No. _____

IN THE
Supreme Court of the United States

ALI NASSER,
Petitioner,

v.

JEDIDIAH MURPHY,
Respondent.

EMERGENCY APPLICATION TO VACATE STAY OF EXECUTION

(EXECUTION IS SCHEDULED FOR OCTOBER 10, 2023)

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

REASONS FOR VACATING STAY OF EXECUTION 4

ARGUMENT 7

I. The District Court Erred By Failing to Apply a Presumption Against the Grant of a Stay, Given that Murphy Challenges a Legal Opinion from *Twelve* Years Ago 7

II. The District Court Erred When It Conducted No Review of the Merits of Murphy's Claim. 9

III. The Lower Court Erred in Failing to Explain What Irreparable Injury Murphy Will Suffer Absent a Stay of Execution. 12

IV. The District Court Erroneously Gave Short Shrift to the Public's Interest in a Timely Enforcement of Murphy's' Criminal Sentence. 16

CONCLUSION 19

TABLE OF AUTHORITIES

Cases

Autry v. Estelle, 464 U.S. 1 (1983) 8

Barefoot v. Estelle, 463 U.S. 880 (1983) 4, 12

Bucklew v. Precythe, 139 S. Ct. 1112 (2019) 7, 14

Calderon v. Thompson, 523 U.S. 538 (1998) 14, 15

Cromartie v. Shealy, 941 F.3d 1244 (11th Cir. 2019) 10

District Attorney's Office for the Third Judicial District v. Osborne, 557 U.S. 52 (2009) 8

Dunn v. Ray, 139 S. Ct. 661 (2019) 6

Ex parte Blue, 230 S.W.3d 151 (Tex. Crim. App. 2007) 11

Ex parte Gutierrez, 337 S.W.3d 883 (Tex. Crim. App. 2011) 2, 7

Ex parte Murphy, No. WR-70,832-05, 2023 WL 6466676 (Tex. Crim. App. Oct. 3, 2023) 11

Garcia v. Texas, 564 U.S. 940 (2011) 10

Gomez v. United States Dist. Court, 503 U.S. 653 (1992) 4, 7, 14, 15

Hill v. McDonough, 547 U.S. 573 (2006) ..... passim

Hilton v. Braunskill, 481 U.S. 770 (1987) 4

Murphy v. State, No. AP-77,112, 2023 WL 6241994 (Tex. Crim. App. Sep. 26, 2023) 2, 7, 13

Netherland v. Tuggle, 515 U.S. 951 (1995) 9, 10

Nken v. Holder, 556 U.S. 418 (2009) 4

Price v. Dunn, 139 S. Ct. 1533 (2019) 14

Ramirez v. Collier, 595 U.S. 411 (2022) 15

Rhines v. Weber, 544 U.S. 269 (2005) 15

Skinner v. Switzer, 562 U.S. 521 (2011) 10

United States v. Salerno, 481 U.S. 739 (1987) 11

Utah v. Evans, 536 U.S. 452 (2002) 13

Statutes

Tex. Code Crim. Proc. art. 64.03 2

Tex. Code Crim. Proc. art. 64.03(a)(2)(B) 13

INTRODUCTION

Plaintiff-Respondent Jedidiah Murphy murdered 80-year-old Bertie Cunningham by shooting her in the head, locking her in the trunk of her car, and eventually dumping her body in a creek. In 2001, a Texas jury convicted him of capital murder and sentenced him to die. Murphy was scheduled to be executed on October 10, 2023. But just thirteen days from his scheduled execution, Murphy filed a civil-rights complaint in the district court challenging Texas's postconviction DNA testing statute and moved for a stay of execution. Appendix (App.) at 1a–22a. On October 6, 2023, the district court granted the stay. App. at 55a–60a. Defendant-Petitioner immediately moved to vacate in the Fifth Circuit Court of Appeals. In a 2-1 decision, the Court of Appeals held Petitioner's motion in abeyance pending litigation in another case. App. at 82a–105a.

