NOS. 23-5617 & 23A254
CAPITAL CASE

IN THE
Supreme Court of the United States

ANTHONY CASTILLO SANCHEZ,
Petitioner,

v.

CHRISTE QUICK, Warden,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

COMBINED BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND RESPONSE IN OPPOSITION TO APPLICATION FOR STAY OF EXECUTION

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Execution Scheduled for September 21st, 2023 at 10:00 a.m. CDT

CAPITAL CASE
EXECUTION SET: SEPTEMBER 21, 2023, AT 10:00 A.M. CST[1]
Nos. 23–5617 & 23A254

QUESTION PRESENTED

Whether this Court should stay an execution on the day before it is scheduled to occur so that Petitioner's new attorney can re-investigate this long-final case as if Petitioner was just arrested?

[1] Petitioner incorrectly states the time of the execution as 10:30 a.m.

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CAPITAL CASE
EXECUTION SET: SEPTEMBER 21, 2023, AT 10:00 A.M. CDT
Nos. 23–5617 & 23A254

COMBINED BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND RESPONSE IN OPPOSITION TO APPLICATION FOR STAY OF EXECUTION

The State of Oklahoma respectfully urges this Court to deny Petitioner Anthony Castillo Sanchez's Petition for Writ of Certiorari to review the United States Court of Appeals for the Tenth Circuit's order entered in this case on September 19, 2023, and to deny the application for a stay of execution presented to this Court on September 20, 2023. *Sanchez v. Quick*, Order and Judgment, Case No. 23-6132 (10th Cir. Sept. 19, 2023) (unpublished).[1] Pet. App'x at unnum. 4-23.

STATEMENT OF THE CASE

A. Factual Background.

Petitioner has filed this petition for *certiorari* review on the eve of his execution for the brutal murder of Juli Busken nearly thirty years ago. The Oklahoma Court of Criminal Appeals ("OCCA") set forth the following facts in its opinion on direct appeal:[2]

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[1] This case was consolidated with Petitioner's motion to file a second or successive habeas petition pursuant to 28 U.S.C. § 2244(b) and motion for a stay of execution pending the resolution of the proposed second habeas petition, captioned *In re: ANTHONY CASTILLO SANCHEZ*, No. 23-6137 (10th Cir.). The Tenth Circuit's denial of Petitioner's § 2244(b) motion "shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari." 28 U.S.C. § 2244(b)(3)(E).

[2] Excerpts of this opinion are heavily edited to omit unnecessary information for the sake of brevity.

Around 5:30 a.m., back at the Dublin West apartments where [Juli] Busken lived, at least three people heard a woman scream in terror. . . . Jackie Evans lived across the parking lot from Ms. Busken. She also heard a woman's scream, and a man saying "just shut up and get in the car." Ms. Evans described a car door opening, then closing, the sound of footsteps, and another car door opening and closing. She then heard the car start and quickly drive away. . . .

. . .

Ms. Busken's body was clothed when she was found, but her jeans were unbuttoned and unzipped, and her underwear was partially rolled down her thighs. . . . Crime scene technicians recovered a possible pubic hair from her stomach when she was turned over. Investigators could see Ms. Busken had been shot in the head.

. . . Several oval shaped bruises were seen on her inner thigh. She was also bruised in a small area near the labia, and a small scrape was found in the perianal region. Fecal matter was smeared in an area on her buttocks. . . . The Medical Examiner recovered the fatal bullet, later identified by caliber as .22 Long Rifle. Subsequent ballistics analysis showed the barrel of the weapon that fired the fatal bullet marked it with sixteen lands and grooves and a right-hand twist.

Police recovered several items of evidence from the crime scene at Lake Stanley Draper, including a discarded pink leotard bearing the initials "JB," wiped with apparent fecal matter. A tissue smeared with apparent fecal matter was also recovered. Investigators could see two sets of footprints leading to the water's edge, and one set leading away, which they marked and photographed. From multiple cuttings of Ms. Busken's garments, the anal swab obtained from the body, and a pair of pajama bottoms recovered from Ms. Busken's vehicle, criminalists later identified the presence of human spermatozoa. Criminalists eventually used the genetic material recovered from Ms. Busken's panties and the pink "JB" leotard to develop the DNA profile of an unknown suspect.

Sightings of Juli Busken and her abductor reported by other witnesses narrowed the timeframe within which Ms. Busken was kidnapped and killed. Janice Keller saw a small red car like Juli Busken's near Lake Stanley Draper between 6:45 and 7:00 a.m. on the morning of December 20, 1996. Keller saw a young man, she approximated between age twenty-five and thirty, driving the car. In the passenger seat, she could see a woman who seemed somewhat younger, with her hair pulled back and prominent bangs in front. In the young woman's remarkably large eyes and facial expression, Ms. Keller sensed the presence of fear. She also noticed how the male driver looked angry. Ms. Keller contacted police about her sighting after hearing of the Juli Busken murder, but was not interviewed until two years later. She provided police with her own profile drawing of the man she saw, and helped develop a composite drawing admitted at trial.

