Nos. 15-7768 &15A744

IN THE
Supreme Court of the United States

RICHARD ALLEN MASTERSON,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari to the
Court of Criminal Appeals of Texas

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND APPLICATION FOR STAY OF EXECUTION

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND APPLICATION FOR STAY OF EXECUTION

Masterson seeks review in this Court following the denial by the Texas Court of Criminal Appeals of leave to file a petition for writ of prohibition. Masterson was convicted and sentenced to death for the strangulation death and robbery of Darin Honeycutt. Masterson has previously and unsuccessfully challenged the constitutionality of his state capital murder conviction and death sentence in both state and federal court. On January 12, 2016, approximately a week before his scheduled execution, Masterson filed two motions for leave to file petitions for writ of prohibition in the Texas Court of Criminal Appeals. In one, addressed herein, he alleged that Section 552.1081 of the Texas Government Code, which exempts from disclosure under the Public Information Act the identity of persons who (1) participate in, supply or administer a substance during an execution; and (2) manufacture, compound, or dispense substances or supplies used in executions, is unconstitutional. Specifically, he argued that the provision violated his right to due process, right to access of information under the First Amendment, right to Due Course of Law under the Texas Constitution, and operates as a violation of the Open Courts Provision of the Texas Constitution. Masterson presents the same claims in the instant petition. The petition should be denied because it

involves claims that are solely state law issues. Nevertheless, his claims are completely lacking in merit.

STATEMENT OF THE CASE

I. Statement of Facts

On Saturday morning, January 27, 2001, Alfred Bishop, the manager of a Houston apartment complex, was approached by friends of Darin Honeycutt. 18 RR 18-19, 21, 34.[1] The friends were worried about Honeycutt because he had not shown up for work. *Id.* at 21. They asked to be let into his apartment. *Id.* After Bishop opened Honeycutt's apartment, they found Honeycutt's naked body in the bedroom. *Id.* at 38-39. And Honeycutt's car was not in the parking lot. *Id.* at 36, 135.

Houston homicide detective Sgt. R. Parish was assigned to the case. *Id.* at 131. Parish was contacted by Morgan Porter, who had heard of Honeycutt's death. *Id.* at 117-18. Porter knew Masterson because Masterson's brother, James, worked for him. *Id.* at 109. The day after Honeycutt's murder, Masterson came looking for his brother, who was not at work. *Id.* at 110-11.

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[1] "RR" refers to the reporter's record of the trial testimony, preceded by volume number and followed by page number(s). "SX" refers to the numbered exhibits offered and admitted into evidence at trial by the State, followed by exhibit number(s). "CR" refers to the clerk's record of pleadings and documents filed with the court during trial, preceded by volume number and followed by page number(s). "SHCR" refers to the state habeas clerk's record, followed by page number(s).

Masterson told Porter: "I think I really put somebody to sleep." *Id.* at 112-13. Porter saw that Masterson was driving a red Ford Escort. *Id.* at 114. Asked where he had gotten the car, Masterson failed to respond. *Id.* He said, however, that he was going back to Georgia. *Id.*

James Masterson also contacted Sgt. Parish and told the sergeant that he thought his brother had gone to Georgia. *Id.* at 168. James contacted Masterson and told him to call Sgt. Parish to clear up the circumstances surrounding Honeycutt's death, which was thought possibly to be the result of a heart attack. *Id.* at 169-71. Of the heart-attack theory, Richard Masterson told his brother, "[T]hat was bull shit" and that he "put [Honeycutt] down." *Id.* at 170-71. James understood Masterson's statement to mean that he had killed Honeycutt. *Id.* at 171. Masterson told James that he had Honeycutt in a headlock until he went limp. *Id.* at 174. Eventually, investigators found Honeycutt's red Ford Escort in Emerson, Georgia. *Id.* at 138.