The facts underlying this dispute are simple. Chapter 64 of the Texas Code of Criminal Procedure affords Texas inmates a path to court-ordered DNA testing of evidence that might be used to attack their convictions. Tex. Code Crim. Proc. art. 64.03. In 2011, the CCA held that Chapter 64 did not entitle inmates to DNA testing of evidence that only

related to an inmate's sentence (the *Gutierrez* rule). *Ex parte Gutierrez*, 337 S.W.3d 883, 901 (Tex. Crim. App. 2011).[1] Murphy now complains this rule prohibits him from seeking DNA testing of evidence that might disprove an extraneous offense that was presented at the punishment phase of his trial—specifically that, in 1997, he kidnapped Sherryl Wilhelm and stole her car. *Murphy v. Davis*, 901 F.3d 578, 583–84 (5th Cir. 2018);[2] App. at 49a–50a. Despite the fact that the *Gutierrez* rule has existed for twelve years, Murphy waited until September 27, 2023, under two weeks from his execution date, to file his lawsuit under 42 U.S.C. § 1983, claiming that the *Gutierrez* rule violates his constitutional rights.

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[1] Murphy applied for touch DNA testing related to an extraneous offense presented at the punishment phase of his trial. He filed his motion in the trial court on March 24, 2023, when it became clear the State was seeking an execution date. *Murphy v. State*, No. AP-77,112, 2023 WL 6241994, at *5 (Tex. Crim. App. Sep. 26, 2023); *see also* Tex. Code Crim. Proc. art. 64.03 (statute permitting DNA testing). The trial court denied testing on the grounds that Chapter 64 of the Texas Code of Criminal Procedure does not permit testing of evidence that only relates to the punishment phase of trial and that Murphy's motion was made for the purpose of delay. *Murphy*, 2023 WL 6241994, at *3–5. The Texas Court of Criminal Appeals (CCA) affirmed the judgment of the trial court, finding that both grounds for denial were not error. *Id.*

[2] Wilhelm identified Murphy as her assailant at the punishment phase of trial. *Murphy*, 901 F.3d at 583–84.

App. at 1a–15a. Murphy moved for a stay of execution to resolve that lawsuit. App. at 16a–22a.

Over Petitioner's opposition, the district court granted the stay, noting that a similar claim challenging the *Gutierrez* rule is pending in the Fifth Circuit. App. at 55a–60a.[3] In its order, the district court made no analysis of the merits of Murphy's lawsuit, did not explain how he would ever obtain DNA testing if he won his suit given the state court's alternative and dispositive holding that his lawsuit was merely a delay tactic, and did not explain how the testing would show Murphy did not commit the extraneous offense in question. *Id*. Most egregiously, the district court did not utter a word about the last-minute nature of Murphy's lawsuit. *Id*.

Petitioner raised these complaints in his motion to vacate the stay of execution, filed in the Fifth Circuit. Instead of vacating the stay, the Fifth Circuit only compounded the error by holding Petitioner's motion in abeyance and making the very same mistakes as the district court—noting only the pending appeal in *Gutierrez* and making no mention of

[3] *See Gutierrez v. Saenz*, No. 21-70009 (5th Cir.).

whether the claim had any merit or whether Murphy would suffer any injury and failing to address whether Murphy should be denied relief due to his abusive and dilatory litigation tactics. App. at 82a–85a.

The dissent from the Fifth Circuit's decision in this case succinctly described the rationale of both the majority opinion and the district court:

> The majority opinion is grave error. It succumbs to a vapid last-minute attempt to stay an execution that should have occurred decades ago.

App. at 86a. (Smith, J., dissenting). Petitioner now asks this court to remedy that "grave error" by vacating the district court's order staying Murphy's execution.

REASONS FOR VACATING STAY OF EXECUTION

"Last-minute stays [of execution] should be the extreme exception, not the norm[.]" *Bucklew v. Precythe*, 139 S. Ct. 1112, 1134 (2019). Thus, "[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. 573, 584 (2006). (quoting *Nelson v. Campbell*, 541 U.S. 637, 650 (2004)). Such a

presumption recognizes that "federal courts can and should protect States from dilatory or speculative suits" *Hill*, 547 U.S. 585. And in doing so, a reviewing court must also "take into consideration . . . obvious attempt[s] at manipulation" made by inmates bringing forth long available claims at the last minute. *Gomez v. United States Dist. Court*, 503 U.S. 653, 654 (1992) (per curiam).

