

No. 17A890

IN THE
Supreme Court of the United States

THOMAS WHITAKER and PERRY WILLIAMS,
Applicants,
v.

BRYAN COLLIER, Executive Director,
Texas Department of Criminal Justice, et al.,
Respondents.

On Application for Stay of Execution to the
United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED

Is a stay of execution warranted where the Applicants' challenges to Texas's execution protocol are not likely to succeed on the merits, where there is no likelihood of constitutionally-impermissible pain, and where the state and public have a significant interest in the finality of a criminal conviction?

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BRIEF IN OPPOSITION

The State of Texas respectfully submits this brief in opposition to the application for stay of execution filed by Applicant, Thomas Whitaker.

STATEMENT OF THE CASE

I. Whitaker's Offense and Conviction Challenges¹

"Since at least 2000," Whitaker "had planned with several other individuals, at different times, to murder his family." *Whitaker v. State*, 286 S.W.3d 355, 357 (Tex. Crim. App. 2009) (footnote omitted). On December 10, 2003, Whitaker murdered his mother and younger brother, and he attempted to murder his father. *Id.* While police continued to investigate the crime, Whitaker stole \$10,000 from his father and fled to Mexico. *Id.* He was apprehended in Mexico fifteen months later. *Id.* He was tried and convicted of capital murder. *Id.*

Whitaker's conviction and death sentence were affirmed on direct appeal by the Texas Court of Criminal Appeals (CCA). *See id.* That court also denied his initial state habeas application. *Ex parte Whitaker*, No. WR-73421-01, 2010 WL 2617806 (Tex. Crim. App. June 30, 2010).

¹ Because only Whitaker faces imminent execution, he is the true applicant here, and Respondents omit any discussion of Williams.

In 2011, Whitaker filed a federal habeas petition. *Whitaker v. Stephens*, No. H-11-CV-2467, 2015 WL 1282182 (S.D. Tex. Mar. 17, 2015). The district court denied relief, *see id.*, and the Fifth Circuit affirmed, *Whitaker v. Davis*, 853 F.3d 253, 260 (5th Cir. 2017). This Court denied certiorari on October 10, 2017. *Whitaker v. Davis*, 138 S. Ct. 317 (2017).

On November 1, 2017, the state trial court set Whitaker's execution for February 22, 2018. Execution Order 1–2, *State v. Whitaker*, No. 05-DCR-042969 (Dist. Ct. Fort Bend County, Tex. Nov. 1, 2017).

On February 9, 2018, Whitaker filed a subsequent state habeas application. Subs. Appl. Postconviction Writ Habeas Corpus 10–32, *Ex parte Whitaker*, No. WR-73,421-02 (Dist. Ct. Fort Bend County, Tex. Feb. 9, 2018). The CCA found the application to be abusive under state law and dismissed it on procedural grounds. Order, *Ex parte Whitaker*, No. WR-73,421-02 (Tex. Crim. App. Feb. 15, 2018).

II. Whitaker's Method-of-Execution Litigation

In October 2013, Whitaker and two other inmates, Perry Williams and Michael Yowell, filed a 42 U.S.C. § 1983 action challenging Texas's execution protocol. ROA.25–52. They also moved for a temporary

injunction to halt Yowell’s then-impending execution. ROA.53–71. The district court denied injunctive relief, ROA.592–97, and the Fifth Circuit affirmed, *see Whitaker v. Livingston*, 732 F.3d 465, 466, 469 (5th Cir. 2013) (*Whitaker I*). This Court denied Yowell a stay of execution and a writ of certiorari. *Yowell v. Livingston*, 134 S. Ct. 417 (2013). Yowell was executed pursuant to the challenged execution protocol. He was dismissed as a plaintiff. ROA.633.

Applicants then filed an amended complaint, ROA.707–38, which the district court dismissed as unripe, ROA.888, but the Fifth Circuit reversed, finding Article III jurisdiction, *Whitaker v. Livingston*, 597 F. App’x 771, 773, 774 (5th Cir. 2015) (*Whitaker II*).

