Nos. 17A–1412 & 17–9559

IN THE

Supreme Court of the United States

DANNY BIBLE,
Petitioner,

v.

LORIE DAVIS ET AL.,
Respondents.

On Petition for Writ of Certiorari and
Application for Stay of Execution to the
United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI AND APPLICATION FOR STAY OF EXECUTION

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CAPITAL CASE
QUESTIONS PRESENTED

Petitioner Danny Paul Bible was convicted and sentenced to death for the 1979 rape-killing of Inez Deaton. Direct appeal and initial state habeas proceedings were unsuccessful, and Bible subsequently sought relief in district court via a federal habeas petition. The district court denied any relief and refused any certificate of appealability (COA). In turn, the Fifth Circuit denied its own COA, and this Court denied certiorari review of the Fifth Circuit's COA denial.

Almost three months after the trial court set Bible's execution date (and only nineteen days before his execution), Bible filed his dilatory § 1983 suit, alleging that executing him with Texas's lethal injection protocol was unconstitutional. The district court denied the stay and dismissed the suit with prejudice; the Fifth Circuit affirmed and denied its own stay; and Bible now seeks to appeal. His application for a stay of execution and petition for a writ of certiorari now presents the following claims for review:

1. Whether the district court abused its discretion by dismissing Bible's lawsuit and refusing to stay Bible's execution or grant injunctive relief when Bible failed to demonstrate the Texas protocol presents a substantial risk of serious harm that is sure or very likely to cause serious illness and needless suffering?

2. Whether the district court abused its discretion by dismissing Bible's lawsuit and refusing to stay Bible's execution or grant injunctive relief when Bible's access-to-courts claim is plainly time-barred under the statute of limitations?

3. Whether the district court abused its discretion by dismissing Bible's lawsuit and refusing to stay Bible's execution or grant injunctive relief after it determined that Bible's method-of-execution lawsuit was dilatory?

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INTRODUCTION

Danny Paul Bible has killed at least four people, including an infant. He is a serial rapist and repeat child molester, with convictions for robbery, theft, kidnapping, rape, and murder. He almost exclusively targets women and children as his victims. Unlike many offenders, he remained violent as he aged, committing his most recent rape in his late forties. The press refers to him as "the ice pick killer."

In 1979, Bible raped and killed Inez Deaton. Bible was not arrested at the time, and the case went cold until 1998, when Bible confessed after his arrest for a rape in Louisiana. A Texas jury subsequently convicted Bible of capital murder and sentenced him to die. Following Bible's unsuccessful direct appeal and state and federal habeas corpus proceedings, the trial court set Bible's execution date for June 27, 2018. On June 8, 2018—less than three weeks before his scheduled execution—Bible filed the instant civil rights lawsuit alleging that age, poor health, and poor medical care over the years have made it "very difficult" or "outright impossible" for the Respondents to execute him by lethal injection. *See generally* ECF No. 1[1] (Complaint). Instead, he proposed that the Respondents execute him either by firing squad or nitrogen hypoxia. ECF No. 1 at 73–78. Ultimately, however, he urged the courts to enjoin the Respondents from executing him using lethal injection or, alternatively, to order the Respondent to provide him with "access to the courts

[1] "ECF No. __" refers to entries on the district court's electronic docket sheet, available on PACER. "CR" refers to the Clerk's Record of pleadings and documents filed during Bible's trial. "RR" refers to the Reporter's Record of the transcribed trial proceedings. "DX" and "SX" refer to the defense and State trial exhibits, respectively. "SHCR" refers to the Clerk's Record of pleadings and documents filed during Bible's state habeas proceedings. All references are preceded by volume number and followed by page number where applicable.

during the entirety of the execution." ECF No. 1 at 88. In conjunction with this dilatory action, Bible filed a motion for a stay of execution. ECF No. 3 (Stay Motion).

The district court roundly rejected Bible's arguments in its opinion denying relief and any stay. ECF No. 13 at 9–22. The district court held that at least one of Bible complaints was time-barred; his prospective harms were either minor or speculative; and he failed to demonstrate a viable alternative method of execution. Moreover, the district court appropriately found that "Bible's unnecessary delay in filing suit and seeking equitable relief is an independent basis on which the Court will deny relief." ECF No. 13 at 8. The Fifth Circuit "saw no error in the district court's conclusion that Bible's suit constitutes a dilatory tactic and therefore warrants no equitable relief." *Bible v. Davis*, No. 18–70021, slip op. at 7 (5th Cir. Jun. 26, 2018) (unpublished). Indeed, Bible's suit clearly fails to make the case for any stay or relief and is instead only a meritless attempt to delay imposition of his well-deserved sentence. *Rhines v. Weber*, 544 U.S. 269, 277–78 (2005) (it is no secret that "capital petitioners might deliberately engage in dilatory tactics to prolong their incarceration and avoid execution of a sentence of death.").

Bible's delay in bringing his suit both equitably counsels against granting a stay and calls into question the basis for his complaints. As the district court noted, "[t]he filing of a lawsuit nineteen days before an execution based on long-standing health concerns—especially when accompanied by a discovery motion based on an expedited timetable only days before his execution—lessens the credibility of the plaintiff's arguments." ECF No. 13 at 8. "Nothing prevented Bible from bringing suit

to challenge his execution long before now, and in a manner that would allowed for full factual development and deliberate consideration." *Id*. at 7. "Any urgency is a matter of Bible's own creation." *Id*. at 8.

A stay of execution is an equitable remedy and, as such, it "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) (citing *Nelson v. Campbell*, 541 U.S. 637, 649–650 (2004)). So, too, an injunction against a particular method of execution must not ignore the State's interests. Such is especially true where, as here, the plaintiff's claims fail on several fronts. To begin, the district court found that at least one of Bible's complaints (access-to-courts) was time-barred under the applicable two-year statute of limitations. *Walker v. Epps*, 550 F.3d 407, 412–14 (5th Cir. 2008); *Whitaker v. Collier*, 862 F.3d 490, 494 (5th Cir. 2017), *cert. denied*, 138 S. Ct. 1172 (2018); Tex. Civ. Prac. & Rem. Code Ann. § 16.003(a) (West 2015). And concerning Bible's Eighth Amendment complaints, the district court held that the "the pain [Bible] describes [. . .] does not rise to the level requiring this Court to take the drastic step of intruding into the execution process" and the "risks posed by Bible are too speculative to warrant a stay of execution." ECF No. 13 at 17. Indeed, Bible admits that prison medical staff has drawn his blood for laboratory tests. ECF No. 1 at 47–48; ECF 1–1 at 30. These blood draws rebut Bible's claim that his veins cannot be accessed.

In fact, Bible has not presented even a single instance of the Respondents failing to access a vein during an execution (or, for that matter, an additional vein for

the second IV line). ECF No. 1–3 at 9. This is even without resort to a cutdown procedure. *Id*. Bible provides no example of a Texas execution, performed under the current protocol, gone horribly awry because of vein failure. Texas is the most prolific death-penalty state in the nation.[2] But Bible must venture out of the state to find examples of relevant, problematic executions. Appellant's Brief at 7–8; ECF No. 1 at 58. Yet, the Court should disregard isolated examples of problematic executions in other states when it has numerous uneventful Texas executions upon which to base its opinion.

Nor should this Court overlook the fact that, for almost twenty years, Bible managed to elude justice for Deaton's death, and he should not be rewarded with a stay of execution simply because his evasion of the authorities resulted in him reaching an older and more infirm age by the time of his execution. State and federal habeas review of Bible's conviction is complete, and Texas and the victims have an extremely strong interest in seeing Bible's sentence carried out almost forty years after Deaton was callously raped and murdered. Bible has the burden of persuasion on his stay request, and he is required to make "a clear showing" that he is entitled to any injunction. *Hill*, 547 U.S. at 584. This Court also entertains "a strong equitable presumption against the grant of a stay" since Bible could have raised this claim at a time that did not require the issuance of a stay. *Id*. (quotation omitted).

