No. 23A308

IN THE
SUPREME COURT OF THE UNITED STATES

ALI NASSER – PETITIONER

vs.

JEDIDIAH ISAAC MURPHY – RESPONDENT

OPPOSITION TO MOTION TO VACATE STAY OF EXECUTION

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I. Introduction

The stay entered by the United States District Court for the Western District of Texas was prudent, well-reasoned, and legally supported. The United States Court of Appeals for the Fifth Circuit did not disagree. The posture of Mr. Murphy's case is unique and calls for deference to those decisions.

As the District Court did in initially granting Mr. Murphy a stay of execution, the Fifth Circuit Court of Appeals found that a stay is appropriate given "similar issues pending before this Court" in another case which has had the benefit of "complete briefing and argument." *Nasser v. Murphy*, No. 23-70005, at 4 (5th Cir. Oct. 9, 2023). To grant the State's Application to Vacate would disrupt and undermine the Circuit's orderly adjudication of issues and proceedings in this and the other case that has raised the same issues.

Indeed, the Fifth Circuit has begun – but not finished – reviewing a nearly-identical constitutional claim in a separate case currently pending (upon the State's appeal from the ruling of a *different* federal district court, the Federal District Court for the Southern District of Texas, granting relief on the same issue).

As the State submitted this matter to the Court of Appeals in an emergency fashion, and there are complex, significant constitutional issues at play, it was eminently reasonable for that Court to exercise its thoughtful discretion to leave the District Court's stay in place *temporarily*, pending fair resolution.

II. Summary of Pertinent Procedural History

Jedidiah Murphy was convicted and sentenced to death in 2001 for the killing of Mrs. Bertie Cunningham. In order to sentence him to death, the jury had to find that "there [was] a probability that [Murphy] would constitute a continuing threat to society." Tex. Code Crim. Proc. art 37.071(b)(1). The most damaging evidence the State introduced against Mr. Murphy at the punishment phase of his trial was testimony from the victim of a prior, unadjudicated kidnapping and robbery. But Mr. Murphy did not commit this extraneous offense.

In an attempt to prove his innocence of this extraneous offense, on March 24, 2023, Murphy filed a motion for post-conviction DNA testing of certain evidence from this prior unadjudicated offense. This motion was denied by the trial court. Murphy then appealed to the Texas Court of Criminal Appeals. That court affirmed the trial court in an opinion issued on September 26, 2023. *Murphy v. State of Texas*, No. AP-77,112 (Tex. Crim. App. Sept. 26, 2023).

After his state court litigation was unsuccessful, on September 27, Mr. Murphy filed a federal civil rights complaint under 42 U.S.C. § 1983, alleging violations of his constitutional rights related to Chapter 64 of the Texas Code of Criminal Procedure. The statute limits access to post-conviction DNA testing to evidence related to the crime of conviction, but not evidence that might demonstrate innocence of the death penalty. In the same case, he also filed a motion to stay his execution so that he could pursue the claims in his civil rights complaint. The State opposed the motion for a stay.

The ensuing decisions of the District Court and the Court of Appeals are discussed in more detail *infra.* On October 6, 2023, the U.S. district court issued an order staying Mr. Murphy's execution pending resolution of the underlying civil rights complaint. The State appealed to the Fifth Circuit. On October 9, 2023, after receiving briefing from both parties, a three-judge panel of the Fifth Circuit issued an opinion that left in place the district court's stay of execution.

Before this Court is an emergency appeal by the State of Texas seeking to vacate the stay of execution entered by the district court and left in place by the Fifth Circuit.

III. The Future Dangerousness Case at Trial: The Wilhelm Kidnapping and the Ellis Robbery

Sheryll Wilhelm testified that on August 26, 1997, a man forced her into her car in the parking lot of Arlington Memorial Hospital in Arlington, Texas, choked her, made her get on the floor, and drove away with her. She escaped by leaping from the moving car onto the highway as her assailant kept driving. The same day, shortly after Ms. Wilhelm escaped, the same man who kidnapped Ms. Wilhelm attacked 69-year-old Marjorie Ellis and stole her purse during a struggle outside an ice cream shop in Wichita Falls, Texas. A witness—Felix Ozuna—chased the witness a short distance. Ellis and Ozuna both gave descriptions of the robber as a tall, slender, Hispanic or white male with an olive complexion.