On remand, Applicants filed a second amended complaint. ROA.1217–37. Respondents moved to dismiss, ROA.1238–63, which the district court granted, ROA.1473–89. The Fifth Circuit affirmed the dismissal. *Whitaker v. Collier*, 862 F.3d 490, 494–501 (5th Cir. 2017) (*Whitaker III*).

Applicants then requested a sixty-day extension to file their petition for writ of certiorari, which was granted, and which put their

deadline at December 4, 2017. *See Docket No. 17-7506*, Supreme Court of the United States, <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/17-7506.html> (last visited Feb. 16, 2018).

While Applicants attempted to file their certiorari petition on December 4, 2017, the petition was not accepted because it failed to comply with this Court's rules. On December 14, 2017, Respondents inquired with Applicants regarding the status of the case. On December 18, 2017, they responded that there were "some technical complaints about" the filing, that they had sixty days to make corrections, but that they intended "to have it taken care of and re-submitted this week." E-mail from Bobbie Stratton to Kyle Hawkins, Assistant Solicitor General (Dec. 18, 2017 2:49 PM) (on file with Respondents).

On December 28, 2017, Applicants re-submitted their petition, but it was again rejected because of failure to comply with this Court's rules. On January 3, 2018, Respondents again inquired with Applicants regarding the status of the case. That same day, Applicants responded that they had not yet received a notice of docketing, but that they would provide an update once they learned if the petition had been accepted. E-

mail from Bobbie Stratton to Kyle Hawkins, Assistant Solicitor General (Jan. 3, 2018 2:31 PM) (on file with Respondents).

On January 18, 2018, Respondents yet again inquired with Applicants regarding the status of the case. That same day, Applicants responded that they had to “make a technical correction,” but that they would make their “revised filing today.” E-mail from Bobbie Stratton to Kyle Hawkins, Assistant Solicitor General (Jan. 18, 2018 12:40 PM) (on file with Respondents).

On January 18, 2018, Applicants re-submitted their petition. Pet. Writ Certiorari, *Whitaker v. Collier*, No. 17-506 (U.S. Dec. 4, 2017). On January 22, 2018, this Court accepted the petition and docketed it. On January 23, 2018, Respondents filed their response in opposition. Br. Opp’n, *Whitaker v. Collier*, No. 17-506 (U.S. Jan. 23, 2018). On February 6, 2018, Applicants replied. Reply Br. Opp’n, *Whitaker v. Collier*, No. 17-506 (U.S. Feb. 6, 2018). The petition remains pending, and is set for conference on February 23, 2018. *See Docket No. 17-7506*, Supreme Court of the United States, <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/17-7506.html> (last visited Feb. 16, 2018).

On February 16, 2018, Applicants moved the Fifth Circuit to stay Whitaker's execution. Mot. Stay Execution, *Whitaker v. Collier*, 862 F.3d 490 (5th Cir. 2017) (No. 16-20364). On February 19, 2018, the Fifth Circuit denied the stay motion. Order, Feb. 19, 2018, *Whitaker v. Collier*, 862 F.3d 490 (5th Cir. 2017) (No. 16-20364).

Applicants now request a stay of Whitaker's execution from this Court. Appl. Stay Execution 5–15. Respondents oppose.

REASONS FOR DENYING THE APPLICATION FOR STAY OF EXECUTION

Whitaker was properly convicted of capital murder and sentenced to death for orchestrating the murder of his mother, Patricia, and his younger brother, Kevin. Whitaker's direct appeal, initial and subsequent state habeas applications, and initial federal habeas petition have all been rejected by the courts.

In addition to challenging his conviction, Whitaker attacked Texas's execution protocol via a 42 U.S.C. § 1983 action. That case is presently before the Court on petition for writ of certiorari after the Fifth Circuit affirmed its dismissal. Now, Whitaker seeks a stay of his execution based on the petition's pendency, claiming that he has made a strong showing of likely success on the merits. The Court should decline

Whitaker's request because the application is dilatory and the claims underlying it are meritless.

