

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**

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT IN REPLY TO BRIEF IN OPPOSITION

I. Inaccuracies in Respondents' Questions Presented.

As a threshold matter, Respondents' statements in the questions presented could easily mislead the Court about the facts governing the trajectory of this case since its inception. In the first sentence of their Questions Presented, Respondents state Petitioners "brought this challenge to the Texas lethal-injection protocol in 2013—five years after the protocol was adopted" Respondents' Br., at i. This statement glosses over critical details and attempts to mislead this Court into believing a full five years passed between protocol adoption and the filing of this lawsuit. In fact, Texas changed from a three-drug to a one-drug protocol in June 2012, and then changed again to compounded pentobarbital in September 2013. Petitioners filed their initial complaint less than a month later, on October 1, 2013. ROA.25; Pet. App. 1, at 7.

Although the panel majority found Counts One and Two of Petitioners' complaint were time barred, it also found with respect to a critical portion of Claim III, as well as Claim IV, "given the lack of briefing and the importance of this question, we assume, *arguendo* only,

that these claims are not time-barred.”¹ As such, in the first instance, Respondents’ first proposed Question – Whether Petitioners’ claims are time-barred – was not addressed by the Circuit Court with respect to two of Petitioners’ significant claims. It is thus not properly before this Court.

Respondents’ second proposed question is equally flawed. It asks the Court to consider “[w]hether Petitioners’ plead a known and alternative method of execution or a plausible substantial risk of severe pain warrants dismissal for failure to state a claim.” Respondents’ Br., at i. This question begs the questions raised by Petitioners: “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 . . . ?” See Petition, at ii. Respondents’ question cannot fairly be posed or answered unless and until the inadequacy of the proceedings at the root of the Petition – the

¹ The limited briefing on this issue – although, Petitioners submit, exaggerated by the panel decision – resulted from the fact that Respondents only raised it for the first time in their Motion to Dismiss, which was filed just shy of *two years after* the filing of Petitioners’ Original Complaint. See ROA.25–52, 1217–37, 1238–63. The substantive nature of the changes in Texas’ protocol were interwoven with the development and discovery Petitioners were promised, sought, and were denied. As the dissent below stated “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.” Pet. App. 1, at 19, n. 1 (Graves, J., dissenting).

district court's clearly erroneous abdication of the most basic rules of procedure – are addressed and redressed.

II. The procedural errors in the district court's ruling and the circuit court's decision should not be disregarded and reversal is warranted on this issue alone.

Respondents attempt to downplay the significance of the procedural errors in the district court's ruling and the Fifth Circuit's decision below. These issues, however, are dispositive of this case, and moot the questions posed by Respondents. Indeed, they go to the seminal and critical standards applied when a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) is considered by the federal courts – standards the district court flaunted. Letting the rulings below stand would be injurious to the orderly and consistent application of the federal rules.

In granting Respondents' Rule 12(b)(6) motion to dismiss, the district court utilized two clearly erroneous standards: first, it considered evidence outside the complaint, and, second, it applied a heightened – and erroneous – pleading standard. 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 and Respondents cite to none. Respondents fault Petitioners for failing to show a circuit split on this issue, and the reason is simple: the Fifth Circuit Court of Appeals is the first to take such an unprecedented position.

Respondents ask this Court to disregard these errors altogether – yet, they are alone sufficient to require reversal of the panel majority’s affirmance of the district court’s dismissal. “[T]he district court clearly erred and this issue alone is sufficient to warrant reversal.” Pet. App. 1 at 22 (Graves, J., dissenting).

III. Petitioners’ claims are not barred by the statute of limitations.

Fifth Circuit precedent holds that any change in the execution protocol after a death row inmate’s conviction becomes final triggers an accrual date for the statute of limitations on the date the change becomes effective. *Walker v. Epps*, 550 F.3d 407, 414 (5th Cir. 2008). Following that precedent, the Fifth Circuit assumed in *Wood v. Collier* (*Wood II*), 678 Fed. App’x 248 (5th Cir. 2017) (per curiam) that the 2013 change to compounded pentobarbital was the appropriate accrual date. Following its own precedent, “the 2013 change would be the appropriate

accrual date here.” Pet. App. 1, at 23 (Graves, J., dissenting). Although Respondents argue *Wood II* is not precedent, Respondents Br. at 17, because the *Wood* court “assumed without deciding” the issue; that too is what the panel majority did. Pet. App. 1, at 7. Respondents cannot have it both ways: If *Wood II* is not binding precedent; this issue is not properly before this Court.

Moreover, even under the analysis relied upon in *Gissendaner v. Commissioner, Georgia Department of Corrections*, 779 F.3d 1275, 1280–81 (11th Cir. 2015), the change to compounded pentobarbital is substantial. The panel majority relies on the simple premise that “the switch between the two forms of the same drug does not significantly alter the method of execution.” Pet. App. 1, at 6 (quoting *Gissendaner*). Compounded pentobarbital is not made in the same fashion as manufactured pentobarbital. As Judge Graves identified, Petitioners’ other claims “are greatly affected by the change in protocol.” Pet. App. 1, at 24 (Graves, J., dissenting). The change affects the beyond-use-date² and availability of data regarding its effects. *See id.*

² Petitioners’ concerns about drugs that are beyond their use date appear to be borne out in recent executions, where Respondents are using compounded drugs of an unprecedented age. *See* Ed Pilkington, *Texas to execute third prisoner this year amid reports of botched killings*, THE GUARDIAN, Feb. 1, 2018, available at:

Respondents fault Petitioners for not offering an explanation or argument as to how or why the different manner creates a substantial change. *See* Respondents' Br. at 16. This position ignores three important facts: (1) Petitioners' expert on compounded pentobarbital made numerous attempts to educate the district court about the potential ways in which the use of this drug could go wrong; (2) Petitioners were wholly denied the ability to develop this information through the district court's disjointed approach to discovery; and (3) the district court's refusal to permit a trial denied Petitioners the opportunity to present expert testimony on this issue. Indeed, the district court's decision on the statute of limitations question required reliance on matters outside the record. Respondents insist the district court did not err in dismissing this case on the pleadings, but fault Petitioners for having no evidence.³ That position, as detailed below, is

<https://www.theguardian.com/us-news/2018/feb/01/texas-to-execute-third-prisoner-this-year-amid-reports-of-botched-killings>

³ The latest outcome of executions using drugs well beyond a scientifically sound beyond-use-date would certainly qualify as evidence should Petitioners be allowed to present it. *See* Ed Pilkington, *Texas to execute third prisoner this year amid reports of botched killings*, THE GUARDIAN, Feb. 1, 2018, available at: <https://www.theguardian.com/us-news/2018/feb/01/texas-to-execute-third-prisoner-this-year-amid-reports-of-botched-killings>. (Anthony Shore, executed in Texas on January 18, 2018, trembled, struggled to breathe, and stated "Ohh wee, I can feel that it does burn; Burning!" William Rayford, executed on January 30, 2018, rose up, shook, jerked, and grimaced after the

both circular and untenable, and violates the prior mandate of the Fifth Circuit.

Respondents also contend Petitioners waived any discussion of whether the 2012 change in protocol from a three-drug to a one-drug protocol is “substantial” because whether that change was substantial was never briefed before the Fifth Circuit. Respondents’ Br., at 18; Pet. App. 1, at 7. This position ignores Petitioners’ response to the Motion to Dismiss, as well as the opinion in *Wood II*, which previously assumed the 2013 change sets the accrual date. Pet. App. 1, at 23 (Graves, J., dissenting). This position also ignores the entirety of the complaint, which includes a copy of the 2012 protocol, as well as Petitioners’ response to Respondents’ motion to dismiss, which asserts the 2012 change in protocol as an alternative date from which the statute of limitations could run, as well as Petitioners’ briefing in the circuit court. *See* ROA.1259, 1306. This issue cannot be waived because no party could have predicted the panel majority’s opinion would veer away from its own previous precedent and undo the holding in *Wood II*, nor that

lethal drugs began to flow).

the panel majority would follow the non-binding authority of *Gissendaner*. Respondents fail to acknowledge any of these facts.

Finally, Respondents contend Petitioners waived their points concerning the inapplicability of statutes of limitations as to claims for injunctive relief because the circuit court did not have an opportunity to address the issue. In fact, these points were discussed in the dissenting opinion. *See* Pet. App. 1, at 23.

Petitioners' claims are not time-barred. In finding they were, the district court and panel majority employed the same procedural traps as have infected this entire case.

IV. The law of the case doctrine applies; the district court violated this doctrine, as well as the circuit court's mandate.

Respondents assert that because the circuit court's initial opinion "was limited to the question of Article III jurisdiction," there was no mandate rule or law of the case. Respondents' only argument against this violation is that the circuit court's opinion could not possibly have addressed any merits questions regarding a motion to dismiss or discovery." Respondents' Br. at 32. This view is much too narrow.

Respondents fail altogether to note the explicit language of the circuit court's remand order: "Accordingly we VACATE the order of the district court and REMAND this matter so that Whitaker is able to fully develop the claims based on the existing protocol for an appropriate trial on the merits."⁴ *Whitaker v. Livingston (Whitaker II)*, 597 F. App'x 771 (5th Cir. 2015) (per curiam), the circuit court directed the district court to allow Petitioners "to fully develop" their claims. Instead, the district court took a complicated approach to preclude Petitioners any form of "full development" of the record and their

⁴ Notably, Respondents did not raise any statute of limitations concerns in those prior proceedings, nor did the district or circuit courts address them.

evidence. This blatant disregard for the mandate rule should not be permitted and review and reversal are warranted on this issue alone.

V. Resolution of the procedural errors raised by Petitioners must precede any evaluation of Petitioners' claims under *Glossip*.

Respondents' assertions that Petitioners failed to plead an available alternative method of execution or that there was a substantial risk of severe pain under *Glossip v. Gross*, 135 S. Ct. 2726 (2015) attempts to sidestep the fundamental and preliminary procedural questions Petitioners raise. Without providing Petitioners access to information exclusively in Respondents' possession, or an opportunity to develop the record through depositions and testimony (as the Fifth Circuit mandated), the district court's finding that Petitioners failed to state a claim cannot stand – indeed it is cause, alone, for this Court's intervention.⁵ Moreover, as Petitioners briefed (at pp. 24–27), the heightened standard Respondents assert applies is inapplicable here.

Although the elements of a method of execution claim—as pleaded by *Whitaker* here—are relevant, the heightened

⁵ For instance, the availability of alternative execution drugs in an area that Petitioners, without a license to purchase controlled substances, cannot explore or document.

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.

Pet. App. 1., at 26 (Gravies, J., dissenting). As Justice Graves notes in his dissent, and as Petitioners' petition discusses, they *plead* all the elements of a "method of execution" claim, which is all that is required under the 12(b)(6) standard of review. The district court dismissed Petitioners' claims by improperly relying on matters outside the record, and faulting Petitioners for failing to present evidence the Court refused to permit or order. *See* Pet. App. 1, at 27 (Graves, J., dissenting); Petition at 26–28.

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.

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Respectfully submitted,

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