Nos. 21A632

IN THE
Supreme Court of the United States

BUNTION,
Petitioner,
v.
LUMPKIN, TX DCJ, et. al
Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION TO APPLICATION FOR A STAY OF EXECUTION

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QUESTION PRESENTED

Where a death-sentenced inmate has known the factual and legal predicate of his claim for ten years, i.e., does the Eighth Amendment prohibit his execution because of a lengthy stay on death row, is he entitled to the extraordinary remedy of a stay of execution where he cannot demonstrate a substantial likelihood of success on the merits?

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BRIEF IN OPPOSITION

Applicant Carl Wayne Buntion murdered Houston Police Officer James Irby in 1990, shooting him three times in cold blood. Buntion has pursued his right to appeal and collateral review for more than thirty years. He is scheduled to be executed after **6:00 p.m. (Central Time) today, Thursday, April 21, 2022**.

Buntion has challenged his conviction and death sentence in both state and federal court—three times before the highest state court and seven times in federal courts, including twice before this Court. Buntion recently filed a successive habeas corpus petition and a civil rights lawsuit in which he claimed his Eighth and Fourteenth Amendment rights were violated because of the length of time he has served on death row, *see Lackey v. Texas*, 514 U.S. 1045 (1995) (mem.) (Stevens, J., respecting denial of cert.), and moved for a stay of execution. The United States District Court for the Southern District of Texas, Houston Division dismissed his habeas petition as successive and his civil rights complaint for failure to state a claim and denied stay. *Buntion v. Lumpkin,* No. 4:22-CV-01104 (S.D. Tex. Apr. 15, 2022); *Buntion v. Collier, et al*, No. 4:22-CV-01125, 2022 WL 1164669 (S.D. Tex. Apr. 18, 2022). The Fifth Circuit Court of Appeals affirmed the district court's judgments and also denied Buntion a stay of execution. *Buntion v. Lumpkin*, *et al.*, Nos. 22-70003, 22-70004, 2022 WL 1164032 (Apr. 20, 2022).

Buntion now, on the day of his scheduled execution, seeks a stay in this Court for review of questions arising from the lower courts' holdings, i.e., that the *Lackey* claim he raised in his federal habeas petition was successive, and that the same claim in his civil rights complaint failed to state a claim on which relief can be granted. *See generally*, Mot. for Stay at 23–25. He asserts again in this Court that an inmate's right to be free from cruel and unusual punishment under the Eighth Amendment is violated when they are subjected to a lengthy stay on death row. But he is not entitled to the extraordinary relief he requests.

This Court—or any court—has never recognized a constitutional challenge to a death sentence based on the length of time a petitioner has served on death row awaiting execution. Buntion fails to demonstrate any reason the Court should intervene now in order to create a new rule of law out of whole cloth, especially when his claim is unexhausted, procedurally defaulted, time-barred, and utterly lacking in merit. There is simply no likelihood that Buntion could succeed on the merits of a petition for writ of certiorari and, thus, no grounds for a stay. Consequently, Buntion is not entitled to a stay of execution or relief under 28 U.S.C. § 2254 or 42 U.S.C. § 1983.

STATEMENT OF THE CASE

I. Statement of the Case

A. Facts of Buntion's capital murder

The Texas Court of Criminal Appeals (CCA) summarized the facts establishing Buntion's guilt of capital murder:

> The State's evidence[1] at trial established the following: At about 7:45 p.m., June 27, 1990, Houston police officer James Irby was on motorcycle patrol when he stopped a car on Airline Drive for a minor traffic violation. After parking his motorcycle, Irby approached the driver's side of the car and spoke briefly with the driver, who had already exited the vehicle. Irby and the driver, still conversing, walked toward the rear of the car. Irby then walked back to the driver's side of the car, looked in, and spoke briefly with [Buntion], who was the only passenger. Irby then returned to the rear of the car, where he continued speaking with the driver. [Buntion] then exited the car from the passenger's side. Irby motion to [Buntion] to get back in the car, but he proceeded toward Irby, and when he was about five feet from Irby, he raised a long-barrel revolver with both hands and fired a shot into Irby's forehead. Irby died almost instantly.

Buntion v. State, No. 71, 238 slip. op. at 1-2 (Tex. Crim. App. May 31, 1995) (footnote original).

B. Evidence presented at Buntion's 2012 punishment hearing.

The CCA summarized evidence presented at Buntion's new punishment hearing in 2012:

> [Buntion] had thirteen prior felony convictions, many of which involved assaulting other people. Most notably, [Buntion] was convicted in 1965 of "assault to murder" an Alabama peace officer.

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[1] [Buntion] presented no evidence during the guilt/innocence phase of his trial.