In light of Whitaker's failure to set forth a sound claim for relief, there is simply no reasonable probability that the Court will ultimately grant a writ of certiorari in this case. Likewise, state and federal habeas review of Whitaker's conviction is complete, and the State has an extremely strong interest in seeing Whitaker's sentence finally carried out. Any stay of execution is therefore unwarranted, and Whitaker's application should be denied.

ARGUMENT

I. The Standard of Review Governing Stays in Capital Cases.

"The party requesting a stay bears the burden of showing that the circumstances justify an exercise of [judicial] discretion." *Nken v. Holder*, 556 U.S. 418, 433–34 (2009). Before utilizing that discretion a court must consider:

(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Id. at 434 (citations omitted) (internal quotation marks omitted). A stay of execution “is not available as a matter of right, and equity must be sensitive to the State’s strong interest in enforcing its criminal judgments without undue interference from the federal courts.” *Hill v. McDonough*, 547 U.S. 573, 584 (2006). “A court considering a stay must also apply ‘a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay.’” *Id.* (quoting *Nelson v. Campbell*, 541 U.S. 637, 650 (2004)); see *Gomez v. U.S. Dist. Court for N. Dist. of Cal.*, 503 U.S. 653, 654 (1992) (per curiam) (“A court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief.”).

II. Whitaker Has Not Made a Strong Showing That He Is Likely to Succeed on the Merits.

Applicants woefully fail to prove entitlement to a stay of execution. Applicants’ likely-success-on-the-merits argument is primarily the adoption of the dissenting opinion in *Whitaker III*. Appl. Stay Execution 5–10 (citing *Whitaker III*, 862 F.3d at 502–07 (Graves, J., dissenting)). Reiterating already-dispatched arguments is not strong proof of likely success; rather, it is proof of the opposite. Further reinforcing the

likelihood of failure on the merits is the consistency with which circuits have denied method-of-execution challenges. *See, e.g., In re Ohio Execution Protocol Litigation*, No. 17-4221, 2018 WL 651386, at *5–6 (6th Cir. Feb. 1, 2018). More proof of likely failure on the merits is this Court’s denial of certiorari in *Wood v. Collier*, 138 S. Ct. 316 (2017), a case with substantially “similar claims to Whitaker’s and Williams’s,” *Whitaker III*, 862 F.3d at 498. And still more proof is the denial of certiorari in other cases challenging compounded pentobarbital. *Zink v. Lombardi*, 135 S. Ct. 2941 (2015); *Gissendaner v. Bryson*, 135 S. Ct. 1580 (2015).

Nonetheless, Applicants’ specific arguments reveal no strong proof of likely success on the merits. Applicants initially claim that the district court violated the mandate of *Whitaker II* by failing to grant discovery and a trial. Appl. Stay Execution 6–7. But the only issue before the *Whitaker II* panel was whether Applicants’ claims were ripe. *Whitaker II*, 597 F. App’x at 773–74. Thus, whether to grant discovery or hold a trial were not issues “of fact or law decided on appeal [that could] not be reexamined either by the district court on remand or by the appellate court on subsequent appeal.” *United States v. Lee*, 358 F.3d 315, 320 (5th

Cir. 2004) (quoting *United States v. Matthews*, 312 F.3d 652, 657 (5th Cir. 2002)). There was no mandate-rule violation.

Irrespective, the mandate rule “is an exercise of discretion . . . not a limit on judicial power,” and it “is not inviolate.” *Id.* (quoting *Matthews*, 312 F.3d at 657). Applicants have failed to show that an allegation that a circuit court failed to police its prior mandate, an exercise of discretionary authority, is a substantial question. This is especially true since this Court has recognized that, if a plaintiff has failed to state a claim upon which relief can be granted, which occurred in this case, neither discovery nor a trial should commence. *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009) (“Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.”). Applicants’ mandate-rule argument fails to demonstrate a strong showing of likely success.

