No. 16A750

In the Supreme Court of the United States

TERRY EDWARDS
Applicant,

v.

BRYAN COLLIER, ET AL.
Respondents.

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

BRIEF IN OPPOSITION TO MOTION FOR STAY OF EXECUTION

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

ADRIENNE MCFARLAND
Deputy Attorney General
for Criminal Justice

ELLEN STEWART-KLEIN
Assistant Attorney General

EDWARD L. MARSHALL
Chief, Criminal Appeals Division

MATTHEW OTTOWAY
Assistant Attorney General
Counsel of Record

Post Office Box 12548, Capitol Station
Austin, Texas 78711
Tel: (512) 936-1400
Fax: (512) 320-8132
Email: *matthew.ottoway@oag.texas.gov*

Counsel for Respondent

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

Cases

Statutes and Rules

Rules

BRIEF IN OPPOSITION

Terry Darnell Edwards (Edwards) is scheduled for execution after 6:00 p.m., Thursday, January 26, 2017. Edwards was properly convicted of capital murder and sentenced to die for the killing of Mickell Goodwin. Edwards's direct appeal, state habeas corpus application, federal habeas corpus petition, application for a COA, certiorari petition, last-minute successive state habeas corpus application, last-minute Rule 60(b) motion, and last-minute stay motion have been rejected by the courts.

In addition to this slew of litigation, Edwards—along with fellow Plaintiffs Jeffery Wood, Rolando Ruiz, Robert Jennings, and Ramiro Gonzales—has challenged Texas's execution protocol via a 42 U.S.C. § 1983 action. Specifically, Edwards complains about Texas's use of compounded pentobarbital as the lethal-injection drug. Following the district court's denial of any relief, Plaintiffs appealed to the United States Court of Appeals for the Fifth Circuit. There, they asked the court for stays of execution pending appeal. However, the Fifth Circuit denied the motion for the stays, and Plaintiffs did not appeal. Now, the time for filing a petition for a writ of certiorari contesting that ruling has passed.[1]

---

[1] Petitions for certiorari must be filed within ninety days of the lower court's decision. S. Ct. R. 13.1. In civil cases, the Court considers that time period jurisdictional and will not accept a petition filed outside the time allowed. S. Ct. R. 13.2 (citing 28 U.S.C. § 2101(c)).

Despite the expiration of his time to seek review, Edwards has filed an application asking this Court to stay his execution. *See generally* Application for Stay of Execution (Appl.). Edwards believes that the Court should issue a stay to allow completion of his appeal challenging the denial of his § 1983 action. *Id*. However, the Court should decline to grant a stay based on the dilatory nature of Edwards's motion and the meritless character of the underlying claims. To begin, Edwards had the opportunity to challenge the Fifth Circuit's decision denying the stay in his case starting in September 2016, when the Fifth Circuit's decision was rendered. Had Edwards moved with alacrity, a petition for certiorari seeking review of that decision could have been filed and considered in the normal course of business. Instead, Edwards has waited until little more than twenty-four hours before his execution to file this application for stay—thereby imposing maximum inconvenience on the Court and the Defendants. Moreover, Edwards's underlying claims are plainly meritless, as reflected by the Fifth Circuit's thorough opinion.

In light of Plaintiff'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. Likewise, state and federal habeas review of Edwards's conviction is complete, and the State and the victims have an extremely strong interest in seeing Edwards's sentence finally carried out at this point. Any stay of execution is therefore unwarranted, and Edwards's motion should be denied.

STATEMENT OF THE CASE

I. Facts of the Crime

The Texas Court of Criminal Appeals (CCA) summarized the facts of Edwards's crime as follows:

