No.__________________

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2021

CARL WAYNE BUNTION,

Petitioner

v.

BRYAN COLLIER, ET AL.,

Respondents

**ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

APPENDIX TO MOTION FOR STAY OF EXECUTION PENDING FILING, CONSIDERATION, AND DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

This is a capital case. Mr. Buntion is scheduled to be executed after 6 o'clock p.m. central time today, April 21, 2022.

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Appendix A

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
April 20, 2022
Lyle W. Cayce
Clerk

No. 22-70003

Carl Wayne Buntion,

Petitioner—Appellant,

versus

Bobby Lumpkin, Director, Texas Department of Criminal Justice, Correctional Institutions Division,

Respondent—Appellee,

consolidated with

No. 22-70004

Carl Wayne Buntion,

Plaintiff—Appellant,

versus

Bryan Collier, Bobby Lumpkin, Dennis Crowley,

Defendants—Appellees.

Application for Certificate of Appealability and Appeal
from the United States District Court
for the Southern District of Texas
USDC Nos. 4:22-cv-1104 & 4:22-cv-1125

Before COSTA, DUNCAN, and OLDHAM, *Circuit Judges*.

PER CURIAM:*

Carl Buntion killed a police officer. The State of Texas prosecuted him for capital murder, and a jury convicted him. He has been sentenced to death twice. He has unsuccessfully applied for postconviction relief in state and federal court, several times each. Most recently, a federal district court denied him a certificate of appealability ("COA"), dismissed his related 42 U.S.C. § 1983 suit, and refused to stay his execution. We consolidated Buntion's last-minute proceedings before our court. We now deny a COA, affirm the district court's § 1983 dismissal, and affirm the district court's denial of a stay.

I.

A.

Our court has narrated the following facts twice before. *See Buntion v. Quarterman (Buntion I)*, 524 F.3d 664, 666–69 (5th Cir. 2008); *Buntion v. Lumpkin (Buntion II)*, 982 F.3d 945, 947 (5th Cir. 2020) (per curiam). On June 27, 1990, Houston Police Officer James Irby pulled over a car in which Buntion was a passenger. *Id.* Buntion first ignored Officer Irby's orders. *Id.* Then Buntion shot him in the head without provocation. *Id.* After Officer

* Judge Costa concurs in the judgment only.

Irby fell to the ground, Buntion shot him two more times. *Id.* "Officer Irby died almost instantly." *Id.*

Buntion fled. He tried to steal a car by shooting at the driver. *Id.* That did not work, so he "walked into a nearby warehouse and pointed his gun" at two different employees. *See id.* After he tried to steal one of their vehicles, a police officer arrested him. *See id.*

A Texas jury convicted Buntion of capital murder in 1991, and that same jury recommended a sentence of death. *See id.*; *Buntion I*, 524 F.3d at 668. The trial court imposed that sentence.

B.

1.

Buntion tried and failed to obtain relief on direct appeal. *See Buntion I*, 524 F.3d at 668–69 (describing those attempts). He tried and failed to obtain relief in state habeas proceedings. *See id.* (describing those attempts). Then he tried to obtain relief in federal habeas proceedings. That attempt was unsuccessful as well. *See id.* at 676 (denying federal habeas relief), *cert. denied*, 555 U.S. 1176 (2009).

Buntion petitioned for state habeas relief once more. "This time, the Texas Court of Criminal Appeals ('CCA') granted the application." *Buntion II*, 982 F.3d at 947 (citing *Ex parte Buntion*, No. AP-76236, 2009 WL 3154909 (Tex. Crim. App. Sept. 30, 2009) (per curiam)). After concluding that the jury instructions at Buntion's first trial were inadequate—on the ground that they unjustifiably downplayed his mitigating evidence at the sentencing stage—the CCA remanded for a new punishment hearing. *See Ex parte Buntion*, 2009 WL 3154909, at *2.

After that hearing, another jury concluded that Buntion should be sentenced to death. *See Buntion v. State*, 482 S.W.3d 58, 66 (Tex. Crim. App.

2016) (appeal from that determination); *see also Buntion II*, 982 F.3d at 947–48 (summing up some of the cardinal issues at play in the second hearing). The CCA, Texas's highest court for criminal cases, affirmed that conviction and sentence. *See Buntion v. State*, 482 S.W.3d at 106 (on direct review). And the Supreme Court once again denied certiorari. *Buntion v. Texas*, 136 S. Ct. 2521 (2016). Buntion then raised various claims in another state habeas petition, and "[t]he state habeas court denied all of them—some on the merits and some for Buntion's failure to raise them on direct appeal." *Buntion II*, 982 F.3d at 948.

Buntion filed another federal habeas petition. He raised seven claims in district court, but the district court denied relief. *See Buntion II*, 982 F.3d at 948. Buntion sought a COA, *see* 28 U.S.C. § 2253(c), but the district court denied that too. *See Buntion II*, 982 F.3d at 948.

Then, in the case we've been referring to as *Buntion II*, Buntion sought a COA from our court based on three of his seven claims. 982 F.3d at 948. We "review[ed] and reject[ed] each claim in turn." *Id.* Buntion's first claim was an Eighth- and Fourteenth-Amendment challenge, based on the contention that his sentence was unconstitutionally "based on the jury's unreliable and inaccurate predictions about his future dangerousness." *Id.* We refused a COA on that claim on the ground that it was procedurally defaulted and, in the alternative, meritless. *Id.* at 949–51. Buntion next argued that the delay between his initial sentencing hearing and his second sentencing hearing "violate[d] the Due Process Clause." *Id.* at 951. We likewise refused a COA on that argument, on the grounds that it was defaulted and meritless. *Id.* Third and finally, Buntion argued that the Constitution prohibited his execution "because of how much time he has spent on death row." *Id.* at 952; *see also Lackey v. Texas*, 514 U.S. 1045 (1995) (memorandum of Stevens, J., respecting the denial of certiorari). We refused a COA on that argument on the ground that it was unexhausted. And we held

in the alternative that it was, likewise, "undebatably meritless." *Buntion II*, 982 F.3d at 952. Accordingly, we denied Buntion's COA application. *See id.* at 953. And the Supreme Court then denied certiorari for a third time. *See Buntion v. Lumpkin*, 142 S. Ct. 3 (2021) (mem.).

2.

On January 4, 2022, Texas scheduled Buntion's execution for April 21, 2022. Buntion subsequently filed another habeas petition in state court. *See Ex parte Buntion*, No. WR-22,548-05, 2022 WL 946264, at *1 (Tex. Crim. App. Mar. 30, 2022) (describing the petition). That petition raised two claims that we rejected in *Buntion II*—namely, the *Lackey* claim and the future-dangerousness claim. *Id.* His third claim was that "[t]he evolving standards of decency that mark the progress of a maturing society under the Eighth and Fourteenth Amendments prohibit executions as a punishment for murder." *Id.* (quotation omitted).

Pursuant to Texas Code of Criminal Procedure article 11.071, § 5, the CCA "dismiss[ed] [Buntion's] subsequent application as an abuse of the writ without considering the claims' merits." *Id.*; *see also* Tex. Code Crim. Proc. art. 11.071, § 5(a) (providing that "[i]f a subsequent application for a writ of habeas corpus is filed after filing an initial application, a court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that . . ." and going on to explain the relevant showings).

On April 6, 2022, Buntion filed another federal habeas petition. That is the petition at issue in this case. Under 28 U.S.C. § 2244, "[b]efore a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application."

§ 2244(b)(3)(A). Rather than filing such a motion, Buntion simply filed his habeas petition in the district court.

The district court held that § 2244(b) bars Buntion's petition. The district court reasoned that, because this is a successive federal habeas petition, § 2244(b) applies. And both of the arguments raised in the petition (namely, the future-dangerousness claim and *Lackey* claim) were raised in a prior habeas petition and hence are barred. *See* § 2244(b)(1) ("A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed."). It rejected Buntion's arguments to the contrary and dismissed his petition for lack of jurisdiction. *See Williams v. Thaler*, 602 F.3d 291, 301 (5th Cir. 2010) ("A petitioner's failure to seek authorization from an appellate court before filing a second or successive habeas petition acts as a jurisdictional bar." (quotation omitted)). In the same order, the district court denied Buntion's motion for a COA. Buntion timely applied for a COA in this court.

