NO. 17-___

In the
Supreme Court of the United States

THOMAS WHITAKER AND PERRY WILLIAMS

PETITIONERS,

v.

BRYAN COLLIER, WILLIAM STEPHENS;
JAMES JONES; UNKNOWN EXECUTIONERS

RESPONDENTS.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 2008, Texas' lethal injection protocol required the use of a three-drug cocktail. In June 2012, Texas adopted a new protocol, specifying the use of a single drug: pentobarbital. In September 2013, Texas turned for the first time to the use of compounded pentobarbital.

On October 1, 2013, Petitioners filed their original complaint and amended on November 1, 2013. Respondents moved to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1). The district court granted that motion on the basis that the action was not "ripe," as neither Petitioner was then scheduled to be executed. The circuit court reversed, finding the district court had "clearly erred" and remanded the action to permit Petitioners to "fully develop the claims based on the existing protocol for an appropriate trial on the merits." *Whitaker v. Livingston*, 597 F. App'x 771, 774 (5th Cir. 2015).

In the wake of the circuit court's mandate, upon remand Petitioners sought discovery, depositions, hearings, and a trial. Only the most minimal discovery was permitted. When Mr. Williams was scheduled for execution, the district court set the case for trial two weeks hence and restricted the testimony that would be permitted. When the Texas withdrew Mr. Williams' execution date, the district court cancelled the trial, and granted the state's motion to dismiss, finding Petitioners' claims failed on their face, and many of their claims were barred by Texas' two-year statute of limitations.

The district court's order granting Respondents' motion to dismiss relied on evidence outside the record, yet failed to convert the motion to a summary judgment motion and give Petitioners an opportunity to respond. The panel majority of the Circuit Court of Appeals, while acknowledging the district court considered evidence outside the pleadings, found this clear error "harmless." As the dissent noted, "there is no authority for the application of a harmless error standard . . . The district court clearly erred, and this issue alone is sufficient to warrant reversal." *See* App. 1 at 21–22 (Graves, J, dissenting).

These facts give rise to the following question(s) presented:

Should this Court permit the circuit court's abdication of the fundamental rules of procedure, the mandate rule, and circuit precedent in defense of a district court's clearly erroneous decision dismissing petitioners' claims challenging Texas' lethal injection protocol and procedures?

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1) is reported at 678 Fed. App'x. 248.

JURISDICTION

The court of appeals issued its opinion on July 7, 2017. App. 1. The petition was originally due on October 5, 2017. Petitioners timely filed an Application for Extension of Time on September 22, 2017. Justice Samuel Alito granted the application on September 27, 2017, thereby setting the deadline to file this petition as December 4, 2017. Petitioners timely file this petition on December 4, 2017. This Court has jurisdiction under 28 U.S.C. § 1291.

This action was originally filed in the United States District Court for the Southern District of Texas, Houston Division, where jurisdiction was predicated on 42 U.S.C. § 1983. Venue was appropriate in the

Southern District because a substantial portion of the events giving rise to this litigation occurred or will occur there.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution, the pertinent portion of the Fourteenth Amendment to the United States Constitution, and 42 U.S.C. § 1983 are reproduced at App. 5a–c.

STATEMENT OF THE CASE

In 2008, Texas' lethal injection protocol required the use of a three-drug cocktail. *See* App. 1, n. 10; ROA.1277-1286. In June 2012, Texas adopted a new protocol, specifying the use of a single drug: "100 milliliters of solution containing 5 grams of pentobarbital." ROA.1267-1275. In September 2013, Texas turned for the first time to the use of compounded pentobarbital to carry out executions. *See* Second Amended Complaint at 4; ROA.1217; 1221.

On October 1, 2013, Petitioners filed a complaint under 42 U.S.C. §1983, asserting violations of their rights to due process, access to courts, and the right to be free from cruel and unusual punishment. Newly informed that then-plaintiff Michael Yowell's execution would be carried out with compounded (vs. manufactured) pentobarbital,

plaintiffs filed a Motion for a Temporary Injunction, seeking a stay of Mr. Yowell's execution. The district court denied that request, and the Fifth Circuit affirmed. See *Whitaker v. Livingston* (*Whitaker I*), 732 F.3d 465(5th Cir. 2013).[1]

Petitioners (Whitaker and Williams) amended their complaint on November 1, 2013. The State moved to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) for a lack of jurisdiction, and the district court granted that motion on the basis that the action was not "ripe" as, at that time, neither plaintiff was scheduled to be executed. The circuit court reversed on January 22, 2015, finding that the district court had "clearly erred," and remanded the action to permit plaintiffs to "fully develop the claims based on the existing protocol for an appropriate trial on the merits." *Whitaker v. Livingston*, 597 F. App'x 771, 774 (*Whitaker II*) (5th Cir. 2015).

Upon remand, in the wake of the circuit court's mandate, Petitioners sought discovery, depositions, hearings, and a trial. The district court permitted only the most minimal and constrained discovery, however. When Petitioner Williams was scheduled for

[1] Mr. Yowell was executed, and, thus, dismissed from the case.

execution, the district court set the trial for two weeks hence, and restricted the testimony that would be permitted. The trial date was withdrawn when the State withdrew Mr. Williams' execution date.

On September 11, 2015, Petitioners filed their second amended complaint. On the same day, Respondents responded to court ordered discovery via an Advisory stating they would not be providing half the documents the court ordered, as the documents were purportedly not under Respondents' control or in their possession. ROA.1210. On September 14, 2015, Respondents filed a motion to dismiss for failure to state a claim, pursuant to Federal Rule of Civil Procedure 12(b)(6). ROA.1238. Petitioners filed a response to the motion to dismiss, a response to the advisory, their own advisory (regarding the state's attempted illegal importation of sodium thiopental), a motion to compel and/or supplemental motion for discovery, an advisory regarding the setting of an execution date for Petitioners Williams, a motion for status conference, a motion for information, and a motion for trial or stay of execution. ROA.1304-1344, 1349-1380, 1383-1432. Respondents opposed them all. Despite the Fifth Circuit's prior mandate to permit plaintiffs to "fully develop the claims based on the existing protocol for

an appropriate trial on the merits," the district court either denied or failed to rule on the discovery and other related motions, and granted Respondents' motion to dismiss on June 6, 2016. The court *sua sponte* took judicial notice of Defendants' 2008 protocol, but failed to do the same with respect to the June 2012 execution protocol (although both were attached to the Respondents' advisory).

Neither the full development nor "appropriate trial on the merits" mandated by the circuit court's remand ever took place. *See also* App. 1 (Graves, J., dissenting) at n. 1.

REASONS FOR GRANTING THE PETITION

I. The Fifth Circuit applied a harmless error standard to affirm what the panel majority recognized as a clearly erroneous ruling by the district court. There is no authority for the application of a harm standard in such a circumstance.

In granting Respondents' motion to dismiss pursuant to Rule 12(b)(6), the district court utilized two clearly erroneous standards: first, the court considered evidence outside the complaint, and, second, the court applied a heightened – and erroneous – pleading standard. The panel majority found no error. It did so by applying an inapplicable

harm standard, and by ignoring significant aspects of the district court's opinion.

The district court's clear errors on these two issues alone require reversal, without consideration of the remaining issues. Not only do these errors contravene this Court's jurisprudence, reflecting the most fundamental and preliminary tenets of civil procedure and adjudication, they contaminate the rest of the district court's adjudication – and thus the panel majority's affirmance. "Accordingly, the district court clearly erred and this issue alone is sufficient to warrant reversal." App. 1 at 22 (Graves, J., dissenting).

In deciding a motion to dismiss pursuant to Rule 12(b)(6), a district court should limit its inquiry to only the facts stated in the complaint. Fed. R. Civ. P. 12(d). The district court must not go outside the pleadings and must accept all well-pleaded facts as true, viewing those facts in the light most favorable to the plaintiff. *See Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). Rule 12(d) provides "if, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56." Fed. R. Civ. P. 12(d). If

that occurs, all parties must first be given a reasonable opportunity to present all the material that is pertinent to the motion. *See id.* Only then, may the district court consider evidence presented that is outside the pleadings.

That the district court *did* consider matters outside the complaint is beyond dispute, and is recognized by the panel majority. *See* App 1. at 16. The panel mentions two such errors: the district court's citation to "stipulations Texas made to do additional testing on the compounded pentobarbital before the plaintiffs' execution and their concession that that would be satisfactory." *See id.* However, there are countless others—indeed, it is difficult to find a paragraph in the district court's opinion that *does not* cite to matters beyond Petitioners' complaint, factual assertions that have no basis anywhere in the record, and assertions that appear to merely be the opinion of the court.[2]

Nonetheless, the panel majority dismisses the district court's clear violation of this Court's opinions and Rule 12(b)(6) by saying that they are "harmless." App. 1 at 16. In support, the panel majority stated:

[2] Many of these instances are detailed in the briefing in the court below. See Petitioners' Brief at 25–37; Petitioners' Reply Brief at 2–6.

"[b]ut we have already held that such an error is harmless. *See Wood*, 836 F.3d at 542. 'Accepting the facts as pled, all claims still fail.' *Id.*"

Wood v. Collier, 836 F.3d 534 (5th Cir. 2017) is a matter that arose from this case. In the course of the district court litigation in this case, as noted in the district court's opinion in *Wood*, Respondents stipulated that they would test the execution drug shortly before either Petitioner's execution. *See* ROA.1477. *Wood* arose when five death row plaintiffs brought a 42 U.S.C. §1983 action primarily focused on an equal protection claim: if testing was to be performed for Williams and Whitaker, it should also be performed for the *Wood* plaintiffs. The same district court judge who presided in *Whitaker* also presided over *Wood*, dismissing it in short order for failure to state a claim, relying heavily on its ruling in *Whitaker*. *See Wood*, 836 F.3d at 537.

Importantly, not only is *Wood* derivative of the same district court's ruling in *Whitaker*—and thus suffers the same errors—the *Wood* plaintiffs did not raise on appeal a challenge to the parameters of the district court's dismissal pursuant to Rule 12(b)(6). As such, the panel majority's citation to *Wood* as justification for the application of a harmless error standard is inapt. "Further, it is troubling that this

court is relying on a subsequent case decided by the same district court which denied prisoners relief that the State agreed to provide here." App. 1 at 21 (Graves, J., dissenting).

Nor is *Wood* authority for the application of a harmless error standard to a violation of the well-established rule prohibiting consideration of matters outside the pleadings when adjudicating a motion to dismiss. *Id.* Indeed, there is no such authority for good reason. Once the error is committed—and matters outside the pleadings are considered—it cannot be undone, and a harm analysis is inappropriate. "Thus, the district court applied a standard which was clearly erroneous and there is no authority for the application of a harmless error standard." App 1. at 21 (Graves, J., dissenting).

Moreover, the fundamental nature of these errors infects the entire opinion of the district court, as well as that of the panel majority. Assessment of the merits of Petitioners' claims, or compliance with any applicable statute of limitations, cannot be accorded any deference when made in the context of a motion to dismiss that relied extensively on matters outside the pleadings to resolve factual disputes without converting the motion into one for summary judgment, and giving the

parties an opportunity to present all materials that would be pertinent to such a motion.

The errors discussed in this section are alone sufficient to require reversal of the panel majority's affirmance of the district court's dismissal. "[T]the district court clearly erred and this issue alone is sufficient to warrant reversal." App. 1 at 22 (Graves, J., dissenting).

II. The opinion of the majority panel deeming Petitioners' claims as time-barred conflicts with earlier opinions in the Fifth Circuit, including the very case upon which the panel majority relies.

A. The accrual date of the statute was either the passage of the June 2012 protocol or the change to compounded pentobarbital in 2013; Petitioners filed their lawsuit within the applicable two-year statute of limitations of both dates.

The accrual date of the statute of limitations for the claims brought by Petitioners is either the passage of the June 2012 protocol or the change to compounded pentobarbital in 2013. In either case, Petitioner's lawsuit is timely. In September 2013, the Texas Department of Criminal Justice ("TDCJ") began purchasing and using compounded, rather than manufactured pentobarbital to carry out executions. ROA.1221. This constituted a substantial change to the TDCJ protocol, and, therefore, should be the latest date limitations for Petitioners' section 1983 claims accrued. *See Walker v. Epps*, 550 F.3d 407, 414 (5th Cir. 2008) (holding that limitations on a section 1983 method-of-execution action accrues on the later of either the date a plaintiff's conviction and sentence have become final on direct review or, in the event a state changes its execution protocol after a death-row inmate's conviction has become final, on the date that protocol change

becomes effective). Alternatively, the statute of limitations accrued in June 2012 when the TDCJ changed from utilizing a three-drug cocktail to a single drug to carry out executions. ROA.1220-1221.

The 2008 protocol set forth a method for lethal injection, but the lethal drugs being injected changed significantly and substantially in 2012 (from a three drug cocktail, including a paralytic, to use of a single drug) and changed again in 2013 when the sources for manufactured pentobarbital ran dry and the state began using compounded drugs. ROA.1220-1221. "The current execution protocol was written and adopted in June, 2012." ROA.1220. Petitioners brought their initial complaint in 2013, well within Texas' two-year statute of limitations. ROA.25-52.

The majority panel relied on the Eleventh Circuit's opinion in *Gissendaner v. Commisioner, Georgia Department of Corrections*, 779 F.3d 1275, 1282 (11th Cir. 2015) to erroneously hold the 2013 change from manufactured to compounded pentobarbital is not a "substantial" change because the switch was from one form to another form of the same drug. App. 1, at 6. The circuit court also assumed the change in

2012 was not time-barred because this question was not briefed. App. 1, at 7.