> On the morning of July 8, 2002, [Edwards] and another man robbed and killed two clerks at a Dallas Subway sandwich shop. Both victims were shot in the head from only inches away. [Edwards] later gave a statement in which he admitted being inside the sandwich shop but claimed that the other man, "T-Bone," did the shooting. [Edwards] acknowledged having the money stolen from the store and the gun used to kill the victims, but claimed that "T-Bone" gave him the gun when they left the store. [Edwards] had worked at that particular Subway some months earlier, but he had been fired when it appeared that he had been stealing money from the register. [Edwards] had previously been fired from another Subway shop for misappropriating store funds under his control.
>
> The State also presented evidence that [Edwards] had been charged with felony theft and placed on deferred adjudication community supervision on March 25, 1992. On November 7, 1997, [Edward's] was adjudicated guilty and sentenced to five years in prison. On that same day, he was also convicted of possession with intent to deliver cocaine and sentenced to five years and a $500 fine.
>
> Michael Weast testified that he was in a Subway shop in Fort Worth at about 9:00 p.m. on April 26, 2002. As he was preparing to leave, two men came in and began acting suspiciously. One of the men pulled a gun and ordered the people behind the counter to lie down while the other man apparently took the video surveillance tape. As they drove off from the Subway, the robbers almost ran down a uniformed deputy sheriff who drew his gun and

> yelled at them to stop. Weast identified [Edwards] as the perpetrator without the gun.

Edwards v. Texas, No. AP-74,844, 2006 WL 475783, at *1 (Tex. Crim. App. Mar. 1, 2006).

II. State and Federal Habeas Proceedings

Edwards was convicted of capital murder and was sentenced to death for the murder of Mickell Goodwin. SHCR206–09.[2] The CCA affirmed his conviction on automatic direct appeal. *Edwards*, 2006 WL 475783, at *4. While direct appeal was pending, Edwards filed a state habeas application. SHCR.2. The CCA adopted the findings of the trial court and denied relief. *Ex parte Edwards*, No. WR-73,027, 2009 WL 4932198, at *1 (Tex. Crim. App. Dec. 16, 2009).

Edwards filed a federal petition for a writ of habeas corpus, but the district court denied any relief. *Edwards v. Stephens*, No. 3:10-CV-6-M, 2014 WL 3880437 (N.D. Tex. Aug. 6, 2014). Edwards requested a COA from the Fifth Circuit Court of Appeals, which denied his request. *Edwards v. Stephens*, 612 F. App'x 719 (5th Cir. 2015). This Court denied Edwards's petition for a writ of certiorari. *Edwards v. Stephens*, 136 S. Ct. 403 (2015).

---

[2] "SHCR" refers to the state habeas clerk's record, followed by the relevant page number(s).

The state trial court set Edwards's execution for May 11, 2016. Order Setting Execution Date, *State v. Edwards*, No. F02-15086-N (195th Dist. Ct., Dallas County, Tex. Feb. 1, 2016). The date was thereafter changed to October 19, 2016. Order Modifying Execution Date, *State v. Edwards*, No. F02-15086-N (195th Dist. Ct., Dallas County, Tex. Apr. 6, 2016). Edwards was then set for execution in October, but the date was eventually postponed to January 26, 2017. Order Modifying Execution Date, *State v. Edwards*, No. F02-15086-N (195th Dist. Ct., Dallas County, Tex. Sept. 29, 2016).

On January 10, 2017—a mere sixteen days before his scheduled execution—Edwards filed his first Rule 60(b) motion seeking to reopen the district court's 2014 judgment and stay his execution. The district court found that Edwards's Rule 60(b) motion constituted an impermissible successive federal application and transferred it to the court of appeals so that Edwards could seek authorization. *Edwards v. Davis*, No. 3:10-CV-6-M, 2017 WL 253065 (N.D. Tex. Jan. 19, 2017). Edwards appealed the district court's Rule 60(b) denial and transfer order to the Fifth Circuit and sought a stay of execution. Pet'r Br. & Mot. Stay Execution, *In re Edwards*, No. 17-10066 (5th Cir. Jan. 25, 2017). The Fifth Circuit agreed with the district court that Edwards's Rule 60(b) motion was actually a second-or-successive petition and alternatively concluded that he had not demonstrated extraordinary circumstances necessary to obtain Rule 60(b) relief. *In re Edwards*, No. 17-

10066, slip op. at 5–15 (5th Cir. Jan. 25, 2017). The court also found the Rule 60(b) motion untimely and denied his accompanying request for stay of execution. *Id*. at 15–18. Edwards then filed what he entitled a "Motion to Strike," asking the Fifth Circuit to vacate a portion of its opinion. Pet'r Mot. Strike, *In re Edwards*, No. 17-10066 (5th Cir. Jan. 25, 2017). That motion remains pending.