Over three years later, Ms. Wilhelm saw Mr. Murphy's picture on the television news, in connection with his arrest for the kidnapping and killing of Mrs.

Cunningham. Ms. Wilhelm read a newspaper article about the arrest, researched Mr. Murphy on the internet, and spoke to her mother, who told her that Mr. Murphy looked like the man in her old composite sketch.

Ms. Wilhelm's testimony for Mr. Murphy's jury was emotional and impactful. She described not only her attacker and his actions that night, but vividly spoke about fearing for her life, praying for her life (until her kidnapper ordered her to stop), and her choice to make the terrifying leap from a high-speed moving car. As to her identification of Mr. Murphy, she testified that she had no doubt he was her assailant when she identified him in the photo-spread and in court, despite the fact that she initially failed to identify him in the courtroom during a pretrial suppression hearing.

Ms. Wilhelm's emotional testimony was so powerful that it carried the day over significant defense evidence to rebut it: Mr. Murphy did not match the description given of the Wichita Falls (Ellis) robber (a "tall, slender, Hispanic or white male with an olive complexion"); he clocked in at work on time that day (calling into serious question whether he would have had time to drive to Arlington and Wichita Falls to commit the extraneous offenses); and his ex-wife, with whom he was living at the time, also provided a partial alibi based on notes from her daybook.

The prosecution presented neither expert testimony about Mr. Murphy's future dangerousness, nor victim impact testimony from any of Mrs. Cunningham's surviving family. The rest of the evidence introduced against Mr.

Murphy at punishment, in substance and in kind, was monumentally different from the evidence about the Wilhelm kidnapping and the Ellis robbery.[1] Thus, when considering Mr. Murphy's future dangerousness, it was chiefly Ms. Wilhelm's testimony that the jurors had on their minds. Because of its striking similarity to the capital crime, the Wilhelm kidnapping/Ellis robbery was the critical factor in the jury's determination that Mr. Murphy was a future danger. Without it, there is little chance that the jurors would have voted to sentence Mr. Murphy to death.

But Mr. Murphy did not commit the Wilhelm kidnapping or the Wichita Falls robbery. By falsely connecting him to these unadjudicated priors, the State was able to obtain a death sentence by creating an erroneous impression that he was a serial kidnapper who preyed upon vulnerable, elderly women.

IV. The §1983 Civil Rights Complaint

Mr. Murphy filed a civil rights lawsuit pursuant to 42 U.S.C. § 1983 in the United States District Court for the Western District of Texas, seeking access to evidence in the State's possession for post-conviction DNA testing that would exonerate him of the Wilhelm/Ellis extraneous offenses (the primary aggravators the State relied upon to support a finding of future dangerousness and ultimately secure his death sentence).

[1] It consisted of evidence of nonviolent property offenses for which he had received probated sentences, a 2-day jail sentence, and a fine; evidence that he had brandished a gun in a car with a high-school classmate after leaving a graduation party where there was underage drinking (the classmate did not contact police); evidence of a domestic dispute with a girlfriend in 1997 for which assault charges were never filed); and evidence that he had cursed and threatened a co-worker during an argument in 2000 (again, no charges were ever filed).

Mr. Murphy's lawsuit raises the precise legal questions currently under review by the Fifth Circuit Court of Appeals in *Gutierrez v. Saenz*, No. 21-70009 (5th Cir.) (pending), argued just three weeks ago after full briefing, supplemental authority submissions, and a request from the panel for the parties to address an additional issue at oral argument. The *Gutierrez* appeal follows the United States District Court for the Southern District of Texas reaching the merits of this claim and finding a federal constitutional violation – again, identical to the one Mr. Murphy raises.

A. The District Court Decision

On October 6, 2023, the United States District Court for the Western District of Texas issued an order staying Mr. Murphy's execution, finding it persuasive that "a sister court has recently issued a declaratory judgment on the very claims before this Court, which are now a live issue before the Fifth Circuit Court of Appeals," *Murphy v. Nasser*, No. 1:23cv1170, Dkt. 16, at 5 (W.D.Tex. Oct. 6, 2023), and concluding that a stay is warranted in the case to allow the Fifth Circuit adequate time to resolve the unique and serious legal issues raised in both *Gutierrez* and the instant complaint." *Id*. at 6.

The State appealed.

