

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

EX PARTE JEDIDIAH ISAAC MURPHY

.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE TEXAS COURT OF CRIMINAL APPEALS

THIS IS A DEATH PENALTY CASE
EXECUTION DATE OCTOBER 10, 2023
PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Is an inmate who is to be executed entitled to procedural due process to discover the effects of a catastrophic fire on the drugs to be used in his execution?

PARTIES TO PROCEEDING BELOW

Jedidiah Isaac Murphy is the death sentenced inmate.

The State of Texas is represented by Ali Nasser, District Attorney Pro Tem

RELATED CASES

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IN THE
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JEDIDIAH ISAAC MURPHY– PETITIONER

vs.

STATE OF TEXAS – RESPONDENT

Petitioner, JEDIDIAH ISAAC MURPHY, respectfully prays that a writ of certiorari issue to review the judgment below.

CITATION TO OPINIONS BELOW

The opinion of the Texas Court of Criminal Appeals appears at Appendix 1 to the petition and is unpublished. The dissent appears at Appendix 2.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

The judgment of the court below became final today, October 10, 2023. *Ex parte Murphy*, No. AP-77, 116 (Tex. Crim. App., October 10, 2023).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Amendment to the United States Constitution provides, in relevant part, that no state shall “deprive any person of life, liberty, or property, without due process of law.” U.S. Const. Amend. XIV.
2. The Texas Code of Criminal Procedure Article 43.24 provides: “No torture, or ill treatment, or unnecessary pain, shall be inflicted upon a prisoner to be executed under the sentence of the law.”

STATEMENT OF THE CASE

On September 27, 2023, Murphy filed an Application for Writ of Habeas Corpus Under Article I, § 12 of the Texas Constitution and Texas Code of Criminal Procedure Article 11.05 in the trial court (App. 1). This writ challenged the State’s use of fire-damaged and expired chemicals which the State intends to use to execute Murphy on October 10, 2023. In this writ, Murphy seeks injunctive relief from imminent violations of the United States Constitution, the Texas Constitution, and statutes.

Murphy filed this original writ in an attempt to address these problems in the trial court. As the proper fact-finder, the trial court was best suited to provide a forum for an evidentiary hearing so that Murphy could establish and prove his claims. However, in an order dated October 5, 2023, the trial court denied Murphy’s writ without hearing any evidence, finding only that Murphy had not met the

threshold established in *Glossip v. Gross*, 576 U.S. 863, 877 (2015). (App. 2).

Murphy appealed to the Texas Court of Criminal Appeals arguing that he was entitled to hearing in the trial court to establish his claims and that his execution with fire-damaged expired drugs would violate the Eighth Amendment. The court denied Murphy's appeal on the merits. *Ex parte Jedidiah Isaac Murphy*, No. AP-77, 116 (Tex. Crim. App., October 10, 2023). (App. 3).

The current execution protocol in Texas was adopted on April 21, 2021.¹ That protocol requires that individuals be executed by lethal injection using 5 grams of pentobarbital.² Mr. Murphy is scheduled to be executed pursuant to this protocol on October 10, 2023. But there is a problem.

At approximately 2:30 AM on August 25, 2023, a fire erupted in the Administration Building at the Texas Department of Criminal Justice's (TDCJ) Huntsville Unit. It burned for up to ten hours, causing catastrophic damage to the third floor of the Administration Building, among other areas of the building. Multiple agencies, including the Huntsville Fire Department, the Montgomery County Emergency Services, the Willis Fire Department, the Walker County Emergency Services, the New Waverly Fire Department, the Crabb Prairie Fire Department, the Dodge Fire Department, the Riverside Fire Department, the Walker County Office of Emergency Management, and the Texas Department of Emergency Management responded to the scene.

¹ See App. 1, Ex. 4-, TDCJ Execution Protocol.

² *Id.* at 10.