Edwards then filed his second Rule 60(b) motion on the morning of his scheduled execution. Pet'r Second Rule 60(b) Mot., *Edwards v. Davis*, No. 3:10-CV-6-M (N.D. Tex. Jan. 26, 2017), ECF No. 95. That motion, too, remains pending.

In addition to federal litigation, Edwards, on January 18, 2017—a mere eight days before his scheduled execution—filed a successive state habeas application, which the CCA denied as abuse of the writ. *Ex parte Edward*s, No. WR-73,027-02, slip op. (Tex. Crim. App. Jan. 24, 2017) (per curiam) (not designated for publication). Edwards has not attempted to appeal this decision.

III. Edwards's § 1983 Lawsuit

Edwards and his fellow Plaintiffs filed a § 1983 suit on August 12, 2016, the primary basis being that the use of compounded pentobarbital is cruel and unusual. ROA.8–49.[3] Plaintiffs also moved for expedited discovery and

[3] "ROA" refers to the record on appeal in Edwards's § 1983 lawsuit followed by page number(s).

injunctive relief. ROA.98–165. Defendants moved to dismiss for failure to state a claim and opposed Plaintiffs' motions. ROA.254–305.

On August 16, 2016, the district court held a hearing. ROA.330, 422–90. Two days later, Plaintiffs moved to stay their executions pending appeal. ROA.333–37. On August 19, 2016, the district court dismissed Plaintiffs' suit and denied all then-pending motions. ROA.365–79.

Plaintiffs appealed to the Fifth Circuit, where the matter remains currently pending. *Wood v. Collier*, No. 16-20556 (5th Cir.). Plaintiffs also sought stays of execution pending their appeal. The Fifth Circuit denied Plaintiffs motion in a published opinion dated September 12, 2016. *Wood v. Collier*, 836 F.3d 534 (5th Cir. 2016). No petition for certiorari was filed.

ARGUMENT

I. Standard of Review

A stay of execution is an equitable remedy. *Hill v. McDonough*, 547 U.S. 573, 584 (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), *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.* In order 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); *see Calderon v. Thompson*, 52 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)) . "A stay of execution should first be sought from the Court of Appeals, and this Court generally places considerable weight on the decision reached by the circuit courts in these circumstances." *Barefoot*, 463 U.S. at 895.

II. Edwards Has Not Made a Strong Showing That He Will Succeed on the Merits.

The Fifth Circuit well-summarized Edwards's lethal-injection complaint—"[Edwards's] primary contention is that Texas's use of compounded pentobarbital creates significant risks of unnecessary pain, and thus the state should be compelled to re-test the drug shortly before execution." *Wood*, 836 F.3d at 537. Premised on this complaint, Edwards alleged an equal protection violation—a "contention that Texas's decision to re-test the pentobarbital in the *Whitaker*[4] case and not here denies [Edwards] equal protection" and "that re-testing[5] in *Whitaker* created a right to re-testing for

---

4 *Whitaker v. Livingston*, No. H-13-2901, 2016 WL 3199532 (S.D. Tex. June 6, 2016), *appeal filed Whitaker v. Collier*, No. 16-20364 (5th Cir. June 6, 2016).

5 Edwards describes re-testing as "a vital safety measure[.]" Appl. 2. This description is odd given that he and his fellow plaintiffs initially *rejected* such a stipulation as *constitutionally insufficient*. *See* ROA.45 ("*Nor can Plaintiffs' Equal Protection claim be resolved by this Court by simply ordering that Defendants perform*

all prisoners[.]" *Id*. at 539–40 (footnote omitted). Edwards presently advances only the latter claim. Appl. 12–24.