[2] The TDCJ's website lists 551 executions carried out since 1982. TDCJ, Death Row Information. Available at: https://www.tdcj.state.tx.us/death_row/dr_executed_offenders.html (last accessed Jun. 12, 2018).

Bible argues in his petition (Pet.) that this Court should grant certiorari to determine whether it was permissible for the district court to dismiss his claims solely on the pleadings. Pet. at i. But the district court did not just dismiss his claims—it also denied any stay. As noted, by the district court, Bible's lawsuit does not survive without the stay, and his execution will proceed. Moreover, this Court should not condone a procedure which encourages and promotes dilatory lawsuits—since it is the delay in filing that precludes factual development and forces reliance on the pleadings. Had Bible filed in a timely fashion, he could have engaged in discovery and possibly had a hearing on his claims. Bible's argument flies in the face of the Court's admonishment in *Hill* that the courts should protect the states from dilatory suits.

Bible also asserts in his petition that there is a circuit split on "whether a federal court hearing a challenge to the method of execution can deny a stay exclusively based on the timeliness of the filing [. . .] or must courts consider the merits of the underlying claim or the other [stay] factors." Pet. at i. But this purported circuit split has no bearing on the resolution of Bible's case. The lower courts—while agreeing that Bible's dilatory tactics and delay constituted an independent basis for relief—also alternatively considered the merits of the underlying claim and the other stay factors. *See generally* ECF No. 13 and *Bible*, No. 18–70021, slip op. The lower courts found that Bible's delay was an independent basis for dismissing his suit, but that was not the only basis for denying the stay or denying relief. Bible's claims were not meritorious, and the stay factors equitably weighed against him. Bible has thus already had the evaluation that he wants under his preferred precedent.

Bible further attempts to avail himself of the recent grant of certiorari in *Bucklew v. Precythe*, 17–8151, 2018 WL 1400413, at *1 (U.S. Apr. 30, 2018). One of the questions presented in *Bucklew* is whether the Eighth Amendment requires an inmate to prove an adequate alternative method of execution when raising an as-applied challenge to the state's proposed method of execution based on his rare and severe medical condition. But *Bucklew* is easily distinguishable, and Bible cannot shoehorn his facts and posture into anything resembling Bucklew's situation.

To begin with the obvious, Bucklew suffers from a rare disease that has a direct and gruesome bearing on his ability to be executed. Bucklew has cavernous hemangioma, which causes clumps of weak, malformed blood vessels and tumors. *Bucklew v. Precythe*, 883 F.3d 1087, 1090 (8th Cir. 2018). The tumors can obstruct his airway and fill with blood and sometimes rupture. *Id.* His condition has also compromised peripheral veins in his hands and arms. *Id.* at 1090, 1093. Bucklew argues his cavernous hemangioma would lead him to choking and hemorrhaging during lethal injection. *Id.* When lying down, a tumor impedes his airway and he must adjust his breathing, otherwise he will choke and his tumor will rupture and bleed. *Id.* He contends that the "twilight stage" of lethal injection would result in him being conscious but also unable to adjust his breathing to avoid choking and hemorrhaging to the point of suffocation. *Id.* Bucklew also claims that his vascular malformation will also impede the lethal drug from circulating as intended and creates a substantial risk of a prolonged and extremely painful execution. *Id.*

Given the evidence of Bucklew's condition, the courts in Bucklew's case did not reach a decision whether he presented a risk that is sure or very likely to cause serious illness and needless suffering. *Id.* at 1094. Rather, the lower courts held that Bucklew failed to show that his proposed alternative method of execution would significantly reduce a substantial risk of severe pain. *Id.*

Bible comes before the Court with a different ruling and under much, much different facts. Bible does not suffer from any disease so rare or gruesome as Bucklew's and has not provided compelling evidence that he will potentially choke to death on his own blood or tumors. In the absence of this rare and unique disease, requiring specialized training or qualifications for the execution team is wholly unwarranted. Based on Bible's own conditions, the Fifth Circuit found that Bible could not show that Texas' protocol was sure or very likely to cause him severe pain but declined to reach the question of whether he was required to plead a viable execution alternative. *Bible v. Davis*, No. 18–70021, slip op. at 10. Bible thus failed to demonstrate the first *Baze*[3] prong, whereas Bucklew failed to demonstrate the second. When the Fifth Circuit rested its ruling solely on the first *Baze* prong, it completely obviated the need to decide the questions presented in *Bucklew*.[4] The resolution of *Bucklew* will have no bearing on the Fifth Circuit's decision.

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[3] *Baze v. Rees*, 553 U.S. 35 (2008).

[4] Bucklew could arguably show a plausible alternative to lethal injection since his proposed nitrogen hypoxia was an authorized method of execution under Missouri law. *Id.* at 1094 (citing Mo. Stat. Ann. § 546.720). Texas law limits executions to lethal injection.

Finally, it is worth noting that Bucklew has been litigating his method-of-execution claims for years. *Bucklew*, 883 F.3d at 1089–90. In contrast, Bible has been litigating his method-of-execution claims for approximately nineteen days. This disparity suggests that Bible's suit is less a genuine challenge to Texas lethal-injection protocol and more a meritless attempt to postpone his lawful execution.

In sum, the equities favor the State in this matter. The State's interest in enforcing its criminal judgments is strong—Bible has committed the most serious offense under Texas law, and he has had extensive judicial review. Moreover, Bible could have brought this suit years ago, but waited until the eve of his execution date. This, too, must weigh heavily against Bible, and a stay should be denied.

The district court correctly observed "this lawsuit cannot proceed without a stay of Bible's execution date." ECF No. 13 at 22–23. The resulting decision to dismiss Bible's § 1983 suit, as well as the district court's independent decision to equitably dismiss the case based on Bible's dilatory behavior, were correctly affirmed by the Fifth Circuit. Given Bible's failure to set forth a sound claim for relief, there is simply no reasonable probability that the Court will ultimately grant certiorari in this case. This Court should therefore deny certiorari review, deny Bible's application for a stay, and permit Bible's execution to proceed.

STATEMENT OF THE CASE

I. Facts of the Crime

On May 26, 1979, Inez Deaton, a twenty-year-old married woman and the mother of a toddler, went to use the telephone in her friend's parents' home. 16 RR

83, 102–04. Her friend's cousin, Bible, was the only person in the house. *Id*. at 91, 111–12. The next day, a stranger discovered Deaton's abused body in a field. *Id*. at 19–26, 42. Deaton had been sexually assaulted and sodomized, and died from stab wounds. *Id*. at 128–37, 142. Around the time of Deaton's funeral, Bible disappeared. *Id*. at 91–92, 116–17. The case remained unsolved until 1998, when Bible—in custody for another rape in Louisiana—confessed that he had murdered Deaton. 16 RR 174; SX 1A, 3, 3A; SHCR 428, 500.

II. Evidence Relating to Punishment

At punishment, the State presented evidence concerning Bible's 1998 rape of a woman at a motel in Louisiana. 19 RR 24–29; 22 RR 44–72. After the rape, Bible attempted to stuff the woman into a duffel bag but failed. *Id*. Apprehended in Florida, Bible subsequently confessed, pled guilty to aggravated rape, and was sentenced to life in prison without parole. 19 RR 37–46; SX 2, 58; SHCR 482.

While in custody for the Louisiana rape, Bible also confessed to murdering his former sister-in-law, her baby, and her roommate. 21 RR 55–78; 19 RR 50; SX 4; SHCR 443. In his confession, Bible admitted to using drugs and alcohol, picking up his sister-in-law's roommate in his van, raping the roommate, and then repeatedly hitting her. *Id*. After disposing of the roommate's body, he claimed that he had an argument with his sister-in-law and pushed her and her baby down a stairwell. *Id*. Bible then dumped his sister-in-law and her baby on the side of the road. *Id*.

