IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CHRISTOPHER ANTHONY YOUNG, *Plaintiff*,	§	
	§	No. 4:18–cv–02420
	§	Hon. Keith P. Ellison
DAVID GUTIERREZ, et al., *Defendants*.	§	**DEATH PENALTY CASE**

DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFF YOUNG'S MOTION FOR A STAY OF EXECUTION WITH BRIEF IN SUPPORT

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RESPONSE IN OPPOSITION

On November 21, 2004, Plaintiff Christopher Anthony Young forced his way into a woman's apartment and sexually assaulted her at gunpoint in view of her three young daughters. 17 RR 77–78, 80–81, 84–85.[1] Young then stole the woman's car. 12 RR 33–35; 17 RR 90–92. Young drove down the block to a convenience store, where he attempted to rob the owner and shot him to death when he resisted. 12 RR 49; 13 RR 52, 58; 19 RR SX 8. The murder was captured on tape by the store surveillance camera.

Pursuant to the order of the trial court, Young is scheduled to be executed sometime after 6:00 P.M. on July 17, 2018. As shown below, Young has already availed himself of the full panoply of state and federal appeals available to death-row inmates in Texas. Now, a mere *four* days before his

[1] "ECF No. __" refers to entries on this Court's electronic docket sheet, available on PACER. "RR" refers to the court reporter's trial transcripts. "SX" refers to the State's trial exhibits. "CR" refers to the clerk's record of documents that were filed during petitioner's trial. "SHCR" refers to the clerk's record of petitioner's state habeas proceeding. References are preceded by volume number and followed by page number or exhibit number, where applicable.

scheduled execution, Young filed the instant civil rights lawsuit alleging that the Texas Board of Pardons and Paroles voted against recommending commutation of his sentence of a reprieve simply because he is an African-American. *See generally* ECF No. 1, Complaint Filed Pursuant to 42 U.S.C. § 1983 (Complaint). In his Complaint, Young argues that his circumstances are substantially similar to those of Thomas Whitaker, a white death-row inmate for whom the Board unanimously recommended clemency. Young claims that the only reason that Whitaker received clemency, and Young, did not is because Whitaker is white, and Young is black.

In conjunction with this action, Young has filed a motion for a stay of execution. ECF No. 2, Motion for a Stay of Execution Pending Disposition of Plaintiff's Complaint Filed Pursuant to 42 U.S.C. § 1983 (Stay Motion). However, Young's motion clearly fails to make the case for any stay and is instead only a meritless tactic to delay imposition of his well-deserved sentence. *Rhines v. Weber*, 544 U.S. 269, 277–78 (2005) (it is no secret that "capital petitioners might deliberately engage in dilatory tactics to prolong their incarceration and avoid execution of a sentence of death.").

A stay of execution is an equitable remedy and, as such, it "must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Hill v. McDonough*, 547 U.S. 573, 584 (2006) (citing *Nelson v. Campbell*, 541 U.S. 637, 649–650 (2004)).

Young's state and federal collateral proceedings have long run their course in the many years since he was sentenced to death. The State has a compelling interest in seeing that its laws are enforced and in carrying out executions as scheduled. Further unnecessary delay hinders that interest.

Such is especially true where, as here, Young cannot succeed on his claims. This Court lacks jurisdiction under Fifth Circuit precedent to issue stays in § 1983 suits challenging clemency proceedings. In any event, Young's claims fail to demonstrate a valid basis for relief. Supreme Court precedent makes clear that clemency is the prerogative of the executive branch, and not the business of the judiciary. Texas' procedures are completely acceptable under the Supreme Court's minimal standards governing clemency proceedings. And Young's equal protection claim is wholly speculative and conclusory. Young provides no direct evidence that any member of the Board acted with racial animus and only infers discrimination based on the disparate treatment in Whitaker's case. But Young's case is easily distinguishable from Whitaker's, as demonstrated below.

Young has the burden of persuasion on his stay request, and he is required to make "a clear showing" that he is entitled to one. *Hill*, 547 U.S. at 584. Young abjectly fails to make that showing. Accordingly, Young's motion for a stay should be denied.