A. Edwards does not demonstrate sure or very likely pain from the use of compounded pentobarbital.

In ignoring the Eighth Amendment, Edwards ignores the most important question concerning Texas's lethal-injection protocol—whether the use of compounded pentobarbital will inflict unconstitutional pain. Appl. 12–24. He abandons his Eighth Amendment claim before the Court because he knows it is meritless—"Texas alleges, and *Appellants do not dispute*, that Texas has used compounded pentobarbital to execute thirty-two prisoners since 2013 without issue." *Wood*, 836 F.3d at 537 (emphasis added). The number is now thirty-four and still without issue.[6] Given this fact, the Fifth Circuit persuasively reasoned that Edwards failed to make a showing of harm

---

testing 'shortly before' each execution. Specific parameters must be set down, in compliance with the relevant science: the minimal amount of time before each execution during which the drugs must be tested; the type of tests conducted; the minimal qualifications of the laboratory conducting the testing; and other relevant factors." (emphasis added)).

[6] Texas has now executed thirty-four inmates using compounded pentobarbital without issue. Michael Graczyk, *Texas Carries Out First US Execution of 2017*, (Jan. 11, 2017, 9:51 PM EST), http://bigstory.ap.org/article/2f04f2b63590487cabebdc1a8667d956/convicted-killer-2-fort-worth-set-die-wednesday ("Christopher Wilkins, 48, was declared dead at 6:29 p.m., 13 minutes after a lethal injection of pentobarbital."); Michael Graczyk, *Texas Man Who Killed Neighbor Couple Has Been Executed* (Oct. 5, 2016, 8:59 PM EDT), http://bigstory.ap.org/article/fde849e31e3a49dd8196d33b65d7ad35/texas-man-who-killed-2-neighbors-wants-execution-proceed ("[Barney Fuller] took a couple of breaths, then began snoring. Within 30 seconds, all movement stopped.").

under *Glossip v. Gross*, 135 S. Ct. 2726 (2015), which reiterated the Eighth Amendment standard for method-of-execution claims:

> The reality is that pentobarbital, when used as the sole drug in a single-drug protocol, has realized no such risk. The prisoners cannot avoid the facts that: (1) the district court found that at least thirty-two executions in Texas have utilized the single-drug compounded pentobarbital protocol without incident and, (2) when pentobarbital is the sole drug used to execute, unconsciousness necessarily precedes death, effectively obviating the problem of conscious pain and suffering that was oft cited as a risk of the "three-drug cocktail." Rather, relying on conjecture regarding the drugs' beyond-use dates and compounding, the prisoners urge only that "[t]esting the compounded pentobarbital shortly before its use ensures the prisoner will not suffer severe pain...." But this assertion fails to reach the Eighth Amendment bar on unnecessarily severe pain that is sure, very likely, and imminent.

Wood, 836 F.3d at 540 (footnotes omitted). The fact that TDCJ is using a process and drug that has repeatedly passed constitutional scrutiny should end the inquiry.

B. Edwards's equal protection claim lacks merit for numerous reasons.

Despite Edwards's acknowledgment of this extensive history that compounded pentobarbital is safe and painless, and thus knowing that his execution will be too, he wants more (and unnecessary) protocol (re-testing), and he cloaks his request in the language of the Equal Protection Clause. Appl. 12–20. But this attempt "to bridge this shortfall [of failing to demonstrate a substantial risk of serious harm] with equal protection language, while

creative, brings an argument that is ultimately no more than word play." *Wood*, 836 F.3d at 540.

Although Edwards did not timely challenge the Fifth Circuit's opinion in *Wood*, he devotes almost all his argument to proving it wrong—it required him to prove Eighth Amendment harm, it did not find that strict scrutiny applied, it did not find Edwards similarly-situation with the *Whitaker* plaintiffs, and it permitted a "litigation exception" to the Equal Protection Clause. *See* Appl. 12–20. Had Edwards thought that this *published* opinion was wrong, he should have challenged it in the normal course of appeal. Nonetheless, *Wood* was correctly decided but, even if there is debate on that point, Edwards fails to make a strong showing of likely success.

1. Edwards's complaint that he required to prove an Eighth Amendment violation to trigger equal protection review is illusory.