> Further, [Buntion] committed the instant offense a little over a month after he was released to parole while serving a sentence for the offense of sexual assault of a child. . . .
>
> In addition, [Buntion] committed numerous unadjudicated extraneous offenses and bad acts, both in and out of prison. During a previous term of imprisonment, [Buntion] was found to be in possession of a shank. While on a prison furlough, [Buntion] used his brother's birth certificate to obtain a visit with his ex-wife, who was in jail. When a jail official discovered [Buntion]'s true identity and the fact that he was on a prison furlough, the official arrested [Buntion] and returned him to prison. Approximately a week before the instant offense, [Buntion] showed an acquaintance a gun. He told her that he always carried it because he would rather kill than go back to prison. While in jail for the instant offense, [Buntion] threatened other detainees who asked him why he was there. [Buntion] said that he would kill them "like [he] killed the cop" if they did not leave him alone.
>
> Additional evidence indicated that [Buntion]'s character for violence had not changed during his time in prison. . . . While in jail awaiting the punishment retrial, [Buntion] wrote letters to his brother, Bobby. The letters contained language from which a jury could reasonably infer that [Buntion] remained a continuing threat to society. For example, in a July 2011 letter, [Buntion] stated that he was glad that he would never be released from prison because he would "hate to think about what [he would] do to certain people that have screwed [him] around." In an August 2011 letter, [Buntion] advised Bobby that if the district attorney questioned Bobby about Bobby's previous criminal record, Bobby should just say that the district attorney "made [Bobby] what [he was]" by sending Bobby to prison on his first offense instead of giving him probation. "If they create a 'monster,' they should not complain when it feeds (on society.) right? [sic] Right."

Buntion v. State, 482 S.W.3d 58, 67–68 (Tex. Crim. App. 2016).

II. Conviction and Postconviction Proceedings

In January 1991, a Harris County jury found Buntion guilty of capital murder and sentenced him to death. *Id.* at 65. His conviction and sentence

were affirmed by the CCA on direct appeal. *Buntion v. State*, No. AP-71,238 (Tex. Crim. App. May 31, 1995) (unpublished). Buntion's initial state application for habeas relief was denied by the CCA in November 2003. *Ex parte Buntion*, No. WR-22,548-02 (Tex. Crim. App. Nov. 5, 2003) (unpublished).

Buntion then filed a petition seeking federal habeas relief that was provisionally granted by this Court on April 28, 2006, *Buntion v. Dretke*, 4:04-cv-01328 (S.D. Tex. April 28, 2006). The Fifth Circuit Court of Appeals, however, vacated that judgment and denied habeas relief. *Buntion v. Quarterman*, 524 F.3d 664 (5th Cir. 2008), *cert. denied*, 555 U.S. 1176 (2009).

Following this Court's denial of certiorari review, Buntion returned to state court to file a subsequent state habeas application, alleging that his death sentence was invalid under *Penry v. Johnson*, 532, U.S. 782 (2001). The CCA granted the writ, awarding Buntion a new trial on punishment. *Ex parte Buntion*, 2009 WL 3154909 (Tex. Crim. App. 2009).

The trial court held the new punishment hearing in February 2012, and Buntion was sentenced to death a second time. *Buntion v. State*, 482 S.W.3d 58, 65 (Tex. Crim. App. 2016). The CCA affirmed the trial court's sentence of death on direct appeal. *Id.* at 106. The Court denied certiorari review. *Buntion v. Texas*, 136 S.Ct. 2521 (2016).

Buntion next sought habeas relief from his new death sentence in the state court, but that application was denied by the CCA. *Ex parte Buntion*,

2017 WL 2464716 (Tex. Crim. App. June 7, 2017). The Court denied Buntion's petition for writ of certiorari. *Buntion v. Texas*, 138 S. Ct. 737 (2018).

Buntion subsequently filed a federal petition for habeas relief with brief in support on June 7, 2018, which was denied by the U.S.D.C. for the Southern District of Texas, Houston Division. *Buntion v. Lumpkin*, No. 4:17-cv-2683 (S.D. Tex. Mar. 5, 2020). The Fifth Circuit denied Buntion's application for a certificate of appealability, and this Court denied Buntion's petition for writ of certiorari on October 4, 2021. *Buntion v. Lumpkin*, 982 F.3d 945 (5th Cir. 2020), *cert. denied* 142 S.Ct. 3 (2021).

Buntion next filed a fifth state application for habeas relief; the CCA dismissed this application as an abuse of the writ without considering the merits of the claims. *Ex parte Buntion*, NO. WR-22,548-05, 2022 WL 946264 (Tex. Crim. App. Mar. 30, 2022). Buntion did not filed a petition for writ of certiorari.

Twelve days before his scheduled execution, Buntion filed suit pursuant to 42 U.S.C. § 1983, alleging the Eighth and Fourteenth Amendments will not permit his execution because he has been incarcerated on death row for over thirty years. Just a day before filing his § 1983 complaint, Buntion filed a successive federal habeas petition pursuant to 28 U.S.C. § 2254, raising the

same *Lackey* claim.[2,3] On April 14, 2022, the district court dismissed his habeas petition because it was successive. *Buntion* v. *Lumpkin*, No. 4:22-CV-01104, 2022 WL 1164670 (S.D. Tex. Apr. 14, 2022). Two business days later, the district court dismissed his § 1983 complaint after finding it not cognizable under § 1983, thus failing to state a claim on which relief can be granted, pursuant to 28 U.S.C. § 1915A.