David Kill was on his way home from a night shift at Tinker Air Force Base, driving back toward Norman that morning around 7:10 to 7:15 a.m. He encountered a red compact car bearing an Arkansas license plate driving away from Lake Stanley Draper. A male driver, alone in the car, cut off Mr. Kill in traffic and seemed not to notice he was there. Mr. Kill was incensed by the man's driving and chased the car back to Norman at high speed. He testified that despite his aggressive pursuit of the car, the driver still seemed oblivious to him. He parted with the red car when he turned on Alameda Street, but watched it continue south toward Lindsey Street. After seeing a news report about Ms. Busken's disappearance, Mr. Kill realized he had seen her car and called Oklahoma City Police. Kill also gave a physical description of the driver he had seen and helped develop a composite drawing, also admitted as evidence.

Late in the evening of December 20, 1996, OU Police found Juli Busken's red Eagle Summit parked just across the street from the Dublin West Apartments, where the screams were heard early that morning. A pair of pajama bottoms recovered from the car were stained with semen, from which criminalists later isolated a sperm fraction and

developed a partial DNA profile. . . . Records of activity from Ms. Busken's missing cell phone showed that a call was placed on December 21, 1996, to a number investigators later associated with Appellant's former girlfriend. Calls were also placed from Ms. Busken's phone after her murder to two numbers (both in the form 447–68xx) similar to phone numbers later associated with friends of Appellant.

. . . Throughout the entire investigation, prior to July, 2004, Anthony Castillo Sanchez was never interviewed, contacted, or considered a suspect in Ms. Busken's murder. Indeed, Ms. Busken's closest friends testified at trial they had never seen or heard of Anthony Sanchez as a friend or acquaintance of Juli Busken.

. . .

. . . The State presented evidence at trial that Appellant's DNA matched the DNA profile generated from the sperm cell fraction isolated on Ms. Busken's panties; and also matched the sperm cell fraction isolated from the stained pink leotard discarded at the crime scene. The matches corresponded to Appellant's known DNA at all sixteen genetic loci tested. The State's DNA expert characterized the probability of a random DNA match on the Busken evidence with an unrelated individual other than Appellant as 1 in 200.7 trillion Caucasians, 1 in 20.45 quadrillion African Americans, and 1 in 94.07 trillion Southwest Hispanics. Appellant also could not be excluded as the donor of a DNA mixture isolated from epithelial cell fractions on the panties and leotard. DNA comparisons on the spermatozoa recovered from the anal swab and the pajama bottoms from the car were inconclusive.

Appellant's former girlfriend, Christin Setzer, testified that between 1994 and 1996 she lived with Appellant in a residence on Drake Drive in southeast Norman, about one mile from Juli Busken's apartment. . . . When police interviewed Ms. Setzer years after the Busken murder, she described an incident when shots were fired within the Drake Drive residence. Only Appellant and his step-father were in the room where shots were fired. Ms. Setzer told

> police she later saw bullet holes in the east wall of the room. Police obtained a search warrant for the residence in 2004, and dismantled the walls looking for evidence of these shots and any potential projectiles. They located a linear defect in the lumber of a wall stud consistent with a bullet strike, but were unable to find a projectile. Police also found a piece of foam which bore marks consistent with a bullet strike. After police collected these items and left the scene, the owner of the residence vacuumed the area of the wall which police had dismantled. Searching the contents of the vacuum bag later in his garage, he located an item later identified as a .22 Long Rifle projectile. The Drake Drive bullet was marked ballistically with sixteen lands and grooves and a right-hand twist, and thus shared the same caliber and general barrel markings as the .22 bullet that killed Juli Busken. Testimony from one of Appellant's friends established that Appellant was in possession of a small .25 caliber pistol in 1994 and 1995. The State impeached this witness with his prior statement that the pistol could have been a .22 or .25 caliber. Attempts to positively identify the Drake Drive bullet and the bullet recovered from Juli Busken as being fired from the same weapon proved inconclusive.

Sanchez v. Oklahoma, 223 P.3d 980, 987-90 (Okla. Crim. App. 2009) (paragraph numbers omitted).

The OCCA made additional factual findings in denying Petitioner's claim that there was insufficient evidence to support his murder conviction:

> Despite conceding that the DNA evidence establishes "a strong connection between Mr. Sanchez and a sexual assault," Appellant argues the evidence of murder is insufficient. Appellant's major points may be summarized as follows: (1) Other than his ability to drive a standard transmission, "nothing whatsoever places him in the car," meaning none of the fingerprints developed from inside Ms. Busken's vehicle could be matched to him; (2) although Appellant finds it "obvious that Ms. [Keller, an eyewitness] described Juli Busken" as the female she saw in the red car near Lake Stanley Draper, the witness' description of the