Eight days after Honeycutt's death, Masterson met Steven Drew in a gay club in Tampa, Florida. 19 RR 201. The two left the club in Drew's vehicle and went to Drew's apartment. *Id.* at 203. There, Masterson jumped Drew and placed him in a headlock. *Id.* at 206. Drew said, "There was nothing sexual about it. . . . [I]t was really violent and I knew it had nothing to do with sex at all." *Id.* at 206-07. Drew fell to the ground; Masterson straddled him and continued to strangle him with both hands. *Id.* at 209. Drew lost

consciousness, and when he came to, his wallet and car were gone. *Id.* at 209-10. Drew had bruises around his throat, he lost his voice for a few days, and the blood vessels in his eyes were broken. *Id.* at 211.

On February 6, 2001, Deputy E. Thoreson, an officer with the Belleview, Florida, Police Department, was running tags in a mobile home park when he came across a Toyota—Drew's car—which had been reported stolen. *Id.* at 48-49, 226. After Masterson was identified as the driver of the Toyota, he was arrested. *Id.* at 48-49, 226-28; 18 RR 143-44.

While Masterson was in the Marion County, Florida, jail, he confessed both to the attack on Drew and Honeycutt's murder. 19 RR 59-89, 230-31. Houston Police Detective David Null recorded Masterson's statement, and the tape was played for the jury. *Id.* at 70-89; SX 2. In the statement, Masterson said he strangled and killed Honeycutt to steal his car. 19 RR 70-80; SX 2. Asked what happened with Drew, Masterson said: "Pretty much the same thing I did in Houston, except the person didn't die. . . . I didn't let the person get undressed this time." 19 RR 230.

At trial, Masterson testified at guilt-innocence. Although he acknowledged killing Honeycutt, he said the death was an accident that occurred during sex. *Id.* at 114-78. He said Honeycutt asked him to put his arm around his neck to perform erotic asphyxiation. *Id.* at 126-27. In the process, Honeycutt went "limp" from the "sleeper hold" and died. *Id.* at 128-

29. Masterson said he fled because he had convictions. *Id.* at 130-31. To make the incident appear to be a robbery, he took Honeycutt's VCR and car. *Id.* at 130-32.

Dr. Paul Shrode, an assistant Harris County medical examiner, conducted Honeycutt's autopsy. 18 RR 193. Dr. Shrode believed Honeycutt's death was caused by "external neck compression." *Id.* at 205, 208. Dr. Shrode said that Honeycutt had a narrowed coronary artery. *Id.* at 208. The doctor ruled out the narrow artery as the cause of death but said the condition may have hastened the death. *Id.* at 206-08. Dr. Shrode said Honeycutt's death was consistent with his having been subjected to a "sleeper hold," in which Masterson pressed the inside of his elbow against Honeycutt's windpipe and applied pressure. *Id.* at 201, 209.

II. Appellate and Postconviction Proceedings

Masterson was found guilty of the robbery-related capital murder of Darin Honeycutt and sentenced to death. 2 CR 318-19. His conviction and sentence were affirmed on appeal, *Masterson v. State*, 155 S.W.3d 167 (Tex. Crim. App. 2005), and certiorari review was denied, *Masterson v. Texas*, 546 U.S. 1169 (2006). His first application for state habeas corpus relief was denied, *Ex parte Masterson*, No. WR-59481-01, 2008 WL 3855113 (Tex. Crim. App. Aug. 20, 2008) (unpublished), and his second was dismissed as abusive, *Ex parte Masterson*, No. WR-59481-02, 2012 WL 6630160 (Tex. Crim. App. Dec.

19, 2012) (unpublished). The federal district court denied his petition for habeas corpus relief and denied permission to appeal. *Masterson v. Thaler*, No. 4:09-CV-2731, 2014 WL 808165 (S.D. Tex. Feb. 28, 2014) (unpublished). The Fifth Circuit subsequently denied Masterson a certificate of appealability (COA). *Masterson v. Stephens*, 596 Fed. Appx. 282 (5th Cir. Jan. 9, 2015) (unpublished). This Court denied Masterson certiorari review. *Masterson v. Stephens*, 135 S. Ct. 2841 (2015).