Greg Mathis, Fire Chief of the Huntsville Fire Department, led the fire response. According to Chief Mathis, emergency personnel finally managed to get the main blaze under control at approximately 6:30 a.m., four hours after the initial alarms rang out. However, personnel remained on the scene and continued to battle small fires and smoke in the Administration Building until approximately noon.

News reports indicate that the Administration Building was subject to extensive damage. At a press conference held after the fire, Chief Mathis indicated that dealing with the damage will require “a pretty extensive mop-up operation.”³ Given the extent of the damage, TDCJ was forced to relocate the staff that worked in the Administration Building as well as 655 inmates who were housed in a housing block next to the Administration Building. The affected areas of the Administration Building remain “sealed off until the State and local investigations can be completed.” *Id.* The investigation remains ongoing.

According to a report written by Captain Jon Brandon Kolaja from the Huntsville Fire Department, an unnamed correctional officer approached Captain Kolaja as the fire was blazing, and asked him to “check on the pharmacy”—which, on information and belief, refers to lethal injection chemicals stored in the Administration Building.⁴ According to the report, Captain Kolaja and the unnamed officer donned self-contained breathing apparatuses and entered the

³ Brenda Poe, *Walls Unit Damage in Overnight Fire*, The Huntsville Item (Aug. 25, 2023), <https://www.itemonline.com/news/wall-unit-damaged-in-overnight-fire/article-9fa1c0a8-44340-11ee-aas57-f735e9eb6f555.html>.

⁴ See App. 1 Ex 5, Huntsville Fire Department Report, p. 2

burning building in an attempt to retrieve the lethal injection chemicals. When they reached the third floor, however, they discovered that the area was being “overtaken by fire,” and Captain Kolaja and the unnamed officer fled for their safety. *Id.* Captain Kolaja and the officer did not retrieve the lethal injection drugs from the burning Administration Building. Due to the destructive, long-burning fire from which Kolaja and the officer were forced to flee, that part of the building will, on information and belief, be considered a “total loss.”

Building fires create an extreme level of heat. “Fully developed building fires can generally attain average gas temperatures throughout the room containing the fire in excess of 1,000 degrees Celsius (1800 degrees Fahrenheit).”⁵ Features of the Huntsville Unit building would have increased, on information and belief, the internal temperatures even higher than average:

1. The Huntsville Unit building had a clay-tile roof, which trapped the fire within the building and made it harder for firefighters to control it. In addition, firefighters had trouble accessing the necessary areas of the fire due to “building construction,” key-locked doors, and the size and strength of the fire; and outside water hoses could not get close enough to the affected area.⁶

⁵ Milke, et al., Overview of Fire Protection in Buildings, Federal Emergency Management Agency, at A-17, available at https://www.fema.gov/pdf/library/fema403_apr.pdf.

⁶ App. 1, Ex. 5, Huntsville Fire Dept. Rpt., p.2 (“Due to building construction and heavy fire, crews had difficult time making access. This was a prison unit with multiple keys needed for access and control to each area. After L624 and L614 flowed water for some time there was some control of the fire:); *id.* (“The water was partially successful in limiting the spread, however, the Spanish roofing tiles limited the water to reach all the fire. Also, the distance from the ladder tip to the admin. building was farther than an effective water stream from the ladder truck:); *id.* at 3 (“Suppression Factor: Building construction or design, other, Roof collapse, Egress/exit problem”).