On April 19, 2022, Buntion appealed the district court's dismissal of § 1983 complaint and denial of his motion to stay his execution. After consolidating Buntion's appeals, the Fifth Circuit affirmed the district court's judgments and ruling the next day. *Buntion v. Lumpkin,* No. 22-70003, *consolidated with Buntion v. Collier*, *et al.*, No. 22-70004, – F.4th –, 2022 WL 1164032 (5th Cir. 2022).

On April 21, 2022, Buntion filed in this Court an application for a stay of execution.

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[2] Buntion also alleged in his § 2254 petition that his Eighth and Fourteenth Amendment rights are violated because his punishment is based on the jury's speculation about his future behavior, which has subsequently been proven false because of his good behavior in prison. This claim is not relevant to this application.

[3] On April 11, 2022, Buntion filed a complaint pursuant to 28 U.S.C. § 2201; the Court dismissed his complaint without prejudice on April 15, 2022. *Buntion v. Lumpkin*, Civil Action No. 4:22-cv-1168.

REASONS FOR DENYING THE APPLICATION FOR STAY

The questions underlying Buntion's request for a stay of execution are without merit and unworthy of the Court's attention; he accordingly cannot demonstrate the Court should grant his application. 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, Buntion advances no compelling reason to grant a stay for this Court to review the questions he wishes to raise through a petition for writ of certiorari; no compelling reason exists because he cannot demonstrate his underlying claims will succeed on the merits. The Court should, therefore, deny Buntion's application for a stay of execution.

ARGUMENT

I. The Lower Courts Properly Concluded That Buntion Is Not Entitled to a Stay.

A stay of execution is an equitable remedy. *Hill v. McDonough*, 547 U.S. 573 (2006). It 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." *Id*. (citing *Nelson v. Campbell*, 541 U.S. 637, 649–50 (2004)). 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). 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.* 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 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 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 v. McDonough*, 547 U.S. at 584 (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.").

As discussed below, Buntion cannot demonstrate a strong likelihood of success on the merits. Buntion has recently appealed the federal district court's denial of relief from the same *Lackey* claim, and this Court rejected Buntion's challenge only last year. *Buntion v. Lumpkin*, 982 F.3d 945 (5th Cir. 2020), *cert. denied* 142 S.Ct. 3 (2021). He raised this challenge before the CCA in a state application for habeas relief; the CCA dismissed his habeas application as an abuse of the writ. *Buntion*, 2022 WL 946264. He did not seek review of that dismissal from this Court. Instead, Buntion sought to raise this same challenge in the district court through a successive federal habeas petition and civil rights complaint, which he now proposes deserve yet another review from this Court. He is mistaken.

Further, as noted above, the Court in *Nelson* recognized that a stay of execution is an equitable remedy, and that the last-minute and abusive nature of an inmate's claim bears on the issue of whether the inmate is entitled to the remedy. 541 U.S. at 649–50. Again, Buntion is petitioning for review of a federal habeas petition and a § 1983 lawsuit he filed within thirteen days of his scheduled execution. The late nature of these actions weighs heavily against a stay of execution. For this reason, and because Buntion cannot show

a likelihood of success on the merits, his request for a stay of execution must be denied.

II. A Petition for Writ of Certiorari Would Be an Improper Vehicle from which Buntion May Obtain Relief.

Buntion is seeking delay merely for the sake of avoiding his execution. As discussed below, Buntion cannot show he is likely to succeed on the merits of a *Lackey* claim. He cannot succeed because fails to demonstrate how his position is any different (other than the addition of years), or how the passage of time between his last federal habeas petition and the complaint and petition that give rise to the petition for certiorari he wishes to file, substantively alters his claims to render them meritorious on a second review by this Court. Accordingly, his claim brought under 28 U.S.C. § 2254 is successive under § 2244(b)(1), procedurally defaulted, and time-barred. Likewise, his claim under § 1983 is unexhausted and time-barred. Buntion ultimately cannot demonstrate the Eighth Amendment prohibits the execution of an inmate who is incarcerated for a lengthy period of time, prior to his execution, particularly where the inmate had been exercising his appellate and collateral review rights. For these reasons, Buntion cannot demonstrate he would be successful on the merits.

A. Buntion's *Lackey* claim brought in his successive federal habeas petition.

1. This claim is procedurally defaulted.

Buntion alleges that, because he has been incarcerated on death row for over thirty years, his execution would violate the Eighth Amendment. But Buntion only presented this claim to the state court for review in a state habeas application that dismissed as an abuse of the writ; it is therefore procedurally defaulted. Buntion cannot succeed on the merits of a claim that cannot be reviewed.

It is well settled that federal review of a claim is procedurally barred if the last state court to consider the claim expressly and unambiguously based its denial of relief on a state procedural default. *Coleman v. Thompson*, 501 U.S. 722, 729 (1991); *Harris v. Reed*, 489 U.S. 255, 263 (1989); *Amos v. Scott*, 61 F.3d 333, 338 (5th Cir.) (1995). And a federal court "may not review federal claims that were procedurally defaulted in state court—that is, claims that the state court denied based on an adequate and independent state procedural rule." *Davila v. Davis*, – U.S. –, 137 S. Ct. 2058, 2064 (2017).

