No. 23A308

IN THE
Supreme Court of the United States

ALI NASSER,
Petitioner,

v.

JEDIDIAH MURPHY,
Respondent.

REPLY IN SUPPORT OF EMERGENCY APPLICATION TO VACATE STAY OF EXECUTION

(EXECUTION IS SCHEDULED FOR OCTOBER 10, 2023)

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

INTRODUCTION

Jedidiah Murphy is scheduled for execution this evening, at 6 p.m. That execution, however, has been stayed by the district court below. Yesterday, Petitioner asked this Court to vacate the stay of execution. Murphy has filed his response. *See* Response in Opposition (Resp.). Petitioner now files his reply.

ARGUMENT

I. Murphy Fails to Show How His Claim Has Any Merit.

Murphy's request for a stay has now been briefed three separate times. In those rounds of briefing, Murphy has filed a motion for stay, a reply in support, and two oppositions to motions to vacate the stay. And yet he cannot explain why Chapter 64 of the Texas Code of Criminal Procedure is facially unconstitutional. Resp. at 9–10. He merely cites to the district court opinion below. *Id*. But that opinion makes no attempt to explain why Chapter 64 is unconstitutional *on its face*. *See United States v. Salerno*, 481 U.S. 739, 745 (1987) ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of

circumstances exists under which the Act would be valid."). The only judge to address the merits of this argument is the dissenting judge below, who found the claim patently meritless. App. at 95a–99a.

Murphy lodges no challenge to this analysis. He merely clings to the fact that another inmate has a similar claim pending on appeal. But he never offers any support for staying an execution to wait for a pending circuit appeal. That's because there is no support for such a proposition. *See Netherland v. Tuggle*, 515 U.S. 951, 952 (1995). Nor is such a proposition workable. For example, lethal injection protocols have been steadfastly accepted by this Court for years. *See e.g., Barr v. Lee*, 140 S. Ct. 2590, 2591–92 (2020). If an inmate appealed the use of lethal injection, and thus had a "live action" on the issue pending on appeal, could a second inmate seeking a stay of execution be entitled to an automatic stay by filing a frivolous lethal-injection lawsuit and pointing to the first inmate's pending appeal? Of course not. *See, e.g., Garcia v. Texas*, 564 U.S. 940, 941 (2011) ("It is our task to rule on what the law is, not what it might eventually be.").

But that is the logic adopted by the district court and erroneously approved of by the Court of Appeals. Such an unworkable and potentially abusive standard for disrupting a state-court judgment should be soundly rejected. *See Hill v. McDonough*, 547 U.S. 573, 584 (2006) ("equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts."). Murphy's challenge to the facial unconstitutionality of the statute must stand or fall on its own merits.

II. Murphy Still Fails to Explain Irreparable Injury

Murphy argues that this Court should not focus on whether "injury" exists but rather assume injury and focus on whether or not it is "irreparable." He cites no authority for this staggering proposition. Of course, one must prove injury to make a showing of irreparable injury. Not only that, but one must prove the injury would be be redressable by a favorable ruling in the lawsuit itself. *See Reed* v. *Goertz*, 598 U.S. 230, 243 (2023) (Thomas, J., dissenting). Such redressability is lacking here. Murphy never explains how his injury—presumably lack of access to exculpatory DNA material—would be redressed by winning his lawsuit.

As the dissenting judge below correctly noted, "even if the application of Chapter 64 violates Murphy's procedural due process rights, he still would not be entitled to the DNA testing he seeks under the state court's alternative holding of unreasonable delay." App. at 101a. In three rounds of briefing, Murphy has never been able to respond to this argument.

Murphy's attempt to downplay the aggravating evidence independent of the Wilhelm kidnapping is also unpersuasive. He argues he merely "brandished" a gun in a car with a classmate, Resp. at 5 n.1, when in reality he "put the gun to her head, asked if she was afraid to die, and held it there for a minute." *Murphy*, 901 F.3d at 583. He argues that he had a mere "domestic dispute" with his girlfriend, Resp. at 5 n.1. leaving out the following:

> A responding officer also testified for the State about a domestic-abuse call involving Murphy and his girlfriend. The officer said that when he entered Murphy's home, the girlfriend had a bloody nose and Murphy had a knife. The officer subdued Murphy with pepper spray.