STATEMENT OF THE CASE

I. Facts of the Crime

The Texas Court of Criminal Appeals (CCA) provided the following summary of the crime[2] on direct appeal:

> The evidence at trial established that on November 21, 2004, within minutes of stealing a red Mazda Protégé from its owner at gunpoint, [Young] drove the stolen vehicle to the mini-mart/dry cleaners owned by Hasmukhbhai Patel. The following events were captured on the store's surveillance camera:[3] [Young], wearing a black shirt and light-colored shorts, entered the store at 9:37 a.m. and appeared to be holding something hidden within his left pocket. [Young] looked around the front of the store before moving behind Patel, who was working in the rear of the store. [Young] asked Patel the cost of cleaning clothes at the store. [Young's] voice immediately changed to a lower tone, and [Young] stated, "Alright [sic], give up the money. I'm not playing. I'm not fucking playing." Patel came into view as he quickly moved behind the counter towards the cash register, and [Young] could be seen leaning over the front counter with his left arm completely extended, pointing a silver handgun at Patel. Again, [Young] ordered Patel to "give up the money," followed by [Young's] firing his first shot in the direction of Patel (now out of view behind the cash register). [Young] then yelled, "You be fucking up. I'm not playing. Give it up!" He fired a second shot in the direction of Patel. At this point, the alarm went off as Patel had apparently pushed the panic button on the system. [Young], with his handgun still extended, followed the fleeing Patel to the opposite side of the front counter, and he could be heard over the alarm shouting, "I said give up the money, right." The video caught [Young's] movement behind the counter in the direction of the cash register. He was out of view for

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[2] Young's statement that he shot Patel over a dispute related to his girlfriend is thoroughly rebutted by the CCA's statement of facts, which is itself based on a *store surveillance tape*. ECF No. 1 at 5.

[3] The surveillance camera provided both audio and video evidence of the crime. The camera also time and date-stamped the film so it evidences the exact timing of the offense. [footnote in original]

a few seconds before coming back into view and was then seen concealing his handgun under his shirt as he left the store.

Two of Patel's regular customers, Raul Vasquez, Jr. and Hattie Helton, happened to be in the parking lot of the store at the time of the offense. Vasquez had just pulled into a parking space in front of the store. Before he could exit his truck, he heard gunshots and looked up to see a black male leaning over the counter firing a gun at Patel. When the gunman left the store and got into a small red car, Vasquez called the police and then chased the gunman, but with no success. Vasquez was able to tell the police that the car's license plate had a "W" and that the perpetrator was wearing a black shirt and light-colored shorts. Helton, who was parked directly in front of the door, had just exited the store moments earlier and was in her car checking her "scratch-off" lottery tickets. When she heard the store alarm go off, she looked up to see a black male exit the store and get in a small red car that was parked by the gas pumps. Once he was gone, Helton exited her car and called to Patel. When he did not answer, Helton called the police on a payphone located outside of the store. Both Vasquez and Helton identified [Young] as the perpetrator at trial.

[Young] was apprehended at approximately 11:00 a.m. when an officer spotted the red car parked at a house several miles away. The car's license plate began with a "W." [Young] was wearing a black shirt and light-colored shorts. [Young's] hands, shirt, and the steering wheel of the car all tested positive for gunshot residue. Patel's blood was found on one of [Young's] socks. Patel died from the gunshot wound to his chest. The murder weapon was never recovered.

Young v. State, 283 S.W.3d 854, 860–61 (Tex. Crim. App. 2009).

II. Punishment Facts

The CCA also provided the following summary of the punishment:

The evidence in the instant case revealed that, immediately after he stole a car from a woman at gunpoint, [Young] drove to Patel's store, demanded money, and then shot Patel dead when

Patel did not cooperate quickly enough. [Young] then left the store, disposed of his weapon, and picked up a prostitute with whom he could do drugs. This evidence of such a callous crime might alone support a finding of future dangerousness. However, the State presented further evidence that, immediately prior to the instant crime, [Young] also committed aggravated sexual assault on the woman from whom he stole the red Mazda Protégé.

At approximately 8:45 a.m. on November 21, 2004, Daphne Edwards was serving breakfast to her three young girls, all under the age of eight, when she realized that she was out of cigarettes. Edwards decided to leave her efficiency apartment and quickly drove to Patel's store about one block away while the children were eating. She was gone less than five minutes. Upon returning, she parked in front of the apartment and went straight inside. Almost immediately after her return, there was a knock on her door. Thinking it was her sister, Edwards opened the door to find [Young] standing there pointing a silver revolver at her. [Young] put the gun to Edwards' head, pushed his way in and asked her, "Where's the fucking money?" [Young] walked Edwards through the apartment at gunpoint to make sure no one else was home other than the children and that there was no access to a phone. The three children were scared and crying. Edwards gave [Young] all the money that she had in her purse—$28—but he told her that she had to give him something else because that was not enough money. [Young] then told Edwards to undress. He had Edwards tell her girls to go to the other room; however, as it was an efficiency apartment the girls could still see and hear everything that happened. [Young] then told Edwards that she was not disrobing quickly enough, so he shot the gun into the floor next to her feet. Edwards disrobed, and [Young] made her sit in a chair and perform oral sex on him. [Young] then made Edwards walk to the bathroom where the children could not fully see what was happening but [Young] could see the children. [Young] then made Edwards get on her knees and perform oral sex on him again.[4] [Young] then decided that he wanted Edwards to wear something "sexy" for him, so he took her back out of the bathroom to get her clothes. Edwards picked out an outfit but [Young] thought it was too long, so she picked out another outfit. He made her put on this