B. Fifth Circuit Opinion

On October 9, a three-judge panel of the Fifth Circuit Court of Appeals held the State's request in abeyance, in order to fully consider the significant constitutional issues raised in both *Gutierrez* and Mr. Murphy's case:

> Murphy challenges the limitation of testing to evidence affecting guilt. A different district court agreed with a similar argument and declared that Texas must provide testing if a sufficient basis is shown that it would have affected sentencing and not just the finding of guilt. *See Gutierrez v. Saenz*, 565 F. Supp. 3d 892, 911 (S.D. Tex. 2021). A Fifth Circuit panel heard oral argument in that case on September 20, 2023, and a decision on that appeal is pending. *See Gutierrez v. Saenz*, No. 21-70009.
>
> Certainly, that appeal [*Gutierrez*] has similar issues that could affect the proper resolution in this case. Waiting for that decision is not required by any general procedural rule or by rules of this court. Nonetheless, in light of the fact that complete briefing and argument has occurred in *Gutierrez*, unlike the emergency-necessitated accelerated consideration here, we conclude we should wait for that decision unless there is some basis to distinguish the present appeal.

Nasser, 23-7005 at 4 (5th Cir. Oct. 9, 2023). The Fifth Circuit then examined and compared the two cases and concluded there was no meaningful basis to distinguish their claims. *Id*.

ARGUMENT

For the following reasons, this Court should deny the State's Emergency Motion.

I. The District Court Did Not Err By "Failing to Apply A Presumption Against the Grant of A Stay"

Petitioner argues that this Court should vacate the district court's stay of execution because the district court "fail[ed] to apply a 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." (Motion at 7.) Although timeliness is one of the equitable factors for a court to consider in

deciding whether or not to grant a stay, it is not the only one, and it does not trump the other factors. One district court judge, and two circuit court judges, have considered all the equities in this case and concluded that the others have a weight that cannot be ignored. This Court should not disturb that judgment.

A stay of execution is a matter of equity, and is considered in light of the following four factors:

> (1) whether the stay applicant is likely to succeed on the merits of his suit;
>
> (2) whether he will be irreparably injured without a stay;
>
> (3) whether the other interested parties will be substantially injured by a stay; and
>
> (4) the public interest.

Nken v. Holder, 556 U.S. 418, 434 (2009). Analysis of the need for a stay is a balance of these four equities, and although dilatoriness or timeliness may be part of the third equity, it is by no means the only consideration even within that factor.

In Mr. Murphy's case, the federal district court and two judges of the Fifth Circuit panel tasked with weighing the equities did not find the timeliness factor to be strong enough to outweigh other equities – in particular, the likelihood of success on the merits, irreparable injury, and the public interest. Yet, there is no evidence that these courts did not consider it. To the contrary, the Fifth Circuit majority opinion noted, in discussing the similarity between *Murphy* and *Gutierrez*, "A possible distinction concerns Murphy's delay in filing for DNA testing. Nonetheless, delay is also a live issue in *Gutierrez.* Given that delay is a concern in

both cases, and both Murphy and Gutierrez make the same constitutional challenge, we will consider all issues regarding the stay after the release of the opinion in *Gutierrez*." No. 23-70005 at 4. This shows that the court did consider the timeliness factor but did not find it to be singularly determinative.

Furthermore, it is worth pointing out the Texas Court of Criminal Appeals' decision under *Gutierrez*'s federal suit was the apparent controlling authority concerning Mr. Murphy's access to DNA testing in his case, until the Southern District of Texas declared that legal framework unconstitutional under the due process clause. The *Gutierrez* decision from the Southern District issued on March 23, 2021. No. 1:19cv-185, Dkt. 141 (S.D. Tex. Mar. 23, 2021). Mr. Murphy has acted with diligence.

II. The District Court Was Correct to Conclude That Mr. Murphy Has Made A Substantial Showing That He Is Likely To Succeed on the Merits of His Facial Challenge to Texas' Post-Conviction DNA Statute.

The district court concluded, after a thoughtful analysis, that Mr. Murphy had shown the requisite likelihood of success. The Fifth Circuit did not disagree, being in the unique position of having just received extensive briefing and argument on the exact same issue in a separate case (*Gutierrez*, *supra*, upon the State's appeal from a ruling of the Southern District of Texas granting relief.[2] As the District Court in Mr. Murphy's case thoroughly explained:

> Murphy has shown the requisite likelihood of success. The merits issues in Murphy's complaint is currently before the Fifth Circuit Court of Appeals, and was the subject of oral argument just over two weeks

[2] In fact, one of the judges on Mr. Murphy's panel – Judge Southwick, who authored the majority opinion here – is also on the panel in *Gutierrez*. No. 21-70009 (5th Cir.).