3.

On April 7, 2022, Buntion sued various Texas officials in their official capacities in federal district court. *See* 42 U.S.C. § 1983. His complaint included one claim: the *Lackey* claim. One week later, on April 14, Buntion moved the district court for a stay of his execution based on that claim.

The district court denied the stay. It applied the Supreme Court's four-factor test for emergency equitable relief, *see Nken v. Holder*, 556 U.S. 418 (2009), and held that Buntion failed to make the requisite showing. Specifically, it held Buntion had not made a strong showing of likely success on the merits, that a stay would substantially injure the other party in this case (Texas), and that the public interest did not favor a stay. It concluded that, even though Buntion's impending execution amounted to irreparable injury, a stay was not warranted. The court also noted the last-minute nature

of Buntion's suit and suggested Buntion should have sued earlier. In the same order, the district court also dismissed Buntion's complaint with prejudice. *See* 28 U.S.C. § 1915A (directing district courts to review "before docketing, if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity," and to dismiss the complaint if it "fails to state a claim upon which relief may be granted").

Buntion appealed the district court's dismissal and its refusal to stay the execution. We consolidated Buntion's various filings and consider all of them in this opinion. We construe Buntion to request three things: a stay of execution, *see* FED. R. APP. P. 8, a COA, and injunctive relief under § 1983. We address each in turn.

II.

"[A] stay of execution is an equitable remedy . . . not available as a matter of right." *Hill v. McDonough*, 547 U.S. 573, 584 (2006). A "court considering a stay must also apply a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." *Id.* (quotation omitted).

Accordingly, when a prisoner seeks a stay of execution, we apply the four-factor test the Supreme Court announced in *Nken v. Holder*, 556 U.S. 418 (2009). The factors are: (1) whether Buntion has made a strong showing of likely success on the merits, (2) whether Buntion will be irreparably injured in the absence of a stay, (3) whether a stay would injure other interested parties, and (4) where the public interest lies. *See id.* at 426. "[L]ike other stay applicants," Buntion "must satisfy all of the requirements for a stay, including a showing of a significant possibility of success on the merits." *See Hill*, 547 U.S. at 584. We hold that Buntion is unlikely to prevail on his

request for a COA, *see infra*, Part III, and he is unlikely to succeed on his § 1983 claim, *see infra*, Part IV. It follows that Buntion cannot satisfy the first *Nken* factor. *See* 445 U.S. at 426. We will therefore deny a stay.

III.

We now turn to habeas. We (A) begin with the rules governing COAs. Then we (B) reject Buntion's request for a COA on his future-dangerousness claim, and we (C) reject Buntion's request for a COA on his *Lackey* claim.

A.

"A state prisoner seeking appellate review of a habeas petition 'denied by a federal district court' must 'first obtain a COA from a circuit justice or judge.'" *Buntion II*, 982 F.3d at 948 (quoting *Buck v. Davis*, 137 S. Ct. 759, 773 (2017)). The existence of a COA is a jurisdictional prerequisite to an appeal. *See Gonzalez v. Thaler*, 565 U.S. 134, 137, 142 (2012) (discussing 28 U.S.C. § 2253(c)(1)).

An applicant for a COA must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). In cases where the district court denies a COA on purely constitutional grounds, the applicant must show that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Buck*, 137 S. Ct. at 773 (quotation omitted); *accord Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) ("Under the controlling standard, a petitioner must show that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." (quotation omitted)). When the district court denies a COA on procedural grounds, the applicant must show "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a

constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Further, "[a]t the COA stage, the only question is whether the applicant has shown that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further. This threshold question should be decided without full consideration of the factual or legal bases adduced in support of the claims." *Buck*, 137 S. Ct. at 773 (quotation omitted) (going on to explain that a court may not first decide the merits and only then "justif[y] its denial of a COA based on its adjudication of the actual merits" (quotation omitted)). In a capital case, "any doubt as to whether a COA should issue in a death-penalty case must be resolved in favor of the petitioner." *Pippin v. Dretke*, 434 F.3d 782, 787 (5th Cir. 2005).

B.

Buntion argues his death sentence violates the Eighth and Fourteenth Amendments because it was based in part on the jury's finding of a "probability that [Buntion] would commit criminal acts of violence that would constitute a continuing threat to society." Tex. Code Crim. Proc. art. 37.0711, § 3(b)(2). Buntion points out that he has been peaceful in prison since his sentence. And it follows, in his view, that the jury's prediction has proven false. It further follows, Buntion contends, that his execution would be unconstitutionally arbitrary.

We (1) explain that "jurists of reason would [not] find it debatable whether" § 2244(b)(1) bars this claim. *Slack*, 529 U.S. at 484. Thus, we hold § 2244(b)(1) is a sufficient ground for refusing a COA on this claim. Then, (2), we explain it's equally undebatable that this claim is procedurally

defaulted. *See id.* Thus, we hold procedural default is a sufficient ground for refusing a COA on this claim. Finally, (3), we explain that "jurists of reason would [not] find it debatable whether" Buntion's future-dangerousness argument "states a valid claim of the denial of a constitutional right." *Id.* Thus, we hold substantive meritlessness is an independent ground for refusing a COA on Buntion's future-dangerousness claim.

1.

In his last federal habeas petition, Buntion challenged the Texas statute that requires juries to make predictions about a defendant's future dangerousness. He argued the relevant statutory provision was "unconstitutional because several studies indicate that juries' dangerousness predictions usually prove untrue." *Buntion II*, 982 F.3d at 948–49. He *also* raised a case-specific challenge, contending that "his [non-violent] post-conviction behavior [was] evidence that the jury got it wrong in his case too." *Id.* at 949. The district court rejected both versions of that claim and denied a COA on it. *See Buntion v. Davis*, No. 4:17-CV-02683, 34–36 (S.D. Tex. Mar. 5, 2020) (denying this claim as meritless). In turn, we denied a COA on that claim because it was "both procedurally defaulted and substantively meritless." *Buntion II*, 982 F.3d at 949–51.[1]

Buntion now makes that same case-specific challenge. He argues that time has proved the jury's future-dangerousness prediction false. That means Buntion's challenge to the accuracy of the jury's future-dangerous

[1] Buntion suggests that his previous petition challenged only the constitutionality of the relevant Texas statute and did not challenge his individualized future-dangerousness finding. But Buntion clearly made both arguments in his first habeas petition. *See* Petition for Writ of Habeas Corpus for Carl Wayne Buntion at 101–02, *Buntion v. Davis*, No. 4:17-CV-02683 (S.D. Tex. Mar. 5, 2020) (arguing the jury's prediction was inaccurate in his case); *see also Buntion II*, 982 F.3d at 950–51 (addressing both arguments).

prediction is "[a] claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application." § 2244(b)(1). So the claim "shall be dismissed." *Id.*; *see also In re Sharp*, 969 F.3d 527, 529 (5th Cir. 2020) (per curiam) ("Any attempt to [raise a previously raised claim in a successive petition] is strictly barred by § 2244(b)(1), which admits of no exceptions."); *Williams*, 602 F.3d at 301 (explaining this is a jurisdictional bar).

Buntion nonetheless contends that § 2244(b)(1) does not apply because his future-dangerousness claim was not ripe when he filed his first habeas petition. He relies principally on *Ford v. Wainwright*, 477 U.S. 399 (1986). In *Ford*, the Court held it cruel and unusual to execute an insane prisoner. *Id.* at 409–10 ("[T]he Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane."). Because the *Ford* inquiry focuses on the petitioner's sanity at the time of execution, some *Ford* claims are by necessity unripe at the time of a first petition—but may have become ripe by the time of a later one. *See Panetti v. Quarterman*, 551 U.S. 930, 934 (2007) ("The State acknowledges that *Ford*-based incompetency claims, as a general matter, are not ripe until after the time has run to file a first federal habeas petition."). In *Panetti*, the Court held that "a § 2254 application raising a *Ford*-based incompetency claim filed as soon as that claim is ripe," even if that petition was "filed second or successively in time." *Id.* at 945, 944.