Edwards's first critique of *Wood* is that it required him to prove an Eighth Amendment violation before engaging the Equal Protection Clause. Appl. 12–15. But whether that is legally wrong or right, the Fifth Circuit simply did not do it. In Section III(A)(i) of *Wood*, the Fifth Circuit analyzed Edwards's Eighth Amendment claim, finding that he failed to meet the *Glossip* harm standard and that his equal protection allegations did not affect this failing of proof. *Wood*, 836 F.3d at 539–40. In Section III(A)(ii) of *Wood*, an entirely separate section, the Fifth Circuit then considered Edwards's equal

protection claim, finding it to be without merit and absent any discussion of compounded pentobarbital, impermissible pain, or the Eighth Amendment. *Id.* at 540–41. The "error" that Edwards ascribes to *Wood* simply does not exist.

2. The Equal Protection Clause does not apply to governmental litigation decisions.

Edwards's remaining complaints stem from the same source—he does not believe that TDCJ's litigation decision in *Whitaker* is exempt from equal protection review (the level of scrutiny to be applied and whether he is similarly situated have no significance if such a decision is exempt). Appl. 18–20. But this Court's precedent clearly walls off such discretionary decisionmaking from equal protection review when government acts as proprietor instead of regulator or lawmaker.

Edwards does not press a protected-class equal protection claim. His other option, then, is to raise an equal protection class-of-one claim—an allegation that he is being "intentionally treated differently from others similarly situated and there is no rational basis for the difference in treatment." *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam). But the Equal Protection Clause does not apply when the government is not acting as the sovereign, but is instead acting "to manage internal operation." *Engquist v. Or. Dep't of Agr.*, 553 U.S. 591, 598 (2008). As the Court has explained:

> There are some forms of state action, however, which by their nature involve discretionary decisionmaking based on a vast array of subjective, individualized assessments. In such cases the rule that people should be "treated alike, under like circumstances and conditions" is not violated when one person is treated differently from others, because treating like individuals differently is an accepted consequence of the discretion granted. In such situations, allowing a challenge based on the arbitrary singling out of a particular person would undermine the very discretion that such state officials are entrusted to exercise.

Id. at 603. Litigation decisions, such as whether to stipulate to additional compounded pentobarbital testing, fit *Engquist* perfectly. *See Wood*, 836 F.3d at 541 ("The strategic decision of the State of Texas to re-test in one case, in the context of an ever-changing array of suits attacking its use of capital punishment from all angles, is within the discretion inherent in the challenge made here."). As such, Edwards fails to raise an equal protection claim.

His retort is that *Engquist* is limited to its facts—when the government is making employment decisions. Appl. 18–19. But that ignores the rationale of *Engquist*, which the Court justified with an example outside of the employment context:

> Suppose, for example, that a traffic officer is stationed on a busy highway where people often drive above the speed limit, and there is no basis upon which to distinguish them. If the officer gives only one of those people a ticket, it may be good English to say that the officer has created a class of people that did not get speeding tickets, and a "class of one" that did. But assuming that it is in the nature of the particular government activity that not all speeders can be stopped and ticketed, complaining that one has been singled out for no reason does not invoke the fear of improper government classification. Such a complaint, rather, challenges the legitimacy

> of the underlying action itself—the decision to ticket speeders under such circumstances. Of course, an allegation that speeding tickets are given out on the basis of race or sex would state an equal protection claim, because such discriminatory classifications implicate basic equal protection concerns. But allowing an equal protection claim on the ground that a ticket was given to one person and not others, even if for no discernible or articulable reason, would be incompatible with the discretion inherent in the challenged action. It is no proper challenge to what in its nature is a subjective, individualized decision that it was subjective and individualized.