2. The fire burned and spread for over five hours before firefighters could bring it under control – and then continued to burn in numerous “hot spots” for another five hours after that.
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3. The building was slated for major code-compliance upgrades – which had not yet begun – after the State Fire Marshal found “nearly 1700 violations,” including failures to test “fire doors, dampers, or standpipe systems.”⁸

When exposed to high temperatures, pentobarbital suspensions quickly degrade, impacting the pH and causing insoluble precipitates to form in the suspension. In other words, solid particles separate from the liquid in a vial, compromising the consistency of the chemical levels throughout the container.⁹ Furthermore, its chemical structure can change, turning into an entirely different substance with a different pharmacological impact on the body.¹⁰ For example, when pentobarbital is “heated to decomposition it emits toxic fumes of nitric oxide.”¹¹ When exposed to much lower temperatures than a fire – those of 100°C (212°F) – and for only a single hour, chemical changes cause pentobarbital to lose

⁷ Poe, *Inmates Evacuated Because of Fire at Texas Prison Unit*, *supra*; App. 4, Huntsville Fire Dept. Rpt., p. 3

⁸ Ken Miller, *All Prisoners Accounted For After Fire at Texas Prison Forces Evacuation*, NBCDFW (Au. 25, 2023), available at <https://www.nbcdfw.com/news/local/texas-news/all-prisoners-accounted-for-after-fire-at-texas-prison-forces-evacuations/3324120/>

⁹ See App. 1 Ex. 6-, Report of Dr. Almgren, at ¶ 31 (“The changes in pH can lead to formation of precipitant”).

¹⁰ *Id.* (Also, exposure of pentobarbital to pH outside of the acceptable range can lead to quicker breakdown of the pentobarbital molecule itself, producing further degradation[.]”). Mr. Murphy intends to file a supplemental scientific report further supporting these allegations.

¹¹ NIH National Library of Medicine, PubChem: Pentobarbital (Compound), available at <https://pubchem.ncbi.nlm.nih.gov/compound/Pentobarbital#section=Decompositiion>, citing authorities.

80 percent of its potency. Pharmacological authorities further warn that the type of pentobarbital at issue here – compounded pentobarbital – should be used within *48 hours if stored at room temperature.* ¹²

Mr. Murphy's attempts to gather information about the condition of the substances intended for use in his execution in the wake of the Huntsville Unit fire have been met with bad-faith delay and obstruction by TDCJ. On September 8, 2023, once the extent of the fire and damage became clearer, counsel sent to the TDCJ via email transmission a Public Information Act request seeking information about whether and how the lethal injection substances stored at the Huntsville Unit were affected by the fire.¹³

On September 19, 2023, still lacking a response, counsel sent a follow-up email inquiry:

The Public Information Act requires that the governmental body must produce the requested information "promptly." Gov't Code 552.221. Given that my client is scheduled for execution in three weeks, the delay in your response is neither prompt nor reasonable. If you intend to seek an Attorney General opinion, please advise immediately, so that I have time to respond. Regardless of the fact that the Act gives you 10 days to request such an opinion, in these circumstances the unnecessary use of the full period flouts the language and the spirit of the Act.

The TDCJ Open Records Coordinator responded:

Your request was received on 9/8/2023 and sent for processing.

We are allowed 10 full business days (Monday through Friday and excluding holidays) to process all requests, which means that your request is currently on day # 8.

¹² App. 1, Ex. 6, Almgren Rpt, ¶ 15.

¹³ App. 1, Ex. 14- PIA Request of Sept. 8, 2023.

All requests are processed in the order in which they are received, not on the basis of need or urgency.¹⁴

On the afternoon of the 10th day, TDCJ responded; but did not provide any documents. Instead, they advised counsel that they would be seeking a Request for Decision from the Office of the Attorney General (“OAG”).¹⁵ Their request to the OAG asserted that the “documents responsive to this request contain information that is excepted from disclosure under the PIA . . . Specifically, TDCJ invokes . . . sections 552.028 and 552.101 through 552.158 of the PIA.”

TDCJ’s invocation of sections “552.101 through 552.158” includes every possible exception from disclosure contained within the PIA except for the last four. They are thus asserting that there are 72 exceptions (only a fraction conceivably applicable) which they argue excepts the information from disclosure.