Buntion says his future-dangerousness claim fits within that exception. Pointing to the interval between his last habeas filing and this one, he argues his claim wasn't ripe until after the State set his execution date. That is so, Buntion contends, because his claim hinges not on the facts as they stood at the time the jury sentenced him to death, but rather on the fact that he has *subsequently* been a non-violent prisoner. So in his view, this claim

is just like a *Ford* claim, and we should hold this petition satisfies the *Panetti* exception to the ordinary second-or-successive rule.

We disagree and hold "jurists of reason would [not] find it debatable whether" § 2244(b)(1) deprived the district court of jurisdiction over this claim. *Slack*, 529 U.S. at 484. That is for two independent reasons.

First, reasonable jurists could not debate that *Panetti* applies only to *Ford* claims. *See id.* The *Panetti* Court's holding was: "The statutory bar on 'second or successive' applications does not apply to a *Ford* claim brought in an application filed when the claim is first ripe." *Panetti*, 551 U.S. at 947. Buntion of course does not raise a *Ford* claim. And neither the Supreme Court nor the Fifth Circuit has ever extended *Panetti* to cover non-*Ford* claims.

Second, even if *Panetti could* encompass *some* non-*Ford* claims, its exception undebatably applies only to claims that were not ripe when the prisoner filed his last habeas petition. Indeed, *Panetti*'s stated rationale was that "*Ford*-based incompetency claims, as a general matter, are not ripe until after the time has run to file a first federal habeas petition." 551 U.S. at 943; *see also id.* at 947 ("The statutory bar on 'second or successive' applications does not apply to a *Ford* claim brought in an application filed *when the claim is first ripe*." (emphasis added)). Thus, if a claim was ripe at the time the petitioner filed his prior petition, it falls outside the scope of both *Panetti*'s text and its reasoning.

And Buntion's future-violence claim was undoubtedly ripe when he filed his last petition. As we said in *Buntion II*, the "jury was not asked to find that Buntion would in fact engage in future violence. Rather, the jury was asked to 'find from the evidence . . . [that] there is a probability that . . . Buntion . . . would commit criminal acts of violence.'" 982 F.3d at 951 (quoting TEX. CODE CRIM. PROC. ART. 37.0711, § 3(b)(2)) (alterations

in original)). Put differently, the jury made a "probabilistic assessment" that Buntion was likely to commit further acts of violence. *See id.* It is possible to assess the accuracy of such a probabilistic assessment based on facts in existence *at the time of the assessment*.[2] It follows that, at the time of Buntion's first petition, his future-dangerousness claim was ripe for review. There was no need to postpone that analysis until the State set an execution date. *See id.* at 950–51 (rejecting Buntion's argument as procedurally barred and substantively meritless, but not as unripe). That puts Buntion's claim undebatably beyond *Panetti*'s domain. *See Slack*, 529 U.S. at 484. That is a sufficient reason for denying a COA on this claim.

2.

Second and independently, "jurists of reason would [not] find it debatable whether" Buntion's future-dangerousness claim is procedurally defaulted. *Id.* at 584. "[A] federal court may not review federal claims that were procedurally defaulted in state court—that is, claims that the state court denied based on an adequate and independent state procedural rule." *Davila v. Davis*, 137 S. Ct. 2058, 2064 (2017). If the State "ha[s] . . . firmly established and regularly followed" the rule by the time of the relevant state court decision, then the rule is adequate. *Roberts v. Thaler*, 681 F.3d 597, 604-05 (5th Cir. 2012) (quotation omitted). If the state court decision "clearly and expressly" relies on the state rule to deny relief, or if the decision "does

[2] Buntion argues that his claim became ripe only after the State scheduled the execution because his claim turns on facts that exist only *today*—namely, that he has not committed any acts of violence as of *today*. We reject this argument because probabilistic assessments are just that: probabilities. For example, someone might predict that a given event has an 80% chance of happening. That is not an ironclad claim that the event *must* happen; it is an assessment of the odds at the time of the assessment. If the predicted event does not occur *ex post*, that does not prove anything about the *ex ante* probabilistic assessment. The assessment included, after all, a 20% prediction that the event would not occur.

not fairly appear to rest primarily on . . . or to be interwoven with [federal] law," then the state rule is independent. *Coleman v. Thompson*, 501 U.S. 722, 736, 740 (1991) (quotation omitted). If a state procedural rule is adequate and independent, then a state prisoner who fails to comply with it can't obtain federal habeas relief "absent a showing of cause and prejudice." *Id.* at 747.

In its most recent ruling, the CCA dismissed all of Buntion's claims (including his future-dangerousness claim) together "as an abuse of the writ without considering the claims' merits." *Ex parte Buntion*, No. 2022 WL 946264, at *1. It invoked Texas Code of Criminal Procedure article 11.071, § 5 in support. *See id.* That article provides that, "[i]f a subsequent application for a writ of habeas corpus is filed after filing an initial application, a court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing" one of three enumerated showings. TEX. CODE CRIM. PROC. ART. 11.071, § 5(a). The court held Buntion had "failed to satisfy the requirements" of the statute and dismissed the petition accordingly. *Ex parte Carl Wayne Buntion*, No. 2022 WL 946264, at *1.

Here, Buntion does not contend cause and prejudice excuse his default. Instead, he argues Texas Code of Criminal Procedure article 11.071, § 5 is not independent of federal law.[3] Citing *Ex parte Campbell*, 226 S.W.3d 418 (Tex. Crim. App. 2007), Buntion argues that Texas courts perform a two-step analysis when evaluating article 11.071 sufficiency. First, they ask whether "the factual or legal basis for an applicant's current claims [was] unavailable as to all of his previous applications"; second, they ask whether "the specific facts alleged, if established, would constitute a constitutional

[3] Buntion did not address this argument in our court. But for the sake of thoroughness, we address it as he presented it in his habeas petition in district court.

violation that would likely require relief from either the conviction or sentence." *See id.* at 421. And because that second step includes consideration of the Federal Constitution, Buntion contends this analysis cannot be independent of federal law. *See Coleman*, 501 U.S. at 736.

That argument undebatably fails. Most importantly, Buntion's argument misreads *Campbell*. *Campbell* held the following:

> [T]o satisfy Art. 11.071, § 5(a), 1) the factual or legal basis for an applicant's current claims must have been unavailable as to all of his previous applications; and 2) the specific facts alleged, if established, would constitute a constitutional violation that would likely require relief from either the conviction or sentence.

226 S.W.3d at 421 (footnotes omitted). Thus, a Texas court may dismiss a claim on the first ground—that the claim's "factual or legal basis" was not "unavailable"—without ever reaching the constitutional issue. *See id.* That is exactly what the CCA did in this case when it "dismiss[ed] the subsequent application as an abuse of the writ *without considering the claims' merits*." *Ex parte Carl Wayne Buntion*, No. 2022 WL 946264, at *1 (emphasis added).

Further, it's undebatable that an unelaborated dismissal under article 11.071, § 5 is based on an adequate and independent state ground. *See Slack*, 529 U.S. at 484. Our court has previously rejected arguments to the contrary:

> The use of federal law as guidance for the enactment and application of the Texas statute cited by the Court of Criminal Appeals as the basis for its rejection of Hughes's claims does not, as Hughes suggests, mean that the court's decision rested primarily on federal law or was interwoven with federal law. No application or interpretation of federal law is required to determine whether a claim has, or could have, been presented in a previous habeas application. The Texas Court of Criminal Appeals did not need to consider or decide the merits of

> Hughes's constitutional claims in reaching its decision to dismiss those claims as an abuse of the writ pursuant to Article 11.071, Section 5. Furthermore, there is nothing in its perfunctory dismissal of the claims that suggests that it actually considered or ruled on the merits. Accordingly, its decision was independent of federal law for purposes of application of the procedural default doctrine.

Hughes v. Quarterman, 530 F.3d 336, 342 (5th Cir. 2008). This case is indistinguishable. We therefore conclude that it's undebatable that Buntion's future-dangerousness claim is procedurally defaulted. That is an independent reason for denying a COA on this claim. *See Slack*, 529 U.S. at 484.

3.