Moreover, "[f]iling an action that can proceed under § 1983 does not entitle the complainant to an order staying an execution as a matter of course." *Hill*, 547 U.S. at 584. A request for a stay "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*, 541 U.S. at 649–50. Therefore, Murphy must satisfy all the requirements for a stay, including a showing of a significant possibility of success on the merits. *Id.* (citing *Barefoot v. Estelle*, 463 U.S. 880, 895–96 (1983)). When a stay of execution is requested, 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.

Nken v. Holder, 556 U.S. 418, 434 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)).

Murphy's request for a stay of execution cannot survive these standards. He has had twelve years to challenge the *Gutierrez* rule and only filed a lawsuit asserting such a claim thirteen days from his execution. The district court and Fifth Circuit egregiously failed to even *mention that fact*. Moreover, the district court and Fifth Circuit both failed to correctly apply every single one of the *Nken* factors. Neither conducted any merits review of Murphy's claim to probe it for potential success. They both failed to explain Murphy's irreparable injury. And both completely ignored Murphy's dilatory and manipulative tactics in finding the public interest weighed in favor of granting a stay. These erroneous analyses runs counter to this Court's longstanding disavowal of such abusive attempts to delay execution. The district court must be reversed, and the stay vacated.

ARGUMENT

I. The District Court Erred By Failing to Apply a Presumption Against the Grant of a Stay, Given that Murphy Challenges a Legal Opinion from *Twelve* Years Ago.

"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); *see also Gomez*, 503 U.S. at 654 (per curiam) ("A court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief."). In a nearly identical scenario, this Court recently vacated a stay of execution because the inmate waited until ten days before his execution to seek relief. *See Dunn v. Ray*, 139 S. Ct. 661, 661 (2019).

Given the blatantly last-minute nature of Murphy's lawsuit,[4] his request for a stay should be similarly rejected. Murphy challenges the

[4] As explained *supra* n.1, the CCA has already found that Murphy's state-court motion for DNA testing was submitted for purposes of delay. *Murphy*, 2023 WL 6241994, at *4–5. Murphy only sought state-court testing in March 2023, when the State began seeking an execution date. *Id*.

CCA's interpretation that Chapter 64 does not apply to punishment-related evidence. App. at 1a–15a. But that interpretation came about *twelve years ago*. *Gutierrez*, 337 S.W.3d at 901. "This claim could have been brought more than a decade ago. There is no good reason for this abusive delay, which has been compounded by last-minute attempts to manipulate the judicial process." *Gomez*, 503 U.S. at 654.[5]

Yet the district court and the Fifth Circuit erroneously refused to apply the equitable presumption against a stay of execution. App. at 55a–60a, 82a–85a. Nor did either court utter a single word about manipulative delay. *Id*. Again, this delay yields a "'strong equitable presumption' that no stay should be granted." *Hill*, 547 U.S. at 584. The lower court's disregard of such well-established precedent, and its abdication of a duty to protect the State against" dilatory or speculative suits[,]" is clearly reversible error. *Id*. at 585.

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[5] In his reply brief in the lower court, Murphy argued that he filed his § 1983 lawsuit on September 26, 2023, the same day that the CCA affirmed the denial of DNA testing. App. at 52a. But Murphy did not need to wait on a ruling from the CCA to file his lawsuit. As he argued in his reply, *he is not attacking the judgment of the CCA*. App. at 50a. So, if Murphy is not seeking reversal of the September 26, 2023 judgment, but is instead seeking prospective declaratory and injunctive relief, why did he have to wait until September 26, 2023, to file his lawsuit? Furthermore, the CCA found that Murphy's Chapter 64 DNA motion was a delay tactic. Murphy's previous delay tactic cannot serve as justification for the current one.