[4] DNA tests confirmed the sexual assault by [Young]. [footnote in original]

outfit but did not allow her to put on any underwear. [Young] then decided that he wanted to leave. When Edwards protested that she would not leave her children, [Young] told her, "You did it before. I saw you." [Young] then walked over to the children and kissed each of them on the cheek and told them that their mommy would be back.

[Young] then forced Edwards, still at gunpoint, to leave the apartment and get into her red Mazda Protégé. He had her drive to the front of the apartment complex, at which point he decided that he wanted to drive. As he was getting out of the car, he told Edwards not to drive off or he would go back and kill her children. He told her to move to the passenger seat. As he was getting into the driver's seat, Edwards took the opportunity to escape—[Young] had left the passenger door open and Edwards saw some people in the parking lot. She ran screaming to her cousin's apartment at the front of the complex where they called the police and then went to get the children. [Young] drove off in Edwards' car.

In addition to this evidence, the State also presented [Young's] previous convictions for possession of marijuana, evading arrest, and three assaults with bodily injury, two involving injury to his mother when he was a juvenile. The third assault occurred in September 2004 and involved his girlfriend, Chala Riley, who was eight-months pregnant at the time. In order to stop the assault, Riley lied and told [Young] that she was going into labor. Further, the night before the instant offense, [Young] accosted the same girlfriend after she informed him that she was permanently breaking off their relationship. [Young] pulled her out of her car, beat her, and then took her car, purse, and cell phone. Other evidence showed that [Young] shot at another person in a parking lot on May 9, 2004, but charges were never filed.

[Young] presented evidence of a tumultuous childhood. When he was eight years old, his father was murdered and his sister was molested and impregnated by his stepfather. [Young] argued that he never recovered from these events emotionally as he never received the counseling or the father figures that he needed. He became angry and withdrawn and began using drugs. However, [Young's] mother, new stepfather, aunt, and grandmother all testified to [Young's] good side and how they were

> all shocked and surprised by the instant offense. [Young] had just had two children, a daughter born in June and another in September, and he was attempting to get custody of one of the girls prior to the offense. [Young] also presented evidence that he had told a psychologist that he had consumed fifteen to twenty beers and smoked marijuana the night before the instant offense, and that he smoked crack cocaine the morning of the offense. [Young] further pointed out that he committed no acts of violence or even infractions during his fourteen months of incarceration while waiting for his trial.

Young v. State, 283 S.W.3d at 863–65.

III. Conviction and Postconviction Proceedings

Indicted in 2005 on charges of capital murder, a Texas jury convicted and sentenced Young to death for the killing and robbery of Patel. CR 3, 324–25; 18 RR 117–18. The CCA upheld Young's conviction and death sentence on automatic direct appeal. *Young v. State*, 283 S.W.3d at 854. The Supreme Court denied Young's petition for a writ of certiorari. *Young v. Texas*, 558 U.S. 1093 (2009).

Young also filed a state application for a writ of habeas corpus. SHCR 1. After a hearing (*id.* at 287–387), the trial court recommended that the CCA deny relief and submitted proposed findings of fact and conclusions of law *(id.* at 389–422). Following its own review, the CCA adopted the trial court's findings of fact and conclusions of law and denied Young's application for a writ of habeas corpus. *Ex parte Young*, No. WR–70,513–01, 2013 WL 2446428

(Tex. Crim. App. Jun. 5, 2013) (per curiam) (not designated for publication). It additionally held that several of Young's claims were procedurally barred. *Id.*

Young then petitioned for a federal writ of habeas corpus. The district court denied habeas relief and refused to grant any COA. *Young v. Stephens*, SA–13–CA–500–XR, 2015 WL 4276196, at *11–20 (W.D. Tex. July 13, 2015). Young applied to the Fifth Circuit for a COA, which the court granted in part and denied in part. *Young v. Davis*, 835 F.3d 520, 523 (5th Cir. 2016). Young filed an interlocutory petition for a writ of certiorari from the denial of a COA, which the Supreme Court denied. *Young v. Davis*, 137 S. Ct. 1224 (2017). On June 20, 2017, the Fifth Circuit affirmed the Court's denial of habeas relief. *Young v. Davis*, 860 F.3d 318, 321 (5th Cir. 2017). The Supreme Court denied certiorari review of the Fifth Circuit's decision. *Young v. Davis*, 138 S. Ct. 656 (2018).