Engquist, 553 U.S. at 603–04. Given that *Engquist*'s focus is on whether the challenged governmental action is an exercise of discretion based on "subjective, individualized assessments," it is not surprising that *Engquist* has been applied to non-employment situations. *See, e.g., Integrity Collision Ctr. v. City of Fulshear*, 837 F.3d 581, 586 (5th Cir. 2016) ("[The *Engquist*] conclusion logically applies as well to a local government's discretionary decision to include or not include a company on a non-consent two list.").[7] And it is not

[7] *See also Caesars Mass. Mgmt. Co., LLC v. Crosby*, 778 F.3d 327, 336 (1st Cir. 2015) ("Although *Engquist*'s specific subject was public employment, its reasoning extends beyond its particular facts, and we agree with those federal courts that have found the case applicable beyond government staffing."); *Heike v. Guevara*, 519 F. App'x 911, 922 (6th Cir. 2013) (applying *Engquis*t to coaching decisions at a public university); *Analytical Diagnostic Labs, Inc. v. Kusel*, 626 F.3d 135, 141–43 (2d Cir. 2010) (noting some tension among courts on exactly how far *Engquist*'s reasoning should extend beyond the public employment context, but acknowledging that there are "some circumstances where *Engquist* is properly applied outside of the employment context"); *Flowers v. City of Minneapolis*, 558 F.3d 794, 799–800 (8th Cir. 2009) (applying *Engquist* to police investigations); *Douglas Asphalt Co. v. Qore, Inc.*, 541 F.3d 1269, 1273–74 (11th Cir. 2008) (applying *Engquist* to government contracting); *United States v. Moore*, 543 F.3d 891, 900 (7th Cir. 2008) (applying *Engquist* to prosecutorial and sentencing decisions).

surprising that it was applied here. *See* ROA.375 ("Allowing particular people to claim they were singled out because of the complex decisions in some cases and not others would undermine the very discretion granted to defendants in suits.").[8] Because TDCJ's litigation decision in *Whitaker* is not subject to Equal Protection Clause review, Edwards's claim fails.

3. Edwards fails to prove that he is similarly situated to the Whitaker plaintiffs.

Even if TDCJ's litigation decision were subject to Equal Protection Clause review, Edwards is not similarly situated with the *Whitaker* plaintiffs despite his contentions otherwise. Appl. 17–18. Edwards filed his § 1983 suit after a substantially similar suit—the *Whitaker* suit—had been dismissed. ROA.392–93. This timing alone placed Edwards in a worse litigation position than the plaintiffs in *Whitaker*—the same court had already found the bulk of

---

[8] The consequences of a decision not to exempt litigation decisions from Equal Protection Clause scrutiny would be troubling. A governmental litigation decision would require scrutiny at the highest levels, because it would no longer be a litigation decision—it would be governmental policy for all similar situations. *See* ROA.375 ("If the Constitution required every plaintiff to be treated the same as every other plaintiff, people could make a federal case out of every trial decision made by Texas.").

If Texas chose to give one plaintiff three depositions, but give another plaintiff in a similar lawsuit five depositions, would that decision lead to a § 1983 lawsuit? What if Texas decided to settle one claim because of talented opposing counsel, but fight another similar lawsuit because of untalented opposing counsel? Another § 1983 lawsuit? How about litigation decisions based on perceived favorability or unfavorability of a particular tribunal? Yet another § 1983 suit? And how would those § 1983 claims proceed? Could governmental attorneys be forced to disclose attorney-client-privileged material about why a settlement offer was made in one case but not in another? Could plaintiffs pry into the subjective decisionmaking made by governmental officials, undoubtedly influenced by legal advice from their counsel?

Edwards's allegations failed to state a claim. Moreover, the *Whitaker* case had been pending for two years when TDCJ made its stipulation, but Edwards filed suit just twelve days before the first execution date for the *Wood* plaintiffs. ROA.401. And because of this dilatory filing, Edwards did not have a timely Eighth Amendment challenge to the use of compounded pentobarbital, while the *Whitaker* plaintiffs did. ROA.401. Because Edwards challenges a litigation decision, and because neither he nor his fellow plaintiffs had a similar litigation position to the *Whitaker* plaintiffs, he did not make a similarly-situated showing.

4. Edwards has failed to allege or prove that TDCJ acted with discriminatory intent.

Assuming that the Equal Protection Clause did apply to litigation decisions *and* that Edwards was similarly situated to the *Whitaker* plaintiffs, his claim still fails—because he has not alleged or proven that TDCJ acted with discriminatory intent.

