No. 23-5740

IN THE
Supreme Court of the United States

JEDIDIAH ISAAC MURPHY,
Petitioner,
v.

STATE OF TEXAS,
Respondent.

On Petition for a Writ of Certiorari to the Texas Court of Criminal Appeals

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

(EXECUTION SCHEDULED FOR OCTOBER 10, 2023)

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CAPITAL CASE

QUESTION PRESENTED

1. Does this Court's precedent permit an inmate to attack state-court procedures based on a liberty interest that does not exist?

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Cases

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

In 2001, Petitioner Jedidiah Murphy was convicted for the 2000 capital murder of Bertie Cunningham during the course of a robbery and kidnapping and sentenced to death by a Texas court. Murphy's execution is scheduled for October 10, 2023. Murphy now files a petition for certiorari and application for a stay of execution.

STATEMENT OF THE CASE

I. State-Court Lethal-Injection Proceedings

This proceeding originated from Murphy's original writ application, purportedly filed under Article 11.05 of the Texas Court of Criminal Procedure. Murphy's execution is currently scheduled for October 10, 2023. On September 27, 2023, Murphy filed an application in the trial court arguing that his method of execution was unconstitutional, and that the Court had the authority to issue a writ of habeas corpus under Article 11.05. App. at 2a–53a. On October 5, 2023, the trial court denied the writ application, finding that Murphy could not show his method of execution was unconstitutional. App. at 271a–272a. Murphy appealed. On October 10, 2023, the Texas Court of Criminal Appeals denied

Murphy's appeal. Murphy now seeks certiorari review of that decision. App. at 276a–284a.

REASONS FOR DENYING THE WRIT

I. Murphy Fails to Point to any Constitutional Claim for Relief Raised in State Court.

Murphy contends that Article 43.24 of the Texas Code of Criminal Procedure affords him the right to be free from "torture, ill treatment or unnecessary pain." Tex. Code Crim. Proc. art. 43.24. He claims that, because he has this right under state law, he has a liberty interest in making a showing under Article 43.24, which hehas been deprived by the lack of an evidentiary hearing on the matter. Pet. at 16–17.

Murphy in effect argues, without explanation, that Article 43.24 affords him a liberty interest in "discovering" the effects of a recent prison fire on Texas's lethal injection drugs. Pet. at 17–18. He concedes at the outset, that such requests have been rejected in the Eighth Amendment context. Courts have found that an inmate awaiting execution by lethal injection only has a right against "a risk that is '*sure or very likely* to cause serious illness and needless suffering,' and give rise to 'sufficiently imminent dangers.'" *Glossip v. Gross*, 576 U.S. 863, 877 (2015) (quoting *Baze v. Rees*, 553 U.S. 34, 50 (2008)); "To prevail on such a claim, "there

must be a 'substantial risk of serious harm,' an 'objectively intolerable risk of harm' that prevents prison officials from pleading that they were 'subjectively blameless for purposes of the Eighth Amendment.'" *Glossip*, 576 U.S. at 877 (quoting *Baze*, 553 U.S. at 50).

Courts have also found that, despite such a right, it does not violate due process for a state to not disclose certain facts that speculatively *might* lead to an Eighth Amendment. *Sepulvado v. Jindal*, 729 F.3d 413, 420 (5th Cir. 2013) ("There is no violation of the Due Process Clause from the uncertainty that Louisiana has imposed on Sepulvado by withholding the details of its execution protocol. Perhaps the state's secrecy masks "a substantial risk of serious harm," but it does not create one. Having failed to identify an enforceable right that a preliminary injunction might safeguard, Sepulvado cannot prevail on the merits."). *See Whitaker v. Collier*, 862 F.3d 490, 498 (5th Cir. 2017) ("Disclosing information about the execution protocol 'so [they] can challenge its conformity with the Eighth Amendment—does not substitute for the identification of a cognizable liberty interest.' Lack of a cognizable liberty interest is fatal to the due process claim.").

Murphy acknowledges that the law is against him on this but argues that those claims failed to recognize a cognizable liberty interest under *federal law*, whereas he is now invoking a cognizable liberty interest under state law—Article 43.24. But his explanation ends there. He provides no logical argument for why Article 43.24, essentially a Texas statutory analogue to the prohibition against cruel and unusual punishment, would require a different analysis. Whatever cognizable liberty interest Murphy has under Article 43.24, Murphy's speculative claims that he might be able to argue that this interest "does not substitute for the identification of a cognizable liberty interest.