Where a state court has explicitly relied on a procedural bar, a state prisoner may not obtain federal habeas corpus relief absent a showing of cause for the default and actual prejudice that is attributable to the default, or that the federal court's failure to consider the claim will result in a miscarriage of

justice. *Coleman*, 501 U.S. at 750. A miscarriage of justice in this context means that the petitioner is actually innocent of the crime of which he was convicted. *Sawyer v. Whitley*, 505 U.S. 333, 339–40 (1992); *Smith v. Dixon*, 14 F.3d 956, 974 (5th Cir. 1994). And, in terms of the capital sentencing proceeding, a petitioner must show, "by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law." *Sawyer,* 505 U.S. at 336.

When Buntion raised his *Lackey* claim before the CCA, it was dismissed under the Texas abuse of the writ doctrine. *See* Texas Code of Criminal Procedure Article 11.071 § 5(a)(1) ("[A] court may not consider the merits of or grant relief based on the subsequent application . . . unless the current claims and issues have not been and could not have been presented previously . . . because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application."). The Fifth Circuit held that the CCA applies its abuse of the writ rules regularly and strictly. *Roberts v. Thaler*, 681 F.3d 597, 604-05 (5th Cir. 2012). That statute prohibits a Texas court from considering the merits of, or granting relief based on, a subsequent writ application filed after the final disposition of an inmate's first application unless he demonstrates the statutory equivalent of cause or actual innocence. Tex. Code Crim. Proc. Ann. art. 11.071 § 5.

Because the denial of Buntion's claim was based upon an adequate and independent state procedural rule, his claim is procedurally barred unless he can demonstrate cause and prejudice or a miscarriage of justice. *Coleman*, 501 U.S. at 750. To show a miscarriage of justice in this context, the prisoner must show he is actually innocent of the crime of which he was convicted. *See Sawyer v. Whitley*, 505 U.S. 333, 339–40 (1992). A "truly persuasive showing" of actual innocence may act as a "gateway" to review of an otherwise procedurally barred claim. *See Herrera v. Collins*, 506 U.S. 390, 404, 417 (1993); *Schlup v. Delo*, 513 U.S. 298, 315 (1995). But only in a "rare" and "extraordinary case" may an inmate overcome a procedural default by demonstrating a miscarriage of justice. *Schlup*, 513 U.S. at 321. This requires an inmate to demonstrate "that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." *Id.* at 327. This standard cannot be met by "merely . . . showing that a reasonable doubt exists in light of the new evidence, but rather that no reasonable juror would have found the defendant guilty." *Id.* at 329. Importantly, "[t]o be credible, such a claim requires petitioner to support his allegations with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Id.* at 324. Thereafter, "the habeas court must consider 'all of the evidence,' old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under 'rules of

admissibility that would govern at trial.'" *House v. Bell*, 547 U.S. 518, 538 (2006) (quoting *Schlup*, 513 U.S. at 327–28). Then, the habeas "court must make 'a probabilistic determination about what reasonable, properly instructed jurors would do.'" *Id.* (quoting *Schlup,* 513 U.S. at 329).

Here, Buntion has failed to show cause and prejudice, and he fails to show that he is actually innocent of the crime for which he was convicted. Thus, his claim is procedurally barred from federal habeas corpus review.

2. Buntion's claim is time-barred.

Buntion's claim is also untimely. AEDPA provides a one-year period for filing federal habeas corpus petitions by persons in custody pursuant to the judgment of a State court; this period runs from the latest of four scenarios enumerated within AEDPA. 28 U.S.C. § 2244(d)(1). Since Buntion attacks the proceedings associated with his sentence, the one-year period of limitation ran from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. §2244(d)(1)(A). Applying this one-year limitation period to Buntion's *Lackey* shows that his claim is untimely and barred by the statute of limitations.

Buntion was resentenced to death in 2012 after he had originally been sentenced to death in 1991; the CCA affirmed his sentence in 2016. Buntion filed a state habeas application in 2014 where he did not raise this claim, but he raised a *Lackey* claim in the federal habeas petition he filed in 2018.

Therefore, Buntion's limitations period expired a year after his state habeas application was denied in June 2017, and his federal habeas petition did not toll. *Duncan v. Walker*, 533 U.S. 167, 172 (2001).

At the time of his resentencing, Buntion had served more than twenty years on death row; at the time he filed his federal habeas petition, he had been serving more than twenty-five years. As the Fifth Circuit found in reviewing his *Lackey* claim below, "If *Lackey* claims were a part of the law (and they are decidedly not . . .), Buntion had the legal and factual predicates to raise the claim in his last federal habeas petition." *Buntion*, 2022 WL 1164032, at *9 (citing *Barr v. Purkey*, —— U.S. ——, 140 S. Ct. 2594, 2595, 207 L.Ed.2d 1123 (2020) (Breyer, J., dissenting from the order vacating stay) (contending delays of 16 and more than 20 years are long enough to be unconstitutional)). Given that Buntion's limitations period began running in 2017, and he cannot—as the Fifth Circuit indicated—identify any factual predicate that constitutes a later accrual, his current *Lackey* claim is time-barred.