II. The District Court Erred When It Conducted No Review of the Merits of Murphy's Claim.

Murphy's lawsuit, in substance, argues that Chapter 64's exclusion of punishment-related evidence is a barrier to a capital inmate's ability to show innocence of the death penalty under Article 11.071 § 5(a)(3) of the Texas Code of Criminal Procedure. App. at 7a–11a. Murphy argues that the right to show he is innocent of the punishment of death under § 5(a)(3) establishes a liberty interest. *Id*. And he therefore contends that denying him DNA testing for punishment related evidence violates that liberty interest under *District Attorney's Office for the Third Judicial District v. Osborne*, 557 U.S. 52, 68 (2009).

The district court below erroneously treated the pending appeal of the *Gutierrez* rule in another case as entitling Murphy to an automatic stay, as did the Fifth Circuit. App. at 58a–59a. This Court has previously found that a pending petition for certiorari does not entitle an inmate to a stay of execution. *Autry v. Estelle*, 464 U.S. 1, 2–3 (1983). *Netherland v. Tuggle* is also particularly instructive. 515 U.S. 951 (1995). In *Tuggle*, the Fourth Circuit Court of Appeals stayed Tuggle's execution pending his filing a petition for writ of certiorari to this Court. *Id.* at 951. This

Court reversed, finding that the Fourth Circuit's failure to inquire into the substantive merits of a prospective certiorari petition was error:

> There is no hint that the court found that "four Members of th[is] Court would consider the underlying issue sufficiently meritorious for the grant of certiorari" or that "a significant possibility of reversal" existed . . . We think the inescapable conclusion is that the Court of Appeals mistakenly believed that a capital defendant as a matter of right was entitled to a stay of execution until he has filed a petition for certiorari in due course. But this view was rejected in *Autry*[.]

Id. at 952 (internal citations omitted).

The lower courts' analyses here cannot be squared with *Tuggle*. In determining that Murphy could show a likelihood of success on the merits, the district court, with no analysis as to the actual merits of such a claim, simply found Murphy's claim to be a "live issue before the Fifth Circuit Court of Appeals." App. at 59a. The Fifth Circuit did no better, only pointing to the ongoing *Gutierrez* litigation, and declining to even rule on the motion to vacate the stay of execution until "the release of the opinion in *Gutierrez*." App. at 84a–85a.

Like the Fourth Circuit in *Tuggle*, the courts below failed to explain whether there was a "significant possibility" that the inmate's claim in that appeal was likely to be meritorious. Such an abdication of any real

merits review before granting a stay of execution is akin to the "automatic stay pending certiorari litigation" that this Court rejected in *Autry* and *Tuggle*.

Had either court done the appropriate analysis, they would have discovered that Murphy could not show a likelihood of success on the merits. "[E]very court of appeals to have applied the *Osborne* test to a state's procedure for postconviction DNA testing has upheld the constitutionality of it." *See Cromartie v. Shealy*, 941 F.3d 1244, 1252 (11th Cir. 2019) (quoting *Skinner v. Switzer*, 562 U.S. 521, 525 (2011)). *See, e.g., Garcia v. Texas*, 564 U.S. 940, 941 (2011) ("It is our task to rule on what the law is, not what it might eventually be.").

And Murphy's facial challenge to Texas's procedure for postconviction DNA testing fares no better. "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). Murphy cannot meet such a burden, as Texas applicants may certainly avail themselves of their rights under

§ 5(a)(3) without DNA testing. *See Ex parte Blue*, 230 S.W.3d 151, 162–63 (Tex. Crim. App. 2007) (holding that a prima facie claim of intellectual disability meets the requirements of § 5(a)(3)).[6] As the dissenting judge below noted, "Murphy's procedural due process claim falters at the starting line because he fails to make the necessary showing successfully to mount a facial challenge to the statute." App. at 95a (Smith, J., dissenting). No other judge at this point has even tried to counter this argument. That's because, as the dissent below convincingly explained, the merits of Murphy's claim crumble upon review. App. at 94a–101a. (Smith, J., dissenting).