Murphy also claims this case is different because of a fire that broke out in the Walls Unit of TDCJ. Resp. at 16–17. But that equally speculative argument fares no better in creating a cognizable liberty interest. *See Whitaker v. Collier*, 862 F.3d 490, 498 (5th Cir. 2017) (finding that speculation of potential degradation of pentobarbital after the beyond-use-date failed to meet *Baze* requirements). In any event, TDCJ has tested the drugs and they remain sterile and potent. Resp's App. at 11a–13a.

Murphy attempting a correction of state process. But such process is beyond the review of this Court. *Cf. Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991) ("federal habeas corpus relief does not lie for errors of state law") (internal quotation marks and citation omitted); *Henderson v. Cockrell*, 333 F.3d 592, 606 (5th Cir. 2003) (infirmities in state habeas proceedings do not state a claim for federal habeas relief); *Beazley v. Johnson*, 242 F.3d 248, 271 (5th Cir. 2001); *Wheat v. Johnson*, 238 F.3d 357, 361 (5th Cir. 2001). Indeed, as the Court has explained, "[f]ederal courts may upset a State's postconviction procedures only if they are fundamentally inadequate to vindicate the substantive rights provided." *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 69 (2009).

II. Murphy's Stay of Execution Should be Denied.

"Filing an action that can proceed under § 1983 does not entitle the [plaintiff] to an order staying an execution as a matter of course." *Hill v. McDonough*, 547 U.S. 573, 584 (2006). Instead, such a movant has the burden of persuasion on his stay request, and he is required to make "a clear showing" that he is entitled to a stay of execution. *Id.* at 584. "It is well-established" that petitioners on death row must show a "reasonable

probability" that the underlying issue is "sufficiently meritorious" to warrant a stay and that failure to grant the stay would result in "irreparable harm." *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983), *superseded on other grounds by* 28 U.S.C. § 2253(c)(2). Moreover, in determining whether a movant has made such a showing, a reviewing court "must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Hill*, 547 U.S. at 584. Thus, in deciding whether to grant a stay of execution, the Court must consider four factors: "(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 parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 434 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987))."Last-minute stays should be the extreme exception, not the norm[.]" *Bucklew v. Precythe*, 139 S. Ct. 1112, 1134 (2019); *see also Barr v. Lee*, 140 S. Ct. 2590, 2591 (2020);

As explained above, Murphy's claim clearly lacks merit, as he fails to identify any cognizable liberty interest under Article 43.24. He also

fails to show irreparable injury, as this Court's case law makes clear that rank speculation about the efficacy of lethal injection drugs does not warrant a stay of execution. *See, e.g., Barr v. Lee*, 140 S. Ct. 2590, 2591–92 (2020); *Wood v. Collier*, 836 F.3d 534, 540 (5th Cir. 2016) ("The reality is that pentobarbital, when used as the sole drug in a single-drug protocol, has realized no . . . risk" that it "is sure or very likely to cause serious illness and needless suffering, and give rise to sufficiently *imminent* dangers."); *see also Glossip*, 576 U.S. at 877 (holding no constitutional violation based on anything short of "sure or very likely" serious illness or needless suffering).

Finally, given the extreme delay in this two-decade-old case, the public interest weighs heavily in favor of the State. The State and crime victims have a "powerful and legitimate interest in punishing the guilty." *Calderon v. Thompson*, 523 U.S. 538, 556 (1998) (citation omitted). And "[b]oth the State and the victims of crime have an important interest in the timely enforcement of a [death] sentence." *Bucklew*, 139 S. Ct. at 1133 (quotation omitted); *Gomez v. United States Dist. Court*, 503 U.S. 653, 654 (1992) (per curiam) ("[e]quity must take into consideration the State's strong interest in proceeding with its judgment"). Once post-

conviction proceedings "have run their course . . . finality acquires an added moral dimension." *Calderon*, 523 U.S. at 556. "Only with an assurance of real finality can the State execute its moral judgment in a case" and "the victims of crime move forward knowing the moral judgment will be carried out." *Id*. The State should be allowed to enforce its "criminal judgments without undue interference from the federal courts." *Crutsinger v. Davis*, 936 F.3d 265, 273 (5th Cir. 2019) (citations and internal quotations omitted). Moreover, it bears repeating that "capital petitioners might deliberately engage in dilatory tactics to prolong their incarceration and avoid execution of a sentence of death." *Rhines v. Weber*, 544 U.S. 269, 277–78 (2005). Thus, "[t]he federal courts can and should protect States from dilatory or speculative suits[.]" *Hill*, 547 U.S. 585.

CONCLUSION

For all these reasons, the petition for a writ of certiorari and Murphy's motion to stay execution should be denied.

Respectfully submitted,

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