The reliance on *Gissendaner* is first misplaced because it conflicts with the circuit court's previous determination that the change to compounded pentobarbital was the appropriate accrual date. In *Wood v. Collier (Wood II)*, 678 Fed. App'x 248, 249–50 (5th Cir. 2017), the Fifth Circuit adopted the 2013 change to compounded pentobarbital as the accrual date for challenges to the Texas protocol. *Id.* at 250. The majority panel's opinion ignores the conclusion in *Wood II*.

The reliance on *Gissendaner* is also misplaced because *Gissendaner's* finding of the change to compounded pentobarbital as not substantial conflicts with the 8th Circuit's treatment of compounded pentobarbital as a substantial change in *Zink v. Lombardi*, 783 F.3d 1089 (8th Cir. 2015). The majority panel relies heavily on *Zink* in holding Petitioners claims failed on their face; however, the court in *Zink* treated the change to compounded pentobarbital as a substantial change in execution protocol. The majority panel opinion parses portions of non-binding authority to end-run around the circuit court's adoption of the 2013 change to compounded pentobarbital to reach its

desired result, but it does not consistently apply those opinions or analysis. Doing so would make evident the conflict with *Wood II*.

The majority panel's opinion that the change from manufactured to compounded pentobarbital is not substantial is further misplaced because, as Justice Graves highlighted in his dissent, "compounded pentobarbital is made in a different manner and the change affects everything from the beyond-use date (BUD) to the availability of data regarding its effects." App. 1, at 24 (Graves, J., dissenting). Equally important is how Petitioners' other claims are impacted by the use of compounded pentobarbital. If, for example, the TDCJ elects to inject Petitioners with compounded pentobarbital, which is stored in conditions that would degrade the efficacy or potency of the drug, Petitioners would be unable to seek redress of this action by the TDCJ's denial of counsel during the execution process.

Petitioners filed this lawsuit in October 2013, the month following TDCJ's change to compounded pentobarbital, well within the statute of limitations. ROA.23-52. Petitioners also specifically challenge the 2012 change to a single drug cocktail in each of their previous complaints. ROA.1220-1221. The panel majority ignores the clear fact that

Petitioners asserted that "any statute of limitations that might apply began to run at the time of either the adoption of the 2012 protocol or at the time [Respondents] began to use compounded drugs, and [Petitioners'] complaint was filed well within two years of either date." *See* Petitioners' Response to Defendants' Motion to Dismiss at 3, ROA.1306. Both the 2008 and 2012 protocols were attached to the Motion to Dismiss. *See* ROA.1266-1286. The Fifth Circuit permits consideration on a motion to dismiss of the motion, any opposition to same, and exhibits attached to either when the documents are referred to in the pleadings. *See Brand Coupon Network L.L.C. v. Catalina Mktg Corp.*, 748 F.3d 631, 635 (5th Cir. 2014).

The majority panel also faults Petitioners for not identifying the specific date of the new 2012 protocol—despite the fact that the protocol itself is attached to the motion to dismiss—and faults Petitioners for not discussing the importance of that change as it relates to the statute of limitations. Yet, Petitioners do so in their opposition to the motion to

dismiss.[3] The panel majority erred in affirming the district court's dismissal on statute of limitations grounds.

B. Petitioners seek injunctive relief against injury that has not yet occurred; thus, any statute of limitations is inapplicable.

Petitioners claims seek injunctive relief against an injury that has not yet occurred. Therefore, "it defies logic, and is contrary to the common law of torts, to conclude that the statute of limitations has already run on a suit to prevent an unconstitutional act that has not yet occurred." *Jones v. Allen*, 483 F. Supp. 2d 1142, 1149 (M.D. Ala. 2007). As a matter of common sense, statutes of limitations do not typically begin to run until the wrongful act that causes the injury occurs. *Wallace v. Kato*, 549 U.S. 384, 391 (2007). In this case, a claim challenging a method-of-execution should not accrue until the act causing the constitutional injury occurs, i.e., the actual execution. To bar cases seeking injunctive relief from such injury years before the injury occurs violates common sense and traditional rules of accrual of claims. *See Wallace*, 549 U.S. at 391.

[3] As the motion to dismiss was the first time Respondents raised statute of limitations concerns, Petitioners' opposition was the first opportunity they had to address the issue.

As this Court has held, the policy reasons behind statutes of limitations do not apply in these types of cases. "The statute of limitations . . . was intended . . . to afford security against stale demands, after the true state of the transaction may have been forgotten, or be incapable of explanation, by reason of the death or removal of witnesses." *Bell v. Morrison*, 26 U.S. 351, 351 (1828). That risk does not exist in typical § 1983 cases; moreover, it does not exist at all in cases where the injury itself moots the claim, i.e., the death of the plaintiff following execution. Applying the standard rule for the accrual of a tort claim defies logic.

The majority panel relies on this Court's opinion in *Hill v. McDonough*, 547 U.S. 573, 583–84 (2006) to support its position that such § 1983 claims seeking a stay of execution can unreasonably delay imposition of the sentence. App. 1, at 5. The majority panel confirms "a limit has to be drawn to avoid'[r]epetitive or piecemeal litigation.'" App. 1, at 5 (quoting *Hill*, 547 U.S. at 585). This Court's opinion in *Hill*, however, did not end the petitioner's claim; it provided a framework for it to proceed. In this case, the majority panel utilizes the balancing of public policy to end § 1983 cases in an illogical manner by enforcing an

illogical statute of limitations. These equitable concerns should be handled within the existing procedural framework for equitable relief, rather than how the majority panel suggests by shoehorning unrelated concerns into a statute of limitations analysis. Such analysis does not aid the courts, parties, or increase judicial efficiency, but rather serves only to prevent valid cases based on legitimate concerns with new and evolving methods of execution from being heard.

C. The "law of the case" doctrine applies; thus, any statute of limitations is inapplicable.

Before the circuit court, Petitioners asserted the district court's ruling barring their claims based on statute of limitations violates the "law of the case." In this case, the district court's prior 2013 dismissal based on ripeness states: "[b]ecause Thomas Whitaker and Perry Williams do not know the means that Texas will select for their execution, their claim of an injury from that unknown means is hypothetical . . ." ROA.888. In the subject appeal, the district court switched its view and held that "[t]he plaintiffs have known they would be executed by lethal injection since their convictions became final . . . They have known how Texas would kill them since Texas adopted the

2008 protocol . . . ." ROA.1481. This change by the district court violates the "law of the case" doctrine.

The "law of the case doctrine" promotes finality and efficiency in the judicial process by encouraging courts to follow their own decisions within any given case. *In re Pilgrim's Pride Corp.*, 442 B.R. 522, 529 (Bankr. N.D. Tex. 2010). When a court decides upon a rule of law, the court's decision should continue to govern the same issue in subsequent states of the same case. *Med Ctr. Pharmacy v. Holder*, 634 F.3d 80, 834 (5th Cir. 2011) (citing *United States v. Castillo*, 179 F.3d 321, 326 (5th Cir. 1999) (quoting *Arizona v. California*, 460 U.S. 605, 618 (1983)).

The district court first dismissed the case based on the conclusion that Petitioners' claims were not ripe but then switched gears to dismiss the case again based on the holding that Petitioners' claims were time-barred. It seems the court changed its position only to shoehorn Petitioners' claims towards dismissal. This change in position violates the law of the case doctrine.

The majority panel found this issue to be waived because it was not first presented to the district court for consideration. App. 1, at 4, n. 6. This position by the district court was taken for the first time in its

final opinion central to this appeal. Petitioners timely raised this issue before the Circuit Court in their brief. Unlike the parties in *Muoneke v. Compagnie Nationale Air France*, 330 Fed. App'x 457, 461 n. 11 (5th Cir. 2009) (per curium), relied upon for waiver by the Circuit Court, the parties in *Muoneke* had the opportunity to brief and raise the law of the case issues previously before the Circuit Court. That is not the procedural posture of this issue raised by Petitioners, and their issue should not be overlooked because the district court changed its position in its subsequent opinion. Additionally, the cases relied upon in *Muoneke* discussed waiver of an issue for failure to fully brief the issue on appeal (not before the trial court). *Muoneke*, 330 Fed. App'x 457, 461 n. 11 (citing *Lyndon Prop. Ins. Co. v. Duke Levy & Assocs., LLC*, 475 F.3d 268, 270 (5th Cir. 2007); cf *United States v. Palmer*, 122 F.3d 215, 220–22 (5th Cir. 1997)). That is not the situation in this case, as Petitioners fully briefed its argument regarding the law of the case in its brief to the circuit court.

III. The District Court violated the mandate rule and law of the case, which requires reversal.

The District Court doubled down on its violation of the Circuit Court's remand order in *Whitaker II*, faulting Petitioners for failing to plead facts that could have only been obtained from the State following remand. In *Whitaker II*, the Circuit Court reversed the District Court's previous 12(b)(1) dismissal "so that Whitaker is able to fully develop the claims based on the existing protocol for an appropriate trial on the merits." ROA.920. The majority panel confirms the district court was bound to apply the holding in *Whitaker II*, so the Petitioners "could bring their Section 1983 suit against the existing execution protocol." App. 1, at 4, n. 6. Yet, the majority panel opinion allows the district court to ignore the mandate nonetheless.

On remand, the mandate rule requires a district court to "implement both the letter and the spirit of the appellate court's mandate and may not disregard the explicit directives of that court." *Perez v. Stephens*, 784 F.3d 276, 280 (5th Cir. 2015) (quoting *United States v. McCrimmon*, 443 F.3d 454, 459 (5th Cir. 2006)). This ensures a district court does not "reexamin[e] an issue of fact or law that has already been decided on appeal." *Id.* (citations and

quotations omitted). This correlates the law of the case doctrine with the mandate rule to ensure the district court gives effect to the Circuit Court's mandate and "to do nothing else." *Id.*

Rather than following this clear requirement, which the majority panel acknowledges was required, yet itself does not uphold, the "district court disregarded explicit directives of this court, did not allow Whitaker meaningful discovery or an opportunity to fully develop the claims, and later dismissed under Rule 12(b)(6) while considering matters outside the pleadings without converting the motion to dismiss to a motion for summary judgment." App. 1, at 25 (Graves, J., dissenting).

The district court's action dismissing the case on the pleadings (ROA.1489) without allowing the case to proceed to "an appropriate trial on the merits" (ROA.920) was a singular violation of the mandate. The district court compounded the violation by not allowing full evidentiary development, yet utilizing the limited discovery that was developed as a basis to dismiss the complaint. Violations included, for example, the district court would not allow discovery, except for discrete questions to be answered via letter exchange, not even sworn

Interrogatories. The district court also required Petitioners' expert to answer specific questions the court deemed necessary, but would not allow the expert to expand upon the explanation in a meaningful manner. Additionally, when Mr. Williams was previously scheduled for execution in September 2015, the district court called the case to trial with two weeks' notice and made clear that it would not permit Appellants to cross examine any State witness (a witness for the State would not have even been called). ROA.1694-1696.

Nonetheless, when the case was dismissed under Rule 12(b)(6), the district court utilized the information it learned from Petitioners' expert witness and the State as a factual basis to dismiss the complaint. These inconsistent applications of the circuit court's mandate by both the district court and majority panel served to hold Petitioners to a heightened standard, yet prevent them from meeting that standard by denying them the very information needed.

IV. The panel majority's opinion affirming the district court's conclusion that Petitioners' claims cannot survive a motion to dismiss is infected by reliance on erroneous and inapplicable standards.[4]

The panel majority's conclusion that Petitioners failed to state a claim upon which relief may be granted relies on the heightened standards set forth in *Glossip v. Gross*, 135 S. Ct. 2726 (2015) and *Baze v. Rees*, 553 U.S. 35 (2008).[5] *Glossip*, however, was before the Supreme Court after substantial litigation and record development in the lower courts. The *Glossip* standard cited by the panel majority is what is required to establish a likelihood of success for purposes of injunctive relief (a stay of execution). Likewise, *Baze* was before the Court after a seven-day bench trial. Petitioners here petition the Court from a denial of a motion to dismiss, after only the most minimal discovery, let alone a substantive trial. These substantial procedural differences, and

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[4] The manner in which Petitioners' Second Amended Complaint pleads claims that–when evaluated pursuant to the appropriate standard and based on the relevant and appropriate pleadings–easily survive a motion to dismiss is detailed in full in Petitioners' brief in the circuit court below, and not restated here. Petitioners submit that the district court's application of a clearly erroneous standard, the panel majority's affirmance and application of an irrelevant harm standard, standing alone, require reversal.

[5] Indeed, the panel majority rejected Petitioners' argument that the district court applied an erroneous heightened standard on the basis that "this is a function of the strict substantive requirements of a method of execution claim," citing *Glossip*. App. 1 at 16.

distinctions in relevant standards, are crucial—and are ignored by the panel majority.

> Although the elements of a method of execution claim–as pleaded by Whitaker here–are relevant, the heightened standard of *Glossip* is not applicable because Whitaker must only plausibly allege his claims to survive a 12(b)(6) dismissal rather than establish a likelihood of success on the merits.

App 1. at 26 (Graves, J., dissenting).

The other cases relied upon by the panel majority are likewise inapt. They rely first on their decision in *Wood* to conclude that Petitioners' fail to state a claim. App 1. at 10 (citing *Wood v. Collier*, 836 F.3d 534, 537 (5th Cir. 2016)). Such reliance is entirely misplaced. *Wood*, as described above, was an action brought as a result of the defendants' stipulation in this matter, followed *Whitaker* in time, and was adjudicated by the same district court. To look to *Wood,* and the claims plead there, to address whether Petitioners' claims were sufficient to survive a motion to dismiss is miles beyond the bounds of matters that are appropriate for consideration in a *de novo* appeal of a Rule 12(b)(6) dismissal.