After disposing of the bodies, Bible said that he was going to visit his brother-in-law in jail, stole his wife's car, and flew to Montana. *Id*. Authorities eventually

found the decayed remains of Bible's sister-in-law, her baby, and her roommate in the woods. 21 RR 23–54. Bible pleaded guilty to the murder of the roommate and received a twenty-five-year sentence. 21 RR 8, 41, 72–74; SX 56.

Bible additionally confessed to raping his five young nieces on multiple occasions from 1996 to 1998. 19 RR 63–64, 82–83; SX 5; SHCR 467. This confession was corroborated by his niece's testimony at trial. 22 RR 8–40. Bible also kidnapped a girlfriend and an eleven-year-old babysitter, whom evidence suggests that he raped. 19 RR 101–103, 119–124; 21 RR 10; SX 4; SHCR 443. In conjunction with that offense, Bible pleaded guilty to theft and two counts of aggravated kidnapping. SX 57.

The prosecution further presented evidence that showed that Bible was violent with his girlfriend from 1979–82. 21 RR 12–23. He punched her in the face, sending her to the hospital for stitches, ground his knee into her ear until it bled, poured gasoline on her car and set it on fire, and attacked the car with an axe while her little boy was trapped inside. *Id*. The State also offered Bible's conviction for robbery in Harris County, Texas. 21 RR 7–10; SX 56.

In mitigation, a minister testified about his spiritual encounter with Bible and evidence that Bible had completed religious correspondence classes. 22 RR 83–93; DX 3A–9. The defense also emphasized that while previously incarcerated, Bible only had two minor, nonaggressive disciplinary infractions. 21 RR 9; 23 RR 41–42; SX 122.

III. Conviction and Postconviction Proceedings

Indicted in 2001 on charges of capital murder, Bible was convicted and sentenced to death in 2003 for the rape-killing of Deaton. CR 2, 185, 193–203. The

Texas Court of Criminal Appeals (CCA) upheld Bible's conviction and death sentence on automatic direct appeal. *Bible v. State*, 162 S.W.3d 234 (Tex. Crim. App. 2005). Bible did not file a petition for a writ of certiorari.

While his direct appeal was pending, Bible filed a state application for a writ of habeas corpus. SHCR 2. The trial court recommended that the CCA deny relief and adopted the State's findings of fact and conclusions of law. SHCR 427. Following its own review, the CCA adopted most (but not all) of the findings of fact and conclusions of law and denied Bible's application for a writ of habeas corpus on January 25, 2012. *Ex parte Bible*, No. 76,122–01, 2012 WL 243564 (Tex. Crim. App. Jan. 25, 2012) (per curiam) (not designated for publication).

Bible sought relief in the district court via a habeas petition. The district court denied all relief. *Bible v. Stephens*, 4:13–CV–200, 2014 WL 5500722 (S.D. Tex. Oct. 30, 2014). The district court additionally denied a COA, holding that reasonable jurists could not debate its denial of Bible's claims. *Id.* The court of appeals also denied a COA. *Bible v. Stephens*, 640 F. App'x 350 (5th Cir. 2016) (unpublished). This Court denied certiorari review. *Bible v. Davis*, 137 S. Ct. 328 (2016).

On March 19, 2018, the 351st District Court of Harris County scheduled Bible for execution on June 27, 2018. Almost three months later, on June 8, 2018, Bible filed the instant § 1983 action. ECF No. 1. He filed the associated motion to stay on June 10, 2018. ECF No. 3. The district court denied all relief and any stay on June 21, 2018. ECF No. 13. The Fifth Circuit affirmed the district court's decision and declined to issue its own stay. *See generally Bible*, No. 18–70021, slip op. The instant

petition for a writ of certiorari followed. After initiating his § 1983 action, Bible filed a subsequent state habeas application. The CCA dismissed Bible's application on June 22, 2018. *Ex parte Bible*, No. 76,122–02 (Tex. Crim. App. Jun. 22, 2018).

REASONS FOR DENYING THE WRIT

The questions that Bible presents for review are unworthy of the Court's attention. Supreme Court Rule 10 provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for "compelling reasons." Where a petitioner asserts only factual errors or that a properly stated rule of law was misapplied, certiorari review is "rarely granted." *Id*. Here, the Fifth Circuit correctly stated the standard under *Glossip v. Gross,* 135 S. Ct. 2726 (2015), *and* properly applied it to the facts alleged by Bible. That decision is not contrary to this Court's established precedent and does not raise an important question worthy of the Court's attention. Bible fails to present a compelling reason for the Court to grant review.

ARGUMENT

I. Bible Is Not Entitled to a Stay, and the District Court Did Not Abuse Its Discretion in Denying One.

A. Standard of Review

A stay of execution is an equitable remedy.[5] *Hill*, 547 U.S. at 584. "It is not available as a matter of right, and equity must be sensitive to the State's strong

[5] The district court explained that, while inmates raising method-of-execution suits will typically request stays, injunctions, and temporary restraining orders, courts typically evaluate all requests under the stay of execution standard. ECF No. 13 at 5 n.3. Regardless, the district court stated that it would deny relief under the injunction standard for the same reasons that it denied a stay. *Id*.

interest in enforcing its criminal judgments without undue interference from the federal courts." *Id*. *(*citing *Nelson*, 541 U.S. at 649–50). "It is well-established that petitioners on death row must show a "reasonable probability" that the underlying issue is "sufficiently meritorious" to warrant a stay and that failure to grant the stay would result in "irreparable harm." *Barefoot v*. *Estelle*, 463 U.S. 880, 895 (1983), superseded on other grounds by 28 U.S.C. § 2253(c)(2). Indeed, "[a]pplications for stays of death sentences are expected to contain the information and materials necessary to make a careful assessment of the merits of the issue and so reliably to determine whether plenary review and a stay are warranted." *Id*. To demonstrate an entitlement to a stay, a petitioner must demonstrate more than "the absence of frivolity" or "good faith" on the part of petitioner. *Id*. at 892–93. Rather, the petitioner must make a substantial showing of the denial of a federal right. *Id*. In a capital case, a court may properly consider the nature of the penalty in deciding whether to grant a stay, but "the severity of the penalty does not in itself suffice." *Id*. at 893. The State's "powerful and legitimate interest in punishing the guilty," as well as its interest in finality, must also be considered, especially in a case such as this where the State and victims have for years borne the "significant costs of federal habeas review." *Herrera v*. *Collins*, 506 U.S. 390, 421 (1993) (O'Connor, J., concurring); *Calderon v*. *Thompson*, 523 U.S. 538, 556 (1998) (both the State and the victims of crime have an important interest in the timely enforcement of a sentence).

Thus, in deciding whether to grant a stay of execution, the Court must consider four factors: "(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." *Nken v. Holder*, 556 U.S. 418, 434 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)); *see also Buxton v. Collins*, 925 F.2d 816, 819 (5th Cir. 1991).

"[I]nmates seeking time to challenge the manner in which the State plans to execute them must satisfy *all* of the requirements for a stay, including a showing of a significant possibility of success on the merits." *Hill*, 547 U.S. at 584 (emphasis added). The court should not grant a stay "unless the movant, by a clear showing, carries the burden of persuasion." *Id*. (citing *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam)). This Court "places considerable weight on the decision reached by the courts of appeals in these circumstances." *Barefoot*, 463 U.S. 896. A district court's stay decision is reviewed for abuse of discretion. *Adams v. Thaler*, 679 F.3d 312, 318 (5th Cir. 2012) (citing *Delo v. Stokes*, 495 U.S. 320, 322 (1990)).