This Court's equal protection cases, at least those based on protected-class grounds, which provide an easier-to-meet standard for plaintiffs than class-of-one claims, "have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact." *Washington v. Davis*, 426 U.S. 229, 239 (1976). Rather, "[p]roof of

racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977). "Where a claim is invidious discrimination in contravention of the First and Fifth Amendments, our decisions make clear that the plaintiff must plead and prove that the defendant acted with discriminatory purpose." *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009) (citing *Washington v. Davis*, 426 U.S. at 240); *see id.* at 682 ("[T]he complaint must contain facts plausibly showing that petitioners purposefully adopted a policy of classifying post-September-11 detainees as 'of high interest' because of their race, religion, or national origin.").

Thus, assuming that Edwards is entitled to the most favorable equal protection standard, he has never alleged that TDCJ's litigation decision was motivated by a discriminatory purpose. Thus, his equal protection claim fails for yet another reason. *Cf. Iqbal*, 556 U.S. at 682 (affirming dismissal of an equal protection *Bivens* claim because the plaintiff "did not show, or even intimate, that [defendants] purposefully housed detainees in ADMAX SHU due to their race, religion, or national origin").

5. TDCJ's litigation decision is supported by a rational basis.

Even if the Equal Protection Clause applied to litigation decisions and Edwards is similarly situated to the Whitaker plaintiffs and he could

demonstrate discriminatory intent, his claim still fails—because TDCJ's decision has a rational basis. Specifically, Defendants made the stipulation in *Whitaker* in the midst of ongoing litigation that had not yet been resolved. By contrast, when Edwards and his fellow plaintiffs filed their § 1983 suit, the issues presented were weaker than those in presented in *Whitaker* (and others had largely been resolved by the *Whitaker* litigation in TDCJ's favor). Accordingly, TDCJ had good reason not to again stipulate in Wood. In this sense, the rational basis for TDCJ's decision only further demonstrates that Edwards is not similarly situated to the *Whitaker* plaintiffs. Because a rational basis exists for TDCJ's litigation decision, Edwards's equal protection claim falters.

And Edwards's is incorrect that a higher standard—strict scrutiny—applies to his equal protection claim. Appl. 15–17. "It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33 (1973). Rather, the answer lies in assessing whether there is a [particular] right . . . explicitly or implicitly guaranteed by the Constitution." *Id.* Here, Edwards believes that he has a right to re-test compounded pentobarbital shortly before his execution; however, he provides no argument that there is a constitutional right to such re-testing. That should end the matter.

Nonetheless and instead, Edwards focuses on a much broader proposition—that he has a "fundamental right not to suffer undue pain during his execution[.]" Appl. 2. But the breadth of Edwards's argument is staggering and implicates every detail in the execution process, from the core processes to the minutiae. For example, if TDCJ changed its execution protocol from pentobarbital to another drug because of former's unavailability, would a death row inmate be able to sustain an equal protection claim because he or she was not being executed with pentobarbital like prior inmates? Or, slightly differently, suppose TDCJ determined that another drug was simply safer than pentobarbital so it switched to the new drug. Would this scenario be unconstitutional under the Equal Protection Clause merely because it concerns an execution and inmates were previously executed with the former, but arguably less safe, drug? Or would lesser details, like the date or time of an execution become constitutionally protected? Edwards's attempt at limitless constitutional enshrinement of execution process is why such matters are better left to the Eighth Amendment—which focuses on whether a specific course of action will lead to constitutionally-impermissible pain. Stated another way, Edwards must demonstrate that the challenged action is not merely related to execution protocol, but is *necessary* to ensure that his execution is performed constitutionally. As explained above, Edwards simply cannot meet this standard under the Eighth Amendment, so he cannot meet it

under the Equal Protection Clause. In this, and for all of the above reasons, Edwards does not make a strong showing of likely success on his equal protection claim and a stay should be denied.