Independently, "jurists of reason would [not] find it debatable whether" Buntion's future-dangerousness argument "states a valid claim of the denial of a constitutional right." *Slack*, 529 U.S. at 484. That is for at least three reasons.

First, Buntion's argument hinges on *Johnson v. Mississippi*, 486 U.S. 578 (1988). According to Buntion, *Johnson* stands for the proposition that, if a death sentence is predicated partially on a false assumption, the death penalty is arbitrary and therefore barred by the Eighth Amendment. Buntion undebatably misreads *Johnson*. The last time Buntion made this argument, we explained "that is not what *Johnson* says." *Buntion II*, 982 F.3d at 950. We went on:

> In fact, the Supreme Court has never intimated that the factual correctness of the jury's prediction on the issue of future dangerousness . . . bears upon the constitutionality of a death sentence. The Court contemplated in cases like [*Barefoot v. Estelle*, 463 U.S. 880 (1983),] that dangerousness evidence might be wrong most of the time. Yet it still did not create a

> remedy for defendants whose death sentences turned on that evidence.

Id. at 950–51 (quotations omitted). Precisely the same reasoning applies here.

Second, Buntion's argument undebatably ignores that the jury's prediction likely played a part in his non-violent behavior. All agree that Buntion has been largely kept away from other prisoners for most of the time he has been on death row. That is because, since 1999, Texas has "house[d] death row inmates separately in single-person cells" and "recreated [those inmates] individually." *See* TEXAS DEPARTMENT OF CRIMINAL JUSTICE, DEATH ROW INFORMATION: DEATH ROW FACTS, https://www.tdcj.texas.gov/death_row/dr_facts.html. The jury's future-violence prediction was necessary to its imposition of the death penalty, and the imposition of the death penalty is precisely what led to Buntion's separation from other prisoners. In short, it is entirely plausible that Buntion has been non-violent on death row because he is on death row. And it would be backwards to hold the jury's future-dangerousness prediction became retroactively inaccurate precisely by denying Buntion the opportunity to commit violence. Buntion's contrary argument is undebatably wrong. *See Slack*, 529 U.S. at 484.

Third, Buntion's argument rests on the assumption that, in light of his peaceful post-sentencing behavior, the jury's future-violence prediction was wrong. That assumption is undebatably false. Again: A probabilistic assessment can be accurate (*ex ante*) even if it doesn't come true (*ex post*). We reiterate that the jury did not predict Buntion would certainly commit acts of violence. The jury predicted there was "a probability" that he would do so. *Id.* at 951 (quotation omitted). Buntion does nothing to contest that assessment. Therefore, jurists of reason could not debate this claim, and we deny a COA to pursue it. *See Slack*, 529 U.S. at 484.

C.

Now we turn to Buntion's *Lackey* claim. We (1) explain that "jurists of reason would [not] find it debatable whether" § 2244(b)(1) bars this claim. *Slack*, 529 U.S. at 484. Then we (2) explain it is equally undebatable that this claim is procedurally defaulted. *See id.* Finally, we (3) explain that "jurists of reason would [not] find it debatable whether" Buntion's *Lackey* argument "states a valid claim of the denial of a constitutional right." *Id.* Each of these three grounds provides a separate, independent reason for our denial of Buntion's application for a COA under *Lackey*.

1.

Buntion raised his *Lackey* claim in his prior federal habeas petition, arguing "the Eighth Amendment prohibits his execution because of how much time he has spent on death row." *Buntion II*, 982 F.3d at 952. The district court rejected that claim as both meritless and as barred by the Supreme Court's non-retroactivity precedents. *See Buntion v. Davis*, No. 4:17-CV-02683, 38. We denied a COA on that claim because the claim was both "unexhausted" and "undebatably meritless." *Buntion II*, 982 F.3d at 952–53.[4]

As with his other claim, Buntion now attempts to circumvent § 2244 by analogizing to *Panetti*. On his view, the factual predicate underlying this claim is the interval between the date of his sentence and the moment the

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[4] Though courts are free to dismiss unexhausted claims *without* prejudice, they are also free to *deny* such claims and dismiss *with* prejudice. 28 U.S.C. § 2254(b)(2) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State."). The district court did the latter: It denied Buntion's claims and dismissed his petition with prejudice. *See Buntion v. Davis*, No. 4:17-CV-02683, 40 (granting the State's motion for summary judgment, denying Buntion's habeas corpus petition, and dismissing the case with prejudice).

State scheduled his execution. And because (part of) that factual predicate did not exist at the time he filed his previous petition, Buntion says, this claim fits within the *Panetti* exception to § 2244's text.

This argument undebatably fails for two independent reasons. *See Slack*, 529 U.S. at 484. First, as we explained above, *Panetti* applies to *Ford* claims. The Supreme Court has not extended it beyond that context, and neither has our court. A *Lackey* claim is undeniably not a *Ford* claim. So jurists of reason could not and would not debate whether the *Panetti* exception applies here. *See id.*

Second, although Buntion has now been on death row for longer than he had been at the time of his last petition, it obviously does not follow that his claim was *unripe* at the time of that filing. *See Buntion II*, 982 F.3d at 952–53 (faulting this argument as unexhausted and meritless, not as unripe). Further, Buntion had been on death row for over 25 years by the time he filed his last petition. *See* Petition for Writ of Habeas Corpus for Carl Wayne Buntion at 101–02, *Buntion v. Davis*, No. 4:17-CV-02683(S.D. Tex. Mar. 5, 2020) ("Because he has been incarcerated on death row for over a quarter of a century, the Eighth Amendment will not permit Buntion's execution."). If *Lackey* claims were a part of the law (and they are decidedly not, as we explain below), Buntion had the legal and factual predicates to raise the claim in his last federal habeas petition. *See, e.g.*, *Barr v. Purkey*, 140 S. Ct. 2594, 2595 (2020) (Breyer, J., dissenting from the order vacating stay) (contending delays of 16 and more than 20 years are long enough to be unconstitutional). Buntion's claim was ripe when he filed that petition, and *Panetti* applies only to claims that were unripe at the time of the prior filling. *See* 551 U.S. at 943 (explaining this). That means Buntion's *Lackey* claim, like his future-dangerousness claim, is undebatably beyond the scope of *Panetti*'s exception and hence is undebatably barred by § 2244(b)(1). That is a sufficient reason to deny a COA on this claim. *See Slack*, 529 U.S. at 484.

2.

Second and independently, "jurists of reason would [not] find it debatable whether" Buntion's *Lackey* claim is procedurally defaulted. *Slack*, 529 U.S. at 584. The CCA dismissed Buntion's entire "application," including his *Lackey* claim, "as an abuse of the writ without considering the claims' merits." *Ex parte Buntion*, No. 2022 WL 946264, at *1. Thus, for the same reasons stated above, *see supra*, Part III.B.2, the *Lackey* claim is undebatably defaulted. This is another independent reason for denying a COA on Buntion's *Lackey* claim.

3.

Third and independently, Buntion's claim is "undebatably meritless." *Buntion II*, 982 F.3d at 952. As we explained the last time Buntion raised a *Lackey* claim in our court:

> We, like Justice Thomas, are "unaware of any support in the American constitutional tradition or in th[e] [Supreme] Court's precedent for the proposition that a defendant can avail himself of the panoply of appellate and collateral procedures and then complain when his execution is delayed."

Id. at 952–53 (alterations in original) (quoting *Knight v. Florida*, 528 U.S. 990, 990 (1990) (mem.) (Thomas, J., concurring in the denial of certiorari)). Put more simply still: It is beyond reasonable debate that a State does not violate the Constitution by executing an individual after the individual has spent even a very long period of time on death row. *See Slack*, 529 U.S. at 584. This is another independent reason for denying Buntion a COA on his *Lackey* claim.

IV.

Buntion also filed a § 1983 suit, in which he asserted his *Lackey* claim against various individual defendants in their official capacities. In that suit,

he also asked the district court both for a temporary stay of execution and for an order permanently enjoining the defendants from executing him. The district court denied both and dismissed the suit with prejudice. *See* 28 U.S.C. § 1915A (directing district courts to review "before docketing, if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity," and to dismiss the complaint if it "fails to state a claim upon which relief may be granted"). Buntion timely appealed. We consolidated Buntion's § 1983 appeal with his request for a COA.