On March 13, 2018, the 187th District Court of Bexar County scheduled Young for execution for July 17, 2018. Young then filed a subsequent state habeas application in the trial court on July 2, 2018. Young later filed a suggestion that the CCA reconsider, on its own motion, its decision in Young's direct appeal. On July 10, 2018, the CCA dismissed the subsequent application as "an abuse of the writ without reviewing the merits of the claim raised." *Ex parte Young*, No. WR–70,513–02, slip op. at 2 (Tex. Crim. App. Jul. 10, 2018)

(per curiam) (not designated for publication). The CCA also denied the suggestion for reconsideration without written order.

Young filed the instant § 1983 action and related stay motion on July 13, 2018. ECF No. 1 & 2.

ARGUMENT

I. This Court Has No Jurisdiction to Grant a Stay of Execution.

The Fifth Circuit has repeatedly held that federal courts lack jurisdiction under § 1983 to stay executions based on clemency attacks. *Beets v. Texas Bd. of Pardons and Paroles*, 205 F.3d 192, 193 (2000) ("This court has twice held that federal courts lack jurisdiction under § 1983 to stay executions."); *Faulder v. Johnson*, 178 F.3d 741, 742 (1999) ("[F]ederal courts lack jurisdiction to stay executions under § 1983."); *Moody v. Rodriguez*, 164 F.3d 893 (1999) ("Federal courts lack jurisdiction to stay executions under § 1983"). Such relief is available through a petition for writ of habeas corpus only. *See Faulder*, 178 F.3d at 742. "Prisoner challenges to the result of a single allegedly defective clemency proceeding must be pursued by writ of habeas corpus, not by suits under § 1983." *Moody*, 164 F.3d at 893.

While the Supreme Court has allowed stays to issue in § 1983 actions challenging the method of execution, *see Hill*, 547 U.S. at 580; *see also Nelson*, 541 U.S. at 645–47, and challenges to a state's procedures for DNA testing, *see Skinner v. Switzer*, 562 U.S. 521 (2011); *see also Skinner v.*

Switzer, 559 U.S. 1033 (2010), Young does not demonstrate any similar carve-out for clemency challenges.[5] In fact, the aforementioned cases are the exceptions that prove the rule established in *Beets* and *Faulder*. Indeed, unlike in *Hill* and *Skinner,* Young's claim against the Board is essentially an argument that he is entitled to the same result as Whitaker: commutation of his death sentence to life imprisonment. In other words, the relief Young seeks would "necessarily imply the invalidity of his [death] sentence," and habeas corpus is the only available remedy for such a complaint. *Skinner,* 562 U.S. at 533 (quoting *Heck v. Humphrey,* 512 U.S. 477, 487 (1994)). This Court cannot consider a habeas claim without prior authorization from the Fifth Circuit, and is bound by that Court's precedent to dismiss this case for lack of jurisdiction.

II. Even If This Court Had Jurisdiction to Issue a Stay of Execution, Young Is Not Entitled to One.

A. Standard of review

A stay of execution is an equitable remedy. *Hill*, 547 U.S. at 584. "It is not available as a matter of right, and equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference

[5] The Defendants raised a similar argument in *Tamayo v. Perry*, 553 F. App'x 395, 400 (5th Cir. 2014), but the Fifth Circuit held that "[w]e need not reach this issue, however, because we conclude that we clearly have jurisdiction over the denial of the preliminary injunction, and the same merits analysis underlies both forms of relief sought by Tamayo." Young does not seek a preliminary injunction.