Applicants next claim that the district court considered evidence outside the record. Appl. Stay Execution 7–8. Applicants do not explain why this Court would be interested in the district court’s decision, when it is the Fifth Circuit’s opinion that would be under review. This is

especially true because a Rule 12(b)(6) dismissal is reviewed by an appellate court de novo, applying the same standard as the district court. *Alexander v. Verizon Wireless Serv., LLC*, 875 F.3d 243, 249 (5th Cir. 2017). In other words, the appropriate question is whether *the Fifth Circuit* erred in its independent Rule 12(b)(6) analysis. See *Iqbal*, 556 U.S. at 680–84 (conducting a de novo Rule 12(b)(6) review of the complaint). And Applicants make no allegation that *the Fifth Circuit* considered evidence outside of the pleadings. As such, Applicants fail to make a strong showing of likely success.

Applicants then assert that the *Whitaker III* time-bar analysis conflicted with prior circuit precedent, and that the timeliness of Applicants’ claims was decided in the Rule 12(b)(6) context despite being an affirmative defense. Appl. Stay Execution 8. Again, Applicants make no argument that this Court would be interested in a supposed intra-circuit split regarding a proper accrual date, or that a statute-of-limitations defense was supposedly prematurely decided on the pleadings when there are no contested timing facts.

As to the former complaint, Applicants do not explain what “earlier opinions” the *Whitaker III* time-bar analysis conflicted with, but if it is

Walker v. Epps, 550 F.3d 407 (5th Cir. 2008), it surely does not. *Walker* decided for the first time in the Fifth Circuit that method-of-execution claims were subject to state-law-supplied statutes of limitations, and that the accrual date was the later of either the conclusion of direct review or the date “a state changes its execution protocol.” *Walker*, 550 F.3d at 410–15. But the *Walker* Court had no occasion to decide what *type* of change would reset an accrual date—Mississippi seemingly had the same execution protocol in place from the time it adopted lethal injection to the time the *Walker* plaintiffs filed suit. *See id.* at 416–17. And it simply makes no sense to allow any change in a state’s execution protocol to revive challenges to those portions which remain the same. *See Henyard v. Sec’y DOC*, 543 F.3d 644, 647–48 (11th Cir. 2008).

As to the latter complaint, “[a] statute of limitations may support dismissal under Rule 12(b)(6) where it is evident from the plaintiff’s pleadings that the action is barred.” *Jones v. Alcoa, Inc.* 339 F.3d 359, 366 (5th Cir. 2003). Regardless of timeliness, the lower Court’s decision can be alternatively affirmed on the Rule 12(b)(6) analysis. *See SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943) (“[W]e do not disturb the settled rule that, in reviewing the decision of a lower court, it must be affirmed

if the result is correct ‘although the lower court relied upon a wrong ground or gave a wrong reason.’” (quoting *Helvering v. Gowran*, 302 U.S. 238, 245 (1937))). Applicants fail to show strong proof of likely success.

Applicants finally allege that the Fifth Circuit applied a heightened standard of review in conducting the Rule 12(b)(6) analysis. Appl. Stay Execution 9–10. Again, Applicants fail to show a compelling reason for a grant of certiorari, e.g., a circuit split. Instead, they simply seek correction of a supposed “misapplication of a properly stated rule of law,” a situation where “[a] petition for a writ of certiorari is rarely granted.” Sup. Ct. R. 10.

In any event, Applicants fail to show error. Although Applicants do not identify which of the four claims they raised that were erroneously reviewed by the Fifth Circuit, and therefore they have forfeited such argument, *see CRST Van Expedited, Inc. v. EEOC*, 136 S. Ct. 1642, 1653 (2016) (finding possible forfeiture due to “inadequate briefing on the issue”), Applicants presumably advance their compounded-pentobarbital claim since that is the basis of their irreparable-injury argument. Appl. Stay Execution 11–12. But that claim is easily dispatched.

Baze v. Rees, 553 U.S. 35 (2008) unambiguously supplied “what a prisoner must establish to succeed on an Eighth Amendment *method-of-execution claim*.” *Glossip v. Gross*, 135 S. Ct. 2726, 2737 (2015) (emphasis added). This is a pleading standard inasmuch as it outlines the elements of a method-of-execution claim, and it is not dependent on the procedural posture of either *Baze* or *Glossip*.

