before suing to enjoin the State’s method of carrying it out); *Harris*, 376 F.3d at 417. In deciding whether to grant equitable relief, a court may consider the last minute nature of an application. *Gomez*, 503 U.S. at 654. To hold otherwise would allow litigants to delay an execution indefinitely by filing a succession of requests for injunctive relief mere days before an execution. Before enjoining an execution, a federal court must “give substantial weight to any adverse impact” such an injunction would have on the “operation of a criminal justice system.” 18 U.S.C. § 3626(a)(1) (quoted in *Nelson v. Campbell*, 541 U.S. 637, 649 (2004)). This Court must consider the effect on not only the State’s interest in this particular case, but also on the criminal justice system as a whole. In this case, to entertain Bhuiyan’s complaint would reward late filers and create a perpetual motion machine of last-minute attempts to stay executions.

## CONCLUSION

For the foregoing reasons, the Court should affirm the district court's order denying injunctive relief and deny any request for a stay .

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that on July 20, 2011, I electronically filed this Brief of Defendant-Appellees with the Clerk of the Court using the CM/ECF Document Filing System. I further certify that on the same date, a copy was emailed to counsel for Plaintiff-Appellant and served on all registered CM/ECF filing users, via the Court's electronic Notice of Docket Activity:

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## ELECTRONIC CASE FILING CERTIFICATIONS

I do hereby certify that: (1) all required privacy redactions have been made; (2) this electronic submission is an exact copy of the paper document; and (3) this document has been scanned using the most recent version of a commercial virus scanning program and is free of viruses.

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