> driver as an older man points to someone other than Appellant, who had just turned eighteen; (3) because of the narrow time frame established by the respective sightings related by [eyewitnesses] Janice Keller and David Kill, of two people riding together around 6:45, and then the lone driver leaving Lake Stanley Draper around 7:15, the sexual assault probably occurred elsewhere. Appellant therefore reasons that the "times involved lend themselves to more than one person involved."
>
> . . .
>
> Three strands of evidence contradict Appellant's major premise that he cannot be placed at the scene of the murder or in Ms. Busken's car: First, Appellant's DNA matched the unknown DNA isolated from sperm fractions recovered from Ms. Busken's panties, and the unknown DNA from the pink leotard found discarded at the crime scene. Police also identified human sperm from stains found on pajama bottoms recovered from Ms. Busken's car. These facts permit the logical inference that the sperm on the pajama bottoms in Ms. Busken's car is also Appellant's, despite inconclusive DNA results on the pajama bottoms. Second, records of activity on Ms. Busken's missing cell phone show a call placed to a number which investigators eventually associated with Appellant's former girlfriend, over thirty hours *after* the Busken murder. The logical inference is that Appellant was in possession of Ms. Busken's phone, and he got the phone from her car, where she usually left it. Finally, the shoe impressions discussed in Proposition Four, consistent with a pair of Nike shoes owned by Appellant, tend to establish his presence where Ms. Busken was murdered. This direct and circumstantial evidence is sufficient to support the jury's finding that Appellant sexually assaulted and murdered Juli Busken.

Id. (emphasis adopted, paragraph numbers omitted).

The federal district court rejected similar arguments on habeas review:

> "DNA testing has an unparalleled ability ... to identify the guilty." *District Attorney's Office for Third Judicial Dist. v. Osborne,* 557 U.S. 52, 55 (2009). "It is now often possible to determine whether a biological tissue matches a suspect

with near certainty." *Id.* at 62. In the present case, petitioner was connected to Ms. Busken's murder through a near certain match of his DNA to sperm cells found in the panties Ms. Busken was wearing when her body was found and in her ballet leotard which was found at the crime scene as well. Of the sixteen genetic loci tested, petitioner's DNA matched at every one (State's Exhibit 106). "The State's DNA expert characterized the probability of a random DNA match on the Busken evidence with an unrelated individual other than [petitioner] as 1 in 200.7 trillion Caucasians, 1 in 20.45 quadrillion African Americans, and 1 in 94.07 trillion Southwest Hispanics." *Sanchez,* 223 P.3d at 989–90.

Despite the strength of the DNA evidence, petitioner argues that the state's evidence fails to show that he was the perpetrator. Petitioner argues alleged weaknesses in the presented evidence, and he downplays the "[p]urported corroborating evidence" found by the OCCA. Petitioner even implicates his own father by claiming that the composite drawings prepared by the police in the course of the investigation look more like his father than him. Petition, pp. 6–12. In response to these arguments, respondent contends that petitioner completely ignores the highly deferential posture this court must take in reviewing a sufficiency of the evidence claim. Applying the mandated double deference, *Jackson* deference to the jury's determination and AEDPA deference to the OCCA's direct appeal decision, respondent asserts that petitioner's sufficiency challenges to his murder and rape convictions must be denied. The court agrees.

In addition to the DNA evidence, the OCCA specifically found that petitioner was connected to Ms. Busken through two additional strands of evidence. *Sanchez,* 223 P.3d at 1002. One involved Ms. Busken's cell phone. When the police recovered Ms. Busken's car, her cell phone was missing. A day after her murder, Ms. Busken's cell phone was used to call a number associated with one of petitioner's ex-girlfriends (J. Tr. XI, 2660–61; State's Exhibits 120 and 141). *Id.* at 989, 1002. Second, shoeprints were left by the perpetrator at the crime scene. *Id.* at 1002. With respect to this evidence, the OCCA noted as follows:

> Investigators observed and photographed two pairs of shoe prints in the soil leading to where Juli Busken's body was found. One pair of shoe prints correlated to hiking boots worn by Ms. Busken. The other pair of shoe prints led down to the killing scene and then back toward the road. Police compared photographs of these prints to a variety of shoes and came to believe the soles were similar to the Nike *Air Max 2*. Photographs of the questioned shoe print were admitted at trial, along with inked imprints and acetate overlays of the Nike *Air Max 2* shoes provided by the Nike Corporation. The State then presented testimony from [petitioner's] ex-girlfriend, Christin Setzer, who read to the jury an October 14, 1996, entry from her personal calendar indicating that she and [petitioner] had purchased matching Nike shoes that day.

Id. at 999–1000.

