

FILED

March 14, 2006

Charles R. Fulbruge III
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-70010

TOMMIE COLLINS HUGHES,

Petitioner-Appellant,

v.

GARY JOHNSON, Executive Director, Texas Department of
Criminal Justice; DOUG DRETKE, DIRECTOR, TEXAS DEPARTMENT OF
CRIMINAL JUSTICE, CORRECTION INSTITUTIONS DIVISION; CHARLES
O'REILLY, Senior Warden, Huntsville Unit Huntsville, Texas;
and UNKNOWN EXECUTIONERS,

Defendants-Appellees.

Appeal from the United States District Court for the
Southern District of Texas, Houston Division
No. 4:06-0678

Before JONES, Chief Judge, BENAVIDES, and CLEMENT, Circuit Judges.

PER CURIAM:*

The plaintiff-appellant Tommie Collins Hughes ("Hughes") is scheduled to be executed on March 15, 2006. Hughes appeals the district court's dismissal of his suit seeking injunctive relief pursuant to 42 U.S.C. section 1983. He alleged that the particular

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

method of execution used by Texas, lethal injection, may cause excruciating pain in violation of the Eighth Amendment. The district court, citing Fifth Circuit precedent, dismissed the complaint with prejudice, concluding that Hughes unnecessarily delayed in bringing his Eighth Amendment challenge to the method of execution. The district court expressly recognized that it did not have to determine whether the Eighth Amendment claim is cognizable under section 1983 because Fifth Circuit precedent holds that Hughes is not entitled to equitable relief due to his dilatory filing. Before this Court, Hughes requests a stay of execution. Because we agree with the district court's analysis, we affirm.

The district court correctly applied our precedent. This Court has held that "[a] challenge to a method of execution may be filed any time after the plaintiff's conviction has become final on direct review." *Neville v. Johnson*, __ F.3d __, 2006 U.S. App. LEXIS 3096 (5th Cir. Feb. 8, 2006) (citing *White v. Johnson*, 429 F.3d 572, 574 (5th Cir. 2005)), *cert. denied*, *Neville v. Livingston*, 2006 U.S. LEXIS 1088 (Feb. 8, 2006). Furthermore, we have made clear that waiting to file such a challenge shortly before a scheduled execution constitutes unnecessary delay. *Harris v. Johnson*, 376 F.3d 414, 417-19 (5th Cir. 2004), *cert. denied*, *Harris v. Dretke*, 542 U.S. 953 (2004). Although Hughes's direct

appeal has been final for almost six years,¹ he did not file the instant complaint until 14 days before his scheduled execution. Hughes had almost six years to file his suit, to seek discovery, and to litigate his request for relief under section 1983. Hughes "cannot excuse his delaying until the eleventh hour on the ground that he was unaware of the state's intention to execute him by injecting the three chemicals he now challenges." *Harris*, 376 F.3d at 417.

Whether or not he properly states a claim under section 1983, Hughes is not entitled to the relief he seeks due to his dilatory filing. He has been on death row for more than seven years but waited to challenge a procedure for lethal injection that has been used by the Defendants during his entire stay on death row. See *White*, 429 F.3d at 574 (reaching the same conclusion when petitioner filed after six years); see also *Harris*, 376 F.3d at 417. Nonetheless, Hughes contends that he has not delayed in bringing suit because his execution was not scheduled until December of 2005. We reject this argument. This Court, in *Harris*, explicitly stated that a challenge should be brought when the conviction and sentence are affirmed on direct review and not when the execution is "an imminent or impending danger." *Harris*, 376 F.3d at 418; see also *Neville*, __ F.3d at __, 2006 U.S. App. LEXIS

¹ *Hughes v. State*, 24 S.W.3d 833 (Tex. Crim. App. 2000), cert. denied, *Hughes v. Texas*, 531 U.S. 980 (2000).

3096 at *1 (finding that a method-of-execution challenge may be filed after the plaintiff's conviction has become final on direct review). Hughes's death penalty conviction was affirmed in 2000. Waiting until two weeks before his scheduled execution date constitutes unnecessary delay. See *Harris*, 376 F.3d at 416. *Harris* and *Neville* control and require us to affirm the district court's dismissal of this claim.

The district court properly considered Hughes's attempts to distinguish his case from prior cases, such as *Neville, Smith v. Johnson*, 2006 U.S. App. LEXIS 3527 (5th Cir. Feb. 14, 2006), and *White*, and found them unavailing. We agree. This case falls squarely within the holdings of *Neville, Smith*, and *White*. Thus, our precedent applies to Hughes's case, and this Court must deny his request to stay.

Hughes also contends that his execution should be stayed pending the Supreme Court's decision in *Hill v. Crosby*, a case also involving a challenge to the method of execution. 126 S. Ct. 1189 (2006) (granting certiorari). In *Neville*, we declined such an invitation, explaining that Fifth Circuit precedent "remains binding until the Supreme Court provides contrary guidance." ___ F.3d at ___, 2006 U.S. App. LEXIS 3096 at *3. Moreover, the Supreme Court has denied certiorari in recent challenges to Texas's lethal-injection protocol. See, e.g., *Smith*, 2006 U.S. LEXIS 1090 (Feb. 15, 2006).

Accordingly, based on the foregoing reasons, we AFFIRM the district court's dismissal of Hughes's complaint and DENY Hughes's motion for a stay of execution.