3. Buntion raised this claim in a successive petition.

Buntion raised this claim in a successive petition. *Buntion*, 2022 WL 1164670. AEDPA instructs the Court to dismiss any claims presented in a second or successive habeas corpus application, unless the petitioner has first sought—and obtained—authorization from the Fifth Circuit to file the

successive claim. 28 U.S.C. § 2244(b)(1), (3); *see Williams v. Thaler*, 602 F.3d 291, 301 (5th Cir. 2010) (citing *id.*); *see also* Rules Governing Section 2254 Cases, R. 9. Congress enacted § 2244(b) in response to prisoners repeatedly challenging the validity of the same conviction and sentence. *In re Cain*, 137 F.3d 234, 235 (5th Cir. 1998). The section "sharply limits the federal courts' consideration of second or successive habeas applications." *In re Sepulvado*, 707 F.3d 550, 553 (5th Cir. 2013); *see Felker v. Turpin,* 518 U.S. 651, 664 (1996) ("[T]his requirement simply transfers from the district court to the court of appeals a screening function which would previously have been performed by the district court"). "Without such authorization, the otherwise–cognizant district court has no jurisdiction to entertain [the] . . . the petition." *Leal Garcia v. Quarterman*, 573 F.3d 214, 219 (5th Cir. 2009); *see also Burton v. Stewart*, 549 U.S. 147, 152–53 (2007); *Williams v. Thaler*, 602 F.3d 291, 305 (5th Cir. 2010); *In re Flowers*, 595 F.3d 204, 205 (5th Cir. 2009); *Crone v. Cockrell*, 324 F.3d 833, 838 (5th Cir. 2003).

Moreover, a "petitioner's failure to seek authorization from an appellate court before filing a second or successive habeas petition 'acts as a jurisdictional bar'" until the Fifth Circuit grants the petitioner permission to file the successive petition. *Williams*, 602 F.3d at 301, (quoting *United States v. Key*, 205 F.3d 773, 774 (5th Cir. 2000)). This jurisdictional limitation described by § 2244(b) is one of *subject matter*. *Crone v. Cockrell*, 324 F.3d 833,

838 (5th Cir. 2003) ("[W]e find that the district court did not have subject matter jurisdiction over Crone's application because Crone did not obtain an order from this Court authorizing the district court to consider the successive application.").

Although 28 U.S.C. § 2244(b) does not specifically set forth what constitutes a "second or successive" petition, the Fifth Circuit has held that a petition "is successive when it either presents a challenge to the petitioner's conviction or sentence that could have been presented in an earlier petition or can be said to be 'an abuse of the writ.'" *Propes v. Quarterman*, 573 F.3d 225, 229 (5th Cir. 2009) (citing *Crone*, 324 F.3d at 836–37). "Informing a federal court's decision on successiveness is 'whether petitioner possessed, or by reasonable means could have obtained, a sufficient basis to allege a claim in the first petition[.]'" *Saahir v. Collins,* 956 F.2d 115, 118 (5th Cir. 1992) (emphasis omitted) (quoting *McCleskey v. Zant*, 499 U.S. 467, 498 (1991)).

The lower court dismissed Buntion's federal habeas petition as successive pursuant to 28 U.S.C. § 2244(b)(1),[4] finding that his claims were

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[4] Because the district court did not dismiss Buntion's petition based upon 28 U.S.C. § 2244(b)(2), this court lacks jurisdiction to review the district court's decision on that ground. *See United States v. Daly*, 152 F. App'x 424, 425 (5th Cir. 2005) (rejecting challenge to sentence for lack of jurisdiction where appellant did not allege a "legal error or misapplication of the guidelines"); *see also Milam*, 832 F. App'x at 919–20 (rejecting Petitioner's argument that the district court erred in dismissing his successive petition under § 2244(b)(1) where the court had applied § 2244(b)(3)(A)).

available when he filed his federal habeas petition in 2018, and he had raised Future Dangerousness and *Lackey* claims that are identical to those raised below, except for the duration of his stay on death row. ROA.70003.116 (citing *Allen v. Ornoski*, 435 F.3d 946, 957 (9th Cir. 2006)); *Buntion*, No. 4:17-cv-02683, ECF No. 4 at 92–102, 111–14. The claims Buntion raises here are the same claims he raised in his prior federal petition. As found by the district court in *Buntion*, No. 4:22-cv-11064 (citations omitted),

> Buntion argues that the passage of time renders his old claims previously unavailable—that the certainty of an execution date breathes new life into claims previously resolved by the federal courts. [citation omitted]. Buntion's argument, however, would eviscerate AEDPA's abuse-of-the-writ provisions and allow an endless succession of federal petitions differing from each other only in the time which had transpired since the inmate's conviction.

Certainly, a petition is not second or successive merely because it follows an earlier federal petition. *Crone*, 324 F.3d at 836. While AEDPA lacks specificity as to "second or successive," raising the same claims in successive habeas petitions is the very definition of an abuse of the writ. Such claims "shall be dismissed" pursuant to § 2244(b)(1). There are no exceptions to this mandatory rule. *In re Sharp*, 969 F.3d 527, 528 (5th Cir. 2020).