Zink v. Lombardi , 783 F.3d 1089 (8th Cir. 2015)(en banc)(per curiam), decided before *Glossip*, relied on *Whitaker I* and *Wellons v.*

Commisioner, Georgia Department of Corrections, 754 F.3d 1260, 1265 (11th Cir. 2014), both of which were decided in the context of an appeal of a denial of a motion for preliminary injunction, and thus reviewed under a heightened standard, as was *Fears v. Morgan (In re Ohio Execution Protocol)*, No. 17-3076, 2017 WL 2784503 (6th Cir. June 28, 2017).[6] *Gissendaner v. Commissioner*, 779 F.3d 1275 (11th Cir. 2015) was also decided before *Glossip*, relied on *Wellons*, and was evaluated in the context of a motion for stay as well as a motion to dismiss. Likewise, the panel majority relies on *Whitaker I*, before the circuit court on a motion for stay of execution, and *Sepulvado v. Jindal*, 729 F.3d 413 (5th Cir. 2013), an appeal to the circuit court from the Louisiana district court's grant of a preliminary injunction and stay of execution. *See* App. 1 at 14. The heightened standard applied in those cases is simply not applicable here. *See* App. 1 at 26 (Graves, J., dissenting)

The panel majority's reliance on cases in which courts adjudicated claims in the context of motions for stays of execution, preliminary

[6] The panel majority cites *Fears* in footnote 18, appended to their statement that they use the *Glossip* and *Baze* standards to evaluate the motion to dismiss in this case. The footnote states: "[t]he en banc Sixth Circuit has just now reiterated these tests in rejecting a challenge to Ohio's protocol"—but fails to note the timing or context of the *Fears* decision. App 1. at 9.

injunction, or after extensive factual development below, infects and undermines the entire opinion.[7] To permit the district court and the panel majority to exploit them merely because this is a lethal injection challenge endorses a dangerous approach that threatens the imperative of orderly litigation that abides by the rules.

This error is profoundly aggravated in this case, where the district court that has controlled the litigation has prevented and precluded any meaningful factual development—in violation, even, of the circuit court's previous mandate. Petitioners pled the requisite facts, provided

[7] The application of an erroneous standard is additionally compounded by the panel majority's reliance on the district court's erroneous reliance on matters outside the pleadings. For example, in footnote 19, the panel majority points to the Petitioners' allegation in their second amended complaint that Respondents at one point possessed three other drugs for possible use in executions, "but at oral argument they inexplicably claim they did not so designate." App 1. at fn. 19. The panel does not designate which oral argument, and it is thus impossible to verify or defend the accusation. Regardless, "oral argument" is clearly not one of the pleadings relevant to a motion to dismiss. The footnote is appended to a discussion about the adequacy of Petitioners' proposed alternative. Petitioners' statement regarding Respondents' possession of the other three drugs was made in the context of their claim regarding the importance of notice–the three drugs in Respondents' possession have been present in numerous notoriously botched executions; if Petitioners don't have notice that such drugs might be used, they are unable to protect their constitutional rights. *See* Second Amended Complaint, ROA1222. The district court mentions Petitioners' statement regarding Respondents' possession of other drugs and follows it with the statement that "Texas stipulates that it will not change its means, method, and procedure before it kills Williams and Whitaker. Texas will use compounded pentobarbital . . ." ROA 1477. Of course, as Petitioners alleged, Texas cannot use compounded pentobarbital if it is unable to get it at the time of either Petitioners' execution. Thus the particular stipulation upon which the district court's opinion relies could be rendered false and moot at any moment. Although footnote 19's notation of a matter outside the pleadings relevant to a motion to dismiss may seem inconsequential, it is not.

the district court with an expert report detailing the manner in which the risks alleged would cause Petitioners severe suffering, and were anticipating a trial, set by the court, at which they planned to present the testimony of two experts. They sought, in every manner possible, discovery and an opportunity to develop facts that were unavailable precisely because they were exclusively in Respondents' possession. The district court's sudden grant of Respondents' motion to dismiss without permitting meaningful discovery or the anticipated trial—while faulting plaintiffs, through application of an erroneous standard, for failing to substantiate their claims, should not be countenanced.

> The thread throughout the district court opinion is the circular logic of Whitaker's inability to prove his claims until after his rights are violated, despite the fact that once that happens, Whitaker would be deceased and unable to prove anything–particularly if he is denied counsel at execution. However, this logic ignores that fact that Whitaker is not required to prove the claims in his complaint to survive a motion to dismiss.

App. 1 at 27 (Graves, J., dissenting).

CONCLUSION

For the foregoing reasons, Petitioners respectfully request this Court grant their petition for writ of certiorari. Alternatively, Petitioners request this Court summarily reverse the decision of the

Fifth Circuit Court of Appeals and remand this matter for consideration in accordance with well-established rules of civil procedure.

Dated: December 4, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of this Court; that I am counsel in this matter for Thomas Whitaker and Perry Williams; that on this day, December 4, 2017, I caused the foregoing Petition for Writ of Certiorari to be served on opposing counsel via e-mail delivery to:

Scott Keller
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and that all parties required to be served have been served.

/s/ Bobbie L. Stratton
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NO. 17-___

In the
Supreme Court of the United States

THOMAS WHITAKER AND PERRY WILLIAMS

PETITIONERS,

v.

BRYAN COLLIER, WILLIAM STEPHENS;
JAMES JONES; UNKNOWN EXECUTIONERS

RESPONDENTS.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONERS' APPENDIX

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-20364

United States Court of Appeals
Fifth Circuit
FILED
July 7, 2017
Lyle W. Cayce
Clerk

THOMAS WHITAKER; PERRY WILLIAMS,

Plaintiffs–Appellants,

versus

BRYAN COLLIER; WILLIAM STEPHENS;
JAMES JONES; UNKNOWN EXECUTIONERS,

Defendants–Appellees.

Appeal from the United States District Court
for the Southern District of Texas

Before SMITH, PRADO, and GRAVES, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

Thomas Whitaker and Perry Williams sued state officials under 42 U.S.C. § 1983 to challenge their method of execution under the First, Sixth, Eighth, and Fourteenth Amendments. Because the plaintiffs have not stated a claim on which relief can be granted, we affirm the dismissal of their complaint.

I.

Whitaker and Williams were convicted of capital murder and sentenced to death. Whitaker's conviction and sentence were affirmed in 2009,[1] Williams's in 2008.[2] They filed their original complaint in October 2013.[3] The district court dismissed because their date of execution had not been set, so the dispute was not ripe, but we reversed because "the current protocol is presumably 'the means that Texas will select for their execution.'" *Whitaker v. Livingston*, 597 F. App'x 771, 773, 774 (5th Cir. 2015) (per curiam).

On remand, the plaintiffs filed a second amended complaint (the subject of this appeal) with four counts. Count One alleges that the lack of a notification requirement, in Texas's execution protocol, for changes to the protocol violates the Eighth Amendment and the Fourteenth Amendment's Due Process Clause. Count Two alleges that the lack of a requirement that prisoners have access to counsel "during the events leading up to and during the course of their execution" violates the First, Sixth, and Eighth Amendments. Count Three alleges that the failure to conduct additional testing of the compounded pentobarbital (the execution drug), use of the compounded pentobarbital after its "Beyond Use Date" ("BUD"), and the absence of other appropriate safeguards violate the Eighth and Fourteenth Amendments. Count Four alleges that the failure to release, or the concealment of, information about the protocol violates the Eighth and Fourteenth Amendments. The defendants, referred to collectively as the Texas Department of Criminal Justice ("TDCJ"), moved to dismiss under Federal Rule of Civil Procedure 12(b)(6).

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[1] *Whitaker v. State*, 286 S.W.3d 355, 357 (Tex. Crim. App. 2009).

[2] *Williams v. State*, 273 S.W.3d 200, 204 (Tex. Crim. App. 2008).

[3] Michael Yowell was also a complainant, but he was executed in October 2013. *See Whitaker v. Livingston*, 732 F.3d 465, 469 (5th Cir. 2013).

While the motion to dismiss was pending, the district court permitted limited discovery. During that time, Texas stipulated that it would conduct additional testing of the compounded pentobarbital before executing Whitaker and Williams.[4] The court eventually granted TDCJ's motion to dismiss all claims. It held that Counts One, Two, and the part of Count Three challenging the lack of additional safeguards were barred by the statute of limitations. It also ruled that Whitaker and Williams had failed to state a claim on the remaining issues. On appeal now,[5] we affirm the dismissal.

II.

The statute of limitations for Section 1983 method-of-execution claims is the same as the general personal-injury limitations for the state of conviction. *Walker v. Epps*, 550 F.3d 407, 411–12 (5th Cir. 2008). In Texas, a personal-injury action must be brought "not later than two years after the day the cause of action accrues." TEX. CIV. PRAC. & REM. CODE ANN. § 16.003 (West 2016). A method-of-execution cause of action accrues "on the date direct review of a plaintiff's conviction and sentence is complete" or "in the event a state changes its execution protocol after a death-row inmate's conviction has become final . . . on the date that protocol change becomes effective." *Walker*, 440 F.3d at 414.

The plaintiffs filed their original complaint more than two years after their convictions and sentences became final, so to benefit from a more recent accrual date, they must show a change in the protocol. They maintain that TDCJ's September 2013 change from manufactured to compounded

[4] At oral argument, TDCJ affirmed its commitment to retest the compounded pentobarbital.

[5] Whitaker's scheduled execution was called off because TDCJ was unable to complete the stipulated-to additional testing in time.

pentobarbital "constituted a substantial change to the TDCJ protocol" that "should be the date that limitations for [plaintiffs'] section 1983 claims accrued." Alternatively, they contend that limitations has not begun to run because they are subject to a continuing injury resulting from TDCJ's ability to change its protocol at any time. We must decide whether the change to compounded pentobarbital can serve as the substitute accrual date and, if so, for which specific parts of the protocol.[6]

Walker did not decide what kind of change would be sufficient to reset the accrual date or how much of the protocol would be challengeable. *Id.* at 415. So far, we have only assumed *arguendo* that the most recent change—in 2013—is the accrual date where the claims were time-barred regardless of the date chosen. *See* W*ood v. Collier*, No. 16-20556, ___ F. App'x ___, 2017 WL 892490, at *1 (5th Cir. Mar. 6, 2017) (per curiam). We did not decide whether that September 2013 date—which we termed "the most generous accrual point possible"—or an earlier date (given that "[s]ome of the aspects of Texas's death penalty protocol . . . have not changed since 2008") was the appropriate accrual date. *Id.* at *1 n.7.[7]

The Eleventh Circuit requires that, for the accrual date to reset, a change to the protocol must be substantial. *Gissendaner v. Comm'r, Ga. Dep't of Corr.*, 779 F.3d 1275, 1280 (11th Cir.) (per curiam) (quoting another source). Moreover, "a claim that accrues by virtue of a substantial change in a state's

[6] The plaintiffs' argument that the law of the case prevents the application of a limitations bar was waived because they did not raise it in the district court. *See Muoneke v. Compagnie Nationale Air France*, 330 F. App'x 457, 461 n.11 (5th Cir. 2009) (per curiam). Even if it had not been waived, the district court was bound to apply the holding in *Whitaker*, 597 F. App'x at 774, that the plaintiffs could bring their Section 1983 suit against the existing execution protocol.

[7] To the extent that *Wood*, being unpublished, is not precedent, we now adopt its reasoning and conclusions as published precedent.

execution protocol is limited to the particular part of the protocol that changed." *Id.* at 1280–81. "In other words, a substantial change to one aspect of a state's execution protocol does not allow a prisoner whose complaint would otherwise be time-barred to make a 'wholesale challenge' to the state's protocol." *Id.* at 1281.

We agree with the Eleventh Circuit: To reset the accrual date, a change to an execution protocol must be substantial, and any new accrual date is applicable only to the portion of the protocol that changed. *See id.* at 1280–81. In permitting Section 1983 method-of-execution claims, the Supreme Court acknowledged that such claims, where they entail a stay of execution, can unreasonably delay imposition of the sentence. *Hill v. McDonough*, 547 U.S. 573, 583–84 (2006). "Repetitive or piecemeal litigation presumably would raise similar concerns." *Id.* at 585. The most straightforward way to avoid that is to place reasonable limits on the type of change that resets the accrual date instead of allowing a proliferation of claims that could indefinitely delay the sentence, as well as creating a perverse incentive for states to refuse to make the very changes the plaintiffs are seeking.

The definition of "substantial" requires further elaboration. The plaintiffs are correct that setting the level of abstraction at lethal injection, as the district court seemed to suggest,[8] is too strict. We cannot say that the use of any injectable substance that causes death is always an insignificant change, because there could be substances that do create a "substantial risk of serious harm." *Glossip v. Gross*, 135 S. Ct. 2726, 2737 (2015) (quoting *Baze v. Rees*, 553 U.S. 35, 50 (2008)). But a limit has to be drawn to avoid "[r]epetitive or piecemeal litigation." *Hill*, 547 U.S. at 585.

[8] *Whitaker v. Livingston*, No. H-13-2901, 2016 WL 3199532, at *5 (S.D. Tex. June 6, 2016).

Again, we follow the Eleventh Circuit. The plaintiff in *Gissendaner* challenged the constitutionality of Georgia's switch from manufactured to compounded pentobarbital. The court held that was "not a substantial change because the switch between two forms of the same drug does not significantly alter the method of execution." *Id.* at 1282. We agree.

