CASE NO. 23-5421 (CAPITAL CASE)

IN THE SUPREME COURT OF THE UNITED STATES

BRENT BREWER,
Petitioner,

v.

BOBBY LUMPKIN, DIRECTOR,
Respondent.

APPLICATION FOR A STAY OF EXECUTION

EXECUTION SCHEDULED FOR AFTER
7:00 P.M. EASTERN TIME, THURSDAY NOVEMBER 9, 2023

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To the Honorable Samuel A. Alito, Jr., Associate Justice of the Supreme Court of the United States and Circuit Justice for the Fifth Circuit:

The State of Texas has scheduled the execution of Brent Brewer for November 9, 2023. Mr. Brewer respectfully requests a stay of execution pending consideration and disposition of the Petition for Rehearing filed along with this Application.

STANDARDS FOR A STAY OF EXECUTION

Mr. Brewer respectfully requests that this Court stay his execution, pursuant to Supreme Court Rule 23 and 28 U.S.C. § 2101(f), pending consideration of his concurrently filed Petition for Rehearing. *See Barefoot v. Estelle*, 463 U.S. 880, 889 (1983) ("Approving the execution of a defendant before his [petition] is decided on the merits would clearly be improper."); *see also Lonchar v. Thomas*, 517 U.S. 314, 320 (1996) (court may stay execution if needed to resolve issues raised in initial petition).

The standards for granting a stay of execution are well established. Relevant considerations include the prisoner's likelihood of success on the merits, the relative harm to the parties, the extent to which the prisoner has unnecessarily delayed his or her claims, and the public interest. *See Hill v. McDonough*, 547 U.S. 573, 584 (2006); *Nelson v. Campbell*, 541 U.S. 637, 649–50 (2004); *Barefoot*, 463 U.S. at 895. All four factors weigh in Mr. Brewer's favor.

PETITIONER SHOULD BE GRANTED A STAY OF EXECUTION

1. Petitioner is likely to succeed on the merits.

In his initial habeas petition, Mr. Brewer raised a substantial claim of constitutional error – trial counsel's failure to object to the State's introduction of and reliance on false and discredited expert testimony about future dangerousness. The expert was, of course, wrong. Mr. Brewer's record of thirty-four years of imprisonment shows no violent, assaultive, or threatening behavior. He has never been a danger. The State's expert lied and declared, without any scientific basis, that Mr. Brewer had no conscience and would be a future danger.

But that reality did not sway the state courts, and was ignored by the federal habeas court. Although one state court judge was persuaded that Mr. Brewer should be granted relief, the Fifth Circuit refused to even review the claim on the merits, denying a request for a COA, which allows his execution to proceed on Thursday without any federal appellate review of a potentially meritorious claim that goes directly to the imposition of the death penalty. All Mr. Brewer asks for, in this still initial habeas corpus proceeding, is the opportunity for full appellate consideration of his claim.

As set forth in Mr. Brewer's Petition for Rehearing, rehearing should be granted because courts are divided on whether a state court dissent indicates that a certificate of appealability should be granted, and because the equities of the extraordinary circumstances favor Mr. Brewer. Rehearing is appropriate under Rule 44.2 owing to (1) the Texas Board of Pardons and Paroles' decision earlier this

afternoon not to recommend that the Governor grant clemency – a failure of the judicial system's "fail safe" – which is an intervening circumstance of substantial effect; and (2) Mr. Brewer's presentation of many more circuit and district court decisions granting COA solely because a state court dissent on an issue indicates debate among jurists of reason, which are substantial grounds not previously presented.

2. Petitioner has been timely and diligent in his litigation.

This Court has observed that "[l]ast-minute stays should be the extreme exception, not the norm" *Bucklew v. Precythe*, 139 S. Ct. 1112, 1134 (2019). But the Petition for Rehearing is not a last-minute successor petition filed long after the initial denial of habeas corpus relief. Rather, Mr. Brewer's Petition for Rehearing is merely the end of his initial habeas proceedings challenging his 2009 sentence of death. The State rushed to seek an execution date for Mr. Brewer even before he had filed his Petition for Writ of Certiorari with this Court, and now Mr. Brewer is scheduled to be executed on November 9, fifteen days before the time allowed for filing a petition for rehearing under Rule 44 has even elapsed.

3. Petitioner will be irreparably harmed if a stay is not granted.

Mr. Brewer's execution will cause irreparable harm. Irreparable injury "is necessarily present in capital cases." *Wainwright v. Booker*, 473 U.S. 935, 935 n.1 (1985).

4. The public interest weighs in favor of granting a stay.

As the Petition for Rehearing describes in detail, the unresolved question of whether state court dissent indicates that a certificate of appealability should be granted is an issue of significant public importance. Moreover, the merits of the underlying claim also weigh in favor of granting a stay. Texas courts have repudiated Dr. Coons' unreliable and unscientific testimony in capital cases – but too late, in their view, for Mr. Brewer. Mr. Brewer recognizes that the State has an interest in protecting the finality of its judgments. But the State has no legitimate interest in the execution of someone whose death sentence is predicated on scientifically unreliable and inadmissible expert testimony. In light of these issues, the public interest weighs in favor of granting a stay.

FOR THE FOREGOING REASONS, and those set forth in the Petition for Rehearing, Petitioner respectfully requests that his Application for a Stay of Execution be granted.

CONCLUSION

For these reasons and those stated in his Petition for Rehearing, Applicant respectfully requests that his Application for a Stay of Execution be granted.

Respectfully submitted,

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Dated: November 7, 2023