4. This claim is without merit.

Since *Lackey*, the lower courts have "resoundingly rejected" such claims as meritless. *Knight v. Florida*, 120 S. Ct. 370, 461 (1999) (Thomas, J.,

concurring). In fact, as the Fifth Circuit has explained, Buntion confronts "a wall of cases uniformly rejecting the claim." *Ruiz v. Davis*, 850 F.3d 225, 230 (5th Cir. 2017). Specifically, in the federal courts of appeal, several circuits have outright rejected the idea that a lengthy stay on death row violates the Eighth Amendment. *See, e.g.*, *Reed v. Quarterman*, 504 F.3d 465, 465 (5th Cir. 2007) (twenty-four years on death row); *ShisInday v. Quarterman*, 511 F.3d 514, 526 (5th Cir. 2007) (twenty-five years); *Carter v. Johnson*, 131 F.3d 452, 466 (5th Cir. 1997) (fourteen years); *Lackey v. Johnson*, 83 F.3d 116, 117 (5th Cir. 1996) (nineteen years); *Free v. Peters*, 50 F.3d 1362 (7th Cir. 1995) (twenty years); *Johns v. Bowersox*, 203 F.3d 538, 547 (8th Cir. 2000) (fifteen years); *Smith v. Mahoney*, 611 F.3d 978, 998 (9th Cir. 2010) (twenty-five years); *McKenzie v. Day*, 57 F.3d 1493, 1494 (9th Cir. 1995) (twenty years); *Richmond v. Lewis*, 948 F.2d 1473, 1492 (9th Cir. 1990) (sixteen years); *Stafford v. Ward*, 59 F.3d 1025, 1028 (10th Cir. 1995) (fifteen years).

Similarly, numerous state courts have also rejected the claim. *Smith v. State*, 74 S.W.3d 868, 869, 875–76 (Tex. Crim. App. 2002) (thirteen years); *Bell v. State*, 938 S.W.2d 35, 53 (Tex. Crim. App. 1996) (twenty years); *Ruiz v. State*, 771 N.E.2d 46, 54–55 (Ind. 2002) (twenty years); *People v. Sims*, 736 N.E.2d 1092, 1040–41 (Ill. 2000) (fifteen years); *State v. Ruiz*, 591 N.W.2d 86, 93–95 (Neb. 1999) (twenty years); *Hitchcock v. State*, 578 So.2d 685, 693 (Fla. 1990) (twelve years), *rev'd on other grounds*, 505 U.S. 1215 (1992); *People v. Fry,* 959

P.2d 183, 262 (Cal. 1998) (seven years); *Ex parte Bush*, 695 So.2d 138, 140 (Ala. 1997) (sixteen years); *State v. Schackart*, 947 P.2d 315, 336 (Ari. 1997). Despite the fact that over two decades have passed since Justice Stevens's invitation to evaluate the claim, Buntion has not identified a single court, state or federal, that has accepted the merits of his Eighth Amendment claim. As noted by the Fifth Circuit below, 2022 WL 1164032:

> We, like Justice Thomas, are "unaware of any support in the American constitutional tradition or in th[e] [Supreme] Court's precedent for the proposition that a defendant can avail himself of the panoply of appellate and collateral procedures and then complain when his execution is delayed."

Id. at *10 (citing *Buntion*, 982 F.3d at 952–53 (alterations in original) (quoting *Knight v. Florida*, 528 U.S. 990, 990 (1990) (mem.) (Thomas, J., concurring in the denial of certiorari))). "Put more simply still: It is beyond reasonable debate that a State does not violate the Constitution by executing an individual after the individual has spent even a very long period of time on death row. *Id.* (citing *Slack*, 529 U.S. at 584).

Accordingly, Buntion cannot demonstrate he could succeed on the merits of the claims he wishes to bring before the Court.

B. Buntion's *Lackey* claim brought under 42 U.S.C. § 1983 cannot succeed on the merits.

1. Buntion's claim is unexhausted.

Buntion has admitted he has not exhausted his claim as required under the Prison Litigation Reform Act (PLRA). Rather, in the Fifth Court, he stated that he presented this claim to the CCA in "the spirit of the PLRA in this case where adherence was not required (because the TDCJ does not have the authority to ignore the trial court's order to execute Buntion on April 21)." But the PLRA strictly sets out the process for exhaustion, which Buntion concedes he did not follow. Buntion cannot demonstrate a likelihood of success on the merits of a claim this Court cannot review.

Section 1997(e) of the PLRA provides that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). Exhaustion is *mandatory* "irrespective of the forms of relief sought and offered through administrative avenues." *Booth v. Churner*, 532 U.S. 731, 739, 740–40 n.6 (2001); *see Gonzalez v. Seal*, 702 F.3d 785, 788 (5th Cir. 2012) ("[T]here can be no doubt that pre-filing exhaustion of [the] prison grievance processes is mandatory." (citing *Woodford v. Ngo*, 548 U.S. 81 (2006); *Jones v. Bock*, 549 U.S. 199 (2007)). The PLRA's exhaustion requirement

applies to Buntion's challenge. *See Ross v. Blake*, 578 U.S. 632, 648 (2016) ("Courts may not engraft an unwritten 'special circumstances' exception onto the PLRA's exhaustion requirement.").