from the federal courts." *Id.* (citing *Nelson*, 541 U.S. at 649–50). "It is well-established that petitioners on death row must show a "reasonable probability" that the underlying issue is "sufficiently meritorious" to warrant a stay and that failure to grant the stay would result in "irreparable harm." *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983), superseded on other grounds by 28 U.S.C. § 2253(c)(2). Indeed, "[a]pplications for stays of death sentences are expected to contain the information and materials necessary to make a careful assessment of the merits of the issue and so reliably to determine whether plenary review and a stay are warranted." *Id.* To demonstrate an entitlement to a stay, a petitioner must demonstrate more than "the absence of frivolity" or "good faith" on the part of petitioner. *Id.* at 892–93. Rather, the petitioner must make a substantial showing of the denial of a federal right. *Id.* In a capital case, a court may properly consider the nature of the penalty in deciding whether to grant a stay, but "the severity of the penalty does not in itself suffice." *Id.* at 893. The State's "powerful and legitimate interest in punishing the guilty," as well as its interest in finality, must also be considered, especially in a case such as this where the State and victims have for years borne the "significant costs of federal habeas review." *Herrera v. Collins*, 506 U.S. 390, 421 (1993) (O'Connor, J., concurring); *Calderon v. Thompson*, 523 U.S. 538, 556 (1998) (both the State and the victims of crime have an important interest in the timely enforcement of a sentence).

Thus, in deciding whether to grant a stay of execution, the Court must consider four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 434 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)); *see also Buxton v. Collins*, 925 F.2d 816, 819 (5th Cir. 1991).

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

Given the legally and factually deficient nature of his claim for relief, Young fails to show that there is any significant possibility that he will succeed on the merits. Young's failure to offer a sound claim for relief therefore supports the denial of a stay of execution.

1. Texas's clemency procedures meet the Supreme Court's due-process requirements.

"[P]ardon and commutation decisions are rarely, if ever, appropriate subjects for judicial review." *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 276 (1998) (Rehnquist, J.C., with three justices joining and four justices concurring in result) (citing *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 464 (1981)). Due process is not violated where the clemency procedures do no more than confirm that clemency powers are committed, "as is our

tradition," to the authority of the executive. *Id*. An inmate has no substantive expectation of clemency. *Id*. at 283. "[C]lemency [is] a prerogative granted to executive authorities . . . . It is not for the Judicial Branch to determine the standards for this discretion." *Cavazos v. Smith*, 565 U.S. 1, 9 (2011). "If the clemency power is exercised in either too generous or too stingy a way, that calls for political correctives, not judicial intervention." *Id*. Clemency proceedings involve no "objective factfinding." *Dumschat*, 452 U.S. at 464 (addressing commutation and parole issues). The decisions also involve "purely subjective evaluations and predications on future behavior." *Id*. Such matters involve not questions of fairness but of grace.

Nevertheless, although four justices of the Supreme Court found a death-sentenced inmate's life interest to be insufficient to warrant due process protection, a majority of the Court has found that such an inmate has not been deprived of all of his life interest. *Woodard*, 523 U.S. at 289. Thus, in her concurring *Woodard* opinion, in which she was joined by three other justices,[6] Justice O'Connor stated that "some *minimal* procedural safeguards apply to clemency proceedings." *Id*. (emphasis in original). Those minimal safeguards are not specified, except to cite flipping a coin or arbitrarily denying *any* access

[6] In his dissent, Justice Stevens provided the fifth vote in favor of due process applying to clemency proceedings; however, he would go further than "minimal" procedures.

to the clemency process as examples of situations warranting judicial intervention. *Id*. Even applying her due process standard, however, Justice O'Connor found that Ohio's clemency procedure, including the notice of hearing and the opportunity to interview, comported with due process. *Id*. at 290.

The Fifth Circuit has also interpreted the due-process requirements in clemency cases narrowly. In *Faulder*, the petitioner argued that the Texas Board of Pardons and Paroles' procedures did not comport with the minimal due-process standard set forth in *Woodard*. 178 F.3d at 344. The petitioner in *Faulder* claimed that he received inadequate notice of issues that Board would consider and that it acted in secrecy—not holding hearings, not providing reasons for its decisions, and not keeping records. *Id*. The Fifth Circuit rejected the petitioner's arguments, holding that petitioner's clemency experience did not meet the "low threshold of judicial reviewability" mentioned by Justice O'Connor in her "narrow view of judicial intervention." *Id*. The Fifth Circuit noted further:

> Procedural due process is an inherently flexible concept. And [*Woodard*] emphasizes that extra flexibility is require when, as here, the criminal process has reached an end and a highly individualized and merciful decision like executive clemency is at issue.

Id. at 345. Thus, the Board's actions complied with the constitutional minimum set forth in *Woodard*.