III. The Lower Courts Erred in Failing to Explain What Irreparable Injury Murphy Will Suffer Absent a Stay of Execution.

To warrant a stay, Murphy must show a "likelihood that irreparable harm will result if that decision is not stayed." *Barefoot*, 463 U.S. at 895. In granting the stay of execution, the district court below,

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[6] In fact, Murphy just recently raised several arguments in a subsequent habeas application challenging his death sentence under § 5(a)(3). *Ex parte Murphy,* No. WR-70,832-05, 2023 WL 6466676, at *1 (Tex. Crim. App. Oct. 3, 2023). While that application was dismissed, *id.* at *1, it still underscores the fact that subsequent claims may be presented under § 5(a)(3) without DNA testing.

without any explanation, found "irrevocable harm that would result if this live issue were not first adjudicated by the courts." App. at 60a. Worse than that, the Fifth Circuit did not even bother to cite that factor at all. *See* App. at 82a–85a.

Had either court properly applied that factor, they could not have weighed it in Murphy's favor. For the reasons explained above, Murphy cannot win his suit, and thus declining to stay his execution will result in no injury. But even if *he does* win his suit, he cannot obtain DNA testing. Murphy seeks injunctive and declaratory relief against Petitioner enjoining him from not arguing the *Gutierrez* rule in future state-court DNA proceedings. App. at 13a. Assuming such relief could be granted,[7] the lower court never explained why Petitioner could not simply oppose DNA testing on an alternative ground for denying Chapter 64

[7] This Court's recent opinion in *Reed* did not purport to stand for the astounding proposition that a federal district could enjoin a district attorney from opposing DNA testing in court or from refusing discretionary testing. *Reed v. Goertz*, 598 U.S. 230, 234 (2023) (fining only that a federal court order concluding that Chapter 64 violates due process would only "increase [] the likelihood" that "the state prosecutor would grant access to the requested evidence"); *see also id.* at 249–50 (Thomas, J., dissenting) ("[I]t would only be fair to explain what change in conduct would be legally required of [the district attorney] if Reed prevailed on his due process claim. The majority fails to do so.").

testing—that Murphy seeks it for the purpose of unreasonable delay.[8] Tex. Code Crim. Proc. art. 64.03(a)(2)(B) (requiring a movant show that "the request for the proposed DNA testing is not made to unreasonably delay the execution of sentence or administration of justice"). Given that the CCA already found Murphy failed to show his first Chapter 64 motion was not made for the purposes of unreasonable delay, it follows that he would fail to show otherwise in a second Chapter 64 motion. *Murphy*, 2023 WL 6241994, at *5 ("Under the facts in this case, we hold that the record supports the trial court's finding of unreasonable delay.").

The dissent below recognized that this unreasonable delay finding was fatal for Murphy:

> However, the procedural posture of this case is unique. The CCA denied Murphy's request for DNA testing both because Chapter 64 bars it as a matter of law and because Murphy had unreasonably delayed in requesting DNA testing . . .

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[8] This alternative ground also distinguishes this situation from *Reed*. The majority in *Reed* reasoned that "if a federal court concludes that Texas's post-conviction DNA testing procedures violate due process, that court order would eliminate the state prosecutor's justification for denying DNA testing. It is 'substantially likely' that the state prosecutor would abide by such a court order." 598 U.S. at 234 (citing *Utah v. Evans*, 536 U.S. 452, 464 (2002)). But in this case, the declaratory judgment and injunction sought by Murphy *would not* "eliminate the state prosecutor's justification for denying DNA testing" because Petitioner could justify his opposition through the unreasonable delay requirement of Chapter 64.

> This second holding is crucial because, even if the application of Chapter 64 violates Murphy's procedural due process rights, he still would not be entitled to the DNA testing he seeks under the state court's alternative holding of unreasonable delay.

App. at 101a.

Murphy also fails to explain how the DNA testing sought will lead to relief. As mentioned above, Murphy seeks touch DNA testing of belongings found in Wilhelm's car the next day, arguing that such evidence would reveal the true perpetrator.[9] App. at 73a–74a. But the presence of another's touch DNA on the property would not be exculpatory given the "ubiquity" of touch DNA. *Reed v. State*, 541 S.W.3d 759, 771 (Tex. Crim. App. 2017); *see also id.* at 777 (describing how epithelial cells from a person can be left by another person based on an "exchange principle"). In any event, rebutting the Wilhelm kidnapping would not have affected the jury's decision to sentence Murphy to death

[9] While Murphy has been less clear about his theory in his § 1983 lawsuit, his motion for DNA testing in the trial court made the specific argument that, since his trial, "DNA testing has evolved to now include touch or handler DNA." App. at 73a–74a.

given the aggravating evidence against Murphy,[10] including his violent history of threatening to harm a coworker, holding a gun to a woman's head and asking if she was "afraid to die," and abusing his live-in girlfriend. *Murphy*, 901 F.3d at 583.