Beyond the evidence of petitioner's DNA, the use of Ms. Busken's cell phone after her death, and the shoeprints found at the scene, the jury received additional circumstantial evidence as well. As detailed by the OCCA in its determination of the facts, the state also presented evidence that (1) petitioner lived within a mile of Ms. Busken's apartment (and within a mile of where her car[4] was found), *id.* at 989, 990; (2) when Ms. Busken was abducted around 5:30 a.m., only one man's voice was heard telling her to shut up and get in the car, and the sounds of the car doors opening and closing indicated that Ms. Busken had only one abductor, *id.* at 987; (3) between 6:45 and 7:00 a.m., a man was seen driving Ms. Busken's car with Ms. Busken in the passenger seat near Lake Stanley Draper, *id.* at 988–89; (4) around 7:15 a.m., a man was seen driving Ms. Busken's car away from Lake Stanley Draper, *id.* at 989; and (5) a .22 Long Rifle bullet, with sixteen lands and grooves and a right-hand twist, was recovered from Ms. Busken's skull, and a bullet with these same characteristics was found at the residence petitioner occupied at the time of Ms. Busken's murder, *id.* at 990.[5]

[4] On the driver's side floorboard, there was reddish dirt and sand, which was not found anywhere else in the car's interior (J. Tr. IX, 2261).

[5] The state also presented evidence that petitioner possessed a small caliber pistol in the year or two prior to the murder. There was a question as to whether the pistol was a .22 or a .25 caliber. *Sanchez*, 223 P.3d at 990.

From all of the presented evidence, the court concludes that the OCCA did not act unreasonably with respect to its application of *Jackson* and its upholding of the jury's determinations of guilt with respect to petitioner's convictions for murder and rape. While petitioner seeks to minimize the relevance of the presence of his semen in Ms. Busken's panties and on her ballet leotard, this evidence was more than just evidence of association with Ms. Busken.[6] As Ms. Busken's closest friends testified, Ms. Busken had no relationship with petitioner as a friend, an acquaintance, or otherwise. *Sanchez,* 223 P.3d at 989. Yet, the presence of his semen clearly shows that he[7] had intimate contact with her.[8] The evidence also supports the conclusion that the crimes against Ms. Busken were committed by a sole perpetrator. In addition to the sounds heard at the apartment complex and the reddish dirt and sand appearing only on the driver's side floorboard, Ms. Busken was seen being driven by a man who made no attempt to conceal his identity. The jury could have rationally determined that after sexually assaulting her, petitioner killed Ms. Busken to prevent her from identifying him. Then, after the murder, the fact that Ms. Busken's cell phone was used to call petitioner's ex-girlfriend is more than just a coincidence. All of this evidence—the DNA, the cell phone usage, the shoeprints, the bullets, and the sole perpetrator evidence—clearly supports the jury's verdicts and the OCCA's denial of relief with respect to petitioner's murder and rape convictions.

[7] The state's DNA expert testified that petitioner's DNA would be a combination of his parents' DNA. Thus, while petitioner and his father would have common alleles, their DNA would not be the same (J. Tr. XII, 2750-51).

> [8] Petitioner has never claimed to have a relationship with Ms. Busken nor has he offered any explanation as to why his semen was present at the crime scene.

Sanchez v. Trammell, No. CIV-2010-1171-HE, 2015 WL 672447 at *8-10 (W.D. Okla. Feb. 17, 2015) (unpublished) (footnotes 3 and 6 omitted).

The district court also emphatically denied Petitioner's attempt to excuse his procedural default of a claim with a showing of actual innocence, concluding he did "not come remotely close to establishing a miscarriage of justice under this [actual innocence] standard." *Id*. at *22. In denying a certificate of appealability, the Tenth Circuit held that "Mr. Sanchez cannot overcome the DNA evidence from sperm found on the victim's clothing linking him to the crimes" and that any suggestion that Petitioner's semen was planted is "implausible" and undermined by the shoeprint and cell phone evidence. *Sanchez v. Warrior*, 636 F. App'x 971, 974-75 (10th Cir. 2016), *cert. denied, Sanchez v. Duckworth*, 137 S. Ct. 119 (2016).

Finally, earlier this year, Petitioner filed a fourth state post-conviction application in which he alleged his innocence and which was soundly rejected by the OCCA. *Sanchez v. Oklahoma*, No. PCD-2023-95, slip op. at 12-18 (Okla. Crim. App. Apr. 13, 2013) (unpublished).

B. Procedural Background.

Petitioner was convicted in 2006 of, *inter alia*, first-degree murder and sentenced to death. Petitioner's convictions and sentences have been affirmed on

direct appeal (in 2009)[3], in four post-conviction proceedings (in 2010, 2017, 2021, and 2023)[4], and through federal habeas review (from 2010 through 2016)[5]. Petitioner has also unsuccessfully challenged the state's lethal injection protocol.[6]

In 2016, Petitioner exhausted all challenges to his conviction and death sentence. However, due to pending litigation in federal court regarding Oklahoma's execution protocol, an execution date was not set.

In 2017, Petitioner filed a successive post-conviction application in the OCCA and an application to file a second habeas petition in the Tenth Circuit. Petitioner took no further action until 2020, when Petitioner filed a *pro se* third post-conviction application in the OCCA. This application was rejected on February 24, 2021.

In June of 2022, the United States District Court for the Western District of Oklahoma denied the challenge to the execution protocol. On July 1, 2022, the OCCA scheduled Petitioner's execution for April 6, 2023. Subsequently, on motion of the State (for reasons unrelated to this case), the OCCA re-set Petitioner's execution for September 21, 2023.