On December 30, 2015, three weeks before his scheduled execution, Masterson filed a third state application for habeas corpus relief. The Texas Court of Criminal Appeals dismissed the application as an abuse of the writ pursuant to Texas Code of Criminal Procedure, Article 11.071, Section 5(a). *Ex parte Masterson*, 59,481-03 at Order (January 11, 2016). Masterson also sought authorization from the United States Court of Appeals for the Fifth Circuit to file a successive federal habeas petition, but the Fifth Circuit denied Masterson's motion on January 15, 2016. *In re Masterson*, No. 16-20031 (5th Cir. 2016) (unpublished).

On Tuesday, January 12, 2016, Masterson sought leave in state court to file two petitions for writ of prohibition. The Court of Criminal Appeals denied Masterson leave on January 15, 2016. *In re Masterson*, Nos. WR-59,481-04 &-05.

REASONS FOR DENYING THE WRIT

Review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted for compelling reasons only. Sup. Ct. R. 10 (West 2014). In determining whether a compelling reason exists, this Court may consider whether the state court decided an important federal question in a way that conflicts with relevant decisions of this Court. *Id.* Masterson's claims pertain only to questions of state law: whether he was entitled to leave to file a petition for writ of prohibition. The state court determined that Masterson failed to satisfy the prerequisites for being granted leave to file a petition for writ of prohibition. *In re Masterson*, Nos. WR-59,481-04 &-05. Given the state court's decision, no compelling reason exists for this Court to grant Masterson certiorari review.

I. Certiorari Review Is Foreclosed by a Valid State Procedural Bar.

The issue in this case involves only the state court's proper application of state procedural rules governing motions for leave to file petitions for writ of prohibition. The state court denied Masterson leave and did not consider the merits of his claims. *In re Masterson*, Nos. WR-59,481-04 &-05. The state court's disposition, which pertains only to an interpretation of state law, forecloses certiorari review.

This Court has held on numerous occasions that it "will not review a question of federal law decided by a state court if the decision of that court

rests on a state law ground that is independent of the federal question and adequate to support the judgment" because "[the Court] in fact lack[s] jurisdiction to review such independently supported judgments on direct appeal: since the state-law determination is sufficient to sustain the decree, any opinion of this Court on the federal question would be purely advisory." *Sochor v. Florida*, 504 U.S. 527, 533 (1992); *Michigan v. Long*, 463 U.S. 1032, 1042 (1983). Indeed, Masterson fails to present *any* justification for not applying the Court's long-standing rule against reviewing claims denied by state courts on state law grounds, and none exists. There is no jurisdictional adequate basis for granting certiorari review in this case.

II. Nevertheless, Masterson's Claims Are Without Merit.

Masterson's chief complaints regarding due process, due course of law, and access to courts is that the State, via Section 552.1081 of the Texas Government Code is "[s]quelching information relating to the manner and means in which the State will take his life…" Petition at 4. He further claims that "[i]t also leaves a chilling effect on petitioner's ability to determine whether the administered drug will result in cruel and unusual punishment," under the Eighth Amendment. *Id.* at 5. But his arguments are to no avail.

A. Eighth Amendment

Although Masterson's argument briefly touches the Eighth Amendment, the fact is that the relief he seeks—delay of his execution until he obtains

additional information regarding the drug suppliers—is meaningless absent a legitimate Eighth Amendment issue. Indeed, as shown above, Masterson's ultimate concern is "whether the administered drug will result in cruel and unusual punishment." Thus, discussion of Masterson's claim in light of the Eighth Amendment is paramount. And with regard to the Eighth Amendment, challenges to a State's method of execution require two showings, that (1) the State's proposed method of execution entails "a substantial risk of serious harm" that is "*sure or very likely* to cause serious illness and needless suffering," *Baze v. Rees*, 553 U.S. 35, 36, 49-50 (2008), and (2) that the petitioner has proposed a "feasible, readily implemented [alternative procedure that will] in fact significantly reduce a substantial risk of severe pain," *id.* at 52. This Court recently—and emphatically—reiterated this rule. *Glossip v. Gross*, 135 S. Ct. 2726, 2737 (2015).