Applicants most glaringly failed to adequately plead the alternative-method-of-execution element—“identify[ing] an alternative that is ‘feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain.’” *Id.* (second alteration in original). Applicants can hardly deny that this is a pleading requirement—they pled it, alleging that “a single dose of an FDA approved barbiturate, applied with the appropriate safeguards and transparency that apply to both the execution process and the manner in which the drugs are selected, purchased, stored, and tested.” ROA.1231. But that pleading is facially deficient: it fails to identify a specific drug—or even the characteristics of a hypothetical drug (e.g., injectable vs. oral, short-acting vs. long-acting, duration of action)—let alone claim that the drug has ever been previously used in an execution. Rather, Applicants’

“alternative” “is little more than a concession that there are constitutional ways for TDCJ to carry out executions.” *Whitaker III*, 862 F.3d at 499. And it is tantamount to suggesting an untested process. *See Baze*, 553 U.S. at 54 (“[W]e reject the argument that the Eighth Amendment requires Kentucky to adopt the untested alternative procedures petitioners have identified.”). On this basis alone, Applicants fail to strongly prove a showing of likely success on the merits.

III. Whitaker Is Unlikely to Suffer Irreparable Harm.

Whitaker has also not demonstrated a likelihood that he will suffer irreparable harm if a stay of execution is not granted. The harm at issue is not his death, but whether it will be accompanied by constitutionally-impermissible pain. He has not shown that the present execution protocol, nor the use of compounded pentobarbital, will inflict such pain. Rather, the record here shows that “[t]hirty-two inmates in Texas have been killed with compounded pentobarbital without incident.” ROA.1474. Another panel of the Fifth Circuit analyzed Whitaker’s assertion of irreparable harm and found it wanting:

The prisoners argue the injury they will face is the possibility of severe pain during their executions, but they do not demonstrate that they are nigh sure to suffer unnecessary pain. Texas, on the other hand, proffers that compounded

pentobarbital has been used in thirty-two executions in the state without issue. We cannot say that Appellants have demonstrated that they are likely to suffer an irreparable injury absent a stay.

Wood v. Collier, 836 F.3d 534, 542 (5th Cir. 2016) (footnotes and citations omitted). The number of inmates executed with compounded pentobarbital now stands at forty-four, and still without constitutional issue. *See Executed Offenders*, Texas Department of Criminal Justice, https://www.tdcj.state.tx.us/death_row/dr_executed_offenders.html (last visited February 16, 2018) (showing forty-three executed offenders since Yowell, who was the first inmate to receive a compounded pentobarbital lethal injection).

To counter this *record* evidence, Whitaker cites an article from The Guardian concerning the executions of Anthony Shore and William Rayford. Appl. Stay Execution 11 n.2. This article is double-hearsay, simply relaying what others have said. Ed Pilkington, *Texas to Execute Third Prisoner this Year Amid Reports of Botched Killings*, The Guardian (Feb. 1, 2018 4:14 PM EST). And these double-hearsay accounts, by in large, conflict with that of an eyewitness reporter if hearsay is to be

considered at all.² And the article pre-dates the most-recent inmate executed with compounded pentobarbital, John Battaglia, who expressed no symptoms of pain.³ Whitaker fails to show likely injury without a stay.

IV. The Public Has a Strong Interest in Seeing the State Court Judgment Carried Out.

The State, as well as the public, has a strong interest in carrying out Whitaker's sentence. *See Hill*, 547 U.S. at 584. Whitaker coldly and callously murdered two-thirds of his immediate family, and tried to kill the remaining third, for an inheritance. *Whitaker*, 286 S.W.3d at 357. He did so by recruiting five people to participate in three murder attempts with no more than the promise of remuneration. 28.RR.43–44, 153–58;

² Michael Graczyk, *Texas Executes Dallas Man for Killing Ex-Girlfriend in 1999 Slaying*, The Associated Press (Jan. 30, 2018 11:05 PM ET), <https://www.usatoday.com/story/news/nation/2018/01/30/texas-executes-dallas-man-killing-ex-girlfriend-1999/1081621001/> (“As the lethal dose of pentobarbital began taking effect, [William Rayford] lifted his head from the pillow on the death chamber gurney, repeated that he was sorry and then said he was ‘going home.’ He began to snore. Within seconds, all movement stopped.”).