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[3] *Sanchez v. Oklahoma*, 223 P.3d 980 (Okla. Crim. App. 2009), *cert. denied*, 562 U.S. 931 (2010).

[4] *Sanchez v. State*, No. PCD-2006-1011 (Okla. Crim. App. Apr. 19, 2010) (unpublished); *Sanchez v. State*, 406 P.3d 27 (Okla. Crim. App. 2017); *Sanchez v. State*, No. PCD-2020-933 (Okla. Crim. App. Feb. 24, 2021) (unpublished); *Sanchez v. State*, No. PCD-2023-95 (Okla. Crim. App. Apr. 13, 2023) (unpublished).

[5] *Sanchez v. Trammell*, No. CIV-10-1171-HE, 2015 WL 672447 (W.D. Okla. Feb. 17, 2015) (unpublished); *Sanchez v. Warrior*, 636 F. App'x 971 (10th Cir. 2016), *cert. denied, Sanchez v. Duckworth*, 137 S. Ct. 119 (2016).

[6] *Glossip v. Chandler*, No. CIV-2014-665-F, 2022 WL 1997194 (W.D. Okla. June 6, 2022).

In February of 2023, Petitioner filed his fourth post-conviction application in the OCCA, alleging actual innocence. The OCCA strongly rejected that claim on April 13, 2023. Petitioner did not file a petition for writ of certiorari.

On May 18, 2023, Petitioner sought to replace his appointed attorneys, Mark Barrett and Randall Coyne, with his current attorney, Eric Allen. Doc. 74.[7] After a hearing, the court denied the motion, holding that Petitioner's purported abandonment by counsel was "factually untrue" and that the representation of Mr. Barrett and Mr. Coyne had been "appropriate to the circumstances of the case." Doc. 77 at 1.[8]

On July 17, 2023, Petitioner filed a *pro se* notice of intent to appeal the order denying substitution of counsel which the Tenth Circuit subsequently dismissed upon Petitioner's motion. Doc. 82. On the same day, Mr. Barrett and Mr. Coyne filed a motion to withdraw from Petitioner's case, noting that Petitioner had waived his right to a clemency hearing. Doc. 81. Mr. Barrett and Mr. Coyne also filed a "Motion of Appointed Attorneys to Determine Disposition of Files and Brief in Support". Doc. 80 (all caps removed). This motion was prompted by a letter from Petitioner to Mr. Barrett in which he indicated he was "proceeding with the remainder of [his] case Pro

[7] Documents filed in Western District Case Number CIV-2010-1171-HE will be referred to by docket number ("Doc.").

[8] Petitioner repeats this allegation of abandonment in his Question Presented but does not attempt to rebut the district court's finding. In fact, as outlined above, Mr. Barrett pursued all of Petitioner's habeas litigation, filed two successive post-conviction applications, filed an application to file a second habeas petition, and was preparing to represent Petitioner at his clemency hearing when Petitioner decided to waive said hearing.

Se" and was "writing to instruct you to turn over all copies and originals of all the evidence you have in my case". Doc. 80-1. Mr. Barrett informed the district court that the files Petitioner requested were voluminous and contained much confidential information.[9] Doc. 80 at 1-2. Mr. Barrett noted that Petitioner cited no authority for his assertion that he has a constitutional right to his files, and further opined that Petitioner was likely only constitutionally entitled to the transcripts of his trial. Doc. 80 at 2-3. Mr. Barrett thus asked the Court to order him to provide Petitioner with the trial transcripts (absent *voir dire*) and to notify Petitioner that any additional material would be turned over only upon counsel's receipt of a court order. Doc. 80 at 3-4.

On August 7, 2023, the court permitted Mr. Barrett and Mr. Coyne to withdraw. Doc. 85 at 2. Regarding the files, the court ordered Mr. Barrett

> to maintain possession and control of the referenced files pending further order of the court. No exception for a trial transcript is indicated at this point, as there has been no showing of a further proceeding or potential proceeding as to which petitioner, proceeding *pro se*, might have a justifiable need for it.

Doc. 85 at 1.

On August 22, 2023, Mr. Allen (current counsel) entered an appearance on behalf of Petitioner. Doc. 90. Instead of accepting the district court's invitation to attempt to make a showing of need for the files, Petitioner waited until August 30,

[9] Petitioner references the fact that some of the boxes remain sealed. Pet. at 2. Petitioner ignores that Mr. Barrett informed the Court that these sealed boxes contain duplicates. Doc. 80 at 1-2.

2023, to file a one-paragraph notice of his intent to appeal to the Tenth Circuit. Another week passed before Petitioner filed, on September 7, 2023, a short motion asking the Tenth Circuit for an expedited briefing schedule. On September 8, 2023, the Tenth Circuit remanded the case for reconsideration citing Mr. Allen's appearance in the case. The district court scheduled a hearing on September 13, 2023. On September 12, 2023, Petitioner filed in the district court a motion for a stay of execution "pending Mr. Sanchez's new counsel receiving and reviewing his files to determine the appropriate issues to raise on behalf of Mr. Sanchez." Doc. 100. Respondent filed an objection on the same day. Doc. 101.

