

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 17-70028

United States Court of Appeals
Fifth Circuit

FILED

November 8, 2017

Lyle W. Cayce
Clerk

RUBEN CARDENAS RAMIREZ,

Plaintiff–Appellant,

versus

STEVE MCCRAW, Director, Texas Department of Public Safety;
RICARDO RODRIGUEZ, JR., District Attorney, Hidalgo County;
JOE MARCHAN, Regional Crime Lab Manager, Weslaco DPS Laboratory;
WESLACO CRIMINAL INVESTIGATION LABORATORY,

Defendants–Appellees.

Appeal from the United States District Court
for the Western District of Texas
No. 1:17-CV-1054

Before SMITH, DENNIS, and CLEMENT, Circuit Judges.

PER CURIAM:*

Ruben Cardenas Ramirez¹ was sentenced to death in February 1998 for

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

¹ The caption in the notice of appeal refers to the appellant in this manner, though in previous litigation he has been referred to as Ruben Ramirez Cardenas. For consistency, we continue to refer to him as Cardenas.

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the kidnaping, rape, and murder of his fifteen-year-old cousin, Mayra Laguna, and is scheduled to be executed on November 8, 2017. On November 7, 2017, he filed an action under 42 U.S.C. § 1983 seeking to compel state officials to release evidence for DNA testing; a Motion for Stay of Execution; and a Motion for a Temporary Restraining Order. The district court dismissed his Motion for Stay of Execution on jurisdictional grounds and alternatively for failure to demonstrate that he is entitled to a stay. Cardenas appeals the dismissal. We affirm and, additionally, deny a stay of execution.

I.

In 1997, Cardenas entered the bedroom of his fifteen-year-old cousin, Mayra Laguna, through a window, taped her mouth shut, tied her hands behind her, and forced her to his vehicle. He then raped and beat her before dumping her body in a canal in a remote location. Police brought Cardenas in for questioning to determine Laguna's whereabouts the day of the murder. After finding conflicting details in Cardenas's account of events, police interrogated him, and Cardenas confessed to the crime. A detailed account of the facts is laid out in the Court of Criminal Appeal's affirmance of the conviction. *Cardenas v. State*, 30 S.W.3d 384, 386–90 (Tex. Crim. App. 2000).

Extensive litigation has been pursued in state and federal court. Cardenas first filed a state habeas petition, which the court denied. *Ex Parte Cardenas*, No. 48,728-01 (Tex. Crim. App. May 16, 2001). Cardenas then filed his initial federal habeas petition, which was also denied. *Cardenas v. Dretke*, 405 F.3d 244 (5th Cir. 2005). Cardenas filed a second state habeas petition invoking the International Court of Justice's opinion in *Avena & Other Mexican Nationals (Mex. V. U.S.)*, 2004 I.C.J. 128 (Mar. 31), and the Presidential Memorandum purporting to direct state courts to comply with *Avena*. The state court dismissed this petition as an abuse of the writ. *Ex parte Cardenas*,

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No. WR-17,425-05, 2007 WL 678628 (Tex. Crim. App. Mar. 7, 2007). Cardenas's second federal habeas petition was ultimately denied, and this court declined to issue a certificate of appealability. *Cardenas v. Stephens*, 820 F.3d 197 (5th Cir. 2016). The Supreme Court denied certiorari in January 2017. *Ramirez v. Davis*, 137 S. Ct. 625 (2017).

On September 15, 2017, Cardenas filed a motion in state court seeking DNA testing under Texas Code of Criminal Procedure Chapter 64. The trial court denied the motion, and the Court of Criminal Appeals affirmed on the basis that Cardenas could not establish by a preponderance of the evidence he would not have been convicted if exculpatory results had been obtained through DNA testing and that the motion was not made to unreasonably delay the execution of his sentence. *Cardenas v. State*, No. 77,075 (Tex. Crim. App. Nov. 6, 2017). On November 7, 2017, the day before his scheduled execution, Cardenas filed the instant litigation in federal court claiming that the inability to obtain DNA testing has deprived him of his rights to due process, to be free from cruel and unusual punishment, and to have access to the courts to establish his innocence.

II.

This appeal reaches this court in the late afternoon before an execution scheduled for 6:00 p.m. To provide an opinion in time for further relief to be sought, we give a truncated explanation of the reasons for affirming.

In the limited amount of time since Cardenas filed this action on the day before the scheduled execution, the district court commendably produced an eight-page opinion that comprehensively explains the reasons for denying relief. The action is brought under 42 U.S.C. § 1983. The district court opined that federal courts lack jurisdiction to stay executions in a § 1983 action and that that section is not available where “a judgment in favor of the plaintiff

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would necessarily imply the invalidity of his conviction or sentence.” *Heck v. Humphrey*, 512 U.S. 477, 487 (1994). We decline to adopt the district court’s view on this jurisdictional question.

The district court helpfully set forth an alternative holding that even if it had jurisdiction, it would deny a stay of execution, applying the reasoning of *O’Bryan v. Estelle*, 691 F.2d 706 (5th Cir. 1982) (per curiam), which was a capital case. Despite the obvious presence of irreparable harm, factors such as the likelihood of success on the merits must still be weighed, and the movant must present a substantial case on the merits. *Celestine v. Butler*, 823 F.2d 74, 77 (5th Cir. 1987) (per curiam).

On the merits, Cardenas seeks an injunction requiring the defendant officials to release the biological material on which he asks for DNA testing. The district court accurately analyzed this request as tantamount to a petition for writ of mandamus but observed that “a federal court lacks the general power to issue writs of mandamus to direct state courts and their judicial officers in the performance of their duties where mandamus is the only relief sought.” *See Moye v. Clerk, DeKalb Cty. Superior Court*, 474 F.2d 1275, 1276 (5th Cir. 1973). Even if it could successfully be argued that these four individual defendants are not, strictly speaking, judicial officers of the state courts, we agree with the district court’s conclusion that Cardenas’s claim has no merit.

The district court acknowledged that the state, in Chapter 64 of the Texas Code of Criminal Procedure, has created the right for a convicted defendant to obtain evidence for post-conviction DNA testing, so the available procedures must be adequate to protect that right. *Dist. Attorney’s Office for the Third Judicial Dist. v. Osborne*, 557 U.S. 52, 69 (2009). Chapter 64 requires, however, that a defendant’s motion not be designed to delay execution of the

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sentence and that he must establish, by a preponderance of the evidence, that he would not have been convicted if DNA testing had yielded exculpatory results. TEX. CODE CRIM. PROC. Art. 64.03(a). As the district court reasoned, even if additional testing were to yield a DNA match, that would not exclude Cardenas from having been the murderer. He confessed to the murder, giving details of the murder that at the time were unknown to law enforcement, then leading officers to the body. The Texas Court of Criminal Appeals thus properly reasoned that Cardenas could not establish “by a preponderance of the evidence that he would not have been convicted if exculpatory results had been obtained.” *Cardenas v. State*, No. 77,075, slip op. at 5 (Tex. Crim. App. Nov. 6, 2017).

The district court amply examined the other factors relevant to a stay. Especially on the balance of the equities, the district court recounted that “Cardenas filed his request for DNA testing just 54 days prior to his scheduled execution date despite the fact (1) he was convicted nearly twenty years ago; and (2) Chapter 64 . . . was amended in 2011 and again in 2015 to allow such motions.” In the words of the district court, this was “dilatory behavior.”

The district court’s Order on Motion to Stay Execution is **AFFIRMED**. Cardenas’s motion for a stay of execution is **DENIED**. The mandate shall issue forthwith.