The Constitution does not require the elimination of all risk of pain. *Baze*, 553 U.S. at 47. Rather, only if "conditions presenting the risk [are] '*sure* or *very likely* to cause serious illness and needless suffering,' and give rise to 'sufficiently *imminent* dangers'" will there be an Eighth Amendment claim. *Id.* at 50 (quoting *Helling v. McKinney*, 509 U.S. 25, 33, 33-35 (1993)) (emphasis added by the *Baze* Court). To prevail on such a claim, "there must be a 'substantial risk of serious harm,' an 'objectively intolerable risk of harm' that prevents prison officials from pleading that they were 'subjectively blameless

for purposes of the Eighth Amendment.'" *Id*. at 50-51 (quoting *Farmer v. Brennan*, 511 U.S. 825, 846, & 847 n.9 (1994)). And "[s]imply because an execution method may result in pain, either by accident or as an inescapable consequence of death, does not establish the sort of 'objectively intolerable risk of harm' that qualifies as cruel and unusual" under the Eighth Amendment. *Id*. at 50.

TDCJ-CID is not using any new method or new protocol to carry out Masterson's scheduled execution. Masterson knows that he will be executed in accordance with the TDCJ-CID's July 9, 2012 Execution Procedure, which calls for administering a 5 gram dose of pentobarbital. Pentobarbital has been used effectively across the nation[2] and in forty-nine executions in Texas,[3] the most recent being the November 18, 2015, execution of Raphael Holiday. The Fifth Circuit has found that Texas's single-drug protocol is acceptable under *Baze*. *Ladd v. Livingston et al.*, 777 F.3d 286, 289 (5th Cir.), *cert. denied*, 135

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[2] In addition to Texas, five other states have used, or are currently using, a pentobarbital-based single-drug protocol successfully and without incident. Those states are Missouri (18), Ohio (8), Georgia (9), South Dakota (2), Arizona (7), and Idaho (1). *See* http://www.deathpenaltyinfo.org/execution-list-2015 (last visited January 19, 2016); http://www.deathpenaltyinfo.org/execution-list-2014 (last visited January 19, 2016); http://www.deathpenaltyinfo.org/execution-list-2013 (last visited January 19, 2016); http://www.deathpenaltyinfo.org/execution-list-2012 (last visited January 19, 2016); http://www.deathpenaltyinfo.org/execution-list-2011 (last visited January 19, 2016).

[3] http://www.tdcj.state.tx.us/death_row/dr_executed_offenders.html (last visited January 19, 2016).

S. Ct. 1197 (2015); *Sells v. Livingston et al.*, 750 F.3d 478, 481 (5th Cir. 2014); *Whitaker v. Livingston*, 732 F.3d 465, 468-69 (5th Cir. 2013); *Thorson v. Epps*, 701 F.3d 444, 447 n.3 (5th Cir. 2012). The Ninth Circuit has also held that a procedure involving only a single dose of pentobarbital is consistent with the Eighth Amendment. *See Towery v. Brewer*, 672 F.3d 650, 659 (9th Cir. 2012).

TDCJ-CID safely and successfully used pentobarbital from a licensed compounding pharmacy for twenty-six executions in Texas, and those executions all concluded without incident. In any event, this Court has never held an execution must be painless. *Baze*, 553 U.S. at 47. "The cruelty against which the Constitution protects a convicted man is the cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely." *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 464 (1947). Again, Masterson fails to show the "conditions presenting the risk [are] '*sure* or *very likely* to cause serious illness and needless suffering,' and give rise to 'sufficiently *imminent* dangers.'" *Baze*, 553 U.S. at 50 (emphasis in original, citation omitted).

With respect to the second prong of an Eighth Amendment challenge, Masterson does not attempt to propose an alternative and safer procedure. He simply claims that he has no way of determining if the administered drug will result in cruel and unusual punishment. Thus, his accusation is speculative

and insufficient to warrant relief. It absolutely does not rise to the level of certainty required for a writ of prohibition.

