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**IN THE
SUPREME COURT OF THE UNITED STATES**

In re: Jedidiah Murphy

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

MOTION TO STAY PETITIONER'S EXECUTION TODAY

To the Honorable Justice Samuel Alito, as Circuit Justice for the United States Court of Appeals for the Fifth Circuit:

Petitioner Jedidiah Murphy respectfully requests a stay of his October 10th, 2023, execution (after 6:00 p.m. Central Time today), pending this Court's disposition of a petition for writ of certiorari (contemporaneously filed).

Petitioner requests a stay to litigate significant, *unusual* constitutional challenges to the method of his execution. This is not a run-of-the-mill situation. Texas's lethal injection drugs were exposed to a massive, out-of-control building fire on **August 25, 2023**.

Based on all available information, including news articles, expert materials, and Public Information Responses from the responding fire personnel,¹ Mr. Murphy

¹ These included an account of a prison employee recruiting a fire department employee to escort him into the administration area of the building to retrieve items from the "pharmacy area." As public records also demonstrate that the facility did not contain an actual medical pharmacy, this is presumed

concluded that: 1) the fire raged through the very administration area of the facility where the drugs were stored;² 2) the drugs' exposure to the 1800+ conditions of the long-burning fire certainly would have caused chemical changes to the stability of the drugs;³ and 3) the chemical changes created a significant risk of pain to Mr. Murphy. He accordingly filed a legal action in the Texas state courts arguing violations of (among other things) the Eighth and Fourteenth Amendments; and Texas-law-created liberty interests in freedom from "torture, ill treatment, or unnecessary pain[.]" Texas Code of Criminal Procedure, Art. 43.24.⁴

Yet, Texas provided no meaningful procedural gateway for Mr. Murphy to vindicate his liberty interests. In Mr. Murphy's state action, the district court and then the Court of Criminal Appeals denied his claims on the merits, finding his factual assertions "unproved," while at the same time denying him an evidentiary hearing.

Mr. Murphy's submitted evidence meets the legal thresholds of a *risk* of "serious illness and needless suffering," "an objectively intolerable risk of harm," a *risk* of "severe pain and suffering," and/or a risk of "ill treatment, or unnecessary pain," see *Glossip v. Gross*, 576 U.S. 863, 877-78 (2015); *Baze v. Rees*, 553 U.S. 35, 50 (2008); Tex. Code Crim.

to be the location of the lethal injection drugs. However, once these men reached the location of the pharmacy area, they ended up fleeing for their lives as the fire was about to "breach" the room. See Exhibit 5 to Writ, App. 1. In a recent filing in the Western District of Texas, the State *could have but did not* dispute that the drugs were indeed in the section of the prison most-damaged by the fire. *Murphy v. Lumpkin et al.*, No. 1:23cv1199-RP, dkt. 07 (Opposition to Motion for Stay). As that section of the building has been described a "total loss," the exposure of the drug to the fire's heat is a matter of common sense.

² See n.1.

³ See Writ, pp. 13-16, citing Exh. 6 (Report of Dr. Almgren) and other exhibits, App. 1.

⁴ This state-created interest is more protective than the Eighth Amendment. See *Baze v. Rees*, 553 U.S. 35, 50 (2008) (Eighth Amendment violated not merely by any risk of pain, but by "serious illness and needless suffering," "an objectively intolerable risk of harm"). See also *Glossip v. Gross*, 576 U.S. 863, 877-78 (2015) ("severe pain and suffering"). Article 43.24 explicitly prohibits "unnecessary pain," as well as "ill treatment." This is a lower bar than "needless suffering" and "severe pain." The liberty interest granted by Article 43.24 is therefore more-inclusive than the Eighth Amendment.

Proc. Art. 43.24. Yet, even if it doesn't, Texas has clearly denied him due process of law in denying these claims on the merits without permitting evidentiary development. This mismatch between a liberty interest and its procedure independently violates the federal constitution. See *Dist. Atty's Ofc. For Third Judicial Dist. v. Osborne*, 557 U.S. 52, 69 (2009).