At the conclusion of the hearing, the district court granted Petitioner's motion for the case files but denied his motion for a stay of execution:

> With respect to the motion for stay and as stated more fully from the bench, the court has considerable doubt whether it has the authority to issue a stay of execution in the circumstances existing here. There are no substantive issues remaining for resolution in this habeas case which is, apart from collateral matters, completed. Absent authorization from the Court of Appeals, no further request for habeas relief can be entertained by this court and there has been no such authorization.
>
> Even assuming this court has the authority to issue a stay in the present circumstances, it would nonetheless deny the motion. A stay of execution requires a showing by petitioner of a "significant possibility of success on the merits." Pavatt v. Jones, 627 F.3d 1336, 1338 (10th Cir. 2010). Here, petitioner has made no such showing. There has been no suggestion of a plausible basis for petitioner being entitled to relief. Rather, petitioner's argument is entirely speculative—that he might be able to identify some new issue once his counsel looks through the case materials. That is wholly insufficient as a basis for stay.

> The motion for stay of execution [Doc. #100] is therefore **DENIED**.

Pet. App'x at unnum. 2-3 (emphasis in original).

Petitioner then appealed the denial of his motion for a stay to the Tenth Circuit and also, on September 17, 2023, filed in the Tenth Circuit a motion for authorization to file a first subsequent habeas petition pursuant to 28 U.S.C. § 2244(b)—in which he would argue that he was actually innocent because his father committed the murder—and a motion for a stay of execution. On September 18, 2023, the Tenth Circuit issued a single order denying all three of the issues before it.

Regarding Petitioner's appeal of the district court's order denying his motion for a stay of execution, the Tenth Circuit made the following findings: (1) the basis for Petitioner's motion in the district court was his desire that new counsel would have time to review his case files "in hopes of finding a basis for habeas relief[,]" Pet. App'x at 15[10]; (2) the district court correctly determined that it lacked jurisdiction to grant a stay, due to the Anti-Injunction Act (28 U.S.C. § 2283), Pet. App'x at 15-16; (3) the district court did not abuse its discretion in denying Petitioner's motion because "Sanchez has never given any hint about what he thinks he might find in his previous counsel's case files—much less anything that might satisfy the standard for a second or successive § 2254 petition[,]" Pet. App'x at 16-17; (4) the last-minute nature of the motion supported the district court's decision, Pet. App'x at 17-18; and (5) to the extent Petitioner's opening brief—which made little attempt to show error

[10] Because Petitioner's appendix is not numbered, Respondent cites to the pages on the bottom of the court's order.

in the district court's decision—should be construed as a motion for a stay of execution directed to the Tenth Circuit, the motion was denied because his arguments on appeal were "no less speculative or dilatory" than they were below, Pet. App'x at 18 n.5.

Regarding Petitioner's motion for authorization to file a second or successive habeas petition, the court made the following findings: (1) Sanchez did not challenge the constitutionality of any of the proceedings that went before, but argued only that his execution would violate the constitution because of his alleged innocence, Pet. App'x at 10; (2) Sanchez did not allege his claim was supported by a new rule of constitutional law as to permit a successive habeas petition pursuant to 28 U.S.C. § 2244(b)(2)(A), Pet. App'x at 11; (3) Petitioner did not identify any constitutional error as required by § 2244(b)(2)(B)(ii), Pet. App'x at 12; (4) Petitioner had not shown by clear and convincing evidence no reasonable factfinder would have convicted him in light of new evidence as required by § 2244(b)(2)(B)(ii), Pet. App'x at 12-14; (5) Petitioner had not satisfied the extraordinarily high threshold that might, hypothetically, permit him to bring a claim of actual innocence under *Herrera v. Collins*, 506 U.S. 390, 417 (1993), Pet. App'x at 12-14; (6) Petitioner's alleged new evidence—an affidavit from his late father's girlfriend claiming Petitioner's father, Glen Sanchez, had confessed to the murder—could not overcome the incriminating evidence, "especially the DNA [which was 'a near-certain match]'", Pet. App'x at 13; and (7) Petitioner had neglected to inform the court that the State did DNA testing earlier this year which excluded Glen Sanchez as the contributor of the DNA evidence

and also established a 99.9% probability that Glen Sanchez is the father of the man who contributed the DNA (i.e., sperm cells) at the crime scene, Pet. App'x at 14 n.3.

Finally, the Tenth Circuit denied Petitioner's motion for a stay, related to the § 2244(b) petition, as moot. Pet. App'x at 14.

REASONS FOR DENYING THE WRIT

Petitioner has no proceeding pending, in any court, in which he is challenging his conviction or sentence. Rather, approximately four months before his scheduled execution—and after no less than seven separate proceedings in which he challenged his conviction and sentence—Petitioner chose to replace the experienced capital defense attorneys who had represented him for over a decade. Petitioner now wants this Court to stop a lawful execution that has survived nearly twenty years of scrutiny so that he can start over from scratch. The petition is frivolous.