> ago. See *Gutierrez v. Saenz,* No. 21-70009 (5th Cir. 2023). In *Gutierrez*, the United States District Court for the Southern District of Texas issued a declaratory judgment holding that "granting a right to a subsequent habeas proceeding for innocence of the death penalty but then denying DNA testing for a movant to avail himself of that right creates a system which is fundamentally inadequate to vindicate the substantive rights the State of Texas provides." *See Gutierrez v. Saenz, et al*., No. 1:19-cv-185, Dkt. No. 141 (S.D. Tex. Mar. 23, 2021). Therefore, the district court "conclud[ed] that giving a defendant the right to a successive habeas petition for innocence of the death penalty under Texas Code of Criminal Procedure Article 11.071§5(a)(3) but then denying him DNA testing under Article 64.03(a)(2)(A) unless he can demonstrate innocence of the crime is fundamentally unfair and offends procedural due process." According to the court, denying a movant access to DNA testing of punishment-related evidence renders "illusory" the right to challenge the results of the punishment phase in a subsequent writ pursuant to Article 11.071. *Id*.
>
> In addition to the fact that a sister court has recently issued a declaratory judgment on the very claims before this Court, which are now a live issue before the Fifth Circuit Court of Appeals, the evidence at issue in this writ pertains to what might be regarded as the State's strongest evidence of future dangerousness. As such, it is difficult for the Court to conclude that the negation of this evidence would not have affected the jury's decision in the punishment phase. Therefore, this Court concludes Murphy has made the requisite showing of a likelihood of success. *Nken*, 556 U.S. at 425-26.

No. 1:23cv1170, Dkt. 16 (W.D.Tex. Oct. 6, 2023).

It must be noted that Mr. Murphy's constitutional claim is a facial one, despite the State's attempts to reframe it as an impermissible as-applied challenge. Clearly the lower courts have seen the constitutional claim for what it is, and they have found a likelihood of success here.

The State has argued that Mr. Murphy's constitutional challenge is an impermissible as-applied challenge, barred by the *Rooker/Feldman*[3] doctrine. But this Court has clearly - and recently - recognized the propriety of exactly this sort of facial challenge. *Reed v. Goertz*, 143 S. Ct. 955, 960-61 (2023).[4] *See also Skinner v. Switzer*, 562 U.S. 521 (2011). Mr. Murphy's complaint fully complies with that precedent, and presents a facial constitutional challenge. Any arguments Mr. Murphy has made concerning his own personal injury arising from the State's actions are relevant to different legal requirements – standing, and irrevocable injury under *Nken* – and in no way change the nature of his facial challenge. For the State to argue otherwise is specious and unfair.

III. The District Court and the Fifth Circuit Court of Appeals Did Not Fail to Explain What Irreparable Injury Murphy Will Suffer Absent a Stay of Execution

Death is irreparable. The State argues that it would nonetheless be no "injury" to Mr. Murphy because he cannot prove he will ultimately win his lawsuit. This argument, which is entirely premised on Murphy losing his lawsuit, misreads and defeats the purpose of the irreparable injury *Nken* factor. In evaluating whether a claimant has demonstrated irreparable injury under this factor, courts

[3] *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

[4] Justice Kavanaugh specifically held in *Reed*: "Texas contends that Reed's procedural due process claim contravenes the *Rooker-Feldman* doctrine. [] That doctrine prohibits federal courts from adjudicating cases brought by state-court losing parties challenging state-court judgments. But as this Court explained in *Skinner v. Switzer*, [] even though a 'state-court decision is not reviewable by lower federal courts,' a 'statute or rule governing the decision may be challenged in a federal action.' [] Here, as in *Skinner,* Reed does 'not challenge the adverse' state-court decisions themselves, but rather 'targets as unconstitutional the Texas statute they authoritatively construed.'" Internal quotations omitted.

are not to examine whether there is harm, but rather to assume that the claimed harm occurs, and then decide whether or not that harm is irreparable. As noted above, the district court found that "Murphy has shown the requisite likelihood of success," and the Fifth Circuit did not disagree. Of course, any concern about likelihood of success is fully covered by the first *Nken* factor; thus, the purpose of this factor is not to focus on the injury but on its "irreparability."