We have already denied a stay. *See supra*, Part II. We will now explain why Buntion's § 1983 suit fails in its entirety. We (A) hold this suit is barred by *Preiser v. Rodriguez*, 411 U.S. 475 (1973), and *Heck v. Humphrey*, 512 U.S. 477 (1994). Then, we (B) hold in the alternative that the claim would fail on the merits even if not *Heck*-barred.

A.

A prisoner may use a § 1983 suit to challenge conditions of his confinement. *E.g.*, *Nelson v. Campbell*, 541 U.S. 637, 643 (2004). But a prisoner may not use § 1983 to challenge "the fact or validity of the sentence itself" because such challenges "fall within the core of federal habeas corpus." *E.g.*, *id.* at 643–44; *see also Preiser*, 411 U.S. 475, 499 n.14 ("If a prisoner seeks to attack both the conditions of his confinement and the fact or length of that confinement, his latter claim, under our decision today, is cognizable only in federal habeas corpus."); *Heck*, 512 U.S. at 481 (*Preiser* "held that habeas corpus is the exclusive remedy for a state prisoner who challenges the fact or duration of his confinement and seeks immediate or speedier release, even though such a claim may come within the literal terms of § 1983."). In short, if "a judgment in favor of the plaintiff would

necessarily imply the invalidity of his conviction or sentence," the claim is not cognizable under § 1983. *Heck*, 512 U.S. at 487.

The same rule applies in the death-penalty context. If a § 1983 claim goes merely to the State's chosen method of execution and does not "necessarily imply" the death sentence is invalid, then *Preiser* does not bar the claim. *See id.* But if the claim's success would "necessarily imply" the death sentence is invalid, then *Preiser* does bar the claim. *See id.*

As we described above, *see supra*, Part III.C, Buntion asserts a *Lackey* claim in his habeas petition and in his COA application. He asserts that same claim (and only that claim) in his § 1983 suit. He insists that he accepts the legality of his 2012 death sentence, and he argues that his challenge goes *only* to the State's method of execution—specifically, the State's decision to execute him after a very long delay between his sentence and his execution.

Notwithstanding Buntion's assertions to the contrary, this claim sounds only in habeas. That is because Buntion's contentions under *Lackey* "necessarily imply . . . the invalidity of his . . . sentence," *see id.*, and it is therefore not a cognizable § 1983 claim. If Buntion were to prevail on his *Lackey* claim, it would follow that the State could not execute him under any circumstances whatsoever. The thrust of Buntion's *Lackey* claim is that the State would violate the Constitution by executing him after so long a time has passed. *See Lackey*, 514 U.S. at 1045–46 (memorandum of Stevens, J., respecting the denial of certiorari) (casting the claim in these terms). At this point in time, there is no way to undo that allegedly unconstitutional delay. Thus, if Buntion prevailed on this claim, it would necessarily follow that the State could not execute him now or ever or in any way. That is merely a different way of saying that his sentence would be invalid. *See Heck*, 512 U.S. at 487. Buntion's claim, then, is not a method-of-execution challenge; it is a challenge to the validity of his death sentence. It is therefore not cognizable

under § 1983. *Cf. Bucklew v. Precythe*, 139 S. Ct. 1112, 1126 (2019) (explaining the Supreme Court has "expressly held that identifying an *available* alternative is a requirement of *all* Eighth Amendment method-of-execution claims" (quotation omitted) (first emphasis added)).

This provides a sufficient basis for affirming the district court's dismissal of Buntion's § 1983 complaint. *See Heck*, 512 U.S. at 490 ("Applying these principles to the present action, in which both courts below found that the damages claims challenged the legality of the conviction, we find that the dismissal of the action was correct.").

B.

Even if Buntion's *Lackey* claim were cognizable under § 1983, we hold it would fail on the merits. That is for two independent reasons. First, as we explained above in Part III.C.3, *Lackey* claims are not part of the law. They have not ever been accepted by the Supreme Court or our court. Indeed, the shorthand for the claim is a dissental by Justice Stevens that urged (unsuccessfully, obviously) the Court to recognize the claim. *See Lackey*, 514 U.S. at 1421 (memorandum of Stevens, J., respecting the denial of certiorari) (describing the claim as "novel"). That is one independent basis for affirming the district court's dismissal.

Independently, if Buntion were correct that his *Lackey* claim challenges the State's method of execution rather than the sentence of execution itself, his claim would fail under *Glossip v. Gross*, 576 U.S. 863 (2015). As the Court recently clarified, "*Glossip* expressly held that identifying an available alternative is a requirement of *all* Eighth Amendment method-of-execution claims." *Bucklew*, 139 S. Ct. at 1126 (quotation omitted). Buntion does not attempt to identify an available alternative. That omission makes sense: the gravamen of his *Lackey* claim is that, given the

interval between sentencing and today, no method of execution could possibly suffice. But that omission also means the claim must fail.

V.

The district court's denial of a stay of execution is AFFIRMED. The district court's dismissal of Buntion's § 1983 claim is AFFIRMED. Buntion's motion for stay of execution is DENIED. Buntion's application for a COA is DENIED. All other motions, and all other requests for relief, are DENIED.

Appendix B

United States District Court
Southern District of Texas
ENTERED
April 15, 2022
Nathan Ochsner, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CARL WAYNE BUNTION,	§	
	§	
Petitioner,	§	
	§	
VS.	§	CIVIL ACTION NO. 4:22-CV-01104
	§	
BOBBY LUMPKIN,	§	
	§	
Respondent.	§	

ORDER ON DISMISSAL

Over three decades ago, Carl Wayne Buntion murdered Houston Police Officer James Irby during a routine traffic stop. After his 1991 death sentence was vacated, a second Texas jury found in 2012 that Buntion would be a future societal danger and that no mitigating circumstances warranted a life sentence. Buntion has litigated numerous issues in state court and previously sought federal habeas review.

Facing an execution date of April 21, 2022, Buntion has filed another federal petition for a writ of habeas corpus. Buntion's petition raises two claims: (1) his death sentence was arbitrarily imposed because the jury's future-dangerousness finding has proven incorrect and (2) his execution would serve no legitimate purpose because so much time has passed since his conviction.[1] Respondent Bobby Lumpkin moves to dismiss on grounds that Buntion has initiated an unsanctioned habeas action. (Docket Entry No. 5).

[1] Buntion's second claim—that an Eighth Amendment violation occurs when a prisoner remains on death row too long—originates in a memorandum of Justice Stevens respecting the denial of certiorari. *See Lackey v. Texas*, 514 U.S. 1045, 115 S.Ct. 1421, 131 L.Ed.2d 304 (1995) (mem.) (Stevens, J., respecting denial of cert.). Petitioners refer to this as a "*Lackey* claim." Buntion has not identified any Supreme Court or circuit precedent accepting the constitutional theory proposed by Justice Stevens' memorandum. *See Knight v. Florida*, 528 U.S. 990 (1999) (Thomas, J., concurring in denial of certiorari) ("I am unaware of any support in the American constitutional tradition or in this Court's precedent for the proposition that a defendant can avail himself of the panoply of appellate and

The Anti-Terrorism and Effect Death Penalty Act ("AEDPA") strongly discourages inmates from filing more than one habeas action. Under 28 U.S.C. § 2244(b)(3)(A), only a circuit court of appeals may authorize the filing of a "second or successive application[.]" *See Felker v. Turpin*, 518 U.S. 651, 664 (1996) ("The Act requires a habeas petitioner to obtain leave from the court of appeals before filing a second habeas petition in the district court."). "Indeed, the purpose and intent of [28 U.S.C. § 2244(b)(3)(A)] was to eliminate the need for the district courts to repeatedly consider challenges to the same conviction unless an appellate panel first found that those challenges had some merit." *United States v. Key*, 205 F.3d 773, 774 (5th Cir. 2000) (citing *In re Cain*, 137 F.3d 234, 235 (5th Cir. 1998)). "The question of whether the district court lack[s] jurisdiction over [a] second-in-time federal habeas petition depends on whether [the] petition is a 'second or successive' petition within the meaning of 28 U.S.C. § 2244." *Adams v. Thaler*, 679 F.3d 312, 321 (5th Cir. 2012).