The Fifth Circuit has consistently applied the Supreme Court's standards to find a lack of due process problems with state clemency procedures. *See Tamayo*, 553 F. App'x 395; *Turner v. Epps*, 460 F. App'x 322, 331 (5th Cir. 2012) (per curiam); *Roach v. Quarterman*, 220 F. App'x 270, 275 (5th Cir. 2007) (denying a certificate of appealability where Texas procedures "do not resemble flipping a coin" and petitioner failed to provide evidence that he was denied access to the clemency process or that a clemency decision would be made arbitrarily); *Sepulvado v. La. Bd. of Pardons & Parole*, 171 F. App'x 470, 472–73 (5th Cir. 2006) (per curiam) (holding that petitioner failed to prove that Louisiana's failure to guarantee a clemency hearing violated due process and thus did not meet the "highly deferential *Faulder* standard of review").

The judiciary has a "narrow role in the uniquely executive task of considering clemency[.]" *Tamayo*, 553 F. App'x at 402; *see also Faulder*, 178 F.3d at 344–45; *Moody*, 164 F.3d 893. To the extent that Texas clemency proceedings are subject to due process guarantees, the procedures meet those guarantees set out by the Supreme Court.

2. Young's equal protection claim is baseless, conclusory, and speculative.

In *Woodard*, the Chief Justice noted that the Court left open the question

of whether "a defendant would be entitled to raise an equal protection claim in connection with a clemency decision." 523 U.S. at 276 n.1. But even assuming arguendo that equal protection applies to clemency decisions, Young abjectly fails to make the case that he was discriminated against on the basis of his race. Young provides no evidence of racially discriminatory statements made by any member of the Board. There is no discriminatory language in the Board's decision—on the contrary, the Board's policy and members' voting sheets expressly require the Board members to disavow any reliance on race in reaching their decision.

Instead of offering direct evidence of bias, Young instead points to the commutation of Thomas Whitaker's death sentence on February 22, 2018. Specifically, Young alleges that he and Whitaker are similarly situated because Whitaker's father, who was also one of Whitaker's victims, forgave Whitaker and opposed the death penalty, and here, Patel's son, also opposes the death penalty for Young. ECF No. 1 at 8. Young speculatively argues that the Board's vote in his case "is most likely explained by a single variable—a variable the Constitution precludes decisions-makers from taking into account: race." *Id*. at 3. However, as shown below, Young's speculative and conclusory allegations are not tenable under the relevant case law.

As explained by the Fifth Circuit:

> "[T]he Equal Protection Clause protects individuals from governmental action that works to treat similarly situated individuals differently." *John Corp. v. City of Houston*, 214 F.3d 573, 577 (5th Cir. 2000). In addition, the main purpose of the Equal Protection Clause is to prevent official conduct that discriminates on the basis of race. *Washington v. Davis*, 426 U.S. 229, 239 (1976). "To state a claim of racial discrimination under the Equal Protection Clause and section 1983, the plaintiff 'must allege and prove that [she] received treatment different from that received by similarly situated individuals and that the unequal treatment stemmed from a discriminatory intent.'" *Priester v. Lowndes Cnty.*, 354 F.3d 414, 424 (5th Cir.2004) (quoting *Taylor v. Johnson*, 257 F.3d 470, 473 (5th Cir. 2001) (per curiam)); *see also Village of Arlington Hts. v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 265 (1977) ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.").

Bowlby v. City of Aberdeen, Miss., 681 F.3d 215, 227 (5th Cir. 2012).

And, in general, a complaint will not survive a motion to dismiss unless it pleads sufficient facts to allow the court to draw a reasonable inference that the defendant is liable for the alleged misconduct. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The allegations stated in the complaint must be enough to "raise a right to relief above the speculative level[.]" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678. To survive a motion to dismiss, the complaint must provide "more than a sheer possibility that a defendant has acted unlawfully." *Id.* (citation omitted). "Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and

plausibility of entitlement to relief." *Id*. (citations and internal quotations omitted).

For instance, in *Bowlby*, the Fifth Circuit noted:

> Here, Bowlby's equal protection allegations are as follows: "Plaintiff is a white person. The Defendants have not closed any business of a black person or alleged failure to comply with laws and regulations even though such non-compliance with laws and regulations by black businesses exist." This is insufficient to "state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6).

Bowlby, 681 F.3d at 227.