Not only did the state bar Mr. Murphy from developing his claims in court; but it also ignored or refused every other attempt he made to obtain additional information about the effect of the fire on the drugs. *Writ*, pp. 16-19, *App. 1*. At the same time, the State presented to the lower courts a lab test result it argues proves the safety of the drugs. Their report is meaningless, however, because *they conducted the wrong scientific test*. Even though Mr. Murphy put the State on clear notice that "potency" testing *does not resolve legitimate concerns* about their chemical's safety in the wake of that exposure, see *Writ*, pp. 22-25, *App. 1* (pH must be tested, and solutions visually examined for particulates; "potency" testing is not a stability-indicating test), the only tests TDCJ appears to have performed since the August 25, 2023 fire are potency and sterility tests.

The unique factual circumstances arising from the August 25, 2023 fire meet all the equitable factors relevant to staying an execution. *Nken v. Holder*, 556 U.S. 418, 434 (2009). As noted in Footnote 1, *supra*, the State cannot and does not dispute that the drugs were indeed exposed to fire conditions. The single argument they have made concerning the fire is that they have since tested some of their drugs, and they are "potent." This does not begin to address Mr. Murphy's actual allegations, since, as noted above "potency" testing *does not resolve legitimate concerns* about a

chemical's safety in the wake of extreme heat exposure. Mr. Murphy has made a substantial showing that he is likely to succeed on the merits of his claims.

Other equitable factors include the irreparability of the injury if a stay is not granted – which, in this case, is imminent execution – and public interest. Under the unusual circumstances presented here, the public interest lies in favor of permitting this litigation. Allowing Texas to execute a man with chemicals that have been through the extreme conditions of a fire – and with absolutely no meaningful transparency about the integrity or stability of the drugs – is abhorrent.

Finally, the State will surely argue – as they have below – that Mr. Murphy's litigation is dilatory. They may argue that he waited two or three weeks longer than necessary to file his suit; or that his claims somehow existed for years before the fire even happened. Instead, both Mr. Murphy and his counsel began investigating the fire immediately upon hearing about it (from news media), including by filing Public Information Act requests and waiting as long as reasonably possible for Texas's responses before filing suit. It is the State who has failed to timely comply (or to comply at all) with these PIA requests.

These are the specific steps that Mr. Murphy and his counsel took upon learning of the August 25, 2023, fire:

- Counsel immediately began investigation (through media reports, preliminary witness interviews, and requests for information from responding fire departments) into the extent of the fire, including whether it directly impacted the administration offices at the prison where the pentobarbital was believed to be stored;
- Beginning on September 8th, 2023, counsel diligently submitted Public Information Act requests to TDCJ, to which she has yet to receive any substantive response, see *Complaint* at paras. 30-38;

- On September 19, 2023, Mr. Murphy filed an inmate grievance specifically about the impact of the fire on TDCJ's pentobarbital, which the State was not legally required to address before his scheduled execution (and they have not). Mr. Murphy had also informally tried to raise this issue with TDCJ staff, as noted in his grievance form, *id.*;
- Counsel research, drafted and filed a writ petition on the subject in the Dallas County District Court on September 27, 2023, *Ex Parte Murphy*, No. W-0002424-D.
- When the District Court denied relief, Mr. Murphy, through counsel, immediately filed an appeal to the Texas Court of Criminal Appeals; which only just denied his appeal this afternoon.

In summary, there is little (if anything) more that Mr. Murphy or his counsel could do to demonstrate diligence concerning this unanticipated catastrophic event at a state facility.

In conclusion, Mr. Murphy presents legitimate constitutional claims which he – as well as the public – deserve to have meaningfully heard by the judicial system. And the State of Texas should not be permitted to execute him in the meantime.

CONCLUSION

Mr. Murphy respectfully requests a stay of his execution, to permit further litigation in this Court on these significant issues.

Respectfully submitted this 10th day of October, 2023,

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