A petition is not successive "simply because it follows an earlier federal petition." *Cain*, 137 F.3d at 235; *see also Panetti v. Quarterman*, 551 U.S. 930, 944 (2007). When considering whether a petition is "second or successive," the Supreme Court has specifically found that a claim is not successive if it was not ripe during the initial habeas proceedings, *see Panetti*, 551 U.S. at 944; *Stewart v. Martinez-Villareal*, 523 U.S. 637, 643 (1998), if the district court had dismissed the prior action to allow the exhaustion of state remedies, *see Slack v. McDaniel*, 529 U.S. 473, 478 (2000), or if the new claims attack a distinct legal judgment, *see Magwood v. Patterson,* 561 U.S. 320, 335 (2010). The Fifth Circuit firmly holds that "a later petition is successive when it: (1) raises a claim challenging the petitioner's conviction or sentence that was or could have been

collateral procedures and then complain when his execution is delayed."); *Allen v. Ornoski*, 435 F.3d 946, 958 (9th Cir. 2006) ("The Supreme Court has never held that execution after a long tenure on death row is cruel and unusual punishment.").

raised in an earlier petition; or (2) otherwise constitutes an abuse of the writ." *Cain,* 137 F.3d at 235.

Both of Buntion's latest habeas claims were available when he filed his earlier federal habeas action. *See Allen v. Ornoski*, 435 F.3d 946, 957 (9th Cir. 2006) (finding that an inmate could have brought his *Lackey* claim in his initial federal petition after only six years of incarceration). Buntion, in fact, has already litigated nearly identical issues in federal court. (*Buntion v. Davis*, 4:17-cv-2683, Docket Entry No. 4 at 101, 111).[2] The only significant difference between Buntion's earlier claims and his current ones is that more time has now passed. Buntion argues that the passage of time renders his old claims previously unavailable—that the certainty of an execution date breathes new life into claims previously resolved by the federal courts. (Docket Entry No. 1 at 34; Docket Entry No. 6 at 5-6). Buntion's argument, however, would eviscerate AEDPA's abuse-of-the-writ provisions and allow an endless succession of federal petitions differing from each other only in the time which had transpired since the inmate's conviction.

AEDPA seeks to "reduc[e] piecemeal litigation" and "streamlin[e] federal habeas proceedings." *Burton v. Stewart*, 549 U.S. 147, 154 (2007) (per curiam) (internal quotation marks omitted). Buntion's latest petition unquestionably falls within AEDPA's limitation on second or successive petitions. AEDPA does not give this Court authority to consider the merits of Buntion's

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[2] Buntion has already raised a claim which, like the first claim in his instant petition, argued that "Buntion's sentence is also predicated on an assessment that has proved invalid." (*Buntion v. Davis*, 4:17-cv-2683, Docket Entry No. 4 at 101). Buntion likewise has already litigated a claim nearly identical his second one. The only difference between Buntion's earlier "*Lackey*" claim and his current one is that more time has passed. (Docket Entry No. 1 at 34) ("His claim in this Petition is different. This claim rests on facts that did not exist until an execution date was set. Specifically, at that time, the delay was four years less than it is now. Until a date was set, any speculation about how long Buntion would be incarcerated under a sentence of death before the State sought to execute him could not be known. We now know that length of time is thirty-one years.").

latest federal petition. If Buntion wishes to litigate his claims he must first seek permission from the circuit court. Accordingly, the Court **ORDERS** as follows:

1. Respondent's motion to dismiss (Docket Entry No. 5) is **GRANTED**.

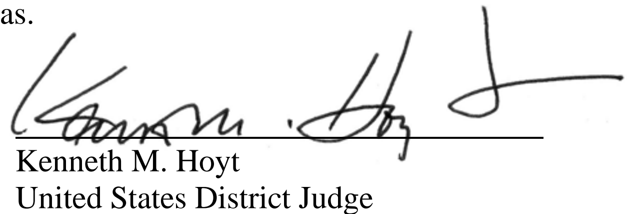
2. Buntion's petition is **DISMISSED WITHOUT PREJUDICE**.

3. Buntion's motion to proceed *in forma pauperis* (Docket Entry No. 2) is **GRANTED**.

4. No issue will be certified for consideration by the circuit court. *See* 28 U.S.C. § 2253(c)(2).

It is so ORDERED.

SIGNED on April 14, 2022, at Houston, Texas.



Kenneth M. Hoyt
United States District Judge

Appendix C

United States District Court
Southern District of Texas
ENTERED
April 18, 2022
Nathan Ochsner, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CARL WAYNE BUNTION,	§	
	§	
Plaintiff,	§	
	§	
VS.	§	CIVIL ACTION NO. 4:22-CV-01125
	§	
BRYAN COLLIER, *et al.*,	§	
	§	
Defendants.	§	

MEMORANDUM AND ORDER

Over thirty-one years after his capital-murder conviction, the State of Texas will execute Carl Wayne Buntion on April 21, 2022. On April 7, 2022, only fourteen days before his scheduled execution, Buntion filed this instant civil-rights lawsuit under 42 U.S.C. § 1983. Buntion, who "turned seventy-eight years old" and "is the oldest person incarcerated on death row in Texas" argues that, "[a]fter such a lengthy incarceration, his execution . . . would [not] serve . . . the permissible purposes of the death penalty." (Docket Entry No. 1 at 8). Buntion moves to stay his execution. (Docket Entry No. 6). The State opposes any relief. (Docket Entry No. 7). The Court finds that Buntion has not shown an entitlement to a stay of execution and that this case should be dismissed.

BACKGROUND

In 1990, Houston Police Department Officer James Irby stopped a vehicle in which Buntion was a passenger. While Officer Irby and the driver talked next to the vehicle, Buntion exited the car. Buntion shot Officer Irby once in the head. After he fell to the ground, Buntion shot Officer Irby twice more in the back.

A jury convicted Buntion of capital murder in 1991. He was sentenced to death. After the Texas Court of Criminal Appeals overturned his sentence, Buntion received another death sentence in 2012. Buntion again exhausted his appellate and habeas remedies. A Texas court recently issued a warrant scheduling Buntion's execution for April 21, 2022.

Buntion filed this lawsuit on April 7, 2022. Buntion's civil-rights complaint raises a single claim: "Buntion's execution after over three decades of delay caused by the State would violate his rights under the Eighth and Fourteenth Amendments." (Docket Entry No. 1 at 24). Buntion's arguments find their genesis in an opinion dissenting from the denial of certiorari in *Lackey v. Texas*, 514 U.S. 1045 (1995). In that dissenting opinion which has given rise to what has sometimes been called a "*Lackey* claim," Justice John Paul Stevens noted that the question of delay between sentencing and execution of the sentence issue was important and would benefit from further judicial review. *Id*. at 1047 (mem.) (Stevens, J.). Labeling his arguments "a challenge to the State's method of execution," Buntion asks this Court to create a new constitutional protection under *Lackey* pursuant to section 1983. (Docket Entry No. 1 at 29).

This lawsuit is not the first time that Buntion has litigated constitutional questions concerning the length of his incarceration. Buntion raised similar arguments in his federal habeas corpus petition (*Buntion v. Davis*, 4:17-cv-2683, Docket Entry No. 4 at 111-14) and in a subsequent state habeas application (*Ex parte Buntion*, 2022 WL 946264, at *1 (Tex. Crim. App. 2022)). Most recently, Buntion filed similar claims in a successive federal habeas corpus petition. (*Buntion v. Lumpkin*, 4:22-cv-1104). Without significant alteration in his legal argument, Buntion has now advanced a *Lackey* claim in a civil-rights petition.