Applying these rules, the district court was correct to dismiss Counts One, Two, and part of Three as time-barred. Whitaker's and Williams's convictions and sentences were affirmed by the Texas Court of Criminal Appeals in 2009 and 2008, respectively.[9] They sued in 2013, well after the expiration of the two-year limitations period for unchanged parts of the protocol. The lack of a notice requirement, the lack of access to counsel during the execution, and the list of additional safeguards in Count Three were all claims that existed as of the May 2008 execution protocol and have not been altered since.[10] These claims are time-barred.

The remaining claims in Count Three, regarding retesting and the BUD of the compounded pentobarbital, would be time-barred under the new rule, because the 2013 change to compounded pentobarbital is not substantial. But,

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[9] *Whitaker*, 286 S.W.3d at 357; *Williams*, 273 S.W.3d at 204.

[10] *Wood*, ___ F. App'x ___, 2017 WL 892490, at *1 n.7. The plaintiffs challenge the basis for evaluating the timing of changes to the protocol by objecting to this court's taking judicial notice of Texas's 2008 execution protocol. They correctly note that the court cannot take judicial notice of the factual findings of another court. *Taylor v. Charter Med. Corp.*, 162 F.3d 827, 830 (5th Cir. 1998). But we can take judicial notice of a fact that is "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be questioned." *Id.* at 829 (internal quotation marks and citation omitted).

The 2008 execution protocol is such a document. Resolving this issue on remand would merely require TDCJ to come forward with the 2008 protocol, easily satisfying the second part of the *Taylor* test. The state's reliance on court filings in other cases for the contents of its own records is not our preferred approach. But it also was not an abuse of discretion for the district court to take judicial notice of the protocol under these circumstances.

in addition to the 2013 change, TDCJ also changed from a three-drug to a one-drug protocol between 2008 and 2012. Because no party raises whether that change is substantial, we do not decide that question. The plaintiffs also do not specifically identify the date of this change in their complaint, although their brief says it was in 2012. The district court identifies this date as well but relies on another case for that proposition.[11] Given the lack of briefing and the importance of this question, we assume, *arguendo* only, that these claims are not time-barred.[12]

Alternatively, the plaintiffs maintain that limitations have not run because the plaintiffs are subject to a continuing injury on account of the lack of a notice provision. This theory is all but foreclosed by *Walker*, 550 F.3d at 417, which addressed a similar claim regarding Mississippi's execution protocol. That state defines a continuing tort as "wrongful conduct that is repeated until desisted." *Id.* (quoting *Stevens v. Lake*, 615 So. 2d 1177, 1178 (Miss. 1993)). Based upon that definition, we held that the protocol was not a continuing tort because "[t]he challenged protocol will affect each plaintiff but once." *Id.* In Texas, a continuing tort occurs where "the wrongful conduct continues to effect additional injury to the plaintiff until that conduct stops."[13] Given the similarities in definitions, TDCJ's execution protocol also is not a continuing tort under *Walker*.

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[11] *Whitaker*, 2016 WL 3199532, at *5 (quoting *Trottie v. Livingston*, 766 F.3d 450, 453 (5th Cir. 2014)).

[12] Count Four alleges an ongoing concealment of information independent of the protocol itself, but this distinction is not discussed in the briefing either. We also assume *arguendo* that this claim is not time-barred.

[13] *Gen. Universal Sys., Inc. v. HAL, Inc.*, 500 F.3d 444, 451 (5th Cir. 2007) (quoting *Upjohn Co. v. Freeman*, 885 S.W.2d 538, 542 (Tex. App.—Dallas 1994, writ denied)). "Although often used by Texas intermediate courts, '[t]he Texas Supreme Court has not "endorsed nor addressed" the concept of the continuing tort doctrine.'" *Id.* (quoting *Walston v. Stewart*, 187 S.W.3d 126, 129 (Tex. App.—Waco 2006, pet. denied)).

III.

Even if the plaintiffs sued timely, they have failed to state a claim.[14] A dismissal for failure to state a claim under Rule 12(b)(6) is reviewed "*de novo*, accepting all well-pleaded facts as true and viewing those facts in the light most favorable to the plaintiff." *Bowlby v. City of Aberdeen*, 681 F.3d 215, 219 (5th Cir. 2012) (internal quotation marks and citation omitted). A complaint must be "plausible on its face"[15] based on "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[16] "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."[17]

A.

The plaintiffs rely on several constitutional amendments, but the core of their suit is a challenge to the method of execution under the Eighth Amendment. In *Glossip*, 135 S. Ct. at 2737, a majority of the Court, in reviewing a preliminary injunction, adopted two elements for a method-of-execution claim. The method of execution must first "present[] a risk that is *sure or very likely* to cause serious illness and needless suffering, and give rise to sufficiently *imminent* dangers." *Id.* (quoting *Baze*, 553 U.S. at 50). "[T]here must be a substantial risk of serious harm, an objectively intolerable risk of harm that

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[14] Given the recurring nature of execution-protocol claims, it is important to rule both on the limitations question and on the validity of the substantive claim, so we make this as an alternative holding. "This circuit follows the rule that alternative holdings are binding precedent and not *obiter dicta*." *United States v. Bueno*, 585 F.3d 847, 850 n.3 (5th Cir. 2009) (quoting *Pruitt v. Levi Strauss & Co.*, 932 F.2d 458, 464 (5th Cir. 1991)); *accord United States v. Peters*, 364 F. App'x 897, 898 (5th Cir. 2010) (per curiam).

[15] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

[16] *Id.*

[17] *Id.*; s*ee generally* 2 MOORE'S FEDERAL PRACTICE § 12.34[1][a], at 12-77 through 12-83 (3d ed. 2017).

prevents prison officials from pleading that they were subjectively blameless for purposes of the Eighth Amendment." *Id.* (quoting *Baze*, 553 U.S. at 50). Second, the plaintiff "must identify an alternative that is 'feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain.'" *Id.* (quoting *Baze*, 553 U.S. at 52). We use those same elements when reviewing whether the plaintiffs have sufficiently pleaded a method-of-execution claim to survive a Rule 12(b)(6) motion to dismiss.[18] The plaintiffs have not done that.

B.

Count Three addresses the method-of-execution claims regarding the compounded pentobarbital itself. Under the first element of *Glossip*, the plaintiffs allege that the fact that there was only a single test of the execution drugs conducted before delivery to TDCJ means that there is a substantial risk of serious harm, because "this lack of information and testing makes it impossible to determine to what extent the compounded pentobarbital has degraded and what the risks to the inmate might be." The plaintiffs further aver that the BUD that the compounding pharmacy assigned to the pentobarbital "is not supported by the relevant provisions of the [United States Pharmacopeia], and in fact, extends far beyond the recommended BUD." The plaintiffs maintain that this "raises grave concerns about potency, sterility, and stability of the pentobarbital, and thus of the risk of severe pain to the inmate."

With respect to the second element of *Glossip*, the plaintiffs contend that TDCJ could alternatively use "a single dose of an FDA approved barbiturate, applied with the appropriate safeguards and transparency that apply to both

[18] The en banc Sixth Circuit has just now reiterated these tests in rejecting a challenge to Ohio's protocol. *See Fears v. Morgan (In re Ohio Execution Protocol)*, No. 17-3076, 2017 U.S. App. LEXIS 11491, at *8–9 (6th Cir. June 28, 2017) (en banc).

the execution process and the manner in which the drugs are selected, purchased, stored, and tested."[19] The plaintiffs also theorize that the protocol does not contain various other safeguards that would allow TDCJ to "determine whether an inmate is subjected to severe pain at the time of his execution."[20]

1.

We addressed similar claims to Whitaker's and Williams's in *Wood*, in which the plaintiffs sought stays of executions as part of their Section 1983 method-of-execution claims, *to-wit*:

> (1) Texas's use of compounded pentobarbital absent re-testing shortly before execution violates the Eighth and Fourteenth Amendments by creating a substantial risk of severe pain; (2) Texas's refusal to disclose elements of its execution protocol violated Appellants' First, Eighth, and Fourteenth Amendment rights to be free from cruel and unusual punishment, due process, notice, an opportunity to be heard, and access to the courts; (3) voluntary re-testing of the pentobarbital that will be used to execute plaintiffs in another suit created a constitutional right to such re-testing for all prisoners; and (4) the lack of a requirement that Texas notify the Appellants of any changes to the drugs or to the lethal injection protocol that will be used to carry out their sentences impairs protection of their right to be free from cruel and unusual punishment and to due process under the Eighth and Fourteenth amendments.

Wood v. Collier, 836 F.3d 534, 537 (5th Cir. 2016). In seeking a stay, the *Wood* plaintiffs relied solely on their retesting/equal-protection claim. We denied the stay because the retesting itself was not required by the Eighth Amendment,

[19] In their complaint, the plaintiffs stated that TDCJ has in its "possession three other drugs purchased for possible use in executions: propofol, midazolam, and hydromorphone," but at oral argument they inexplicably claimed they did not so designate.

[20] Count Three alleges that these deficiencies also violate the Fourteenth Amendment, but that issue is not briefed by the plaintiffs so it is waived. *See United States v. Stalnaker*, 571 F.3d 428, 439–40 (5th Cir. 2009).

irrespective of the equality of its application.[21] "[R]elying on conjecture regarding the drugs' beyond-use dates and compounding, the prisoners urge[d] only that '[t]esting the compounded pentobarbital shortly before its use ensures the prisoner will not suffer severe pain . . . .'" *Id.* at 540. "But this assertion fail[ed] to reach the Eighth Amendment bar on unnecessarily severe pain that is sure, very likely, and imminent." *Id.*

The Eighth and Eleventh Circuits have addressed method-of-execution claims regarding compounded pentobarbital at the motion to dismiss stage and found the complaints insufficient.[22] In *Zink*, 783 F.3d at 1100, the plaintiffs alleged that "the use of compounding pharmacies 'often results in drugs which are contaminated, sub-potent or super-potent, or which do not have the strength, quality or purity' of FDA-regulated drugs." The plaintiffs identified four specific risks that created: (1) sub- or super-potency that either left the prisoner alive but seriously injured or suffocated him to death before he was rendered unconscious; (2) allergic reactions from contamination; (3) pulmonary embolisms from foreign particles; and (4) burning from the drug's improper pH. *Id.* at 1099–1100. The Eighth Circuit held those allegations were too speculative to survive a motion to dismiss, because they were "descriptions of hypothetical situations in which a potential flaw in the production of the pentobarbital or in the lethal-injection protocol could cause pain." *Id.* at 1101.

Whitaker and Williams pleaded a related claim that the single test of the execution drugs conducted before delivery to TDCJ presents a substantial risk

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[21] *Wood*, 836 F.3d at 540 ("However one kneads the protean language of equal protection jurisprudence, the inescapable reality is that these prisoners have not demonstrated that a failure to retest brings the risk of unnecessary pain forbidden by the Eighth Amendment.").

[22] *See Zink v. Lombardi*, 783 F.3d 1089 (8th Cir. 2015) (en banc) (per curiam); *Gissendaner*, 779 F.3d at 1278–79, 1283.

of serious harm because "this lack of information and testing makes it impossible to determine to what extent the compounded pentobarbital has degraded and what the risks to the inmate might be." If pleading hypothetical risks was insufficient to state a claim in *Zink*, *id.* at 1101, and *Gissendaner*, 779 F.3d at 1283, and we do not see a reason to split with our sister circuits' holdings, then the claim that additional testing is required to identify an otherwise unknown risk is surely insufficient. By the first element's own terms, the plaintiffs must make factual allegations as to the substantial risk of the severe pain instead of pleading ignorance. *Glossip*, 135 S. Ct. at 2737.

Whitaker's and Williams's claim that using compounded pentobarbital after its BUD risks severe pain also does not include sufficient factual assertions to survive a motion to dismiss. They claim that the BUD assigned to the drug by TDCJ "is not supported by the relevant provisions of the [United States Pharmacopeia], and in fact, extends far beyond the recommended BUD." This, allegedly, "raises grave concerns about potency, sterility, and stability of the pentobarbital, and thus of the risk of severe pain to the inmate." Again, this is the type of "speculation that the current protocol carries a substantial risk of severe pain" that is insufficient even at the motion-to-dismiss stage.[23]

2.

The plaintiffs have failed to plead an alternative method of execution as required by *Glossip*, 135 S. Ct. at 2737. The "'naked assertion' that other methods would be constitutional, devoid of further factual enhancement, fails to state a claim under the Eighth Amendment." *Zink*, 783 F.3d at 1103. The complaint includes no factual contentions that these alternatives "significantly

[23] *Zink*, 783 F.3d at 1101. The *Zink* plaintiffs alleged, *inter alia*, that the compounded pentobarbital was "use[d] beyond its expiration date . . . exacerbat[ing] the potential for [the aforementioned] harms." *Id.* at 1100.

reduce a substantial risk of severe pain." *Glossip*, 135 S. Ct. at 2737 (quoting *Baze*, 553 U.S. at 52). The plaintiffs merely advance the notion that there are FDA-approved barbiturates that could be administered with appropriate safeguards. The allegation that there are available drugs that could be handled properly is little more than a concession that there are constitutional ways for TDCJ to carry out executions.

3.

The plaintiffs assert in Count Three that TDCJ has "insufficient safeguards in the current execution protocol to protect them from the risk of cruel and unusual punishment at the time of their execution." This count also fails to state a claim.