B. Bible has not made a strong showing that he will succeed on the merits.

Bible argues that he suffers from "a multitude of deteriorating medical conditions." ECF No. 1 at 35. Based on these medical conditions,

> [. . .] Bible makes several assumptions: (1) "attempts to place IV's in Mr. Bible would be futile and likely result in significant pain and suffering"; (2) if the IV is inserted in "a small peripheral vein" he will experience "immense pain" and his "veins may blow"; (3) strapping him to a gurney will "cause shortness of breath that worsens when he is lying down" leaving him gasping for air and choking for the duration of attempts to obtain IV access"; and (4) various health concerns will cause complications after the lethal injection begins. ([ECF] No. 1 at 1–2).

Based on those predicates, Bible's complaint raises four grounds for relief:

> 1. Because of Bible's medical conditions and compromised vein access, implementation of Texas' lethal injection protocol will result in an Eighth Amendment violation.
>
> 2. Any attempt to carry out Bible's sentence will result in a lingering death or unsuccessful execution.
>
> 3. Texas officials have manifested deliberate indifference to Bible's medical needs, giving rise to circumstances potentially causing severe pain in any execution attempt.
>
> 4. Texas protocol violates Bible's right to access the courts.

ECF No. 13 at 4.

However, the district court found that Bible had failed to show an Eighth Amendment violation because he could not show a substantial risk of serious harm and had failed to plead an adequate alternate method of execution. *See generally* ECF No. 13. The court also found that Bible's deliberate indifference claim was predicated on suspect facts and was simply an attempt to micromanage the prison. *Id*. The court also held that Bible's access to courts would not be compromised as his underlying claims lacked merit. *Id*. Bible's access-to-courts claim was further barred by the statute of limitations. *Id*. Given the factually and legally deficient nature of Bible's claims for relief, Bible fails to show that there is any significant possibility that he could succeed on the merits of his claim. Bible's failure to offer a sound claim for relief supports the denial of a stay as well as the decision to dismiss Bible's lawsuit.

1. The lower courts found that Bible's access-to-courts claim is barred by the statute of limitations.

Method-of-execution claims in a civil rights action are subject to a state's personal-injury statute of limitations. *Walker*, 550 F.3d at 412–14. Texas's personal-injury-limitations period is two years. *Whitaker*, 862 F.3d at 494 (citing Tex. Civ. Prac. & Rem. Code Ann. § 16.003(a) (West 2015)). A method-of-execution claim accrues on the later of two dates: when direct review is complete or when the challenged protocol was adopted. *Walker*, 550 F.3d at 414–15.

In the context of Bible's access-to-courts claim,[6] the statute of limitations began to run on the later of the two relevant dates—when the challenged protocol was adopted. The current protocol was adopted on July 9, 2012, *see Sells v. Livingston*, 750 F.3d 478, 480–81 (5th Cir. 2014); ECF No. 1–3. However, Bible's claim regarding his ability to access counsel and courts would have been also available at the time of the 2008 protocol adoption. ECF No. 1–3 at 9 (witnesses only permitted after IV is inserted and running); *Whitaker*, 862 F.3d at 495–96 ("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."). Regardless of the protocol, this claim is barred by the statute of limitations.

[6] While the district court only applied the time bar to Bible's access-to-courts claim and "any claim based on Texas['] protocol," it did not find that the remaining claims were timely. ECF No. 13 at 6 n.5. Rather, it simply could not determine "at this stage" when Bible remaining claims became ripe and opted to deny them on alternative substantive grounds. *Id.*

Bible's complaint on appeal that the district court should not have applied the time bar to his access-to-courts claim was unconvincing. Bible asserts that his access-to-courts claim is predicated on his Eighth Amendment challenge, which was not ripe until recently—effectively, he argues that his access-to-court challenge is as-applied.[7] But, as held by the Fifth Circuit, Bible is making the exact same claim about the protocol that any other death-sentenced inmate could make—that he will lack access to the courts during IV insertion and will be unable to seek a remedy if something goes wrong. Pursuant to *Walker*, such a challenge only requires an examination of when direct appeal was concluded and when the protocol was adopted. Bible or any other inmate could have made this argument when the protocol was adopted—thus, his claim is time-barred by the two-year statute of limitations. *Bible*, No. 18–70021, slip op. 11–12.

But even if the Court were to consider Bible's "as applied" challenge and particular medical circumstances as possibly resetting the statute-of-limitations clock, his claim is nevertheless time-barred. "Bible's complaint does not identify any medical issue that has suddenly arisen, but he chronicles years of health problems." ECF No. 13 at 6. The accident that purportedly left Bible wheelchair-bound occurred in 2003. ECF No. 1–1 at 6; ECF No. 13 at 6. Bible has been litigating issues related to his poor health since his state habeas review began in 2005. SHCR 10–11; ECF No. 13 at 6. "In doing so, Bible manifested awareness that his health concerns could

[7] The Eighth Circuit has questioned whether it is possible to circumvent the statute of limitations simply by bringing an as-applied challenge. *Jones v. Kelley*, 854 F.3d 1009, 1013–14 (8th Cir. 2017).

impact his execution." ECF No. 13 at 6 Bible's doctor's list of his "significant health events" has its last entry in 2012.[8] ECF No. 1–1 at 5–9. Without identifying some discrete medical event that directly rendered Bible's veins inaccessible within the two years antecedent to filing the instant lawsuit, Bible is clearly time-barred. And any claim involving poor medical care by the TDCJ would have accrued concurrent to his medical conditions.

Furthermore, to the extent that Bible alleges that his veins only became inaccessible sometime within the last two years due to gradual deteriorations associated with age and other pre-existing conditions, such an argument is plainly untenable. ECF No. 3 at 9–10, 33–34. Entertaining such an argument would effectively nullify the statute of limitations, because every day an inmate is one day older and can identify another increment of age-related deterioration as a new factual predicate for his claim. The Court should decline to find that Bible can effectively age out of the statute of limitations.

Besides, Bible has made his prior medical history an integral part of his claims. "While he argues that his health has deteriorated in the past year, Bible bases his complaint on a host of medical concerns that have, apparently, been present for years." ECF No. 13 at 6. Bible has made long-ago medical events part-and-parcel of his claims, and, consequently, he must face the time bar.

Bible's medical conditions are longstanding. If Bible's veins are infirm today, they were likely infirm two years ago. Absent documentary evidence of a drastic

[8] Bible asserts that his Parkinson's disease was diagnosed in April 2016, i.e., more than two years ago. ECF No. 1 at 32.

change in health within the last two years that directly caused his veins to become compromised, Bible's access-to-courts claims is time-barred on its face—even if the Court construes his lethal-injection challenge as "as applied" and such "as applied" claims benefit from a different statute of limitations than facial challenges.

2. Bible fails to show an Eighth Amendment violation because he cannot show either a substantial risk of serious harm or a feasible, readily implemented execution-method alternative. Either failure is fatal to his claims.

The district court noted that "[a]ll of Bible's arguments hinge on his allegation that no suitable vein will be found and that protracted efforts to find a vein, possibly unsuccessfully, will cause him pain of an unconstitutional magnitude." ECF No. 13 at 9. "Whether cast as an as-applied challenge, a claim of deliberate indifference, or a complaint of future denial of access to courts, each of Bible's claims turn on him showing that he will suffer severely and needlessly when medical professionals attempt to insert an IV." *Id*.

To make out an Eighth Amendment method-of-execution claim, an inmate must establish that the chosen method creates "a risk that is '*sure or very likely* to cause serious illness and needless suffering,' and give rise to 'sufficiently *imminent* dangers.'" *Glossip*, 135 S. Ct. at 2737 (emphasis in original) (quoting *Baze*, 553 U.S. at 50). This requires showing "'a substantial risk of serious harm,' an 'objectively intolerable risk of harm' that prevents prison officials from pleading that they were 'subjectively blameless for purposes of the Eighth Amendment.'" *Id*. (quoting *Baze*, 553 U.S. at 50). An inmate must also provide a "'feasible, readily implemented'" execution-method alternative that is not "'slightly or marginally safer,'" but

"significantly reduce[s] a substantial risk of severe pain.'" *Id*. (quoting *Baze*, 553 U.S. at 51–52).