Buntion's complaint asks for declaratory and injunctive relief. (Docket Entry No. 1 at 30). Buntion's complaint says that he seeks a stay of execution in a "contemporaneously filed motion,"

but he did not file a motion to stay until April 14, 2022. (Docket Entry No. 1 at 29, No. 6). For the reasons discussed below, the Court finds that Buntion is not entitled to a stay of his execution. The Court also dismisses this case.[1]

STAY OF EXECUTION

Buntion's civil-rights complaint can only proceed if the Court issues a stay of execution or another form of injunctive relief. A federal court has inherent discretion when deciding whether to stay an execution. *See Nken v. Holder*, 556 U.S. 418, 434 (2009); 28 U.S.C. § 2251(a)(1). "[A] stay of execution is an equitable remedy, and an inmate is not entitled to a stay of execution as a matter of course." *Hill v. McDonough*, 547 U.S. 573, 583-84 (2006). In deciding whether to issue a stay of execution, a court must consider: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other party interested in the proceeding; and (4) where the public interest lies. *See Nken*, 556 U.S. at 425-26. "[I]nmates seeking time to challenge the manner in which the State plans to execute them must satisfy all of the requirements for a stay, including a showing of a significant possibility of success on the merits." *Hill*, 547 U.S at 584.

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[1] Given the short time before his execution, the Court will only elaborate on a few reasons for denying a stay and dismissing this case. The Court observes, however, that other strong arguments support the Court's decision. For instance, Buntion concedes that he has not exhausted administrative remedies for his claim. *See* (Docket Entry No. 1 at 22) (Buntion "does not believe that exhaustion is necessary under the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e, because there are no available administrative remedies that could address the challenged constitutional violation"). Further, Buntion has not shown that he has filed this action within the applicable statute of limitations. Also, given that Buntion has previously raised the instant issues in two habeas petitions and that he lacks any arguable basis for his claim in civil-rights law, the Court questions whether the instant action has been done for an improper purpose "such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation." Fed. R. Civ. P. 11(b)(2); *see also Price v. Dunn*, 139 S. Ct. 1533, 1540 (2019) (Thomas, J., concurring) ("Petitioner's strategy is no secret, for it is the same strategy adopted by many death-row inmates with an impending execution: bring last-minute claims that will delay the execution, no matter how groundless. The proper response to this maneuvering is to deny meritless requests expeditiously.").

Buntion's pending motion depends on the operation of equity in his behalf. *See Hill*, 547 U.S. at 584. Before turning to his specific claim, the Court expresses concerns about the timing of Buntion's lawsuit. In the balance of equity, "dilatory behavior" may weigh heavily against a plaintiff. *Ramirez v. McCraw*, 715 F. App'x 347, 351 (5th Cir. 2017). The Supreme Court has observed that "a number of federal courts have invoked their equitable powers to dismiss suits they saw as speculative or filed too late in the day." *Hill*, 547 U.S. at 584. The Supreme Court has recognized the "significant" problems created when death-row inmates delay in filing their section 1983 suits, stating that "federal courts can and should protect States from dilatory or speculative suits." *Id*. at 585; *see also Dunn v. Ray*, ___ U.S. ___, 139 S. Ct. 661 (Mem) (2019) (vacating a stay issued by a circuit court when the inmate sued only days before his execution).

Buntion's complaint does not identify any concern that has suddenly arisen but instead relies on issues that have been present for years. Buntion, in fact, litigated a similar claim in 2018.[2] Buntion, nevertheless, waited until days before his execution to bring this lawsuit. Nothing prevented Buntion from challenging his execution in a civil-rights lawsuit long before now. Any urgency is a matter of Buntion's own creation. Filing this lawsuit only days before an execution lessens the credibility of the Buntion's arguments and raises a concern that he is only engaging in gamesmanship. *See* Charles Alan Wright & Arthur R. Miller, et al., 11a Federal Practice & Procedure § 2948.1 (3d ed., April 2017 update) ("A long delay by plaintiff after learning of the

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[2] The strongest support for Buntion's claim comes from a statement of Justice Breyer respecting the denial of certiorari in Buntion's federal habeas action. *See Buntion v. Lumpkin*, 142 S. Ct. 3 (Mem) (2021) ("Buntion has now been subjected to those conditions for decades. His lengthy confinement, and the confinement of others like him, calls into question the constitutionality of the death penalty and reinforces the need for this Court, or other courts, to consider that question in an appropriate case."). Buntion does not explain why he waited months after that statement to file this lawsuit. Even assuming that Buntion's claims did not become ripe until the State set his execution date, he should have filed this lawsuit much earlier.

threatened harm also may be taken as an indication that the harm would not be serious enough to justify a preliminary injunction.").

The Fifth Circuit has recognized that similarly late-filed lawsuits "constitute[] a dilatory tactic and therefore warrant[] no equitable relief." *See Bible v. Davis*, 739 F. App'x 766, 770 (5th Cir. 2018); *see also White v. Johnson*, 429 F.3d 572, 573-74 (5th Cir. 2005).[3] The Court, therefore, finds that Buntion's unnecessary delay in filing suit requires the denial of equitable relief.

In addition, Buntion has not made a strong showing that he is likely to succeed on the merits and has not otherwise met the requirements for a stay of execution. Buntion's complaint raises a single claim: that his "execution after over three decades of delay caused by the State would violate his rights under the Eighth and Fourteenth Amendments." (Docket Entry No. 1 at 24). Setting aside the question of whether Buntion bears some responsibility for the delay through legal challenges to his conviction and sentence,[4] Buntion has not shown a strong likelihood of success. As an initial matter, Buntion's cause of action sounds in habeas, not civil-rights law. *See Heck v. Humphrey*, 512 U.S. 477, 487 (1994). A civil-rights complaint is not the proper vehicle to bring a *Lackey* claim before the federal courts. "Challenges to the validity of any confinement

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[3] Indeed, "[i]n response to systemic abuses by prisoners bringing dilatory claims, the federal courts—and [the Fifth Circuit] in particular—have been forced to develop extensive jurisprudence resisting those requests for long-available claims presented, for the first time, on the eve of execution." *Ruiz v. Davis*, 850 F.3d 225, 229 (5th Cir. 2017); *see also Bible*, 739 F. App'x at 770 (finding a lawsuit brought nineteen days before execution was dilatory); *Sepulvado v. Jindal*, 729 F.3d 413, 420-21 (5th Cir. 2013) (vacating a stay where inmate challenged a procedure he had known about for two years); *Brown v. Livingston*, 457 F.3d 390, 391 (5th Cir. 2006) (denying equitable relief where "[a]lthough [the prisoner's] direct appeal has been final for seven years, he did not file the instant complaint until six days before his scheduled execution"); *Reese v. Livingston*, 453 F.3d 289, 291 (5th Cir. 2006) (denying stay of execution because "a plaintiff cannot wait until a stay must be granted to enable him to develop facts and take the case to trial – not when there is no satisfactory explanation for the delay").

[4] *See White v. Johnson*, 79 F.3d 432, 439 (5th Cir.1996) ("The state's interest in deterrence and swift punishment must compete with its interest in insuring that those who are executed receive fair trials with constitutionally mandated safeguards . . . . White has benefited from this careful and meticulous process and cannot now complain that the expensive and laborious process of habeas corpus appeals which exists to protect him has violated other of his rights.").

or to particulars affecting its duration are the province of habeas corpus," whereas "requests for relief turning on circumstances of confinement may be presented in a § 1983 action." *Muhammad v. Close*, 540 U.S. 749, 750 (2004); s*ee also Hill v. McDonough*, 547 U.S. 573, 579 (2006). Buntion's *Lackey* claim is not cognizable in a section 1983 action and thus he fails to state a claim upon which relief can be granted. *See Smith v. Shinn*, 2021 WL 5320877, at *2 (9th Cir. 2021).

But whether Buntion has chosen civil-rights or habeas as the vehicle for bringing this claim, his arguments rest on unsure constitutional footing. While Bunion lists dissenting opinions that discuss the possible merit of a *Lackey* claim (Docket Entry No. 1 at 26), he has not cited any case endorsing such a constitutional protection. No current federal jurisprudence supports Buntion's claim. *See Knight v. Florida*, 528 U.S. 990 (1999) (Thomas, J., concurring in denial of certiorari) ("I am unaware of any support in the American constitutional tradition or in this Court's precedent for the proposition that a defendant can avail himself of the panoply of appellate and collateral procedures and then complain when his execution is delayed."); *Allen v. Ornoski*, 435 F.3d 946, 958 (9th Cir. 2006) ("The Supreme Court has never held that execution after a long tenure on death row is cruel and unusual punishment."). Simply, "[p]risoners have been making the delay argument for years, always without success." *Chambers v. Bowersox*, 157 F.3d 560, 569 (8th Cir. 1998).