Once again, there are no factual assertions that would allow the court reasonably to infer that the lack of these safeguards creates a "substantial risk of serious harm." *Id.* (quoting *Baze*, 553 U.S. at 50). The pleading merely lists the alleged deficiencies and states that they are necessary to avoid "the risk of cruel and unusual punishment" because without them "TDCJ cannot determine whether an inmate is subjected to severe pain at the time of his execution." The allegation that the risk of pain is indeterminate fails the requirements of a method-of-execution claim on its face. Even if the pleading had added the qualifier "substantial" to the risk alleged, this would still be a legal conclusion that *Iqbal*, 556 U.S. at 678–79, directs us to disregard.

C.

Counts One and Four deal with the plaintiffs' alleged inability to access information about their method of execution. Count One addresses the lack of a notification requirement in TDCJ's execution protocol itself, and Count Four speaks to TDCJ's failure to disclose, or concealment of, information about the

method of execution. The plaintiffs aver that these are violations of the Eighth and Fourteenth Amendments.

The failure to disclose information or include a notice requirement in the protocol does not offend the Eighth Amendment. "Perhaps the state's secrecy masks 'a substantial risk of serious harm,' but it does not create one."[24] "[W]e know of no case, in the context of executions, in which the Supreme Court has found a liberty interest to exist, based on the contours of the Eighth Amendment, that goes beyond what that Amendment itself protects." *Whitaker*, 732 F.3d at 467.

We rejected the plaintiffs' Fourteenth Amendment due process claim in *Sepulvado*, 729 F.3d at 419. 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." *Id.* The lack of a cognizable liberty interest is fatal to the due process claim. *Id.* at 420.

The plaintiffs contend that we do not have to follow *Sepulvado* because it "was decided before many of the applicable developments in Texas, in this case, in the lethal injection landscape nationally, and before the Supreme Court's decision in *Glossip*." But these changes are insufficient to justify departure from *Sepulvado*. *See Jacobs v. Nat'l Drug Intelligence Ctr.*, 548 F.3d 375, 378 (5th Cir. 2008). Of those reasons, only *Glossip* would be an exception to the rule of orderliness, and it did not address due process questions regarding execution protocols. *See Glossip,* 135 S. Ct. at 2731. Without a cognizable liberty interest, the due process claims cannot survive a motion to dismiss.

Finally, the plaintiffs allege, in Counts One and Four, that this lack of

[24] *Sepulvado v. Jindal*, 729 F.3d 413, 420 (5th Cir. 2013) (footnote omitted) (quoting *Baze*, 553 U.S. at 52).

information interferes with their First Amendment right of access to the courts.[25] This claim fails on the pleadings. "One is not entitled to access to the courts merely to argue that there might be some remote possibility of some constitutional violation." *Whitaker*, 732 F.3d at 467. "Plaintiffs must plead sufficient facts to state a cognizable legal claim." *Id.* Because the plaintiffs have not met the pleadings standards for any of their claims, their access-to-the-courts theory necessarily fails as well.[26]

D.

Count Two alleges the right to counsel "during the events leading up to and during the execution" under the First, Sixth, and Eighth Amendments.[27] These claims are without merit. The Sixth Amendment right to counsel only "extends to the first appeal of right, and no further." *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987). The plaintiffs also have not satisfied the pleading requirements of a method-of-execution claim because they have not identified a "substantial risk of serious harm" from the lack of access. *See Glossip*, 135 S. Ct. at 2737 (quotation marks and citations omitted). The plaintiffs point to the possibility of "botched executions" that access to counsel could address, but that is just the kind of "isolated mishap" that is not cognizable via a method-of-execution claim. *See Baze*, 553 U.S. at 50. Finally, because the

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[25] "[T]he right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances." *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 741 (1983).

[26] The Eighth Circuit has more broadly held that these claims do not extend to the absence-of-notice provisions in execution protocols. *Zink*, 783 F.3d at 1108 ("The prisoners do not assert that they are physically unable to file an Eighth Amendment claim, only that they are unable to obtain the information needed to discover a potential Eighth Amendment violation." (quoting *Williams v. Hobbs*, 658 F.3d 842, 852 (8th Cir. 2011))).

[27] Texas's execution protocol does permit a prisoner to meet with his attorney on the day of the execution with the permission of the warden.

plaintiffs have not succeeded in pleading an underlying claim, their access-to-the-courts assertion fails as well. *Whitaker*, 732 F.3d at 467.

IV.

The plaintiffs raise two procedural objections to the dismissal of their complaint. First, they claim that the district court incorrectly applied the summary-judgment standard to a motion to dismiss. They assert both that the court considered evidence outside the pleadings and that it applied a heightened pleading standard to its review of the complaint.

The district court did not apply a heightened pleading standard. Although it used language such as "established" and "demonstrate," *Whitaker*, 2016 WL 3199532, at *3–4, this is a function of the strict substantive requirements of a method-of-execution claim. As we have repeatedly mentioned, there must be sufficient facts in the complaint for the court reasonably to infer a "substantial risk of serious harm." *See Glossip*, 135 S. Ct. at 2737.

The district court did consider evidence outside the pleadings. It cited to stipulations Texas made to do additional testing on the compounded pentobarbital before the plaintiffs' executions and their concession that that would be satisfactory. *See Whitaker*, 2016 WL 3199532, at *3. But we have already held that such an error is harmless. *See Wood*, 836 F.3d at 542. "Accepting the facts as pled, all claims still fail." *Id.*

The plaintiffs also assert that the court abused its discretion in handling their discovery requests by establishing a confusing process, "predetermin[ing] what issues it thought were relevant" and being overly protective of information it was concerned would leak to the public. Discovery is "inapplicable"

where "[t]he district court ruled on [TDCJ's] motion to dismiss."[28] Any discovery error was harmless, because the plaintiffs were not entitled to discovery without a properly pleaded complaint. *See Twombly*, 550 U.S. at 559.

The judgment of dismissal is AFFIRMED.

[28] *Hollis v. Lynch*, 827 F.3d 436, 451 (5th Cir. 2016); *see also Crenshaw v. United States ex rel. NASA*, No. 97-40487, 137 F.3d 1352 (table), 1998 WL 92559, at *1 (5th Cir. Feb. 12, 1998) (per curiam) (unpublished).

JAMES E. GRAVES, JR., Circuit Judge, dissenting:

Because I would vacate the district court's order of dismissal for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure and remand, I respectfully dissent.

In September of 2013, the Texas Department of Criminal Justice's (TDCJ) supply of Nembutal, the brand name of pentobarbital, prescribed by the current execution protocol expired. There was information that TDCJ had obtained a supply of propofol, midazolam and hydromorphone, but there was a lack of information about which drugs TDCJ planned to use in upcoming executions.

As a result, death-row inmates Thomas Whitaker, Perry Williams and Michael Yowell filed a complaint under 42 U.S.C. § 1983 on October 1, 2013, asserting violations of their rights to due process, access to courts, and right to be free from cruel and unusual punishment against various representatives of the TDCJ. Based upon new information that Yowell's imminent execution would be carried out with newly-purchased compounded pentobarbital, the plaintiffs sought a temporary injunction. The district court denied relief and this court affirmed. See *Whitaker v. Livingston* (*Whitaker I*), 732 F.3d 465 (5th Cir. 2013). Yowell was executed and dismissed from the case.

Whitaker and Williams (hereinafter collectively referred to as "Whitaker") then amended their complaint. The State filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1), which the district court granted on the basis of lack of subject matter jurisdiction. Whitaker appealed. This court vacated the order of dismissal, concluding that "the district court clearly erred" in dismissing the claims on the basis that they were not yet ripe, and remanded "so that Whitaker is able to fully develop the claims based on the existing

protocol for an appropriate trial on the merits." *Whitaker v. Livingston* (*Whitaker II*), 597 F. App'x 771, 774 (5th Cir. 2015).

The matter has proceeded since then with various motions, orders, an order setting execution of Williams that was later withdrawn, and limited discovery. Of particular relevance, on September 11, 2015, Whitaker filed a second amended complaint. Three days later, the state filed a motion to dismiss for failure to state a claim under Rule 12(b)(6). On June 6, 2016, the district court granted the dismissal without allowing full development of the claims, any discovery on the second amended complaint, and/or an appropriate trial on the merits.[1]

Whitaker's second amended complaint claimed that:

> (1) The absence of any requirement that Defendants notify Plaintiffs of any changes in the lethal substance to be used to carry out executions, or changes to their legal injection protocol, deprives Plaintiffs of their ability to protect their right to not be subject to

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[1] The majority states that the district court permitted limited discovery while the motion to dismiss was pending. However, the record reflects that the district court did not allow any discovery on the second amended complaint or after its filing while the motion to dismiss was pending.

Prior to the filing of the second amended complaint and the motion to dismiss, the district court had permitted only limited discovery. For example, when Williams' execution date was set, the district court called the case to trial with two weeks' notice and then put restrictions on the examination of witnesses.

Another example is when the district court ordered Texas to provide Whitaker with the purchase and compounding date for the compounded pentobarbital it has used in executions and any autopsy reports conducted of the execution, and to provide the court with the master formulation record and the certificate of analysis for in camera inspection, all by September 11, 2015. Texas filed an advisory on September 11, 2015, saying that it provided the purchase and creation dates, but could not provide any of the other items ordered.

In its order of dismissal, the district court also acknowledged discovery it had denied, saying: "The plaintiffs want more discovery. Among other things, they want to know what equipment was used to test the lethal-injection drugs and how and from whom Texas acquired the drugs." Then, "Texas has told the plaintiffs what they will kill them with and how they will do it. There is no denial of access just because they do not get what they want." But yet the district court then faulted the plaintiffs for not being able to articulate a challenge to the testing – when the court had denied their discovery on that very issue.

> cruel and unusual punishment, and violates their right to due process, notice, an opportunity to be heard, and access to the courts in violation of the Eighth and Fourteenth Amendments to the United States Constitution;
>
> (2) The absence of provisions that provide Plaintiffs access to counsel during the events leading up to and during the course of their execution deprives plaintiffs of their right of access to counsel and the courts in violation of their rights under the First, Sixth and Eighth Amendments and pursuant to 18 U.S.C. §3599;
>
> (3) Plaintiffs' right to not be subject to cruel and unusual punishment, and their right to due process under the Eighth and Fourteenth Amendments are violated by: (1) Defendants' failure to conduct sufficient testing of the compounded pentobarbital prior to injection; (2) Defendants' use of a "use by" date for the compounded pentobarbital that extends far beyond accepted scientific guidelines; (3) Defendants' carrying out of executions under the current Execution Protocol, which lacks appropriate safeguards to limit the risk that Plaintiffs will suffer severe pain at the time of their executions;
>
> (4) Plaintiffs' right to not be subject to cruel and unusual punishment, and their right to due process under the Eighth and Fourteenth Amendments, notice, opportunity to be heard, and access to courts are violated by: (1) Defendants' failure to disclose information regarding the lethal substance or substances TDCJ intends to use to carry out Texas executions; (2) Defendants' concealment of information about how the executions will be carried out.

The district court dismissed the claims on the basis that (a) the first, second, and part of the third claims are barred by limitations; (b) Whitaker did not adequately plead the complaint; and (c) all four claims are unsubstantiated by reliable, articulable, and demonstrable facts that establish claims upon which they seek relief. Whitaker subsequently filed this appeal.

I. Whether the district court applied a standard which was clearly erroneous when assessing the Rule 12(b)(6) motion to dismiss.

As the majority concedes, the district court improperly considered evidence outside the pleadings without converting the motion to dismiss into a

motion for summary judgment. Thus, the district court applied a standard which was clearly erroneous and there is no authority for the application of a harmless error standard. But, even if there was such authority, the error was not harmless because Whitaker's complaint was not deficient, as discussed herein.

This court reviews de novo the district court's grant of a motion for dismissal under 12(b)(6), applying the same standard used by the district court. *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). To survive a motion to dismiss for failure to state a claim under Rule 12(b)(6), "the plaintiff must plead enough facts to state a claim to relief that is plausible on its face." *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007) (internal marks omitted) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In considering a Rule 12(b)(6) motion to dismiss, the court is limited to considering the contents of the pleadings. *Brand Coupon Network, L.L.C. v. Catalina Marketing Corp.*, 748 F.3d 631, 635 (5th Cir. 2014). Considering evidence outside the pleadings without converting the motion to dismiss into a motion for summary judgment is error. *Id.* *See also* Fed. R. Civ. P. 12(d) (If matters outside the pleadings are considered, the motion must be treated as one for summary judgment and "[a]ll parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.") Thus, the district court erred.

The majority cites *Wood v. Collier (Wood I)*, 836 F.3d 534 (5th Cir. 2016) for the conclusion that this error is harmless. However, there is no authority for the application of a harmless error standard to a Rule 12(b)(6) dismissal. More importantly, *Wood I* cites no such authority. Further, it is troubling that this court is relying on a subsequent case decided by the same district court which denied prisoners relief that the State agreed to provide here. In *Wood*

I, the prisoners were seeking re-testing of the compounded pentobarbital prior to execution – something the State stipulated to here prior to the filing of Whitaker's second amended complaint and part of the evidence improperly considered by the same district court here in deciding the motion to dismiss. Also, the *Wood I* plaintiffs were seeking a stay and did not challenge the time barred holding.

Accordingly, the district court clearly erred and this issue alone is sufficient to warrant reversal.

II. Whether appellants' claims are time-barred; and

III. Whether the district court abused its discretion by violating this court's mandate and by not allowing meaningful discovery.[2]

The claims are not time-barred because the cause of action did not accrue until the state began using compounded pentobarbital under the revised protocol in 2013. Additionally, Whitaker is arguably subject to a continuing injury based on TDCJ's ability to change its protocol at any given time. *See* Tex. Code Crim. Proc. Art. 43.14.

