No. 19-70020

IN THE

United States Court of Appeals for the Fifth Circuit

PATRICK HENRY MURPHY, JR.,
Plaintiff–Appellee,

v.

BRYAN COLLIER, EXECUTIVE DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE; LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION; BILLY LEWIS, WARDEN,
Defendants–Appellants.

On Appeal from the United States District Court
for the Southern District of Texas, Houston Division,
Cause No. 4:19-CV-1106

REPLY TO APPELLEE'S OPPOSITION

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REPLY

I. This Court Has Jurisdiction.

Murphy argues that, while this Court has jurisdiction over orders granting stays of execution under 28 U.S.C. § 1292, the Court should not exercise that jurisdiction because the State artificially created jurisdiction in this Court where none would otherwise exist. Pl.–Appellee's Resp. Opp'n to Mot. Vacate Stay of Exec. 6–9 (Pl. Opp'n). Murphy asserts that, because this Court would not normally have jurisdiction over denials of motions of summary judgment, the State set Murphy's execution date to interfere with the orderly adjudication of his claims and to create a procedural posture that allows the State to appeal the district court's stay grant when it otherwise would not have had an avenue for appeal. *Id*. Neither of these assertions are true.

As a preliminary matter, the defendants in this case—the Texas Department of Criminal Justice (TDCJ)—are *not* the "State" for purposes of Murphy's argument. As the documents Murphy attaches to his opposition show, neither the Attorney General's Office nor TDCJ are responsible for setting or requesting the setting of execution dates. Pl.

Opp'n Ex. B, at 18.[1] Indeed, Murphy acknowledges that the Dallas County District Attorney's Office moved for Murphy's execution date. Pl. Opp'n 5 n.3. Therefore, any implication that the *defendants* in this case set an execution date to interfere with the present federal court litigation is baseless.

Further, had the lower court reached the correct decision in this case—that Murphy is not entitled to a stay of execution—he too would have had a right to appeal that decision and would have enjoyed the jurisdiction of this Court. TDCJ, here, is simply exercising its prerogative to ensure that justice is done and is not engaging in any manipulation. Thus, Murphy's argument boils down to a complaint that the defendants have created an appeal where there is a right to appeal. There is no basis for the inference that such is an attempt to manipulate the courts.

Additionally, to the extent Murphy would imply that the timing of the setting of his execution date is indicative of manipulation, such an argument is also unavailing. Indeed, discovery in this case was completed

[1] As Murphy's appendix is not paginated, the page numbers refer to those contained in the ECF header of the documents.

on June 28, 2019.[2] *See* Docket Control Order 2, ECF No. 24. The parties filed their competing motions for summary judgment on July 18, 2019. *Id.*; Pl. Mot. Summ. J, ECF No. 38; Defs. Mot. Summ. J., ECF No. 39. Dallas County filed its motion to set an execution date on July 30, 2019, and it was granted August 12, 2019, for a date over ninety days later. State's Second Mot. Set Exec. Date, *State v. Murphy*, No. F01-00328-T (283d Dist. Ct., Dallas County, Tex. July 30, 2019); Order Setting Execution Date, *State v. Murphy*, No. F01-00328-T (283d Dist. Ct., Dallas County, Tex. Aug. 12, 2019). That Dallas County sought an execution date after discovery was concluded and dispositive motions were filed in the lower court in no way demonstrates that TDCJ has either interfered with the orderly adjudication of Murphy's claims or that it has manipulated this Court's jurisdiction.

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[2] The lower court's Docket Control Order explicitly states that discovery requests will be deemed untimely if they are filed so close to the June 28 deadline that any discovery response would occur after that deadline. Docket Control Order 2. Murphy's allegation that "discovery is ongoing," Pl. Opp'n 4, is incorrect. That Murphy filed an untimely motion for further discovery, in contravention of the court's standing order, that was denied by the lower court in its order granting the stay does *not* mean that discovery is ongoing. It was not at the time that Dallas County sought the execution date, nor at the time that the execution date was set, and it is certainly not ongoing at this time.

II. Murphy Did Not Raise a Claim Related to the Pre-Execution Holding Area in His Initial Complaint.

In an attempt to escape the conclusions that he was not diligent, that his claim is unexhausted, and that he is untimely, Murphy conflates his execution chamber and pre-execution holding area claims. Indeed, Murphy argues that the claim in his original complaint can be summarized as follows: "Murphy should not be prohibited from freely exercising his religion in the moments before he is executed and his ability to practice his religion during that time should not be less than those adhering to faiths different from his." Pl. Opp'n 20. He argues this summation applies equally to the claim presented in his amended complaint. *Id*. Murphy concludes: "Murphy's desire has always been to be in the presence of his spiritual advisor as close as possible to the moment he dies. That desire is reflected in both complaints." *Id*. at 21.