Under well-supported Fifth Circuit precedent, if it was even a close case whether Mr. Murphy had shown an "irreparable injury" under *Nken*, the district court should find it in a capital case such as this. *O'Bryan v. Estelle*, 691 F.2d 706, 708 (5th Cir. 1982) ("in a capital case, the possibility of irreparable injury weighs heavily in the movant's favor. . . . We must be particularly certain that the legal issues 'have been sufficiently litigated' and the criminal defendant afforded all the protections guaranteed him by the Constitution of the United States.") (quoting *Evans v. Bennett*, 440 U.S. 1301, 1303 (1979) (Rehnquist, J., granting a stay of execution)). This is especially true when "his claim has some merit." *Battaglia v. Stephens*, 824 F.ed 470, 475 (5th Cir. 2016) (quotation omitted). That rule is sound, and this Court should defer to the district court judge and two circuit court judges who decided this factor in his favor.

IV. Neither the District Court nor the Fifth Circuit Court of Appeals Gave "Short Shrift" to the Public Interest in Seeing Mr. Murphy's Execution Carried Out

The public has an interest in the adjudication of the rights Mr. Murphy seeks to vindicate through his § 1983 action. These rights pertain to exculpatory

evidence that could show Mr. Murphy did not commit the extraneous offense used to assert his "future dangerousness" at the penalty phase of his capital trial. The district court rightly concluded that "the public interest will best be served by allowing time for the fair adjudication of the important issues raised in Murphy's complaint, given the irrevocable harm that would result if this live issue were not first adjudicated by the courts." Dist. Ct. Order, No. 1:23cv1170, at 6.

The District Court did not ignore the State's interest here. It nonetheless found that, despite that interest, the public interest more-strongly favored a stay given the significant constitutional issues raised, and currently pending in the Fifth Circuit. *Id*. Again, the Fifth Circuit did not disagree.

Furthermore, the Defendant to Mr. Murphy's suit is actually the prosecutor *pro tem* in the criminal case below. And the prosecutor's duty is to "seek justice within the bounds of the law, not merely to convict." In this way, the "prosecutor serves the public interest[.]" American Bar Association, Criminal Justice Standards for the Prosecution Function, 4th Ed. (2017), Standard 3-1.2, Functions and Duties of the Prosecutor, American Bar Association, Model Rules of Professional Conduct, Rule 3.8 (Special Responsibilities of a Prosecutor), cmt. 1 ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice[.]"). *See also Berger v. United States*, 295 U.S. 78, 88 (1935) (prosecutor's "interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done").

The State argues that "both the State and crime victims have a "powerful and legitimate interest in punishing the guilty." (Motion at 16). However, there is no evidence that the victim's family in this case is supporting the execution. In fact, newspaper articles today indicate that there is at least one member of the victims's family that does not wish to see Mr. Murphy executed. *See* Keri Blakinger, *Jedidiah Murphy and the evolving debate on mental illness and capital punishment*, Los Angeles Times (Oct. 10, 2023), available at https://www.latimes.com/california/story/2023-10-10/texas-jedidiah-murphy-mental-illness-death-penalty-debate.

The public has an interest in enforcing court judgments, to be sure; but, the public interest is not merely in seeing the execution carried out, but "in having a just judgment." *Arizona v. Washington,* 434 U.S. 297, 512 (1978). And the public's confidence in the criminal justice system is undermined when the State carries out executions that violate our constitutional norms. The public, as well as Mr. Murphy, has an interest in the issues that his civil rights complaint invokes. The crimes the State introduced as aggravators at the punishment phase of his trial were never charged, and no one was ever convicted of them. Mr. Murphy has steadfastly maintained his innocence of these uncharged crimes.

Although the State suggests that exculpatory DNA results would not exonerate Murphy due to the "ubiquity" of touch DNA, the argument is disingenuous given the government's frequent use of "touch" DNA in prosecuting cases. And, in addition to excluding him, the touch DNA evidence he seeks

through post-conviction DNA testing could further identify the actual perpetrator of these crimes and bring them to justice.[5] "Modern DNA testing can provide powerful new evidence unlike anything known before. . . . [T]here is no technology comparable to DNA testing for matching tissues when such evidence is at issue. DNA testing has exonerated wrongly convicted people . . . ." *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 62 (2009) (citations omitted).