> Applying the minimal pleading requirements to method-of-execution claims
>
> > requires . . . prisoners to plead more than just a hypothetical possibility that an execution *could* go wrong, resulting in severe pain to the prisoner. The Eighth Amendment prohibits an "'objectively intolerable risk'" of pain, rather than "simply the possibility of pain." . . . "Some risk of pain is inherent in any method of execution—no matter how humane—if only from the prospect of error in following the required procedure." But "the Constitution does not demand the avoidance of all risk of pain in carrying out executions.' Instead, the Eighth Amendment requires that the prisoners show the intended protocol is "'*sure or very likely* to cause serious illness and needless suffering.'"

Zink v. Lombardi, 783 F.3d 1089, 1098–99 (8th Cir. 2015) (en banc) (internal citations omitted) (quoting *Baze*, 553 U.S. at 47, 50, 52, 61–62).

In his petition for certiorari, Bible attempts to call into question the competence of the execution team to handle his execution. Pet. at 28–30. Putting aside for a moment that the district court found that any claim based on the protocol would be time-barred, the TDCJ's May 2008 execution protocol, which is unchanged but for the switch from a three-drug to a single-drug lethal injection, *see Trottie v. Livingston*, 766 F.3d 450, 452 n.1 (5th Cir. 2014), has already been found by the Fifth Circuit to be "substantially similar to the Kentucky protocol that the Supreme Court approved in *Baze*." *Raby v. Livingston*, 600 F.3d 552, 556 (5th Cir. 2010). In that context, the Fifth Circuit has rejected potential "problems with the insertion of the IV, inadequate monitoring of the IV lines during execution, failure to properly observe the appearance of the inmate after the . . . injection(s), and failure by the Warden to annually review the training and licensure of the drug team members or to even know

the specific qualifications that drug team members must possess." *Id*. at 558. That is because "[a] [s]tate with a lethal injection protocol substantially similar to the protocol [in *Baze*] would not create a [demonstrated] risk [of severe pain]." *Baze*, 553 U.S. at 61. Because TDCJ's present protocol is substantially similar to the one upheld in *Baze*, so far as any complaints about training, qualification, access, and procedure are concerned, Bible's complaints fail to offer a valid ground for relief.

In his first and second claims for relief below (Counts 1 and 2), Bible claims that his veins are compromised by his various medical issues and his lethal injection will cause him severe and needless pain as well as a lingering death. In support, Bible appended the declaration of Dr. Ashish Sinha, a physician who has previously testified on behalf of Ohio's death row inmates in a challenge to Ohio's lethal injection protocol. *In re Ohio Execution Protocol Litig.*, 2:11–CV–1016, 2017 WL 5020138, at *9 (S.D. Ohio Nov. 3, 2017) ("Though highly qualified by training and experience to offer opinions on anesthesiology questions, Dr. Sinha often gave his opinions in very absolute terms without the reserve in expression and caution in drawing conclusions usually associated with scientific opinion. This tendency limits the credence the Court can give to his strongly expressed conclusions."), aff'd, 881 F.3d 447 (6th Cir. 2018). Bible states that the district court improperly borrowed this credibility determination from the Ohio court, but the district court also made its own evaluation when it explained that "Dr. Sinha's report repeatedly employs exaggerated, emotional, and conclusive language that does not give the impression of detached, impartial

analysis." ECF No. 13 at 13 n.9. The Fifth Circuit found that the district court acted properly in making this credibility determination. *Bible*, No. 18–70021, slip op. at 9.

Dr. Sinha's declaration moreover does not state that he examined Bible, which the district court found may have compromised his opinions and raised the question of whether he had been given access to all of Bible's medical information. *Id*. Of course, this was because Bible "brought this lawsuit in a dilatory manner which required [Dr. Sinha] to base his conclusions on someone else's observations." ECF No. 13 at 14. The district court also believed that Dr. Sinha was conflating appropriate medical treatment in a therapeutic context with the vastly different treatment appropriate for performing executions. ECF No. 13 at 15 & n.11.

Dr. Sinha has suggested that establishing IV access on Bible will be difficult or impossible. ECF No. 1–1 at 23. Yet, Bible admits that he has had blood drawn by prison medical staff—a fact which appears confirmed by medical records.[9] For instance, a December 21, 2017, individualized treatment plan appears to show the results of blood chemistry analysis from dates in 2017. Defendants' Motion to Seal at Exhibit 1. The same plan also appears to show blood work scheduled for June 4, 2018. Bible has not shown that these blood draws have resulted in serious documented complications of a constitutional magnitude, and the draws belie his assertion that his veins cannot be readily accessed.[10] ECF No. 1–1 at 30. The district court noted

[9] While the Respondents were precluded by Bible's dilatory suit from hiring experts or conducting exhaustive examination of his medical history, it is not accurate to say that no medical evidence was adduced, as the district court recognized in the very next paragraph. ECF No. 13 at 14.

[10] Bible's Complaint notes that he received four units of blood in 2012. ECF No. 1 at 17. One must presume this was accomplished by IV.

that Bible had not shown that these draws were unsuccessful, and that he failed to describe how "attempted IV insertion would cause pain that, in and of itself, would violate Constitutional expectations. Such pain is common to many, many individuals experiencing medical procedures every day." ECF No. 13 at 15. The Fifth Circuit agreed that Bible failed to show a substantial risk of serious harm from IV insertion. *Bible*, No. 18–70021, slip op. at 8–9.

Bible and his doctor speculates that IV insertion into his visible small veins and the subsequent injection of pentobarbital would result in complications. ECF 1–1 at 30; ECF No. 3 at 10. But Bible's proposed harms are "speculative," "wholly dependent on the medical expert being unable to gain venous access easily,' and "are only relevant if the execution is not successful." ECF No. 13 at 13, 17. "[T]he Constitution does not guarantee a painless death." *Id.* at 17. In fact, the Respondents provided a spreadsheet in the district court detailing pentobarbital executions in Texas dating back to 2012, when the current procedure was adopted. The longest execution identified took a mere 38 minutes. The deceased offenders include Lester Bower (67 at the time of his death), William Rayford (64), John Battaglia (62), and James Bigby (61)—all very close in age to offender Bible. *See also* TDCJ, Death Row Information, available at http://www.tdcj.state.tx.us/death_row/dr_facts.html (last accessed Jun. 12, 2018). The deceased offenders also include Suzanne Basso, who was fifty-nine, used a wheelchair, and was pronounced dead within eleven minutes of the

fatal dose.[11] Given Texas's history of uneventful executions with lethal injection under the current protocol, the risk of serious harm cannot be described as objectively intolerable.

Besides, the district court held accidents do not give rise to an Eighth Amendment violation. ECF No. 13 at 16. Contrary to the suggestion in Bible's certiorari petition (Pet. 17-18), however, the Fifth Circuit declined to address this argument as Bible could not show that his execution was sure of very likely to cause needless suffering. *Bible*, No. 18–70021, slip op. at 10. Consequently, it provides nothing for this Court to review. Nevertheless, the Respondents still assert that, even if the Court were to consider Bible's claims "as applied," nothing suggests the speculative harms envisioned by Bible "would be more than an isolated incident" and "[t]he prospect of an isolated incident does not satisfy the requirement that prisoners adequately plead a substantial risk of severe pain to survive a motion to dismiss their Eighth Amendment claim." *Zink*, 783 F.3d at 1101. Bible has failed to identify even one case under the current protocol where the Appellees failed to locate a vein (or even a backup vein) or where a vein has failed during the execution. *See also Raby*, 600 F.3d at 559 (noting that the Warden had testified that "there has never been a problem with the delivery of the drugs requiring the use of the backup lines"). This hardly shows a substantial risk.

[11] Associated Press, Texas Executes Woman for 1998 Murder of Mentally-Impaired Man CBS News (2014), available at https://www.cbsnews.com/news/texas-executes-woman-for-murder/ (last accessed Jun. 13, 2018).