TDCJ’s actions flout the language and spirit of the Act. The PIA Handbook states:

The officer for public information must “promptly” produce public information in response to an open records request. “Promptly” means that a governmental body may take a reasonable amount of time to produce the information, but may not delay. It is a common misconception that a governmental body may wait ten business days before releasing the information. In fact, as discussed above, the requirement is to produce information “promptly.” What constitutes a reasonable amount of time depends on the facts in

¹⁴ See App.1 Ex. 15-, PIA Request Followup Correspondence, Sept. 19, 2023.

¹⁵ See App. 1, Ex. 16-, PIA Response of September 22, 2023.

each case. The volume of information requested is highly relevant to what constitutes a reasonable period of time.¹⁶

TDCJ had 15 days from counsel's original request to submit to the Open Records Division their written comments explaining why the (72) exceptions to disclosure asserted apply. The 15th day was September 29, 2023. To date counsel has not heard anything.¹⁷

TDCJ's actions reek of gamesmanship. By unnecessarily delaying their response the maximum amount of time permitted – as opposed to responding “promptly,” as is their duty – they effectively deny Mr. Murphy even the opportunity to argue for his right to the information.

Neither Mr. Murphy nor his counsel delayed in seeking the information, as neither the relevance of the fire nor the extent of its damage were immediately clear. The critical nature of the information he seeks – whether a catastrophic event

¹⁶ PIA Handbook 2022 p.23(citations omitted), available at <https://www.texasattorneygeneral.gov/open-government/members-public/overview-public-information-act>).

¹⁷ This nonresponse is even more egregious given that similar PIA requests by attorneys for condemned men facing execution have been filed repeatedly over the past 5+ years, and the TDCJ has regularly responded (albeit with an unvarying set of information that fails to change regardless of the substance of the request). Moreover, in the TDCJ's response to Mr. Murphy's Motion for a Stay in *Murphy v. Lumpkin*, C.A. No. 1:23-CV-01199 (WDTX), the TDCJ attached a lab report dated after the Huntsville fire that purports to reflect testing showing that the “execution drugs” are potent and sterile. *See Id.*, Defendant's Response in Opposition (Doc. 7, filed October 5, 2023) and Exhibit A attached.. Thus, the *information is available*. However, those test results standing alone do not say anything about the substances TDCJ intends to use in Mr. Murphy's execution.

significantly denigrated the substances TDCJ intends to use to carry out his execution – cannot be overstated. TDCJ’s response is simply obstructionist.

Murphy also claimed that the use of fire-blighted, expired pentobarbital violates the Texas Constitution’s prohibition on Cruel or Unusual Punishment.

Additionally, use of these drugs violates Art. 43.24 of the Texas Code of Criminal Procedure. Article 43.24 states: “No torture, or ill treatment, or unnecessary pain shall be inflicted upon a prisoner to be executed under the sentence of the law.” Article 43.24 imposes a lower burden on an applicant than the Eighth Amendment does; under the Article, a person only needs to demonstrate “unnecessary pain” – not pain “superadded well beyond” what is necessary. Neither does Article 43.24 require the applicant to show that the level of pain is “unnecessary” by comparison to a known and available alternative method.

REASONS FOR GRANTING THE WRIT

Death is different. This simple truth has been upheld by the Court time and time again. Murphy argues that Texas Code of Criminal Procedure Art. 43.24 establishes a “liberty interest,” such that certain procedural protections are required by the Fourteenth Amendment. *Swarthout v. Cooke*, 562 U.S. 216, 219 (2011). (“Whatever liberty interest exists is, of course, a state interest created by [state] law...[When] a State creates a liberty interest, the Due Process Clause requires fair procedures for its vindication...). Failing to afford Murphy a hearing to establish his claims about the fire-blighted drugs to be used to execute him violated his rights to due process. *See Herman v. Claudy*, 30 U.S. 116 (1956).

- I. Article 43.24 of the Texas Code of Criminal Procedure establishes a “liberty interest” in the treatment and execution of the condemned.