While that may have been Murphy's *desire*, it was neither what he asked for nor what he pled. Indeed, in his initial email to TDCJ's general counsel, Murphy asked only for the following: 1) that his spiritual advisor "be present with him *in the execution chamber*"; 2) that *his body* not be disturbed for seven days or, at least, seven minutes; and 3) that the "chaplain, if present [*in the execution chamber*], not touch him." Defs.

Mot. to Vacate App'x 1 (Defs. App'x), at 26 (emphasis added). In reply to TDCJ's response, Murphy asked that, if TDCJ had a Buddhist on its staff, he would "be content to have him *in the chamber*." *Id.* at 29 (emphasis added). To be sure, Murphy characterized these requests in his initial complaint before the lower court as follows: "Counsel informed Ms. Howell of Murphy's desire to have his spiritual advisor *present in the execution chamber* instead of the prison's Christian chaplain." *Id.* at 9 (emphasis added).

And in that initial complaint, Murphy's claim was clear:

> By creating a policy that only employees *can be present in the execution chamber*, by subsequently employing only Christian and Muslim chaplains and not religious clerics of other religions, and by making part of its execution protocol that a TDCJ-employed chaplain or no chaplain will be present *during executions*, TDCJ has developed a procedure which demonstrates a clear preference for Christianity and Islam over other religions.

Id. at 13 (emphasis added). Throughout his initial complaint, Murphy made many more references to the execution chamber procedures, including under his Free Exercise and Religious Land Use and Institutionalized Persons Act (RLUIPA) claims, in which his primary complaint was that TDCJ's policy would prevent him "from chanting with his spiritual advisor *at the time of the execution* in an attempt to stay

focused on the Buddha . . . ." *Id.* at 20 (emphasis added); *see also id.* at 22 (arguing that, if "chanting with a Buddhist priest *at the time of his death* is not something that he is compelled to do by his religion," then the lower court should find a violation under RLUIPA).[3] He made no references to the time leading up to the execution or to the pre-execution holding area. *See generally id.*

It was only when TDCJ amended the written execution protocol to exclude all non-security personnel from the chamber itself that Murphy changed "the focus of his disparate treatment claim [to be] now on that [pre-execution holding area] time." Pl. Opp'n 20. Murphy, however, did not merely change the "focus" of the claim; he changed the claim. Murphy should not now be permitted to conflate the claims he has raised so that he may evade the procedural obstacles in his path.

Indeed, that Murphy did *not* raise a claim relating to the pre-execution holding area means that the Supreme Court's stay order—to

[3] In his opposition, Murphy obfuscates this claim as follows: "Being able to chant with his spiritual advisor *until the moment he enters the execution chamber* would greatly assist him in maintaining focus." Pl. Opp'n 32 (emphasis added). As is clear from the above, Murphy's initial requests did not pertain to chanting *before* he entered the chamber.

whatever extent it can be read to have passed on Murphy's diligence, exhaustion, or timeliness[4]—has no bearing on this claim. The Supreme Court could not have passed on a claim that was not then before it. Thus, Murphy's repeated arguments that the Supreme Court's order in any way forecloses the diligence, exhaustion, or timeliness inquiries are wholly unavailing.

III. Murphy Has Failed to Exercise Due Diligence.

Putting aside Murphy's misplaced reliance on the Supreme Court's stay grant, Murphy's remaining arguments that he was diligent fail. Indeed, Murphy attempts to justify his failure to raise the instant pre-execution holding area claim in his initial complaint by characterizing

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[4] Murphy disparages TDCJ for not conceding that the Supreme Court found that Murphy acted diligently. Pl. Opp'n 19. But TDCJ does not concede that because the Court did not so find. Indeed, the Court's decision granting a stay was unexplained—there was no opinion of the Court and nothing was decided. Murphy's attempts to divine reasons from an unreasoned order do not constitute binding authority that forecloses these questions in this Court, even if it were the case that Murphy's instant pre-execution holding area claim were before the Court when it granted the stay. *Cf. Selvage v. Lynaugh*, 842 F.3d 89, 95 (5th Cir. 1988), *vacated on other grounds*, *Selvage v. Collins*, 494 U.S. 108 (1990) ("We would find it even more difficult rationally to order outcomes if we were required to guess the meaning of unexplained grants of a stay or writs of certiorari. . . . A brief review of the cases in which the Supreme Court has granted requests for stays . . . explain our sense that abiding our settled view of the law until told to do otherwise best strikes for rational and evenhanded justice.").

his amendment as a "response" to TDCJ's changed protocol. *See* Pl. Opp'n 19. But, as noted in TDCJ's motion to vacate, TDCJ did *not* change its protocol as to the pre-execution holding area; it changed only as to the execution chamber itself. And both versions of the protocol are silent regarding the hours immediately preceding the execution. Therefore, the change in the protocol has no bearing whatsoever on Murphy's ability to raise a claim related to the pre-execution holding area. To be sure, he raised the claim in his amended complaint based on the same *absence* of written policy regarding the hours between 4 p.m. and when the execution begins. *Cf.* Pl. Opp'n 22 n.7 (noting that *neither* protocol contains any information regarding who is allowed to interact with the convicted between 4:00 p.m. and the time he enters the chamber). Therefore, the change in protocol provides no excuse for his lack of diligence.