We review de novo a district court's dismissal of a § 1983 action as time-barred. *See Price v. City of San Antonio, Tex.*, 431 F.3d 890, 892 (5th Cir. 2005). Federal courts look to federal law to ascertain when a § 1983 action accrues and the limitations period begins to run, but "state law supplies the applicable limitations period and tolling provisions." *Harris v. Hegmann*, 198 F.3d 153, 156-57 (5th Cir. 1999).

As this court has said previously, "in the event a state changes its execution protocol after a death-row inmate's conviction has become final, the limitations period will necessarily accrue on the date that protocol change

[2] These issues are combined for discussion.

becomes effective." *Walker v. Epps*, 550 F.3d 407, 414 (5th Cir. 2008) This is consistent with other circuits. *Id.* at 415.

Further, the statute of limitations is an affirmative defense. This case was dismissed under Rule 12(b)(6). Additionally, as Judge Dennis said in his separate opinion, concurring in part and in judgment, in *Wood v. Collier (Wood II)*, No. 16-20556, --- F.App'x ----, 2017 WL 892490 (5th Cir. Mar. 6, 2017):

> I recognize that *Walker v. Epps*, 550 F.3d 407 (5th Cir. 2008), is binding authority in this Circuit and requires plaintiffs seeking solely equitable relief to comply with state statutes of limitations. However, I am concerned that our decision in *Walker* misinterpreted the Supreme Court's decision in *Wilson v. Garcia*, 471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985), when it read it to overrule *Holmberg v. Armbrecht*, 327 U.S. 392, 66 S.Ct. 582, 90 L.Ed. 743 (1946), a case that Wilson neither discussed nor even mentioned. As a member of this court has observed, "[t]he question whether a statute of limitations should apply to a claim such as this one, where the plaintiff seeks purely injunctive relief against an injury that, although certainly foreseeable, has not yet occurred, is a difficult one." *Walker v. Epps*, 287 Fed. App'x 371, 379 (5th Cir. 2008) (King, J., dissenting). As she did, I refer the reader to Judge Myron Thompson's excellent discussion of this subject, published at *Jones v. Allen*, 483 F.Supp.2d 1142 (M.D. Ala. 2007).

Id. at *2. I agree.

Under our existing authority, any change sets the accrual. This court has already assumed the 2013 change in pentobarbital was the appropriate accrual date in *Wood II*. *Id* at *1. The majority explicitly adopts *Wood II's* conclusions as published precedent. Thus, the 2013 change would be the appropriate accrual date here.

Further, even under the non-binding, persuasive authority of *Gissendaner v. Commissioner, Georgia Dept. of Corrections*, 779 F.3d 1275, 1280-81 (11th Cir. 2015), the particular part of the protocol that changed – the

use of compounded pentobarbital – was substantial. Also, the Eighth Circuit treated it as such in the non-binding, persuasive case of *Zink v. Lombardi*, 783 F.3d 1089 (8th Cir. 2015), which the majority here relies on heavily for other reasons.

Compounded pentobarbital is made in a different manner and the change affects everything from the beyond-use date (BUD) to the availability of data regarding its effects.[3] Additionally, Whitaker's other claims, such as access to counsel, are greatly affected by the change in protocol. The district court essentially dismissed this claim because Texas previously complied with the Sixth Amendment right to counsel at trial and there's no basis to suggest it extends to the day of execution. However, such a finding ignores the issue of whether the State can deprive Whitaker of the right to preserve other constitutional rights, such as those at issue here, by denying the presence of counsel at the critical stage of execution. Moreover, Whitaker raised the claims regarding the absence of protocols that should be in place in his amended complaint. *Whitaker II* was decided after that. Thus, this issue was clearly not waived.

This court has previously said:

> Under law-of-the-case doctrine, "the district court on remand, or the appellate court on a subsequent appeal, abstains from reexamining an issue of fact or law that has already been decided on appeal." *United States v. Teel*, 691 F.3d 578, 582 (5th Cir.2012). A corollary of the law-of-the-case doctrine is the mandate rule, which "requires a district court on remand to effect [the court's] mandate and to do nothing else." *Gen Universal Sys., Inc. v. HAL, Inc.*, 500 F.3d 444, 453 (5th Cir.2004) (citation and internal quotation marks omitted). "A district court on remand 'must implement both the letter and the spirit of the appellate court's mandate and may not disregard the explicit directives of

[3] I note that the majority assumes Whitaker's claims regarding retesting, the BUD and concealment of information are not time-barred.

> that court.' " *United States v. McCrimmon*, 443 F.3d 454, 459 (5th Cir.2006) (*quoting United States v. Matthews*, 312 F.3d 652, 657 (5th Cir.2002)). "Whether the law of the case doctrine foreclose[s] the district court's exercise of discretion on remand and the interpretation of the scope of this court's remand order present questions of law that this court reviews de novo." *United States v. Hamilton*, 440 F.3d 693, 697 (5th Cir.2006) (citation and internal quotation marks omitted).
>
> *Perez v. Stephens*, 784 F.3d 276, 280 (5th Cir. 2015).

This court already remanded "so that Whitaker is able to fully develop the claims based on the existing protocol for an appropriate trial on the merits." The majority concedes that the "district court was bound to apply the holding in *Whitaker* [*II*]." That did not happen. Rather than implement the letter and spirit of this court's mandate, the district court disregarded explicit directives of this court, did not allow Whitaker meaningful discovery or an opportunity to fully develop the claims, and later dismissed under Rule 12(b)(6) while considering matters outside the pleadings without converting the motion to dismiss to a motion for summary judgment.

For these reasons, I would conclude that the district court clearly erred and abused its discretion.

IV. Whether appellants' second amended complaint states claims upon which relief may be granted.

Clearly the claims raised by Whitaker exist. *Glossip v. Gross*, 135 S.Ct. 2726 (2015). As stated previously herein, to survive a motion to dismiss for failure to state a claim under Rule 12(b)(6), "the plaintiff must plead enough facts to state a claim to relief that is plausible on its face." *In re Katrina Canal Breaches Litig.*, 495 F.3d at 205. We must accept all well-pleaded facts as true, viewing them in the light most favorable to Whitaker. *Id.* While "factual

allegations must be enough to raise a right to relief above a speculative level," the complaint "does not need detailed factual allegations."

The majority cites *Glossip* for the standard of a method-of-execution claim. *Glossip*, 135 S.Ct. at 2737. But the portion cited by the majority sets out what is required for a petitioner to establish a likelihood of success on the merits for purposes of a stay of execution. Although the elements of a method of execution claim – as pleaded by Whitaker here – are relevant, the heightened standard of *Glossip* is not applicable because Whitaker must only plausibly allege his claims to survive a 12(b)(6) dismissal rather than establish a likelihood of success on the merits. Further, *Baze v. Rees*, 553 U.S. 35 (2008), did not involve a Rule 12(b)(6) dismissal, but rather the court upheld Kentucky's three-drug lethal injection protocol after a 7-day bench trial. Moreover, *Fears v. Morgan (In re Ohio Execution Protocol)*, No. 17-3076, --- F.3d ----, 2017 WL 2784503 (6th Cir. June 28, 2017), also involved a stay of execution under Ohio's three-drug lethal injection protocol, not a Rule 12(b)(b)(6) dismissal.

In *Zink*, which again is non-binding, the Eighth Circuit concluded that the plaintiffs' specific allegations regarding compounded pentobarbital were too speculative because their own experts "underscore[d] that the harms they have identified are hypothetical." *Id.* 783 F.3d at 1101. *Zink* relied in part on *Whitaker I* and its heightened standard on a motion for preliminary injunction to reach its conclusion. *Id.* at 1102. *Zink* also pointed to an Eleventh Circuit case, *Wellons v. Comm'r Ga. Dep't of Corr.*, 754 F.3d 1260, 1265 (11th Cir. 2014), involving the same heightened standard. *Id.* More importantly, *Zink, Whitaker I*, and *Wellons* were all decided before the Supreme Court decided *Glossip*.

The thread throughout the district court opinion is the circular logic of Whitaker's inability to prove his claims until after his rights are violated, despite the fact that once that happens, Whitaker would be deceased and unable to prove anything – particularly if he is denied counsel at execution. However, this logic ignores the fact that Whitaker is not required to prove the claims in his complaint to survive a motion to dismiss.

The district court said, "compounded pentobarbital has successfully killed the condemned in Texas." The relevant factor is not whether a condemned man eventually dies. The district court also found that Whitaker offered no data showing that errors in testing exist, how the integrity of the test is compromised, or that the drug is likely to be defective if it is mis-tested. However, the district court denied discovery on the testing, as discussed above herein.

The district court then improperly relied upon stipulations and evidence outside the pleadings. Further, the district court dismissed Whitaker's assertions that were derived from therapeutic use of old pentobarbital rather than compounded pentobarbital. However, contradictorily, both the district court and the majority conclude that there's no difference between pentobarbital and compounded pentobarbital, in which case the data should have been relied upon. Additionally, the Supreme Court has found that "extrapolations and assumptions" from data on therapeutic doses of drugs used for execution are entirely reasonable. *See Glossip*, 135 S.Ct. at 2741. This would necessarily extend to extrapolations regarding the BUD.

Based on all of this, I would conclude that Whitaker has pleaded enough facts to state a plausible claim and should be given the opportunity to conduct meaningful discovery.

Accordingly, for the reasons set out herein, I would vacate the district court's order of dismissal and remand. Therefore, I respectfully dissent.

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF TEXAS

Thomas Whitaker, *et. al.*, Plaintiffs,	§	
versus	§	Civil Action H-13-2901
Brad Livingston, *et al.*, Defendants.	§	

Opinion on Dismissal

1. *Introduction.*

In 2013, Michael Yowell, Thomas Whitaker, and Perry Williams complained that Texas's method of execution violates the Constitution. Each had been convicted of capital murder and sentenced to die in separate, individual cases. On October 9, 2013, the State of Texas killed Yowell by injecting him with five grams of compounded pentobarbital. Texas will execute Williams on July 14, 2016, using the same method. Whitaker's execution has not been scheduled. Texas moves to dismiss the case.

Williams's and Whitaker's claims will be dismissed because (a) their first, second, and part of their third claims are barred by limitations, (b) they did not adequately plead their complaint, and (c) all four claims are unsubstantiated by reliable, articulable, and demonstrable facts that establish the claims upon which they seek relief.

2. *Background.*

A constitutionally acceptable manner of killing people convicted of capital murder necessarily must exist. In 1982, the State of Texas adopted lethal injection as its sole method of execution. A team prepares two syringes with a drug, and then a medically-

trained person injects a lethal dose through intravenous catheters.[1] Texas law does not specify what substance will be used in lethal injections.[2]

The use of pentobarbital in executions is routine. Courts have found that using a drug similar in effect to pentobarbital is constitutional.[3] Since July 9, 2012, Texas has used pentobarbital. It first used compounded pentobarbital in Yowell's execution. Thirty-two inmates in Texas have been killed with compounded pentobarbital without incident.

Texas initially used pentobarbital purchased from manufacturers; when political pressure severely limited the supply of manufactured pentobarbital, it began purchasing it from compounding pharmacies. The plaintiffs claim that the manufactured pentobarbital is created at facilities that comply with rigorous regulations whereas makers of compounded pentobarbital are (a) exempt from those regulations and (b) do not use formulas established by scientific investigations. They say that because some regulations do not apply to compounding pharmacies, the drugs produced in these facilities are less reliable.

Pentobarbital is an intermediate-acting barbiturate. It is used for therapy and in executions. Therapeutic uses include inducing a coma after brain damage and preventing brain damage in some surgeries. Texas is not using it for therapy and does not administer a therapeutic dose. Two gram doses of pentobarbital are fatal, the five gram doses that Texas uses are overwhelmingly so. (94 at 21).

The parties have offered affidavits describing how pentobarbital is made at compounding pharmacies. (64, 67). Compounding pentobarbital involves dissolving an active ingredient – pentobarbital sodium salt powder – in a water-solvent solution. The mixture is processed into a liquid that can be injected. The compounding pharmacy lists the components of compounded pentobarbital for injection as: 50mg/mL of Pentobarbital; "Propylene glycol 40%"; "Alcohol 10%"; "Sterile water for injection"; and "Sodium

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[1] *Raby v. Livingston*, 600 F.3d 552, 555–56 (5th Cir. 2010).

[2] The executioner will carry out a capital inmate's sentence "by intravenous injection of a substance or substances in a lethal quantity sufficient to cause death and until such convict is dead." TEX. CODE CRIM. PRO. art. 43.14.

[3] *Glossip v. Gross*, 135 S. Ct. 2726, 2733 (2015).

hydroxide and/or hydrochloric acid to adjust pH to approximately 9.5." (89 at 1). Once this process is complete, the solution is tested for sterility, purity, and potency – for reliability.

3. *Procedural History.*

For many who oppose the death penalty, no method of execution will ever be acceptable. The plaintiffs say that they would challenge every method by which Texas would kill them. (94 at 13-15).

The men sued in 2013, days before Yowell's scheduled execution. When this lawsuit began, the complaint alleged that acquiring compounded pentobarbital from a compounding pharmacy rather than a manufacturer creates a risk of severe pain and infection. It claimed questions existed about contamination, purity, or dilution of the pentobarbital.

The court denied the plaintiffs' request for a preliminary injunction. (21). Texas administered a lethal dose of compounded pentobarbital to Yowell on October 9, 2013. (33). The record establishes no indication that his death was cruel. (33).

The plaintiffs amended their complaint and again argued that using *compounded* pentobarbital is itself unconstitutional. (37). Texas filed a motion to dismiss, and the court granted it. (43). The Appeals Court remanded for more information.