Bible asserts that this argument effectively precludes relief on any lethal-injection challenge. That is largely correct. With the Texas' record of uneventful executions, it is dubious that any death-row inmate could speculate that a problematic execution would be anything but an unfortunate accident inadequate to implicate the Eighth Amendment. *Baze*, 553 U.S. at 50 ("Simply because an execution method may result in pain, either by accident or as an inescapable consequence of death, does not establish the sort of 'objectively intolerable risk of harm' that qualifies as cruel and unusual."); *Raby*, 600 F.3d at 562 ("[O]ur review of the constitutionality of Texas' lethal injection protocol is not concerned with a risk of accident. The focus of our inquiry is whether the protocol inherently imposes a constitutionally significant risk of pain."); *Thorson v. Epps*, 701 F.3d 444, 448 (5th Cir. 2012) ("Thorson offered no evidence of any instance of maladministration or suffering during any of more than a dozen executions conducted in Mississippi under the protocol he attacks"). Moreover, Bible's reference to problematic executions in other states contradicts his argument in this respect. If Bible can point to problematic executions in other states as evidence that his too will be problematic, then the Respondents surely must be allowed to point to the uneventful executions under the current protocol. It is simply untenable to suggest that Texas' uneventful history using the current protocol has no bearing on Bible's claims. Conversely, should the Respondents employ a method of execution with no such problem-free history, then plaintiffs will have a much easier time proving their claims, as prison officials will have a harder time convincing the courts that they are blameless.

Concerning Bible's claim that he will not be able to breathe during his execution (ECF No. 1–1 at 42) due to reflux, apnea, and other issues precluding him from lying flat, it is worth observing that Bible must necessarily sleep each night, and one must presume that his problems with reclining flat are not as unmanageable as Dr. Sinha suggests. Indeed, the district court notes that one of Bible's experts admits that he rests in bed, and Dr. Sinha did not explain that Bible slept in a wheelchair or otherwise never lies down. ECF No. 13 at 14. As for Bible's claim that "Defendants have made no plans to stabilize Mr. Bible's extremities, which constantly shake due to severe Parkinson's tremors, while establishing IV access or during the execution," the protocol clearly states that an offender will be "secured to the gurney." ECF No. 3 at 22; ECF No. 1–3 at 9.

Regarding any claim based on Bible being "confined" to a wheelchair affecting his execution (ECF No. 3 at 1, 15, 21–22, 36), a January 18, 2018 clinic note renewed Bible's passes for a walker and a wheelchair. Motion to Seal at Exhibit 3. It was noted that the walker was to be used "in transporting short distances" and the wheelchair was to be used "for longer distance movements." A February 15, 2018 nursing chart review/verbal order note observed that Bible "was up at cell door using walker to ambulate." Motion to Seal at Exhibit 4. A March 22, 2018 status update listed his transport as "walker." Motion to Seal at Exhibit 2. And Bible's motion to stay in the district court admits that he could have used a walker to move a short distance to meet with an attorney around the date that his execution was set. ECF No. 3 at 36; *but see* ECF No. 1 at 35 ("Mr. Bible, for all practical purposes, is now paralyzed from

the waist down"). While Bible doubtlessly does use a wheelchair (especially for longer distances), he is hardly "confined" to it, nor is he paralyzed in the sense that he has no control over or ability to move his limbs. It does not appear that Bible's lack of mobility will impede his execution. And even if Bible was confined to a wheelchair, the Basso execution referenced above shows that a mobility-impaired inmate can still be subject to the protocol without incident.

Bible has argued that the district court applied a standard that required "certainty of constitutionally meaningful injury."[12] However, the district court plainly identified and applied the controlling Supreme Court standard. ECF No. 13 at 9, 14, 16. The Fifth Circuit agreed, stating that "[a]lthough the district court could have been more precise with its language, we do not believe that the district court meant to apply or did apply a heightened standard. [. . .] Even if the district court did err and applied a heightened standard, we conclude this error was harmless because Bible cannot show under the Supreme Court's articulation of the standard that the lethal injection protocol will cause him harm of an unconstitutional magnitude." *Bible*, No. 18–70021, slip op. at 8. Moreover, while Bible complained below that likelihood of harm should be confined to analysis of the irreparable harm factor (Appellant's Brief at 29–30), the probability of harm occurring is explicitly addressed in *Baze* and *Glossip* ("sure or very likely," "imminent," "a substantial risk") and thus must inform the merits analysis as well.

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[12] "*Sure* or very likely," *Glossip,* 135 S. Ct. at 2737, and "certain" are clearly synonyms.

In addition, "[t]he existence of . . . an alternative method of execution . . . is a necessary element of an Eighth Amendment claim, and this element—like any element of a claim—must be pleaded adequately." *Zink*, 783 F.3d at 1103. Bible suggests that the TDCJ should either execute him by nitrogen hypoxia or firing squad. ECF No. 3 at 15–18. The district court agreed that Bible had failed to demonstrate this alternative, but the Fifth Circuit declined rule on this issue since Bible failed to show that he would needlessly suffer and the district court explicitly concluded that its decision did not hinge on this second factor. *Bible*, No. 18–70021, slip op. at 10.

Still, Bible's pleaded execution alternatives are clearly deficient. Bible fails to show that nitrogen hypoxia has been tested and used in executions with any regularity. *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. (emphasis added)). "Sevoflurane gas and nitrogen hypoxia have never been used to carry out an execution. With no track record of successful use, these methods are not likely to emerge as more than a 'slightly or marginally safer alternative.'" *McGehee v. Hutchinson*, 854 F.3d 488, 493 (8th Cir. 2017) (citations omitted), *cert. denied*, 137 S. Ct. 1275 (2017). Similarly, "[t]he firing squad has been used by only one State since the 1920s. It requires trained marksmen who are willing to participate and is allegedly painless only if volleys are targeted precisely. The record comes short of establishing a significant possibility that use of

a firing squad is readily implemented and would significantly reduce a substantial risk of severe pain."[13] *Id*. at 494.

Indeed, Bible does not prove that either proposed solution could be "readily implemented." *Zink*, 783 F.3d at 1104 (failure to plead that "other methods of lethal injection . . . are feasible and readily implemented, or that they would significantly reduce a substantial risk of severe pain allegedly caused by the present method" was subject to dismissal on the pleadings); *Mann v. Palmer*, 713 F.3d 1306, 1315 (11th Cir. 2013) ("Although Mann mentioned an alternative procedure in a memorandum filed in the district court, he 'failed to show that any such alternative procedure or drug is 'feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain.'"). The Texas death-penalty statute only provides for execution by lethal injection, and the Legislature is not currently in session to change that law. Tex. Code Crim. Pro. Art. 43.14; ECF No. 13 at 1 (lethal injection is the only statutorily authorized means available); *see also* p.18 (citing *Boyd v. Warden*, *Holman Correctional Facility*, 856 F.3d 853, 868 (11th Cir. 2017); *Arthur v. Comm'r*, *Ala. Dep't of Corr.*, 840 F.3d 1268 (11th Cir. 2016), *cert. denied Arthur v. Dunn*, 137 S. Ct. 725, (2017), *reh'g denied*, 137 S. Ct. 1838 (2017)). Bible has argued that the Governor, a named defendant, could call a special session to change the law. Appellant's Brief at 41. But that would involve recalling dozens of lawmakers to the Capitol, activating hundreds if not thousands of staff, and cost untold dollars in taxpayer funds. A

[13] While firing squads are not historically uncommon, lethal injection is the only method of execution utilized in Texas for more than fifty years. Available at http://www.tdcj.state.tx.us/death_row/dr_facts.html (last accessed Jun. 12, 2018).

method that requires a special session of the Legislature is hardly "readily implemented."