B. Due process and open courts

Masterson's claim that he is being deprived of due process and open access to courts is equally meritless. First, an inmate's "assertion of necessity—that [a state] must disclose its protocol so he can challenge its conformity with the Eighth Amendment—does not substitute for the identification of a cognizable liberty interest. . . . There is no violation of the Due Process Clause from the uncertainty that [the state] has imposed on [the inmate] by withholding the details of its execution protocol." *Sepulvado v. Jindal*, 729 F.3d 413, 419 (5th Cir. 2013); *see also Trottie v. Livingston et al.*, 766 F.3d 450, 452 (5th Cir.) (per curiam), *cert. denied*, 135 S. Ct. 41 (2014); *Zink v. Lombardi*, 783 F.3d 1089, 1109 (8th Cir. 2015) (en banc) ("We agree with the Eleventh and Fifth Circuits that the Constitution does not require such disclosure [of execution-protocol details]."); *Wellons v. Comm'r Ga. Dep't Corr.*, 754 F.3d 1260, 1267 (11th Cir. 2014) ("Neither the Fifth, Fourteenth, or First Amendments afford Wellons the broad right 'to know where, how, and by whom the lethal injections drugs will be manufactured, as well as 'the qualifications of the person or persons who will manufacture the drugs, and who will place the catheters.'"); *Beaty v. Brewer*, 649 F.3d 1071, 1072 (9th Cir. 2011) (affirming district court's denial of a "procedural due process" notice

claim). Thus, the due-process component of Masterson's claim should be dismissed.

Second, while a state inmate has a "right of access to the courts," that right does not encompass the ability "to *discover* grievances, and to *litigate effectively* once in court." *Lewis v. Casey*, 518 U.S. 343, 350, 354 (1996) (emphasis removed from initial quotation). "One is not entitled to access to the courts merely to argue that there might be some remote possibility of some constitutional violation." *Whitaker*, 732 F.3d at 467. And the inability to discover execution-protocol information is, as a matter of law, insufficient to state an access-to-courts claim. *See Zink*, 783 F.3d at 1108; *Wellons*, 754 F.3d at 1267 (denying an access-to-courts claim based on a lack of execution-protocol information); *Williams v. Hobbs*, 658 F.3d 842, 851-52 (8th Cir. 2011) ("The prisoners do not assert that they are physically unable to file an Eighth Amendment claim, only that they are unable to obtain the information needed to discover a potential Eighth Amendment violation.").

Moreover, under Texas law,

> the open courts provision provides that "'the legislature may not abrogate the right to assert a well-established common law cause of action unless the reason for its action outweighs the litigants' constitutional right of redress.'" *Trinity River Auth. v. URS Consultants, Inc.,* 889 S.W.2d 259, 261 (Tex. 1994) (quoting *Texas Ass'n of Bus. v. Texas Air Control Bd.,* 852 S.W.2d 440, 448 (Tex. 1993)). Thus, to establish an open courts violation in this context, Plaintiffs must show that: (1) they have a well-recognized common-

> law cause of action that is being restricted; and (2) the restriction is unreasonable or arbitrary when balanced against the purpose and basis of the statute. *Moreno v. Sterling Drug, Inc.,* 787 S.W.2d 348, 355 (Tex.1990).

Owens Corning v. Carter, 997 S.W.2d 560, 573 (Tex. 1999). Masterson is not being deprived of any cause of action, as evidenced by the fact that he has filed the instant motion. Rather, his complaint is that he is being denied information that could form the basis for a cause of action, which is a separate matter and insufficient to form a basis for relief.