Although not an exhaustive list, Supreme Court Rule 10 outlines certain circumstances where the grant of a petition for writ of *certiorari* may be warranted, as a matter of judicial discretion and "only for compelling reasons." SUP. CT. R. 10. These circumstances include a conflict among United States courts of appeals on the same matter of importance, a conflict between a United States court of appeals and a state court of last resort on an important federal question, an instance where a United States court of appeals "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power," or when a state court or a United States court of appeals "has decided an important question of federal law that has not been,

but should be, settled by this Court, or has decided an important federal question in such a way that conflicts with relevant decisions of this Court," *inter alia*. SUP. CT. R. 10(a)–(c). In the same sense, this Court has issued the following caution: "A petition for a writ of *certiorari* is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." SUP. CT. R. 10.

Here, Petitioner does not mention, much less try to satisfy, Rule 10. None of his arguments fall within its auspices. In fact, the petition discusses the standards for a stay of execution but offers no argument regarding the constitutionality of his conviction and sentence. Petitioner has failed to even identify a right guaranteed by federal law. The petition should be denied on that basis alone.

Below, Respondent will briefly offer additional reasons for this Court to decline to stay his execution or exercise its discretion to determine whether Petitioner has the right to indefinitely hire new lawyers to try to find new claims.

STANDARD FOR GRANTING A STAY OF EXECUTION

This Court will not grant a stay pending the filing and disposition of a certiorari petition unless the applicant establishes:

> (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay. In close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent.

Hollingsworth v. Perry, 558 U.S. 183, 190 (2010) (*per curiam*); *see also Lucas v. Townsend*, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers); *Evans v. Alabama*,

461 U.S. 1301, 1302 (1983) (Powell, J., in chambers); *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers).

"A stay is not a matter of right, even if irreparable injury might otherwise result," and is "instead an exercise of judicial discretion," "dependent upon the circumstances of the particular case." *Nken v. Holder*, 556 U.S. 418, 433 (2009) (quotation marks omitted). "The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Id.* at 433-34. Moreover, in the execution context, the decision whether to grant a stay "must be sensitive to the State's strong interest in enforcing its criminal judgments." *Hill v. McDonough*, 547 U.S. 573, 584 (2006); *see also Murphy v. Collier*, 139 S. Ct. 1475, 1480 (2019) (Alito, J., dissenting); *Gomez v. U.S. Dist. Ct. for N. Dist. of California*, 503 U.S. 653, 654 (1992) (*per curiam*) (each state has a "strong interest in proceeding with its judgment"). "Both the State and the victims of crime have an important interest in the timely enforcement of a sentence." *Hill*, 547 U.S. at 584. Last-minute execution stays are especially disfavored. *See Dunn v. Price*, 139 S. Ct. 1312, 1312 (2019); *Bucklew v. Precythe*, 139 S. Ct. 1112, 1133-34 (2019); *Hill*, 547 U.S. at 584. Finally, indefinite stays of execution are inappropriate unless the petitioner is not competent to be executed. *Ryan v. Gonzales*, 568 U.S. 57, 76-77 (2013).

ARGUMENT AND AUTHORITY

I. The Question Presented was not Pressed or Passed upon at the Court of Appeals or District Court.

This Court generally does not consider questions that were not presented and passed upon in a lower court. *See Bankers Life and Cas. Co. v. Crenshaw*, 486 U.S.

71, 79 (1988); *accord Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("Because the defensive pleas were not addressed by the Court of Appeals, and mindful that we are a court of review, not of first view, we do not consider them here.").

Petitioner's motion for a stay of execution in the district court did not accuse the court of being dilatory; it merely asserted that the court "did not dispose of this motion until August 7, 2023." Doc. 100 at 3. Similarly, at the Tenth Circuit, Petitioner merely asserted that the motion by previous counsel to withdraw "sat in the District Court until August 7, 2023 when the court disposed of [it]" and that the district court "waited until August 7, 2023, to order that previous counsel maintain the file." Tenth Circuit Opening Brief at 4, 5.

In its Order, the Tenth Circuit noted Petitioner's complaint but refused to consider it:

> Sanchez at times implies the district court is at fault for creating a time crunch. For example, Sanchez points out that Barrett and Coyne first moved for directions on what to do with the case files on July 17, but the district court did not rule on that motion until August 7, when it ordered Barrett and Coyne to keep the files pending further order.
>
> We will not entertain any argument that the August 7 order was erroneous. Sanchez has dismissed that appeal.

Pet. App'x at 18.