Much activity has followed, and the case is fundamentally different. The court has allowed significant discovery that has narrowed the matters in dispute. After many hearings, the plaintiffs amended their complaint for a second time to state precise claims and to include their expert's opinion. The focus of this case has shifted from a blanket complaint that using all compounded pentobarbital is cruel to a question about the purity, sterility, and potency of each batch bought by Texas. The plaintiffs claim that a lethal dose of an imagined drug approved by the Food and Drug Administration would be permissible to use in their executions.

Texas has furnished information about one batch of compounded pentobarbital. Texas purchased the drug on April 28, 2015. Eagle Analytical Services tested the drug. The drug passed microbiological tests. The chemical tests showed a 99.8% potency. (71, Exhibit

A). The plaintiffs' expert agrees that post-compounding testing verifies the correctness of the drug. (111 at 45). The plaintiffs have made no concrete, particularized, or non-speculative claim that the testing was improperly conducted.

Each compounded drug has a beyond use date (BUD). It approximates when a drug might no longer be reliable. A drug with an expired BUD may still be reliable. The plaintiffs say that Texas's failure (a) to test the reliability of compounded pentobarbital and (b) to verify the BUDs creates an unreasonable risk of cruelty. The essence of plaintiffs' complaint is that Texas will botch their executions by using an unreliable or untested drug.

The plaintiffs claim that no compounded drug should be used after 45 days unless its reliability is examined. They concede that their position relies on experiments examining when unreliable drugs are used in therapeutic doses; "there's a fair amount of speculation as to what would happen" if Texas used a lethal dose after the BUD. (94 at 26). No science has been offered that shows the effect time has on the use of a dose ten times the therapeutic use or over twice the lethal dose. The plaintiffs do not explain the nature or level of pain that Williams or Whitaker would suffer if the lethal dose is administered after its BUD.

The plaintiffs claim that using expired pentobarbital is a "systemic" problem. The plaintiffs have not established that Texas has used expired or unreliable compounded pentobarbital; they have not shown or even claimed unacceptable harm done to the last thirty-two prisoners executed with compounded pentobarbital. (114 at 12).

4. *Amended Complaint.*

The plaintiffs have amended their complaint. It claims:

> (1) Texas's unilateral ability to change the execution protocol without notice violates the Eighth and Fourteenth Amendments' prohibition on cruel and unusual punishment, their right to notice, and the opportunity to be heard.
>
> (2) Texas denies attorneys access to the inmate immediately before, and during, the execution in violation of the First, Sixth, and Eighth Amendments.
>
> (3) Their execution will be cruel and unusual under the Eighth Amendment because Texas does not sufficiently test the compounded pentobarbital, it uses old drugs, and the protocol does not contain adequate safeguards.
>
> (4) Failure to disclose information about compounded pentobarbital and concealment of information about the execution procedure violates the plaintiffs' rights to be free from cruel punishment and to be heard.

5. *Texas's Stipulation.*

The plaintiffs initially complained that Texas had other drugs in its possession that it could use to kill Williams and Whitaker: propofol, midazolam, and hydromorphone. They say that under Texas's protocol it could decide to use one of those drugs at any moment before their executions. They also complained that Texas does not re-test the compounded pentobarbital for efficacy and reliability before it is used.

Texas stipulates that it will not change its means, method, and procedure before it kills Williams and Whitaker. Texas will use compounded pentobarbital, test the drug for reliability shortly before the executions, and will follow its current established execution procedure when it kills them. Importantly, this stipulation (a) assuages concerns that an unreliable and untested drug will be used to kill Williams and Whitaker, (b) commits Texas to using compounded pentobarbital in their executions, and (c) has given Whitaker

and Williams months to speak to their attorneys about the protocol that will be followed when Texas kills them.

The plaintiffs concede that if Williams and Whitaker are administered compounded pentobarbital that has been re-tested for potency, sterility, and purity shortly before its use, they do not have a constitutional challenge to its use in their executions.

Despite this concession, the court will now address Texas's motion to dismiss.

6. *Standard of Review.*

Texas moved to dismiss this case after the plaintiffs amended their complaint for the second time. The court accepts all substantiated allegations in the complaint as true and construes them in the light most favorable to the plaintiffs.[4] A "claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant may be liable for the misconduct alleged."[5] Abstract assertions supported by hypothetical or speculative facts and theories are insufficient.

7. *Cruel and Unusual Punishment: The Risk and The Alternative.*

Sufficiently to state a claim to challenge Texas's means and method of execution, the plaintiffs must plead (a) the use of compounded pentobarbital has a demonstrated risk of severe pain and (b) a readily implementable and feasible alternative method of execution.[6]

A prisoner must plead more than a hypothetical possibility that an execution could go wrong or that he may suffer pain. The plaintiffs must plead facts showing an objectively intolerable risk of pain because the compounded pentobarbital is "sure or very likely to cause serious illness and needless suffering, and give rise to sufficiently imminent dangers."[7] Their claims must be specific; they cannot merely offer a hypothetical range of errors.

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[4] *See, e.g., Christopher v. Harbury*, 536 U.S. 403, 406 (2002).

[5] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

[6] *Glossip*, 135 S. Ct. 2726, 2737 (2015) (quoting *Baze v. Rees*, 553 U.S. 35, 50 (2008)).

[7] *Id.* at 2737 (quoting *Baze*, 553 U.S. at 50).

A. The Risk.

The amended complaint relies on a rambling of theories to meet the pleading requirements of *Glossip*. Williams's and Whitaker's burden under the first prong is not light. Courts have repeatedly held that executing inmates with pentobarbital meets constitutional requirements. The plaintiffs speculate that Texas may use compounded pentobarbital after its BUD or that has not been properly stored or both. Their expert says that the use of compounded pentobarbital raises *concerns* about the reliability of the drug which could risk severe pain. He does not say how those concerns give rise to an increase to the risk that the plaintiffs will suffer pain more cruel in character or intensity. The plaintiffs offer no facts that demonstrate that this risk is not more than merely hypothetical nor do they state the intolerable harm Williams and Whitaker would actually suffer from the drug's use.

The plaintiffs agree "in principle" that Texas's stipulation to test the reliability of the drug before execution renders this case moot. (111 at 48). The complaint does not have an identifiable risk or specific harm, much less a demonstrated, substantial one, that will result if the testing shows that the drug is sterile, pure, and potent when administered.

The plaintiffs also speculate that some unknown factor will cause unreasonable harm when the lethal dose of pentobarbital over-sedates the inmate. They do not specify the effect this will have on the nature or level of pain experienced by Williams or Whitaker. They also do not specify the added pain that can be attributed to Texas's use of compounded pentobarbital rather than manufactured pentobarbital to over-sedate the inmate. At best, the plaintiffs plead the possibility of an episodic, isolated pain event, rather than an intolerable, likely risk when administering an excessive dose. Conjecturing on a range of unspecified possible problems with the execution does not amount to an intolerable and concrete risk of possible cruelty or a properly pleaded claim.

B. The Alternative.

The plaintiffs cannot satisfy *Glossip*'s second prong. They have not pleaded a known and available alternative method of execution that would entail a significantly less severe risk of unreasonable pain to them. They have not told Texas a known and available drug that they would like for it to use when it kills them; the law requires that prisoners pick their own poison.

They allege that "a single dose of an FDA approved barbiturate" used under "appropriate" safeguards will meet constitutional requirements. (109 at 15). Pentobarbital is a barbiturate. The FDA certifies that drugs sold to the public as therapeutic are helpful and without unreasonable risk; it does not approve drugs to be used in doses that kill people. Moreover, if the court accepted the plaintiffs' concerns that doses that cause over-sedation lead to an unreasonable risk of severe pain, then those concerns apply equally to their suggested alternative. The plaintiffs have not identified any FDA-approved barbiturate that when used in a lethal dose "significantly reduces a substantial risk of severe pain."[8]

Because Williams and Whitaker have not met the pleading requirements to challenge Texas's method of execution, the second amended complaint must be dismissed.

Alternatively, the court will address each of the plaintiffs' claims.

8. *Statute of Limitations.*

Texas says that Williams's and Whitaker's claims relating to the lethal-injection procedure are time barred.[9] Because Section 1983 has no statute of limitation, Texas's two-year statute for personal-injury actions governs a method-of-execution challenge.[10] William's and Whitaker's cause of action accrued when each knew or should have known of the injury.[11]

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[8] *Glossip*, 135 S.Ct. at 2737

[9] Claims one, two, and the part of three challenging Texas's procedure

[10] *Walker v. Epps*, 550 F.3d 407, 415 (5th Cir.2008); *Burrell v. Newsome*, 883 F.2d 416, 419 (5th Cir.1989).

[11] *Gonzalez v. Wyatt*, 157 F.3d 1016, 1012 (5th Cir. 1998).

Texas adopted its lethal-injection protocol in 2008. The 2008 protocol does not violate an inmate's right to be free of cruel and unusual punishment.[12] Texas revised its execution protocol in 2012, but the "only difference . . . is a change from the use of three drugs to a single drug."[13] The core procedures that Texas will use to kill Williams and Whitaker have been in place since at least 2008.

The plaintiffs have known they would be executed by lethal injection since their convictions became final in 2008 and 2009. They have known how Texas would kill them since Texas adopted the 2008 protocol. Whitaker challenged Texas's execution protocol in his direct appeal to the state that concluded in 2009.[14] Whitaker also raised a lethal-injection challenge in his 2011 federal petition for a writ of habeas corpus.[15]

The plaintiffs filed their complaint on October 1, 2013. Their claims accrued well before October 1, 2011.[16]

Claims one, two, and part of three are barred by limitations. Even if these claims were not precluded, all four claims lack facial plausibility and the facts required to support a reasonable finding that Texas is liable.

9. *Claim One: Ability to Change Execution Method.*

Texas law does not mandate what drug it will use in its lethal-injection protocol. The plaintiffs say that Texas can change the drug and execution protocol without notifying them, thus violating their Eighth and Fourteenth Amendment rights. The plaintiffs specifically allege that it impairs the due-process right to notice, an opportunity to be heard, and access to courts. The plaintiffs agree that this is a legal question. (61 at 13).

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[12] *Raby v. Livingston*, 600 F.3d 552, 562 (5th Cir. 2010).

[13] *Trottie v. Livingston*, 766 F.3d 450, 453 (5th Cir. 2014).

[14] *Whitaker v. State*, 286 S.W.3d 355, 369 (Tex. Crim. App. 2009).

[15] *Whitaker v. Stephens*, 4:11-cv-2467 (S.D. Tex.), DE 1.

[16] *See Valle v. Singer*, 655 F.3d 1223, 1236 (11th Cir. 2011) (applying an earlier accrual date when the only change in protocol was the switch to a new drug); *Cooey v. Strickland*, 479 F.3d 412, 423 (6th Cir. 2007) (applying an earlier accrual date when changes in protocol do not affect the plaintiff's "core complaint").

A state need not disclose every detail of the execution protocol.[17] Before constitutional process requires notice and an opportunity to be heard, the plaintiffs are obliged to identify a cognizable liberty or property interest implicated by the protocol or a change in it.[18] Simple uncertainty about a method of execution does not give rise to a liberty interest.[19] No cognizable liberty interest lies in the disclosure of protocol merely so an inmate can challenge it.[20]

State prisoners have a constitutional "right of access to the courts,"[21] but this right does not guarantee the ability "to discover grievances, and to litigate effectively once in court."[22] The plaintiffs speculate that Texas will change its execution protocol despite Texas telling the court that it will not. A second layer of speculation leads to their claim that a change in protocol would prevent them from filing a lawsuit. A court cannot entertain, much less adjudicate, claims supported merely by speculation overlaid by speculation.[23]

Claim one does not raise an issue upon which relief can be granted.

10. *Claim Two: Access to Counsel and the Courts.*

Texas's execution protocol says that "[t]he offender may have visits with . . . his attorney(s) on the day of execution at the Huntsville Unit; however, the Huntsville Unit Warden must approve all visits." (104, Exhibit 2 at 7).

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[17] *Zink v. Lombardi*, 783 F.3d 1089, 1109 (8th Cir. 2015); *Wellons v. Comm'r Ga. Dep't Corr.*, 754 F.3d 1260, 1267 (11th Cir. 2014); *Sepulvado v. Jindal*, 729 F.3d 413, 419 (5th Cir. 2013).

[18] "To establish a procedural due process violation, Plaintiff must show that (1) he had a property or liberty interest that was interfered with by Defendants, and (2) Defendants failed to use constitutionally sufficient procedures in depriving Plaintiff of that right." *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 460 (1989).

[19] *Whitaker v. Livingston*, 732 F.3d 465, 467 (5th Cir. 2013).

[20] *Sells v. Livingston*, 750 F.3d 478, 481 (5th Cir. 2014); *Sepulvado v. Jindal*, 729 F.3d 413, 419 (5th Cir. 2013)

[21] *Lewis v. Casey*, 518 U.S. 343, 350 (1996).

[22] *Id.* at 354; *Zink*, 783 F.3d at 1112; *Wellons*, 754 F.3d at 1267; *Williams v. Hobbs*, 658 F.3d 842, 852 (8th Cir. 2011).

[23] U.S. CONST. art. III, § 2.

The plaintiffs complain that Texas's lethal-injection protocol limits communication with counsel on the day of, and during the process of, the execution. The plaintiffs fear that they will not be able to petition the courts during the I.V. insertion or later. The plaintiffs insist that they have a right to communicate with attorneys once in the execution chamber, so they could commence litigation about aspects of the execution.[24] The plaintiffs do not identify any specific legal claims that will be inhibited by the lack of in-person access to counsel in the hours and minutes prior to a scheduled execution. Except an intervention by the governor or a court in a pending case, the die is cast when the execution begins.