And even if the law could be changed to permit a different method of execution, the Respondents would have to secure qualified and willing volunteers for a firing squad. The Respondents would also have to secure equipment or possibly design and construct a facility for a nitrogen hypoxia execution. These are no small tasks and would require new protocols, procedures, legislative appropriations, etc. A "readily implementable" alternative in the context of a Texas death-row inmate is not a hypothetical and untested method that is foreclosed by statute nor impossible with the TDCJ's present resources.

In his third claim for relief below (Count 3), Bible claimed that "inadequate provision of medical care by Defendants has contributed to the severe and deteriorating medical conditions that will render Mr. Bible's execution unduly painful. Despite being aware of Mr. Bible's medical conditions, Defendants have failed to adequately prepare and train for his execution and failed to make necessary contingency plans." ECF No. 3 at 7, 20–22. But this claim is rebutted by Bible's own pleadings, which document the time and energy that the TDCJ has spent treating Bible's medical conditions. Bible further fails to show where prison medical staff suggested that Bible is incapable of being executed and advised the Defendants to make alternate preparations. The district court correctly found that this claim was "hypothetical," "speculative, and "premised on suspect facts." ECF No. 13 at 20. Citing Supreme Court and Circuit precedent, the district court found that Bible had

not met the high standard applicable to these claims, and while the courts can issue injunctive relief to preclude a constitutional violation, they cannot micromanage state prisons. *Id*. (citing *Farmer v. Brennan*, 511 U.S. 825, 837 (1994); *Reeves v. Collins*, 27 F.3d 174, 176-77 (5th Cir. 1994); *Domino v. Texas Dep't of Criminal Justice*, 239 F.3d 752, 756 (5th Cir. 2001); *Carlucci v. Chapa*, 884 F.3d 534, 538 (5th Cir. 2018); *Gates v. Cook*, 376 F.3d 323, 338 (5th Cir. 2004)). The district court found, based on the speculative harm and the small chance of Bible's success on the merits, injunctive relief was inappropriate with respect to this claim. ECF No. 13 at 20; *Bible*, No. 18–70021, slip op. at 8 ("he district court's conclusion that Bible could not show that the lethal injection was sure or very likely to cause needless suffering was sufficient to dispose of his lingering death claim." The district court also noted most of this claim was likely barred by the statute of limitations. ECF No. 13 at 20.

In his fourth claim for relief below (Count 4), Bible argued that his access to the courts/counsel and his ability to petition for the redress of grievances will be compromised because his counsel cannot watch the IV insertion and lacks the ability to make immediate phone calls during the execution. ECF No. 3 at 23–25. The district court held that this claim was time-barred, but it also found that Bible had not shown a strong possibility that he could succeed on the merits. ECF No. 13 at 22–23; *Bible*, No. 18–70021, slip op. at 8 ("the district court adequately addressed his access-to-the-courts claim when it determined that this contention was time-barred"). Considering the precedent, the district court observed that, since Bible could not show a "sufficiently imminent underlying Eighth Amendment injury," he failed to provide

underlying predicate for an access-to-court argument, since that right exists to vindicate other rights. *Id*.

Indeed, an inmate must demonstrate a constitutional right to counsel to complain of counsel's absence. *See Wainwright v. Torna*, 455 U.S. 586, 587–88 (1982) ("Since [he] had no constitutional right to counsel, he could not be deprived of the effective assistance of counsel. . ."). Beyond direct appeal, death-sentenced inmates have no constitutional right to counsel. *See Murray v. Giarratano*, 492 U.S. 1, 8–10 (1989) (rejecting claim that "a death sentence [cannot] be carried out while a prisoner is unrepresented").

In denying a similar claim, the Fifth Circuit has explained:

> 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 plaintiffs have not succeeded in pleading an underlying claim, their access-to-the-courts assertion fails as well. [*Whitaker v. Livingston*, 732 F.3d 465, 467 (5th Cir. 2013)].

Whitaker, 862 F.3d at 501.

Bible argued below that finding that the success of his access-to-courts claim is contingent on the success of his underlying Eighth Amendment claim renders the access-to-courts claim redundant. Appellant's Brief at 46–47. This seems true—in the instant context, Bible either wins on both allegations or loses on both. If he cannot

show a violation will occur under *Baze/Glossip*, then he cannot show that he will require access to the courts to pursue the violation. This redundancy is only problematic for Bible because his underlying claim is meritless. As the Fifth Circuit explained in rejecting an analogous Eighth Amendment/Equal Protection argument,

> 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. Attempting to bridge this shortfall in their submission with equal protection language, while creative, brings an argument that is ultimately no more than word play.

Wood v. Collier, 836 F.3d 534, 540 (5th Cir. 2017). Bible's request for injunctive relief allowing him attorney and phone access similarly puts the cart before the horse. If Bible cannot show the likelihood of harm necessary to show a strong possibility of success on his underlying claims, then he cannot show entitlement to relief on this access-to-courts claim, even if injunctive relief on this claim would not necessarily preclude the execution from proceeding.

Ultimately, "what plaintiff[ ] [is] demanding is that, in effect, [he] be permitted to supervise every step of the execution process. [He has] no such entitlement." *Whitaker*, 732 F.3d at 468. Bible seemingly wishes to micromanage his own execution, dictating where and exactly how many times an IV may be inserted, how he is strapped to the gurney, and even who is allowed to observe each moment of the Respondents' preparations. All without any proof that Texas' protocol—which has been used for many uneventful executions involving inmates of varying ages and health—is inadequate. Bible only speculates about hypothetical possibilities, and

that is insufficient to obtain relief. This Court has observed that it "has never invalidated a State's chosen procedure for carrying out a sentence of death as the infliction of cruel and unusual punishment." *Baze*, 553 U.S. at 48; *Glossip*, 135 S.Ct., at 2732. It should decline to do so now.

C. Bible is unlikely to suffer irreparable harm.

Bible's argument that he must merely allege a constitutional deprivation to prove irreparable harm clearly goes too far. In a capital case, a court may properly consider the nature of the penalty in deciding whether to grant a stay, but "the severity of the penalty does not in itself suffice." *Barefoot*, 463 U.S. at 893. As the district court noted, even irreparable harm does not entitle an applicant to a stay as a matter of right. ECF No. 13 at 6. The Fifth Circuit saw "no reason to disturb the district court's conclusion that Bible is not entitled to a stay on this basis." *Bible*, No. 18-70021. slip op. at 9.

Moreover, this is a § 1983 lawsuit, which means that Bible necessarily is not challenging the validity of his sentence (otherwise, he would be raising a successive habeas claim). If Bible dies because of a lethal injection, his sentence has simply been fulfilled. The relevant question, then, is whether Bible will likely endure harm of a constitutional magnitude while still alive and, if so, whether that harm would be significantly greater than what would likely occur under his alternatives. Bible alleges that he will be subject to painful probing while a suitable vein is located for IV insertion. But the need for such probing is speculative and, even if it did occur, it would not cause sufficiently severe pain as to implicate the Eighth Amendment. *See*

Raby, 600 F.3d at 558 (mentioning the "minor pain involved in multiple attempts to find an adequate vein"). "Some risk of pain is inherent in any method of execution—no matter how humane—if only from the prospect of error in following the required procedure. It is clear, then, that the Constitution does not demand the avoidance of all risk of pain in carrying out executions." *Baze*, 553 U.S. at 47. "Simply because an execution method may result in pain, either by accident or as an inescapable consequence of death, does not establish the sort of 'objectively intolerable risk of harm' that qualifies as cruel and unusual.'" *Id*. at 50. The district court noted that Bible's argument that he will suffer complications is "speculative and hypothetical." ECF No. 13 at 18. Additionally, the pain inherent in Bible's hypothetical probing or hypothetical failed vein pales in comparison to the congruent possibility of mishaps occurring with Bible's proposed alternatives—for instance, a lingering death from a misplaced gunshot wound or an incomplete suffocation causing brain damage from oxygen deprivation.