The exclusive avenue in Texas through which inmates must administratively exhaust their claims is through the prison grievance system. Tex. Gov't Code Ann. § 501.008; *see Dillon v. Rogers*, 596 F.3d 260, 268 (5th Cir. 2010) ("Under our strict approach, we have found that mere 'substantial compliance' with administrative remedy procedures does not satisfy exhaustion."). And to properly exhaust, a prisoner must "pursue the grievance remedy to conclusion." *Wright v. Hollingsworth*, 260 F.3d 357, 358 (5th Cir. 2001). This requires completion of both steps of TDCJ's grievance process before a complaint may be filed. *Id*. Further, the Fifth Circuit has held that a federal court is not to inquire as to whether the administrative remedies are adequate. *Alexander v. Tippah Co., Mississippi*, 351 F.3d 626, 630 (5th Cir. 2003). Rather, the only inquiry as to exhaustion is whether such remedies were available. *Id.*; *see Murphy*, 942 F.3d at 714 (Elrod, J., dissenting).

Again, Buntion admits he did not pursue an administrative remedy; his reasoning for his inaction is irrelevant. Brief at 41–42. Further, Buntion's unilateral decision that exhaustion in the CCA was a valid substitute for TDCJ's grievance process is tantamount to an admission that his claim sounds in habeas corpus, not civil rights. In any event, PLRA mandates dismissal of

the complaint. *But see Murphy v. Collier*, 942 F.3d 704, 709 (5th Cir. 2019). Consequently, there is no likelihood Buntion's claim would succeed on its merits.

2. Buntion's claim is barred by the statute of limitations.

Buntion's claim is also untimely. Section 1983 claims, which are best characterized as personal-injury actions, are subject to a state's personal-injury statute of limitations. *Wilson v. Garcia*, 471 U.S. 261, 279 (1985); *Walker v. Epps*, 550 F.3d 407, 412–14 (5th Cir. 2008). Texas's limitations period is two years. Tex. Civ. Prac. & Rem. Code § 16.003(a). Although state law provides the applicable limitations period, federal law determines when the limitation period accrues. *Reed v. Goertz*, 995 F.3d 425, 431 (5th Cir. 2021), *pet. for cert. filed,* No. 21-442 (Sept. 22, 2021). Under federal law, the limitations period begins to run when the plaintiff is aware that he has suffered an injury or has enough information to know that he has been injured. *Id.*; *Russell v. Bd. of Trs.*, 968 F.2d 489, 493 (5th Cir. 1992).

Buntion asserts the basis for his claim is "[t]he delay in executing" him, largely in part "due to the State's own faulty procedures and not because of frivolous appeals on his part" before he received his new punishment hearing in 2012. Brief at 14–15, 37 (internal quotations and citation omitted). Again, Buntion knew the factual basis of his claim at his new punishment hearing in

2012—or, under a generous interpretation, in 2016, when his sentence became final. *Buntion v. State*, 482 S.W.3d 58, 65, 106 (Tex. Crim. App. 2016). That is, he fails to show that the twenty-year period that ran between his initial trial and his second sentencing hearing—about which he complains—was insufficient to have made him "aware he ha[d] suffered an injury or ha[d] sufficient information to know that he ha[d] been injured." *Reed*, 995 F.3d at 431 (internal quotations omitted).

Alternatively, he fails to show a significant difference in "injury" between when he raised this claim in his 2018 federal habeas petition—in which he complained of the twenty-seven-year period that he served on death row[5]—and the lapse of four years until he filed his Complaint in the lower court. The court below noted in Buntion's successive federal habeas action in Civil Action No. 4:22-cv-1104:

> Both of Buntion's latest habeas claims[6] were available when he filed his earlier federal habeas action. *See Allen v. Ornoski*, 435 F.3d 946, 957 (9th Cir. 2006) (finding that an inmate could have brought his *Lackey* claim in his initial federal petition after only six years of incarceration). Buntion, in fact, has already litigated nearly identical issues in federal court. (*Buntion v. Davis*, 4:17-cv-2683, Docket Entry No. 4 at 101, 111). The only significant difference between Buntion's earlier claims and his current ones is that more time has now passed. Buntion argues that the passage of time renders his old claims previously unavailable—that the

5 *Buntion v. Davis*, 4:17-cv-02683, ECF No. 4 at 111–14.

6 In his federal habeas petition, Buntion claimed his death sentence was arbitrarily imposed because the jury's future-dangerousness finding has proven incorrect and also raised a *Lackey* claim.

> certainty of an execution date breathes new life into claims previously resolved by the federal courts. ([ROA.22-70003.37]; [ROA.22-70003.101–02]. Buntion's argument, however, would eviscerate AEDPA's abuse-of-the-writ provisions and allow an endless succession of federal petitions differing from each other only in the time which had transpired since the inmate's conviction.

Regardless, the two-year limitations period has long expired. Buntion therefore cannot demonstrate a likelihood of success on his claim because his claim is time-barred.

3. Buntion does not present factual allegations that are sufficient to raise a right to relief above the speculative level.

Respondents do not contest the material facts asserted by Buntion: when Buntion was convicted and sentenced, the length of his incarceration, and when he filed his habeas applications and petitions. However, these facts and Buntion's arguments are insufficient to demonstrate § 1983 relief is anything more than speculative. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (1955).