III. Edwards Is Unlikely to Suffer Irreparable Harm.

Edwards has not demonstrated a likelihood that he will suffer irreparable harm if a stay of execution is not granted. The harm at issue is not his death, but whether his death will be accompanied by constitutionally-impermissible pain. But Edwards and his fellow plaintiffs have not shown that the present execution protocol nor the use of compounded pentobarbital will inflict such pain. Thus, the Fifth Circuit correctly held that:

> The prisoners argue the injury they will face is the possibility of severe pain during their executions, but they do not demonstrate that they are nigh sure to suffer unnecessary pain. Texas, on the other hand, proffers that compounded pentobarbital has been used in thirty-two[9] executions in the state without issue. We cannot say that Appellants have demonstrated that they are likely to suffer an irreparable injury absent a stay.

Wood, 836 F.3d at 542 (footnotes and citations omitted).

IV. 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 Plaintiff's sentences. *See Hill*, 547 U.S. at 584. Edwards participated in an

---

9 As mentioned above, the number is now thirty-four executions without incident. *See supra* Note 6.

armed robbery leaving two dead. The public's interest lies in executing sentences duly assessed, and for which years of judicial review has terminated without finding reversible error.

Moreover, Edwards and his fellow plaintiffs could have brought this suit long ago. TDCJ's execution protocol, save the drug used, has been in place since at least 2008. *See Trottie v. Livingston*, 766 F.3d 450, 452 n.1 (5th Cir. 2014). The use of a single dose of pentobarbital has been in place since July 2012. *Id.* The switch to compounded pentobarbital occurred in September 2013. *See Whitaker v. Livingston*, 732 F.3d 465, 466 (5th Cir. 2013). The stipulation occurred in October 2015. Defs. Resp. Court's Request Clarification, *Whitaker et al. v. Livingston et al.*, No. H-13-2901, 2016 WL 3199532 (S.D. Tex. June 6, 2016), ECF No. 118 (filed October 23, 2015). Thus, the factual bases of all of Edwards's claims were available more than a year ago and he "cannot excuse his delaying until the eleventh hour on the ground that he were unware of the state's intention to execute him by injecting the [compounded pentobarbital] he now challenges." *Harris v. Johnson*, 376 F.3d 414, 417 (5th Cir. 2004).

Instead of bringing this suit in a timely manner, Plaintiffs are doing "the very thing [they are] not entitled to do . . . namely, to wait until [their] execution is imminent before suing to enjoin the state's method of carrying it out." *Id.* Specifically,

> [b]y waiting until the execution date was set, [Edwards] 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 [Edwards'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. "By waiting as long as he did, [Edwards] 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." *Id*. In short, Edwards's claims "could have been brought [long] ago [and t]here is no good reason for this abusive delay." *Gomez v. U.S. Dist. Ct. N. Dist. Cal.*, 503 U.S. 653, 654 (1992).

Moreover, Edwards could have sought certiorari review of the Fifth Circuit's denial of his stay—a decision rendered on September 12, 2016—but he opted not to. This failure to appeal, which would have permitted the Court to consider the Fifth Circuit's decision without the rush and pressure of a pending execution date, must be held against Edwards. "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.

The families of Edwards's victims have waited many years to see Edwards's sentence carried out. TDCJ opposes any action that would further delay justice for them. Edwards has already passed through the state and federal collateral review processes, and he has already had two execution dates set and withdrawn. The public's interest is not advanced by postponing Edwards's execution any further.

CONCLUSION

Edwards'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 Edwards's sentence is not outweighed by the unlikely and speculative possibility that certiorari will someday be granted. Edwards 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.

Respectfully submitted,

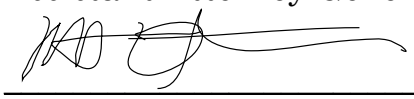
KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

ADRIENNE MCFARLAND
Deputy Attorney General
for Criminal Justice

EDWARD MARSHALL
Chief, Criminal Appeals Division

ELLEN STEWART-KLEIN
Assistant Attorney General



MATTHEW OTTOWAY
Assistant Attorney General
Counsel of Record

P.O. Box 12548, Capitol Station
Austin, Texas 78711
Tel: (512) 936-1400
Fax: (512) 320-8132
Email: *matthew.ottoway@oag.texas.gov*

Attorneys for Respondent