Similarly, Murphy argues that it has "become clear during this proceeding that one cannot know whether his request to have a chaplain of his faith accompany him during the time immediately before he is executed . . . will be granted until TDCJ informs that person before his execution whether it employs any chaplains of his faith." Pl. Opp'n 21.

But this is precisely the reason for requiring that an inmate seeking accommodation: a) exhaust administrative remedies, in which he would be able to discover whether such a request could be granted; and b) exercise due diligence. Murphy's attempts to deflect responsibility for his failure to do either should not be condoned by this Court. The lower court therefore abused its discretion in granting Murphy a stay of his execution.

IV. Murphy's claim is unexhausted.

Murphy believes he has exhausted his claim because he complied with the "purpose" of the exhaustion doctrine by emailing TDCJ's general counsel and because strict adherence to the established grievance process when an execution is imminent is "untenable." Pl. Opp'n 23–24. However, and again, even if an email to TDCJ's general counsel could be considered proper exhaustion—which it is not, *see Jones v. Bock*, 549 U.S. 199, 212 (2007)—Murphy *did not* make any requests with respect to the pre-execution holding area; therefore, even accepting Murphy's incorrect argument as true, he has *not* satisfied the "purpose of the exhaustion doctrine" on this claim.

Moreover, Murphy argues that the grievance process may take eighty days or more. Pl. Opp'n 24. But, as Murphy acknowledges, he amended his complaint to include this claim *when no execution date was pending*. *See id.* at 14. Yet Murphy did not file a grievance with respect to his new accommodation request then either. And, even if he had filed when his execution date was set, he had ninety-four days from that date, and he acknowledges that Director Lorie Davis "testified that that there is no rule that would prevent her from amending TDCJ's execution protocol as soon as two days before a scheduled execution." *Id.* at 24. Therefore, Murphy's grievance—which would have requested an accommodation that was *not* even within the protocol—could certainly have been resolved within that time. Importantly, the Supreme Court has held that it will "not read futility or other exceptions into statutory exhaustion requirements where Congress has provided otherwise." *Booth v. Churner*, 532 U.S. 731, 741 n.6 (2011). Thus, Murphy's failure to exhaust means that his claim should have been dismissed, and the district court abused its discretion in granting the stay.

V. Murphy's claim is untimely.

Murphy argues again that, because an inmate cannot know what faiths will be in the chaplaincy department on the day of his execution, a request should be considered timely if it was made within a reasonable time before the scheduled execution. Pl. Opp'n 25–26. But such an argument is inapposite, as only two accrual dates are relevant to claims concerning execution protocol: when direct review is complete or when the challenged protocol was adopted. *Walker v. Epps*, 550 F.3d 407, 414–15 (5th Cir. 2008). TDCJ's policy regarding the use of chaplains in the pre-execution holding area is not formalized in its execution protocol; therefore, the latter accrual date does not apply in this case, as no protocol has been adopted and no changes have been made. As such, Murphy's claim accrued when direct review of his conviction was completed, and, even under the most generous interpretation, Murphy's direct appeal ended more than a decade ago. *Murphy v. Texas*, 549 U.S. 1119 (2007). His claim is therefore untimely. *See Walker*, 550 F.3d at 415. The district court thus abused its discretion.

VI. Murphy Has Not Established a Likelihood of Success.

All the above reasons, in addition to the reasons discussed in TDCJ's motion to vacate, demonstrate that Murphy has wholly failed to meet his burden to show a strong likelihood of success on the merits of his claim. Indeed, the above procedural defects undermine any assertion that Murphy has *any* likelihood of success. And, contrary to Murphy's argument, Pl. Opp'n 5–6, it is *not* enough that he "survived" TDCJ's motion for summary judgment by showing an issue of genuine fact; to be sure, he ignores that *his competing* motion for summary judgment was also denied, meaning that he too did not meet his burden of showing that there were no genuine disputes as to material fact and he was entitled to judgment as a matter of law. This necessarily means that Murphy has not established a likelihood of success warranting a stay. Therefore, the district court abused its discretion in so granting.

CONCLUSION

For the reasons stated in TDCJ's motion and in this reply, TDCJ respectfully requests that this Court vacate the district court's order staying Murphy's execution.

Respectfully submitted,

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