The test for determining whether state laws create a “liberty interest” was set out in *Sandlin v. Conner*, 515 U.S. 472 (1995). State laws or procedures give rise to a liberty interest when the state’s proposed deviation from policy “imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.” *Id.* at 483. This test was applied to the manner of execution in *Jordan v. Fisher*, 823 F.3d 805 (5th Cir. 2016). There, the court stated that a plaintiff must show that the execution method would “impose atypical and significant hardship’ on them beyond the ordinary for those facing execution.” *Id.* at 811.

While it is true that courts have said that there is no due process right requiring states to disclose information about the execution protocol to be used because there is no cognizable liberty interest, (*See e.g. Sepulvado v. Jindal*, 729 F.3d 413 (5th Cir. 2013); *Whitaker v. Collier*, 862 F.3d 490 (5th Cir. 2017)), these opinions did not address a liberty interest created by Article 43.24 of the Texas Code of Criminal Procedure. Additionally, Murphy is not seeking information about the protocol to be used; instead,

he is seeking information about the effects of a catastrophic fire on the drug to be used in the protocol.

The touchstone of procedural due process is the “requirement that ‘a person in jeopardy of serious loss be given notice of the case against him and opportunity to meet it.’” [*Mathews v. Eldridge*, 424 U.S. 319, 348-49 (1976)] (quoting *Joint Anti-Fascist Comm. V. McGrath*, 341 U.S. 123, 171-72, 71 S.Ct. 624, 95 L.Ed 817 (1951) (Frankfurter, J., concurring) (alteration omitted); see also *id.* at 333, 96 S.Ct. 893 (“The right to be heard before being condemned to suffer grievous loss of any kind...is a principle basic to our society.”) (citation and quotation marks omitted). The notice must be of such nature as reasonably to convey the required information, and “must be granted at a meaningful time and in a meaningful manner.: *E.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507, 533, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004) (quoting *Fuentes v. Shevin*, 407 U.S. 67, 80, 92 S.Ct. 1983, 32 L.Ed.2d 56 (1972) (quotation marks omitted). “A liberty interest may arise from the Constitution itself, by reason of guarantees implicit in the word ‘liberty,’” *Wilkinson v. Austin*, 545 U.S. 209, 221, 125 S.Ct. 2384, 162 L.Ed.2d 174 (2005) (citing *inter alia*, *Vitek v. Jones*, 445 U.S. 480, 493-94, 100 S.Ct., 1254, 63 L.Ed.2d 552 (1980) (liberty interest in avoiding involuntary psychiatric treatment and transfer to mental institution)), “or it may arise from an expectation or interest created by state laws or policies,: *id.* (citing, *inter alia*, *Wolff v. McDonnell*, 418 U.S. 539, 556-58, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974) (liberty interest in avoiding withdrawal of state-created system of good-time credits.)).

Sepulvado v. Jindal, 739 F.3d 716, 721 (5th Cir. 2013) (Dennis, J., dissenting). “A plaintiff need not have an officially recognized liberty interest before being entitled to notice of the deprivation of that interest and an opportunity to be heard at a meaningful time and a meaningful manner.” *Id.* at 724 (citing *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005) (“A liberty interest may arise from the Constitution itself, by reason of guarantees implicit in the word ‘liberty’[.]”).

Murphy has asserted a cognizable liberty interest in discovering the effects of this catastrophic fire upon the drugs to be used in his execution. If TDCJ will not provide this information by public information requests, Murphy is entitled to a hearing to discover it.

CONCLUSION

The failure of the court below to afford Murphy a hearing so that he could discover the effects of a catastrophic fire on the drugs to be used in his execution violates Murphy rights to procedural due process under the Fourteenth Amendment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Catherine Clare Bernhard, hereby certify that a true and correct copy of
Petitioner's Petition for Writ of Certiorari was served on counsel for Respondent on
this 10th day of October, 2023 by service through the court's electronic filing system
to Ali.nasser@oag.texas.gov.

____s/ Catherine Clare Bernhard