Michael Graczyk, *“Tourniquet Killer” Executed in Texas for 1992 Strangling*, The Associated Press (Jan. 19, 2018), <https://www.apnews.com/bd1b3d2b064f48d5a4cf3c4c5df47357> (“As the lethal dose of pentobarbital began, [Anthony] Shore said the drug burned. “Oooh-ee! I can feel that,” he said before slipping into unconsciousness.”).

³ Michael Graczyk, *Texas Executes a Man for Killing His Two Daughters While Their Mom Listened*, Time (Feb. 2, 2018), <http://time.com/5130028/texas-execution-john-david-battaglia/> (“The powerful sedative pentobarbital began to take effect. ‘Oh, I feel it,’ [John Battaglia] said. He gasped twice and started to snore. Within seconds, all movement stopped.”).

Whitaker, 286 S.W.3d at 357. And his actions hardly speak of remorse—he lived with his father for seven months after trying to murder him, 27.RR.209; he tried to bribe a witness into silence, 27.RR.56–57; he stole \$10,000 from his father and fled to Mexico as the investigation focused on him, 25.RR.90–101, and, on the anniversary of his mother and brother’s deaths, Whitaker called his father from jail to complain about his attorney, not once acknowledging his family members’ deaths or expressing contrition, 25.RR.115–23. Whitaker murdered those closest to him and recruited co-conspirators with seeming ease, an incredibly dangerous combination. And no reversible error has been found despite ten years of state and federal review. The public’s interest is not advanced through the presentation of repeatedly-rejected method-of-execution claims.

Moreover, Whitaker could have brought this stay application long ago. He has known about this execution date for almost four months now, and he could have requested a stay anytime since. Thus, he “cannot excuse his delaying until the eleventh hour on the ground that he was unaware of the state’s intention to execute him.” *Harris v. Johnson*, 376 F.3d 414, 417 (5th Cir. 2004). “By waiting as long as he did, [Whitaker]

leaves little doubt that the real purpose behind his claim is to seek a delay of his execution.” *Id.* In short, the stay-of-execution application “could have been brought [long] ago [and t]here is no good reason for this abusive delay.” *Gomez*, 503 U.S. at 654.

Additionally, the pendency of Whitaker’s certiorari petition is a making all his own. Applicants requested the maximum amount of time to file their petition. *See* Sup. Ct. R. 13(5). They twice failed to file petitions in conformance with this Court’s rules. *See* Sup. Ct. R. 14(5). Thus, instead of getting “just” 150 days to file their petition, they actually obtained 195 days, or more than half a year. And, had Applicants filed a rules-conforming petition by the December 4, 2017-deadline, the matter would have probably been decided by now.⁴ This noncompliance, creating the pendency he now seeks to use as a basis for further delay, must be held against Whitaker. *See Hill*, 547 U.S. at 584. “The federal courts can and should protect States from dilatory or speculative suits[.]” *Id.* at 585.

⁴ Based on the December 4, 2017-filing date, a response would have been due January 3, 2018, and conference distribution would have likely occurred fourteen days later, or January 17, 2018. *See* Sup. Ct. R. 15(5). Since that date, this Court has held two conferences (January 19, 2018, and February 16, 2018). *Supreme Court Calendar, October Term 2017*, Supreme Court of the United States, https://www.supremecourt.gov/oral_arguments/2017TermCourtCalendar.pdf (last visited Feb. 16, 2018).

Whitaker has already passed through the state and federal review processes, and no reversible error has been found. And Whitaker has had two courts review his method-of-execution challenges, and neither found them meritorious. The public's interest is not advanced by postponing Whitaker's execution.

CONCLUSION

For the foregoing reasons, the application for a stay of execution should be denied.

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