In *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987), the Supreme Court held that in order to establish an equal protection violation in the analogous context of prosecutorial discretion[7] in capital sentencing, a defendant must prove that the decisionmakers in his case acted with a discriminatory purpose. *See also White v. Thaler*, 522 F. App'x 226, 235 (5th Cir. 2013) (unpublished) ("A defendant claiming an equal protection violation in a death penalty case must prove that the prosecutor acted with a discriminatory purpose in that particular case."); *Hughes v. Dretke*, 160 F. App'x 431, 436 (5th Cir. 2006) (petitioner presented no direct evidence that conviction obtained as a result of racially discriminatory practice). "Exceptionally clear proof" is therefore

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[7] Like clemency decisions, the sound exercise of prosecutorial discretion is a core constitutional function of the executive branch of government, is essential to protecting societal interests in the effective enforcement of criminal law, and is thus ill-suited to judicial review. *United States v. Armstrong*, 517 U.S. 456, 464–65 (1996); *Wayte v. United States*, 470 U.S. 598, 607 (1985)*; United States v. Goodwin*, 457 U.S. 368, 382 (1982).

required before courts will infer abuse of prosecutorial discretion. *McCleskey*, 481 U.S. at 297.

Young's proof is not clear or even remotely compelling. "[Young]'s conclusory assertions that he was treated differently than other similarly situated inmates are insufficient to state an equal protection claim." *Clark v. Owens*, 371 F. App'x 553, 554 (5th Cir. 2010) (citing *Brinkmann v. Johnston*, 793 F.2d 111, 113 (5th Cir. 1986)). Whitaker and Young are not even slightly comparable—Whitaker's case was sui generis. Governor Abbott's proclamation explains at least some of the reasons that clemency was granted in that case. Proclamation by the Governor of Texas, available at https://gov.texas.gov/uploads/files/press/Governor_Abbott_Commutes_Sentence_Of_Thomas_Whitaker_02222018.pdf (last accessed July 13, 2018); *see also Whitaker v. Davis*, 853 F.3d 253, 255 (5th Cir. 2017). The differences between Young and Whitaker are striking. First and most importantly, Whitaker orchestrated the killing of his family for pecuniary gain. *Id.* A man recruited by Whitaker killed Whitaker's mother and brother, but Whitaker's father survived the attempt on his life. *Id.* Despite his son's actions, Whitaker's father forgave his son and opposed his execution. *Id.* By executing his son, the State would have effectively victimized Whitaker's father a second time. In contrast, Patel's son is of no relation to Young and will certainly not lose a child if Young is executed. The unusual facts of Whitaker's case are not repeated here and, in

fact, may never be repeated.

Moreover, Whitaker's father was a direct victim of Whitaker's crime and was wounded during the killings. Patel's son, while doubtlessly suffering immeasurably from his father's murder, was not himself attacked by Young. Additionally, Patel's son is not the only victim of the crimes committed by Young in the criminal episode that resulted in the death penalty. Young raped a mother in front of her three daughters the same day as the murder. Young's complaint does not state that the mother and the daughters have spoken out in favor of clemency.

Second, the Governor's proclamation clearly notes that Whitaker was not the triggerman. Young was the triggerman, and he is caught on videotape killing Patel. *Young v. State*, 283 S.W.3d at 860–61. In fact, Young's current pleading shows that he refuses to accept responsibility for how he killed Patel, asserting that he killed Patel over a dispute that Patel purportedly had with Young's girlfriend. ECF No. 1 at 5. But the CCA's opinion, based on videotape evidence, makes it clear that Patel died senselessly in a robbery. Young's failure to take full responsibility for his crime by contesting indisputable facts is offensive to the issuance of clemency.

Third, although not mentioned by the Governor's proclamation, Whitaker's criminal history outside of his family's murders and associated actions was minimal. *Whitaker v. Davis*, No. 16–70013 (Appellee's Brief at 22–

23). Young had an extensive criminal history unrelated to Patel's murder. Again, egregiously, he raped a mother in front of her three daughters. And, as noted by the CCA,

> In addition to this evidence, the State also presented [Young's] previous convictions for possession of marijuana, evading arrest, and three assaults with bodily injury, two involving injury to his mother when he was a juvenile. The third assault occurred in September 2004 and involved his girlfriend, Chala Riley, who was eight-months pregnant at the time. In order to stop the assault, Riley lied and told [Young] that she was going into labor. Further, the night before the instant offense, [Young] accosted the same girlfriend after she informed him that she was permanently breaking off their relationship. [Young] pulled her out of her car, beat her, and then took her car, purse, and cell phone. Other evidence showed that [Young] shot at another person in a parking lot on May 9, 2004, but charges were never filed.

Young v. State, 283 S.W.3d at 863–65.

Fourth, it is worth noting that the District Attorney also submitted Young's TDCJ disciplinary history to the Board. Exhibit 1. While difficult to read, among other things, these documents suggest that Young was an unruly and disobedient inmate, threatened and assaulted TDCJ staff, and was found in possession of alcohol and weapons.