Buntion asserts he is challenging the method by which the State intends to carry out his execution, focusing on the State's timing. Petition at 23–24. But, contrary to his phrasing, he does not contest the means by which he will be executed. Rather, he admits he takes issue with the State carrying out his sentence altogether and thus—despite his protests—effectively takes issue with the assessment of the death penalty as his sentence. ("[T]he claim is not

that the state could never have executed Buntion. At some point, however, the delay . . . became excessive, so that the Eighth Amendment will not allow for his execution to be carried out."). Buntion does not contest the standard by which a habeas challenge is reviewed:

> 'Challenges to the validity of any confinement or to particulars affecting its *duration* are the province of habeas corpus,' whereas 'requests for relief turning on circumstances of confinement may be presented in a § 1983 action.' *Muhammad v. Close*, 540 U.S. 749, 750 (2004); s*ee also Hill*[], 547 U.S. [at] 579. . . .

Buntion, 2022 WL 1164669 at *10 (emphasis added). Under this case law, Buntion is not presenting a § 1983 challenge to the method of execution.

Buntion is also mistaken about the time his claim became ripe, which he bases on the setting of his execution date, from which "the delay in executing [him]" could be measured. Brief at 40–41. More specifically, he names the delay in his execution as the factual predicate for his claim. Brief at 40. But again, he raised this claim in his 2018 federal habeas petition (as well as in a successive habeas petition that he filed nearly simultaneously—one day apart—with the complaint giving rise to this appeal). As stated above, Buntion therefore knew the underlying basis for his claim in 2018—even earlier, based on his argument that he was subjected to an unconstitutional sentence "for almost twenty years" before he was re-sentenced in 2012. *See* Brief at 39–40. He fails to demonstrate any substantial difference resulting from the passage

of time—just over one year—from this Court's disposition of his appeal of his federal habeas petition to the date his execution date was set.

Contrary to Buntion's argument, his claim became ripe at the time he could have asserted the delay of his execution was unconstitutional. Accordingly, Buntion fails to present factual allegations that are sufficient to raise a right to relief above the speculative level, and there is no likelihood he can succeed on the merits. This Court should deny a stay of execution.

4. Alternatively, Buntion cannot obtain relief because reasonable jurists could not debate the successiveness of Buntion's habeas claim pursuant to 28 U.S.C. § 2244(b).

If the district court's dismissal is found to include a holding that Buntion's *Lackey* claim is properly construed and dismissed as a § 2254 claim, Buntion does not show reasonable jurists could debate the successiveness of Buntion's claim, or that Buntion failed to state a valid claim that he was denied a constitutional right. *See Slack*, 529 U.S. at 484.

First, Buntion does not distinguish his successive claim from this Court's alternative merits-review of the same claims in its 2020 opinion, and law-of-the-case precludes review.[7] *See Woodfox v. Cain*, 772 F.3d 358, 370 (5th Cir.

[7] "Without this doctrine, cases would end only when obstinate litigants tire of re-asserting the same arguments over and over again." *United States v. Matthews*, 312 F.3d 652, 657 (5th Cir. 2002). Yet "law of the case is not a jurisdictional rule, but a discretionary practice." *Id*. The doctrine is therefore "not inviolate." *Id*. But "a prior decision will be followed without re-examination unless": 1) "the evidence on a subsequent trial was substantially different"; 2) "controlling authority has since made

2014) (citing *Med. Ctr. Pharmacy v. Holder*, 634 F.3d 830, 834 (5th Cir. 2011) ("[T]he law-of-the-case doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issue in subsequent stages in the same case."). Here, Buntion cites no new contrary controlling authority, nor does he assert that the Court's prior decision was clearly erroneous and would work manifest injustice. The only evidence Buntion points to is the passage of time. While true, Buntion provides nothing to show such passage of time—again, what amounts to a little more than a year after this Court's prior decision—has significantly altered his position from when he previously raised this *Lackey* claim.

And as the lower court stated, if Buntion's claim is successful, such argument "would eviscerate AEDPA's abuse-of-the-writ provisions and allow an endless succession of federal petitions differing from each other only in the time what had transpired since the inmate's conviction." As argued above,

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a contrary decision of the law applicable to such cases"; or 3) "the decision was clearly erroneous and would work . . . manifest injustice." *Propes v. Quarterman*, 573 F.3d 225, 228 (5th Cir. 2009).

Buntion fails to show his claim could not have been raised before, and he cannot show he would succeed on the merits of his claim.

5. The balance of equities does not weigh in Buntion's favor.

For the above reasons, Buntion fails show he is likely to succeed on the merits. He is not entitled to a "do over." And the State has a strong interest in carrying out this sentence. This Court should not further delay justice for a stay of execution. *See Martel v. Clair*, 565 U.S. 648, 662 (2012) ("Protecting against abusive delay *is* an interest of justice.") (emphasis in original); *see Hill*, 547 U.S. at 584 ("Both the State and the victims of crimes have an important interest in the timely enforcement of a sentence."). Buntion fails to show the State and the victims would not be substantially harmed by a stay, or that the public interest does not favor a stay. Consequently, this Court should deny Buntion's request for one.

CONCLUSION

The application for a stay of execution should be denied.

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