"It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below" although the courts do have the discretion to do otherwise. *Singleton v. Wulff*, 428 U.S. 106, 120-21 (1976). Petitioner does not argue the Tenth Circuit abused its discretion. Nor could he given his own delays to include:

the years in which he did nothing in spite of his claim of actual innocence; his failure to timely appeal the district court's order denying his motion to substitute counsel; his failure to simply return to district court through counsel to ask for the files, *see* Doc. 85 at 1 ("counsel are directed to maintain possession and control of the referenced files *pending further order of the court*" (emphasis added)); and the twenty-three days that passed between the district court's August 7 order and the filing of Petitioner's one-paragraph notice of intent to appeal.

The granting of a stay of execution is an equitable matter. *See Hill*, 547 U.S. at 584. Thus, this Court should consider Petitioner's unclean hands. *Cf. Henderson v. United States*, 575 U.S. 622, 625 n.1 (2015) (the "unclean hands doctrine proscribes equitable relief" when a party's misconduct is immediately related to the equity he seeks); *Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co.*, 324 U.S. 806, 815 (1945) (a court has discretion to "refus[e] to aid the unclean litigant").

Petitioner has not presented a compelling question for this Court's review, nor established a reasonable probability that four Justices would grant certiorari or a fair prospect of reversal on the merits.

II. Petitioner does not Challenge the Tenth Circuit's Holding that the District Court Lacked Jurisdiction over his Motion for a Stay.

In its order denying the motion for a stay, the district court conveyed its "considerable doubt whether it has the authority to issue a stay of execution in the circumstances existing here. There are no substantive issues remaining for resolution in this habeas case which is, apart from collateral matters, completed."

Pet. App'x at unnum. 2. The Tenth Circuit agreed that the district court lacked jurisdiction pursuant to the Anti-Injunction Act, 28 U.S.C. § 2283. Order at 15-16.

Petitioner has not so much as alleged the Tenth Circuit got it wrong.

Petitioner has not presented a compelling question for this Court's review, nor established a reasonable probability that four Justices would grant certiorari or a fair prospect of reversal on the merits.

III. Petitioner does not Challenge the Tenth Circuit's Alternative Holding that He was not Entitled to a Stay of Execution.

The district court also held that Petitioner had failed to make the requisite showing that he was likely to succeed on the merits:

> Here, petitioner has made no such showing. There has been no suggestion of a plausible basis for petitioner being entitled to relief. Rather, petitioner's argument is entirely speculative – that he might be able to identify some new issue once his new counsel looks through the case materials. That is wholly insufficient as a basis for stay.

Pet. App'x at unnum. 3.

The Tenth Circuit agreed: "Sanchez has never given any hint about what he thinks he might find in his previous counsel's case files—much less anything that might satisfy the standard for a second or successive § 2254 petition." Order at 17. The Tenth Circuit also held that the "sequence of events here", described *supra*, "shows significant potential for manipulation." Pet. App'x at 18.

Once again, Petitioner has not challenged these holdings. Accordingly, as to both the Petition and the Application for Stay, Petitioner has failed to show a likelihood of success on the merits.

IV. Petitioner's Arguments Regarding the Relative Harms Misses the Mark.

Petitioner has also not shown a likelihood of irreparable harm if he is not granted a stay, nor has he shown that the balance of equities and harms weighs in his favor. *Nken*, 556 U.S. at 426. Petitioner's conviction and sentence are final and presumptively correct. *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). Petitioner had counsel for every proceeding except for his third post-conviction application which he filed *pro se*. Absent some showing that his execution will be *unlawful*, Petitioner has not shown a likelihood of irreparable harm. *See Bucklew*, 139 S. Ct. at 1122 ("The Constitution allows capital punishment.").

Moreover, Petitioner fails to show that a balancing of the equities and harms weighs in his favor. Petitioner has exhaustively challenged his conviction and sentence, as well as the State's execution protocol and he offers nothing to this Court to cast doubt on the adequacy of these procedures nor the constitutionality of his conviction and sentence.

Further, Petitioner is incorrect in his assertion that "a stay would vindicate the public's interest in making sure an execution is just and only following (sic) full and fair judicial review." Application for Stay at unnum. 4. Petitioner has received full and fair judicial review. And the public interest—including the victim's family—is harmed by undue delay. *See Hill*, 547 U.S. at 584 (federal courts "must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts"). It has been nearly twenty-seven years since Petitioner brutally murdered Juli Busken. "The people of [Oklahoma], the surviving

victims of Mr. [Sanchez]'s crimes, and others like them deserve better," especially when Petitioner's justifications for a stay are entirely without merit. *Bucklew*, 139 S. Ct. at 1134.

Finally, as shown *supra*, Petitioner has been dilatory. *Id.* ("the last-minute nature of an application that could have been brought earlier . . . may be grounds for denial of a stay). Petitioner filed a last-minute motion for an indefinite stay with a suggestion that he may at some point in the future bring a not-yet-identified claim. Petitioner alleges no error of federal law. His blatant attempt to delay a lawful execution, and request for this Court to review the decision below, should be denied.

CONCLUSION

For the reasons discussed above, Respondent respectfully requests this Court deny the Petition for Writ of Certiorari and Petitioner's Application for a Stay of Execution.

Respectfully submitted,

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