Mrs. Wilhelm's vivid testimony about the uncharged kidnapping was more than just an additional piece of evidence in support of Mr. Murphy's supposed future dangerousness. It was the most highly-charged and inflammatory testimony in the entire trial and the crux of the State's case that Mr. Murphy would pose a threat to society. And, as noted above, the rest of the evidence tending to support a future danger finding was markedly different, in substance and in kind, from Mrs. Wilhelm's testimony. Combined with an instruction that Murphy would be eligible for parole in 40 years if sentenced to life in prison, Ms. Wilhelm's testimony virtually assured a death sentence for Mr. Murphy, in spite of his partial alibi, and that Ms. Wilhelm's faulty out-of-court identification occurred three years after the fact.

Finally, the State has failed to address the obvious public interest in like cases being decided on the same basis, rather than having the spectacle of Mr.

[5] Chapter 64 of the Texas Code of Criminal Procedure does not just provide for DNA testing; if an unidentified DNA profile is developed from the evidence, the State is further required to run it through the FBI's CODIS database, and a Texas DNA database. Tex. Code Crim. P. Art. 64.035.

Murphy's execution followed only days or weeks later by a decision in *Gutierrez* showing that, despite his claim for DNA testing being well-founded, he was executed without adequate or sufficient process and in the opposite manner to which Mr. Gutierrez was treated.

V. There is No Error Upon Which This Court Can Rely As A Rationale for Substituting Its Judgment for that of the Fifth Circuit Court of Appeals and the United States District Court

The State argues that granting or leaving the stay in place is "grave error." But, there is no error here. There is no credible basis for this Court to substitute its judgment for that of the United States District Court or the Fifth Circuit Court of Appeals. The district court applied relevant precedent from this Court and from the Fifth Circuit, citing to the governing standard (as to which there has been no dispute between the parties). The district court decided that Mr. Murphy had made a substantial showing that he is likely to succeed on the merits of his civil-rights claim, and that he would suffer irreparable injury if his execution were to go forward, and it also found that there is a valid public interest in the adjudication of these claims. After weighing all of these factors against the State's interest in carrying out the execution today, prior to the resolution of the litigation in *Gutierrez v. Saenz* as well as Mr. Murphy's own civil rights litigation, the district court granted a stay. And the Fifth Circuit deliberately left it in place, pending its decision in *Gutierrez*.[6]

[6] As noted *supra*, one of the judges on Mr. Murphy's panel – Judge Southwick, who authored the majority opinion here – is also on the panel in *Gutierrez*.

Petitioner presents no argument that should cause this Court to find that the district court abused its discretion; nor should it find that the Fifth Circuit erred. Petitioner does not allege that either the district court or the Fifth Circuit applied the wrong standard or precedent to their analyses of Mr. Murphy's stay motion; rather, Petitioner argues that because the district court and the Fifth Circuit Court of Appeals weighed the four *Nken* factors and came to a different conclusion about the balance of the equities than Petitioner urges, the courts committed "grave" error, and the stay must be vacated.

In fact, the Fifth Circuit panel clearly utilized the appropriate standard. They should not be penalized for failing to write enough words in an opinion issued on the State's emergency application. The majority extensively discussed the nature of the stay and injunctive jurisdiction, and rejected the proposed alternative reasoning of the dissent on the questions of merits and delay.

The Fifth Circuit panel engaged in the very same equitable analysis that Petitioner urges; they simply reached a conclusion Petitioner doesn't like. But it is the Fifth Circuit that is in the best position to weigh the direct applicability of *Gutierrez* to Mr. Murphy's claims – a Fifth Circuit opinion that is current being drafted. This was a well-reasoned consideration for the Fifth Circuit in leaving the district court's stay in place in Mr. Murphy's case; and this Court should give due credit to the Circuit Court's exercise of discretion. *See Barefoot v. Estelle*, 463 U.S. 880, 896 (1983) ("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 courts of appeals in these circumstances."). Mere disagreement with the conclusion a court reaches about a balance of the equities is not reason enough to vacate the stay, particularly in light of the irreparable injury – imminent death – that would occur if today's execution were allowed to proceed.

CONCLUSION

Mr. Murphy respectfully asks this Court to decline the State's request to vacate the district court's stay.

Respectfully Submitted,

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PROOF OF SERVICE

On this day, October 10, 2023, I hereby certify that I served a true copy of this Opposition filing on the Movant, Ali Nasser, via email.

s/_____
Katherine Froyen Black