The Court, therefore, easily finds that Buntion has not made a strong showing that he is likely to succeed on the merits of his *Lackey* claim. Buntion's "inability to establish a likelihood of success on the merits is, effectively, dispositive of the motion for stay." *Crutsinger v. Davis*, 930 F.3d 705, 707 (5th Cir. 2019). The Court, however, notes that the other factors weigh heavily against Buntion. Even assuming that the possibility of irreparable injury weighs in Buntion's

favor,[5] the remaining two *Nken* factors weigh strongly against him. A stay would prejudice the Defendant because Texas has a "strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Id.* at 272-73 (5th Cir. 2019). The public interest more greatly lies in allowing the State to carry out its otherwise-valid judgment because "protecting against abusive delay is an interest of justice." *Martel v. Clair*, 565 U.S. 648, 662 (2012). For those reasons, the Court denies Buntion's request for a stay.

BUNTION'S COMPLAINT

Section 1915A of title 28 of the United States Code requires a federal district court to "review . . . a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity." The Court must dismiss a complaint if it is frivolous, malicious, or fails to state a claim upon which relief can be granted. 28 U.S.C. § 1915A(b)(1). For the same reasons which disentitle Buntion to a stay, his complaint fails to state a claim on which relief can be granted. The Court, therefore, must dismiss his complaint under 28 U.S.C. § 1915A.

CONCLUSION

For the reasons described above, the Court **ORDERS** as follows:

1. Buntion's request to proceed *in forma pauperis* is **GRANTED**. (Docket Entry No. 2).

2. Buntion's motion for a stay of execution (Docket Entry No. 6) is **DENIED**.

3. This case is **DISMISSED WITH PREJUDICE**.

4. Buntion may proceed *in forma pauperis* in any appeal in this case.

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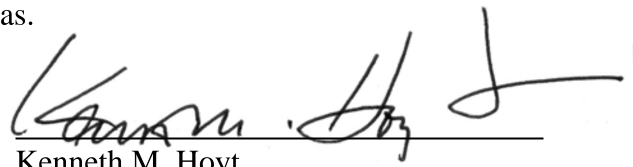
[5] The Fifth Circuit has said that "[i]n a capital case, the possibility of irreparable injury weighs heavily in the movant's favor." *O'Bryan v. Estelle*, 691 F.2d 706, 708 (5th Cir. 1982). Even though the death penalty is irreversible, there must come a time when the legal issues "have been sufficiently litigated and re-litigated so that the law must be allowed to run its course." *O'Bryan*, 691 F.2d at 708 (quoting *Evans v. Bennett*, 440 U.S. 1301, 1306 (1979)).

5. All other requests for relief are **DENIED**.

SIGNED on April 18, 2022, at Houston, Texas.



Kenneth M. Hoyt
United States District Judge

Appendix D

local public agency providing for a loan, grant, contribution, or other Federal aid, or for the payment of a commission or fee;

(b) refrain from extending any further aid under any program administered by it and affected by this order until it is satisfied that the affected person, firm, or State or local public agency will comply with the rules, regulations, and procedures issued or adopted pursuant to this order, and any nondiscrimination provisions included in any agreement or contract;

(c) refuse to approve a lending institution or any other lender as a beneficiary under any program administered by it which is affected by this order or revoke such approval if previously given.

SEC. 303. In appropriate cases executive departments and agencies shall refer to the Attorney General violations of any rules, regulations, or procedures issued or adopted pursuant to this order, or violations of any nondiscrimination provisions included in any agreement or contract, for such civil or criminal action as he may deem appropriate. The Attorney General is authorized to furnish legal advice concerning this order to the Committee and to any department or agency requesting such advice.

SEC. 304. Any executive department or agency affected by this order may also invoke the sanctions provided in Section 302 where any person or firm, including a lender, has violated the rules, regulations, or procedures issued or adopted pursuant to this order, or the nondiscrimination provisions included in any agreement or contract, with respect to any program affected by this order administered by any other executive department or agency.

PART IV—ESTABLISHMENT OF THE PRESIDENT'S COMMITTEE ON EQUAL OPPORTUNITY IN HOUSING

[Revoked. Ex. Ord. No. 12259, Dec. 31, 1980, 46 F.R. 1253; Ex. Ord. No. 12892, §6–604, Jan. 17, 1994, 59 F.R. 2939.]

PART V—POWERS AND DUTIES OF THE PRESIDENT'S COMMITTEE ON EQUAL OPPORTUNITY IN HOUSING

SEC. 501. [Revoked. Ex. Ord. No. 12259, Dec. 31, 1980, 46 F.R. 1253; Ex. Ord. No. 12892, §6–604, Jan. 17, 1994, 59 F.R. 2939.]

SEC. 502. (a) The Committee shall take such steps as it deems necessary and appropriate to promote the coordination of the activities of departments and agencies under this order. In so doing, the Committee shall consider the overall objectives of Federal legislation relating to housing and the right of every individual to participate without discrimination because of race, color, religion (creed), sex, disability, familial status or national origin in the ultimate benefits of the Federal programs subject to this order.

(b) The Committee may confer with representatives of any department or agency, State or local public agency, civic, industry, or labor group, or any other group directly or indirectly affected by this order; examine the relevant rules, regulations, procedures, policies, and practices of any department or agency subject to this order and make such recommendations as may be necessary or desirable to achieve the purposes of this order.

(c) The Committee shall encourage educational programs by civic, educational, religious, industry, labor, and other nongovernmental groups to eliminate the basic causes of discrimination in housing and related facilities provided with Federal assistance.

SEC. 503. [Revoked. Ex. Ord. No. 12259, Dec. 31, 1980, 46 F.R. 1253; Ex. Ord. No. 12892, §6–604, Jan. 17, 1994, 59 F.R. 2939.]

PART VI—MISCELLANEOUS

SEC. 601. As used in this order, the term ''departments and agencies'' includes any wholly-owned or mixed-ownership Government corporation, and the term ''State'' includes the District of Columbia, the Commonwealth of Puerto Rico, and the territories of the United States.

SEC. 602. This order shall become effective immediately.

[Functions of President's Committee on Equal Opportunity in Housing under Ex. Ord. No. 11063 delegated to Secretary of Housing and Urban Development by Ex. Ord. No. 12892, §6–604(a), Jan. 17, 1994, 59 F.R. 2939, set out as a note under section 3608 of this title.]

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(R.S. §1979; Pub. L. 96–170, §1, Dec. 29, 1979, 93 Stat. 1284; Pub. L. 104–317, title III, §309(c), Oct. 19, 1996, 110 Stat. 3853.)

CODIFICATION

R.S. §1979 derived from act Apr. 20, 1871, ch. 22, §1, 17 Stat. 13.

Section was formerly classified to section 43 of Title 8, Aliens and Nationality.

AMENDMENTS

1996—Pub. L. 104–317 inserted before period at end of first sentence '', except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable''.

1979—Pub. L. 96–170 inserted ''or the District of Columbia'' after ''Territory'', and provisions relating to Acts of Congress applicable solely to the District of Columbia.

EFFECTIVE DATE OF 1979 AMENDMENT

Amendment by Pub. L. 96–170 applicable with respect to any deprivation of rights, privileges, or immunities secured by the Constitution and laws occurring after Dec. 29, 1979, see section 3 of Pub. L. 96–170, set out as a note under section 1343 of Title 28, Judiciary and Judicial Procedure.

§ 1984. Omitted

CODIFICATION

Section, act Mar. 1, 1875, ch. 114, §5, 18 Stat. 337, which was formerly classified to section 46 of Title 8, Aliens and Nationality, related to Supreme Court review of cases arising under act Mar. 1, 1875. Sections 1 and 2 of act Mar. 1, 1875 were declared unconstitutional in *U.S. v. Singleton*, 109 U.S. 3, and sections 3 and 4 of such act were repealed by act June 25, 1948, ch. 645, §21, 62 Stat. 862.

§ 1985. Conspiracy to interfere with civil rights

(1) Preventing officer from performing duties

If two or more persons in any State or Territory conspire to prevent, by force, intimidation,