D. The victims and the public have 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 Bible's sentence. *See Hill*, 547 U.S. at 584. Bible is a serial killer, a serial rapist, and a repeat child molester. The public's interest lies in executing sentences duly assessed, and for which years of judicial review have failed to find reversible error.

Bible has already passed through the state and federal collateral review process. The public's interest is not advanced by postponing Bible's execution any further, and the State opposes any action that would further delay justice for the

victims of Bible's crimes. *Martel v. Clair*, 565 U.S. 648, 662 (2012) ("Protecting against abusive delay *is* an interest of justice.") (emphasis in original).

Moreover, as shown above, Bible could have brought this suit long ago. While the Texas statute allows for setting an execution after the conclusion of state habeas review (Tex. Code. Crim. Pro. Art. 43.141), Texas executions are routinely set after the Fifth Circuit or the Court disposes of the inmate's federal habeas case. Here, the Court disposed of Bible's petition for certiorari review on October 11, 2016—over a year and a half ago. *Bible*, 137 S. Ct. 328. Upon denial of certiorari review, direct appeal, state habeas, and federal habeas proceedings were all complete. An execution date was plainly imminent, yet Bible delayed bringing suit. Bible even acknowledges that his claims were (at very least) ripe when his execution was set[14], yet he delayed again—waiting until nineteen days before the execution itself to finally initiate a suit. Bible asserts that he acted diligently after his date was set, but the district court plainly disagreed. ECF No. 13 at 8.

As for Bible's suggestion that he could not have filed earlier because the district attorney did not request his medical records until after his execution was set, this argument is predicated on one of two faulty assumptions—(1) that the district attorney was responsible for investigating Bible's case for him or (2) that Bible could not have himself requested the records after any of the numerous medical events that

[14] Bible states that "Mr. Bible's physical state started rapidly deteriorating about a year ago. [. . .] Due to Mr. Bible's precipitous decline in the last year, the likelihood of a botched execution has become certain or very likely." ECF No. 3 at 9–10; *see also id.* at 28. If that is the case and Bible's decline began "about a year ago," he could have raised the claim then without the necessity of the stay. Accordingly, he fails to surmount the equitable presumption against a stay.

he sets forth as impacting his readiness to be executed, after his federal habeas appeal was denied, or after his execution date was requested or set. Bible's medical records are his own, and he could have requested them from the TDCJ at any convenient time.

Again, it is no secret that "capital petitioners might deliberately engage in dilatory tactics to prolong their incarceration and avoid execution of a sentence of death." *Rhines*, 544 U.S. at 277–78. Bible's delay in bring this suit—without which the courts and the Respondents could have considered and litigated the matter without the rush and pressure of a pending execution date—must be fairly held against Bible. "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.'" *Hill*, 547 U.S. at 584 (quoting *Nelson*, 541 U.S. at 650). "The federal courts can and should protect States from dilatory or speculative suits[.]" *Id.* at 585. Instead of bringing this suit in a timely manner, Bible is doing "the very thing the plaintiff is not entitled to do . . . namely, to wait until his execution is imminent before suing to enjoin the state's method of carrying it out." *Harris v. Johnson*, 376 F.3d 414, 417 (5th Cir. 2004) (citing *Gomez v. U.S. Dist. Ct. N. Dist. Cal.*, 503 U.S. 653, 654 (1992)). Specifically,

> [b]y waiting until the execution date was set, [Bible] left the state with a Hobbesian choice: It could either accede to [his] demands and execute him in the manner he deems most acceptable, even if the state's methods are not violative of the Eighth Amendment; or it could defend the validity of its methods on the merits, requiring a stay of execution until the matter could be resolved at trial. Under [Bible's] scheme, and

> whatever the state's choice would have been, it would have been the timing of [his] complaint, not its substantive merit, that would have driven the result.

Id. The Fifth Circuit noted that "[a]s in *Harris*, Bible's delay would drive the result if he were allowed to litigate his claims fully." *Bible*, No. 18–70021, slip op. at 8. Indeed, Bible's litigation decision to wait until the last possible moment to raise this suit taints all of his complaints. For instance, he complains that the district court erred by not conducting a hearing on his claims and instead dismissed on the pleadings. Pet. at I, 11–16. This is tantamount to invited error, however, as Bible possibly could have had a hearing if he had raised his claims in a timelier fashion. If anything, this lack of an evidentiary hearing was to Bible's benefit, as the limited time available before the execution precluded the Respondents from mustering all of their resources in contesting his claims. Indeed, the proceeding below was almost entirely based on Bible's submissions. Yet, he still could not prevail.

Finally, Bible has asserted that delay should not have been a consideration with respect to his access-to-courts claims because an injunction allowing him access to counsel and communication with the courts would only require an injunction and not a stay of execution. It is doubtful that this is true when the request for injunctive relief is raised mere days before an execution. But even assuming that it is true, the district court found that Bible failed to meet the other requirements for stay or an injunction as well. ECF No. 13 at 5 n.3, 22.

"By waiting as long as he did, [Bible] leaves little doubt that the real purpose behind his claim[s] is to seek a delay of his execution, not merely to affect an

alteration of the manner in which it is carried out." *Harris*, 376 F.3d at 418. In short, Bible's claims "could have been brought [long] ago [and t]here is no good reason for this abusive delay." *Gomez*, 503 U.S. at 654. The district court amply describes Bible's dilatory conduct in the proceeding. ECF No. 13 at 7–8. Bible fails to surmount the equitable presumption in favor of denying the application stay of execution currently before the Court, and the district court and the court of appeals did not abuse their discretions denying the ones before it.

II. The District Court Properly Dismissed This Lawsuit.

Bible asserts that the district court erred by dismissing his suit. However, Bible's lawsuit does not survive without a stay of execution. ECF No. 13 at 22. After Bible's death, his claims become instantly moot. For the same reason, Bible's argument in this respect presents little of consequence to consider, as even if the Court were to agree that the suit was incorrectly dismissed, without concurrently granting the stay of execution, the suit will again just become moot after Bible's execution and thus again be subject to immediate dismissal.

The district court's order explicitly noted the Court's *Hill* opinion. ECF No. 13 at 8. In *Hill*, the Court stated that "[t]he federal courts can and should protect States from dilatory or speculative suits[.]" 547 U.S. at 585. The district court cannot be faulted for following the Court's exhortation. In fact, among the cases mentioned by the *Hill* Court in conjunction with this statement was *White v. Johnson*, 429 F.3d 572, 573–74 (5th Cir. 2005); *see also White v. Livingston*, 546 U.S. 1000 (2005) (denying stay). In *White*, the Fifth Circuit also upheld a sua sponte dismissal of a

§ 1983 action (indeed, by the same district court judge as here) in a lethal-injection case plaintiff delayed in bringing his suit. *Id*. The district court thus clearly acted in accordance with Court and Circuit precedent by dismissing Bible's dilatory action.

Finally, the Fifth Circuit stated it would "affirm regardless of whether this conclusion was erroneous." *Bible*, No. 18–70021, slip op. at 7. The Fifth Circuit, as well as the district court, specifically considered the merits of Bible's claim and the other *Nken* factors. Consequently, Bible's purported circuit split (Pet. at 18–27) has no impact on him. The district court and the Fifth Circuit did exactly what Bible would have them do under his preferred Circuit precedent—consider the stay based on the *Nken* factors without also dismissing solely based on delay. While the lower courts found that Bible's delay was an independent and sufficient grounds for dismissing Bible's lawsuit—the lower courts alternatively considered the stay factors and merits of the claims. Thus, the result for Bible does not change regardless of how this alleged circuit split is resolved—he has already received the determination requested.

CONCLUSION

Bible's request for a stay is dilatory and substantively meritless. Furthermore, the strong interest of the victims and the State in the timely enforcement of Bible's sentence is not outweighed by the unlikely and speculative possibility that certiorari will be granted. Bible thus fails to demonstrate that he is entitled to a stay of execution under this Court's precedent. His motion for a stay should be denied, as should his petition for a writ of certiorari.

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