Murphy v. Davis, 901 F.3d 578, 599 (5th Cir. 2018). He also downplayed the disturbing threats he made to a coworker

> One of Murphy's coworkers also testified for the State. She claimed that Murphy talked about having access to guns,

> bragged about shooting people, and threatened to "knock [her] fucking head off." The woman was so frightened that she quit her job and reported Murphy to the police.

Id. at 583. And while, as Murphy points out, the State never presented "expert testimony" about "future dangerousness", his mitigation evidence seemed to do that on its own:

> The State proceeded to read off some of the MMPI-2 interpretative report's unfavorable hypotheses, referring to them as Dr. Butcher's "statements." Per the State, Dr. Butcher stated that Murphy exaggerated his symptoms and responded to the last section of the MMPI-2 "either carelessly, randomly, or deceitfully, thereby invalidating that portion of the test." The State continued, reading off that Murphy "has serious problems controlling his impulses and temper," "loses control easily," and may be "assaultive." Murphy, according to the parts read aloud, "manipulates people" and lacks "genuine interpersonal warmth." According to the report, Murphy matches the profile of a Megargee Type H offender, a seriously disturbed inmate type. Inmates with Murphy's profile will, per the report, "not seek psychological treatment on their own" and are "poor candidates for psychotherapy."

Id. Simply put, Murphy cannot show he could ever obtain DNA testing if he wins his suit, and he certainly could not show DNA evidence would have rebutted the future dangerous finding.

III. Murphy Fails to Explain His Egregious Delay In Arguing the Public Interest Supports a Stay of Execution.

In his final argument, Murphy contends that the public has an interest in the adjudication of § 1983 action. Resp. at 13. He makes appeals the Petitioner's duty to seek justice and public confidence in verdicts. Resp. at 13–14. But in two decades of state and federal review, in which Murphy was represented by both retained and appointed counsel, not one Court has found that Murphy's rights have been violated. At this point, justice militates in favor of the finality of Murphy's conviction, not delay. *Calderon v. Thompson*, 523 U.S. 538, 556 (1998) (Once post-conviction proceedings "have run their course . . . finality acquires an added moral dimension. Only with an assurance of real finality can the State execute its moral judgment in a case. Only with real finality can the victims of crime move forward knowing the moral judgment will be carried out.").

Murphy urges that a presumption against the stay based on his egregious delay should not trump the other stay factors. Resp. at 7–9. But this is *precisely* when such a presumption should apply. It is Murphy's own delay that caused his execution date to come about before

the *Gutierrez* opinion. He could have challenged that opinion anytime in the last twelve years and he failed to do so. *See Ex parte Gutierrez*, 337 S.W.3d 883, 901 (Tex. Crim. App. 2011). He transparently only sought DNA testing when the State sought an execution date. *Murphy v. State*, No. AP-77,112, 2023 WL 6241994, at *5 (Tex. Crim. App. Sep. 26, 2023). And he egregiously filed this lawsuit only thirteen days of from his execution date. App. at 1a–15a. If this Court's prior rejection of dilatory tactics is to mean anything, this is precisely the type of abusive litigation tactic that should be summarily rejected by this Court by vacating the stay entered below. *See Hill*, 547 U.S. at 585; *Gomez v. United States Dist. Court*, 503 U.S. 653, 654 (1992) (per curiam); *Bucklew v. Precythe*, 139 S. Ct. 1112, 1134 (2019); *Dunn v. Ray*, 139 S. Ct. 661, 661 (2019).

CONCLUSION

For the above reasons, Defendant-Petitioner requests that this Court vacate the district court's order staying Murphy's execution.

Respectfully submitted,

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