The comparison of the relative merits of Young and Whitaker's clemency cases is inappropriate for this Court to engage in and calls into question the separation of powers. Rightfully, this job belongs to the people's elected executives. But even if the Court wished to compare their clemency cases, Young's case is far weaker than Whitaker's. And, even so, as described by

Justice Sotomayor, "[e]xecutive clemency is fundamentally unpredictable. Clemency officials typically have 'complete discretion' to commute a defendant's sentence based on 'a wide range of factors not comprehended by earlier judicial proceedings and sentencing determinations.'" *Holiday v. Stephens*, 136 S. Ct. 387 (2015) (Sotomayor, J., dissenting) (citing *Woodard*, 523 U.S. at 278, 281; Tex. Const., Art. IV, § 11; Tex. Code Crim. Proc. Ann., Art. 48.01 (Vernon Supp. 2014)); *see also Workman v. Summers*, 111 F. App'x 369, 371 (6th Cir. 2004) (stating that a federal court is not authorized to review the substantive merits of a state clemency proceeding, but rather is authorized to the limited inquiry of determining whether some minimal procedural safeguards existed).

Finally, the Defendants have submitted as exhibits the blank voting sheets that were provided to the Board members in Young's case and the Board's general policy concerning clemency cases. The policy statement explicitly explains that the "[t]he Board shall not discriminate against any applicant because of race, color, disability, sex, religion, age, national origin, or genetic information." Exhibit 2. And the blank[8] individual voting sheets provided to the Board members in Young's clemency explicitly provide that "I

[8] The signed sheets could not be obtained for submission with the instant pleading in the limited time available to the Defendants. The Defendants may produce them later if necessary and time permits.

further certify that in arriving at my decision in this matter, I did not give prejudicial consideration to the race, color, sex, religion, national origin or political affiliation of the applicant or the victim." Exhibit 3. Thus, to find for Young, the Court would have to necessarily determine that at least four of the six voting Board members were lying when they signed their sheets and actually voted against clemency for Young because he is an African-American. That is untenable. There is no evidence to support such a finding.

Accordingly, Young cannot show that he is likely to prevail in his civil rights lawsuit challenging the substantive result of the Board's vote. And because Young cannot show a likelihood of success in his civil rights lawsuit, he is not entitled to injunctive relief.

C. Young is unlikely to suffer irreparable harm.

Young argues that in his Stay Motion that if this Court does not grant a stay, "Young will suffer irreparable injury: he will be executed on July 17, 2018." ECF No. 2 at 3. However, this generic assertion is applicable to any execution. In a capital case, a court may properly consider the nature of the penalty in deciding whether to grant a stay, but "the severity of the penalty does not in itself suffice." *Barefoot*, 463 U.S. at 893. Moreover, this is a § 1983 lawsuit, which means that Young necessarily is not challenging the validity of his sentence (otherwise, he would be raising a successive habeas claim). If Young dies, his sentence has simply been fulfilled. *Woodard*, 523 U.S. at 283

("A denial of clemency merely means that the inmate must serve the sentence originally imposed."). At most, Young loses an unlikely and unilateral hope for grace.

D. The State 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 Young's sentence. *See Hill*, 547 U.S. at 584. The public's interest lies in executing sentences duly assessed, and for which years of judicial review have failed to find reversible error. Indeed, Young has already passed through the state and federal collateral review process. The public's interest is not advanced by postponing Young's execution any further, and the State opposes any action that would cause further delay. *Martel v. Clair*, 565 U.S. 648, 662 (2012) ("Protecting against abusive delay *is* an interest of justice.") (emphasis in original).

Again, it is no secret that "capital petitioners might deliberately engage in dilatory tactics to prolong their incarceration and avoid execution of a sentence of death." *Rhines*, 544 U.S. at 277–78. Moreover, "[t]he federal courts can and should protect States from dilatory or speculative suits[.]" *Hill*, 547 U.S. 585. Young offers no evidence of racial animus from any member of the board and can only speculate that their decision to deny relief stemmed from

his race. This "speculative suit" is precisely the sort of "dilatory tactic" that the Supreme Court has commanded this Court not to entertain.

CONCLUSION

For the foregoing reasons, the Defendants ask that the Court deny Young's motion for a stay of execution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that on July 15, 2018, I electronically filed the foregoing pleading with the Clerk of the Court for the U.S. District Court, Southern District of Texas, using the electronic case-filing system of the Court. The electronic case-filing system sent a "Notice of Electronic Filing" to the following attorneys of record, who consented in writing to accept this Notice as service of this document by electronic means:

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