The Constitution guarantees Williams and Whitaker an attorney during all stages of state appeal and federal post-conviction litigation. Long before execution, Texas has already complied with the condemned's Sixth Amendment right to counsel.[25] They have not shown that the Sixth Amendment protects against interruptions of attorney-client communication.

To state a claim for impeding access-to-courts and access-to-counsel, the plaintiffs must plead "actual prejudice with respect to contemplated or existing litigation, such as the inability to meet a filing deadline or to present a claim."[26] The right of access is not "an abstract, freestanding right" but exists to vindicate other rights.[27] They have not pleaded facts to show that in-person communication between an inmate and his attorney on the last day of his life is likely to result in raising a viable legal claim.

Once again, the plaintiffs only speculate that the warden will impair their ability to seek redress in court. The plaintiffs do not plead that any non-frivolous legal claim has been

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[24] It's ironical that the plaintiffs, who did not personally meet their attorneys until quite late in this legal action (111 at 19-20), worry about having them present in the death chamber.

[25] The Sixth Amendment right to counsel it that "once the adversary judicial process has been initiated, the Sixth Amendment guarantees a defendant the right to have counsel present at all 'critical' stages of the criminal proceedings." *Montejo v. Louisiana*, 556 U.S. 778, 786 (2009). The Sixth Amendment right to counsel does not extend beyond direct appeal. *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987).

[26] Lewis v. Casey, 518 U.S. 343, 354 (1996).

[27] *Id.* at 351

or will be impeded by some hypothetical deprivation of access. Conjecture as to the nature and severity of the unreasonable harm they might suffer from the execution is inadequate.

Claim two does not raise an issue upon which relief can be granted.

II. *Claim Three: Eighth and Fourteenth Amendment.*

The plaintiffs allege that Texas violates the Eighth and Fourteenth Amendments by (a) failing to conduct sufficient testing of the compounded pentobarbital prior to injection; (b) using a beyond use date for compounded pentobarbital that extends far beyond accepted scientific guidelines; and (c) relying on Texas's current execution protocol. Aside from not pleading sufficient law or facts to survive dismissal generally, each claim does not rise above the speculative, press-release level.

A. *Testing.*

Texas is not using a new drug. The science and results of using pentobarbital is known and has been known for some time. Texas tests its compounded pentobarbital for sterility, purity, and potency. The plaintiffs suggest that errors in testing have or will occur – a suggestion untethered to reality. They offer no data showing (a) errors in testing exist, (b) how the integrity of the test is compromised, or (c) that the drug is likely to be defective if it is mis-tested.

Compounded pentobarbital has successfully killed the condemned in Texas. Texas will test its drugs before executing these men. Plaintiffs speculate that Texas's compounded pentobarbital is unreliable, but agree that post-compounding testing establishes the reliability of the drug. Even if Texas had not agreed to re-test the drug in their executions, their claim is based on the *assumption* that by the time that the compounded pentobarbital is used in executions it has degraded and thus creates a substantial risk of severe pain. Not only do they not offer facts that the drug actually degrades, they have not specified the type or extent of pain caused by using degraded drugs in super-lethal doses. They do not plead any particularized flaw in testing that raises more than a hypothetical risk of harm. This is an imagined claim.

B. Beyond Use Date.

The plaintiffs no longer argue that the use of *any* compounded pentobarbital violates the Eighth Amendment. The question is the effect of the passage of time – combined with the way Texas stores the compounded pentobarbital – on its quality, sterility, and potency.

The plaintiffs complain that Texas will use compounded pentobarbital after its BUD has passed. Texas has not said that it will use the compounded pentobarbital outside the BUD assigned by the testing company.

The plaintiffs say that the testing company assigns a BUD well after when their expert says is acceptable. Calling companies that do business with Texas incompetent or corrupt because of Texas's death penalty may sound good for mudslinging, but it does not establish a rational claim rooted in real facts.

Despite broad opportunities to do so, the plaintiffs have not described why it would matter even if the drugs were used after the assigned BUD. The concern is that if the compounded pentobarbital is old, then it will no longer be reliable. The plaintiffs have no technical data about the effect of that drug a day, a month, a year, or anytime past the beyond use date. Their expert asserted in an earlier pleading that the prisoners might get meningitis because a news clipping said that people did in a batch given to the elderly. They only allege hypothetical risks; they have not described a significant risk of severe pain resulting from pentobarbital itself, the compounding, or the agency.

The plaintiffs made some assertions about the therapeutic use of old pentobarbital but did not plead any facts about the rate of degradation of compounded pentobarbital. The plaintiffs have claimed that compounded pentobarbital has caused meningitis or other infections when used for therapy. Texas administers two and a half times the amount of the drug needed to kill a person. Alleged complications that develop days or years after a therapeutic dose does not establish that Williams or Whitaker will face an intolerable risk of pain during the score of minutes it takes for the lethal dose to kill them.

Williams and Whitaker seem to claim that there is something inherently wrong with using compounded pentobarbital after the BUD. The BUD merely approximates how

long a drug is guaranteed to be reliable; its passage does not necessitate a change in the drug's reliability nor does it establish that the pain plaintiffs will suffer will be more cruel in character or intensity.

Texas will test the drugs before using them on the plaintiffs. Williams and Whitaker will be killed by reliable compounded pentobarbital.

C. *Texas Protocol.*

The plaintiffs complain that the training, personnel, access, and procedure are inadequate. To state a claim they must show that these purported faults (a) are likely to be true, (b) are sure or very likely to cause serious illness and needless suffering, and (c) give rise to sufficiently imminent dangers.[28] Inmates have repeatedly challenged Texas's execution protocol. Concerns similar to the ones raised here have "failed to establish that the Texas lethal-injection protocol creates a demonstrated risk of severe pain."[29] Even to the extent that the plaintiffs' concerns focus on different elements of the protocol, they do not plead facts that would entitle them to relief because they have not connected their accusations to real unreasonable harms that Williams and Whitaker would endure. Quite simply, "the proper administration of the Texas procedure comports with the Eighth Amendment."[30] No allegation that rises above the speculative exists that maladministration – however generated – causes unintended suffering from Texas's use of compounded pentobarbital.

Claim three does not raise an issue upon which relief can be granted.

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[28] *Glossip*, 135 S. Ct. at 2737 (quotation omitted).

[29] *Raby*, 600 F.3d at 560.

[30] *Ladd v. Livingston*, 777 F.3d 286, 290 (5th Cir. 2015); *see also Sells*, 750 F.3d at 480–81; *Trottie*, 766 F.3d at 42-53.

12. *Claim Four: Access to Courts.*

Prisoners have a right to access the courts.[31] The plaintiffs say that Texas's secrecy and tardiness in disclosing the execution drug denies them access to the courts.

The plaintiffs have been able to bring suit and litigate an Eighth Amendment claim. This court has allowed the plaintiffs to legitimize their facially inadequate complaint. Litigation has uncovered some relevant information about the proposed method of execution. The plaintiffs want more discovery. Among other things, they want to know what equipment was used to test the lethal-injection drugs and how and from whom Texas acquired the drugs.

The plaintiffs' access-to-the-courts argument depends on their ability to show a potential Eighth Amendment violation.[32] Texas has told the plaintiffs what they will kill them with and how they will do it. There is no denial of access just because they do not get what they want. When this requested information has been available it has not been used to support legal claims; it was only used as a tool for opponents of the death penalty to attack suppliers.

As the Appeals Court noted when allowing Yowell's execution to proceed: "what plaintiffs are demanding is that, in effect, they be permitted to supervise every step of the execution process. They have no such entitlement. They must offer some proof that the state's own process – that its choice of pharmacy, that its lab results, that the training of its executioners, and so forth – is suspect. Plaintiffs have pointed to only hypothetical possibilities that the process was defective."[33] The plaintiffs have not pleaded adequate facts or law that shows they have been denied any probative information about Texas's execution procedure.

Claim four does not raise an issue upon which relief can be granted.

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[31] Prisoners have a constitutional right of access to the courts that is "adequate, effective, and meaningful." *Bounds v. Smith*, 430 U.S. 817, 822 (1977). However, this right "guarantees no particular methodology but rather the conferral of a capability—the capability of bringing contemplated challenges to sentences or conditions of confinement before the courts." *Lewis*, 518 U.S. at 54.

[32] *Whitaker*, 732 F.3d at 467.

[33] *Whitaker*, 732 F.3d at 468.

13. *Conclusion.*

Williams and Whitaker have not established that the use of compounded pentobarbital poses a severe risk of injury, nor have they named a reasonable, feasible alternative that Texas should use to kill them. The amended complaint does not offer reasonable data that undermines what the facts and law establish: Williams and Whitaker will be killed by a lethal dose of tested compounded pentobarbital used through a constitutional protocol.

"Though the penalty is great and our responsibility heavy, our duty is clear."[34] This case is dismissed.

Signed on June 6, 2016, at Houston, Texas.

Lynn N. Hughes
United States District Judge

[34] *Rosenberg v. United States*, 346 U.S. 273, 296 (1953) (Clark, J.).

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF TEXAS

Thomas Whitaker, *et. al.*,	§	
	§	
Plaintiffs,	§	
versus	§	Civil Action H-13-2901
	§	
Brad Livingston, *et al.*,	§	
	§	
Defendants.	§	

Final Dismissal

Thomas Whitaker's and Perry Williams's amended complaint is dismissed.

Signed on June 6, 2016, at Houston, Texas.

Lynn N. Hughes
United States District Judge

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF TEXAS

Thomas Whitaker, *et. al.*,

Plaintiffs,

versus

Brad Livingston, *et al.*,

Defendants.

§
§
§
§
§
§
§
§
§

Civil Action H-13-2901

Order on Mootness and Injunction

All motions for discovery, and other requests for relief, are denied. The court does not enjoin Texas from carrying out Williams's execution.[1]

Signed on June 6, 2016, at Houston, Texas.

Lynn N. Hughes
United States District Judge

[1] *Whitaker v. Livingston*, 732 F.3d 465, 466-68 (5th Cir. 2013).

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF TEXAS

Thomas Whitaker, *et. al.*,

Plaintiffs,

versus

Brad Livingston, *et al.*,

Defendants.

§
§
§
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Civil Action H-13-2901

Judicial Notice

The court takes notice of the 2008 execution protocol of the Texas Department of Criminal Justice.

Signed on June 6, 2016, at Houston, Texas.

Lynn N. Hughes
United States District Judge

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 16-20364

D.C. Docket No. 4:13-CV-2901

THOMAS WHITAKER; PERRY WILLIAMS,

Plaintiffs - Appellants

v.

BRYAN COLLIER; WILLIAM STEPHENS; JAMES JONES; UNKNOWN EXECUTIONERS,

Defendants - Appellees

Appeal from the United States District Court for the Southern District of Texas, Houston

Before SMITH, PRADO, and GRAVES, Circuit Judges.

J U D G M E N T

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed.

JAMES E. GRAVES, JR., Circuit Judge, dissenting.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

July 31, 2017

Mr. David J. Bradley
Southern District of Texas, Houston
United States District Court
515 Rusk Street
Room 5300
Houston, TX 77002

No. 16-20364 Thomas Whitaker, et al v. Bryan Collier, et al
USDC No. 4:13-CV-2901

Dear Mr. Bradley,

Enclosed is a copy of the judgment issued as the mandate and a copy of the court's opinion.

Sincerely,

LYLE W. CAYCE, Clerk

Sabrina B. Short

By: _____
Sabrina B. Short, Deputy Clerk
504-310-7817

cc:
Mr. Matthew Hamilton Frederick
Ms. Valerie Anne Henderson
Mr. Scott A. Keller
Ms. Maurie Levin
Mr. Edward Larry Marshall
Mr. Matthew Dennis Ottoway
Ms. Bobbie Leigh Stratton

United States Code Annotated
Constitution of the United States
Annotated
Amendment VIII. Excessive Bail, Fines, Punishments

U.S.C.A. Const. Amend. VIII

Amendment VIII. Excessive Bail, Fines, Punishments

Currentness

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Notes of Decisions (6331)

U.S.C.A. Const. Amend. VIII, USCA CONST Amend. VIII
Current through P.L. 115-84. Also includes P.L. 115-86 to 115-89. Title 26 current through 115-89.

End of Document

United States Code Annotated
Constitution of the United States
Annotated
Amendment XIV. Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement

U.S.C.A. Const. Amend. XIV-Full Text

AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Currentness

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in

insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U.S.C.A. Const. Amend. XIV-Full Text, USCA CONST Amend. XIV-Full Text
Current through P.L. 115-84. Also includes P.L. 115-86 to 115-89. Title 26 current through 115-89.

End of Document

KeyCite Yellow Flag - Negative Treatment
Unconstitutional or PreemptedLimited on Preemption Grounds by Molinelli-Freytes v. University of Puerto Rico, D.Puerto Rico, July 27, 2010
KeyCite Yellow Flag - Negative TreatmentProposed Legislation

United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 21. Civil Rights (Refs & Annos)
Subchapter I. Generally

42 U.S.C.A. § 1983

§ 1983. Civil action for deprivation of rights

Effective: October 19, 1996

Currentness

<Notes of Decisions for 42 USCA § 1983 are displayed in six separate documents. Notes of Decisions for subdivisions I to IX are contained in this document. For additional Notes of Decisions, see 42 § 1983, ante.>

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.

CREDIT(S)

(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.)

Notes of Decisions (5801)

42 U.S.C.A. § 1983, 42 USCA § 1983
Current through P.L. 115-84. Also includes P.L. 115-86 to 115-89. Title 26 current through 115-89.

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