Murphy's "strategy" in bringing such a "vapid last-minute attempt" to stay his execution "is no secret, for it is the same strategy adopted by many death-row inmates with an impending execution: bring last-minute claims that will delay the execution, no matter how groundless. The proper response to this maneuvering is to deny meritless requests expeditiously." *Price v. Dunn*, 139 S. Ct. 1533, 1540 (2019) (Thomas, J., concurring in denial of certiorari).

IV. The District Court Erroneously Gave Short Shrift to the Public's Interest in a Timely Enforcement of Murphy's' Criminal Sentence.

The State and crime victims have a "powerful and legitimate interest in punishing the guilty." *Calderon v. Thompson*, 523 U.S. 538, 556 (1998) (citation omitted). And "[b]oth the State and the victims of

[10] Before a Texas capital defendant is sentenced to death, a Texas jury must determine that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Tex. Code Crim. Proc. art. 37.071 § 2(b)(1);

crime have an important interest in the timely enforcement of a [death] sentence." *Bucklew*, 139 S. Ct. at 1133 (quotation omitted); *see Nelson*, 541 U.S. at 648 ("a State retains a significant interest in meting out a sentence of death in a timely fashion"); *Gomez*, 503 U.S. at 654 ("[e]quity must take into consideration the State's strong interest in proceeding with its judgment"). Once post-conviction proceedings "have run their course . . . finality acquires an added moral dimension. Only with an assurance of real finality can the State execute its moral judgment in a case. Only with real finality can the victims of crime move forward knowing the moral judgment will be carried out." *Calderon*, 523 U.S. at 556.

The district court paid token reference to these authorities, before concluding that the "public interest will best be served by allowing time for the fair adjudication of the important issues raised in Murphy's complaint[.]" App. at 60a. Worse, the Fifth Circuit did not acknowledge them at all, nor did it weigh these interests against the other *Nken* factors. App. at 84a–85a. These analyses were clearly erroneous, given that Murphy has been allowed *more than a decade* to fairly adjudicate

these issues and that he failed to do so. The lower court and Fifth Circuit inexplicably ignored that "capital petitioners might deliberately engage in dilatory tactics to prolong their incarceration and avoid execution of a sentence of death." *Rhines v. Weber*, 544 U.S. 269, 277–78 (2005). They also ignored that "last-minute claims arising from long-known facts, and other 'attempt[s] at manipulation' can provide a sound basis for denying equitable relief in capital cases." *Ramirez v. Collier*, 595 U.S. 411, 434 (2022) (quoting *Gomez*, 503 U.S. at 654). And finally, they ignored that Murphy's last-minute lawsuit has all the red flags of such manipulative, abusive, and dilatory tactics.

Instead of heeding these authorities, the district court below used Murphy's delay to find the public-interest factor weighed *in his favor*—specifically by concluding that the public interest lies in staying his execution so that he could pursue a lawsuit he didn't bother filing until two weeks before his execution. App. at 60a. Such a finding cannot be squared with Court's precedent. *See Hill*, 547 U.S. 585. ("The federal courts can and should protect States from dilatory or speculative suits" in the last-minute litigation context). A capital inmate who waits until

the eleventh hour to raise long-available claims should not get to complain that he needs more time to litigate them.

Given the frivolity of Murphy's claims, his lack of irreparable harm, the State's interest in timely enforcement of its judgments, and Murphy's abusive litigation tactics, "the district court abused its discretion in concluding the balance of equities weighs in favor of granting Murphy's motion for stay of execution." App. at 101a–102a. (Smith, J., dissenting).

CONCLUSION

For the above reasons, and those ably set out by the dissent below, the Defendant-Petitioner requests that this Court vacate the district court's order staying Murphy's execution.

Respectfully submitted,

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