Third, to the extent the "open courts" case law applies, the restriction in this case is not unreasonable or arbitrary when balanced against the rationale of the statute. The Government Transparency and Operation Committee Report states that the purpose of Section 522.1081 was to limit release of information about suppliers of drugs used in executions because those suppliers had received credible threats to their safety. Exhibit A. In other words, the release of the information might put individuals at risk of personal harm. *Id.* Further, "[i]t is the committee's opinion that this bill does not expressly create a criminal offense, increase the punishment for an existing criminal offense or category of offenses, or change the eligibility of a person for community supervision, parole, or mandatory supervision." *Id.* The restriction here is that Masterson cannot access information regarding who will be supplying the drugs for his execution. But as shown, he certainly knows the

protocol and drug that will be used and has been used repeatedly and successfully. And all inmates who ask are provided with an independent laboratory report establishing the potency of the particular vials of pentobarbital that will be used for an execution, and proof that those vials are free from contaminants. The restriction of information in Section 552.1081 is minimal.

Moreover, the Fifth Circuit has explained: "[i]f the state were using a drug never before used or unheard of, whose efficacy or science was completely unknown, the case might be different. The state, however, will use a standard amount of pentobarbital[.]" *Whitaker*, 732 F.3d at 468. Masterson is not entitled to relief by pointing to unknown factors. *Id.*; *see also id.* (cataloguing plaintiffs' complaints that compounding pharmacies are not subject to the same FDA regulations and the sources of the pharmacies' active ingredients was not known). Instead, "plaintiffs must point to *some* hypothetical situation, based on science and fact, showing a likelihood of severe pain." *Id.* (emphasis by the court). The court concluded that even if all the contentions were true, "what plaintiffs are demanding is that, in effect, they be permitted to supervise every step of the execution process. They have no such entitlement." *Id.* Just as in *Whitaker*, Masterson has failed to identify any hypothetical situation, based on science and fact, showing a likelihood of severe pain and, therefore, his underlying Eight Amendment claim necessarily fails.

Likewise, this Court has rejected a similarly speculative constitutional challenge. In *Brewer v. Landrigan*, the Court vacated a stay of execution based upon a claim that the use of an execution drug from a non-FDA-approved source raises questions regarding its efficacy. In a one paragraph opinion, the Court held:

> There is no evidence in the record to suggest that the drug obtained from a foreign source is unsafe. The district court granted the restraining order because it was left to speculate as to the risk of harm. But speculation cannot substitute for evidence that the use of the drug is "*sure or very likely* to cause serious illness and needless suffering."

552 U.S. 996 (2010) (quoting *Baze*, 553 U.S. at 50) (additional citation omitted).

Masterson states that he is being denied certain information that he is entitled to so that he may plead a constitutional claim. But as stated above, Masterson knows full well that he will be executed with a 5 gram dose of pentobarbital obtained from a licensed compounding pharmacy within the United States. What Masterson actually asserts is that he is entitled to know the identity of the pharmacy from whence the pentobarbital came. But the Fifth Circuit has rejected that assertion many times before. *Ladd*, 777 F.3d at 289; *Trottie*, 766 F.3d at 452-43; *Sells*, 750 F.3d at 480-81; *Campbell v. Livingston, et al.*, 567 Fed. App'x 287, 289 (5th Cir. 2014) (unpublished); *Sells*, 561 Fed. App'x at 344-45; *cf. Wood v. Ryan*, 759 F.3d 1076, 1096-98 (9th Cir. 2014) (Bybee, J., dissenting) (requiring the disclosure of the pharmacy's

identity pursuant to the First Amendment does not "contribute to discussing whether Arizona's method is lawful").

For these reasons, Masterson is not entitled to relief.

C. First Amendment

Last, Masterson alleges that Section 522.1081 deprives him of his rights under the First Amendment. This argument is equally unavailing. The case Masterson relies on is *Cal. First Amend. Coalition v. Woodford,* 299 F.3d 868 (9th Cir. 2002), which held that the public has a First Amendment right to view executions; restrictions preventing witnesses from viewing tie down and insertion of IV lines fail the strict scrutiny standard because execution team members can wear surgical attire to conceal their identities. *Id.* at 878-85. A district court in Arizona recently adopted *Woodford* and attempted to extend it to lethal drug manufacturers in *Schad v. Brewer,* 2013 WL 5551668 (D. Ariz. 2013), holding that the State's refusal to disclose manufacturer of drugs violates First Amendment. *But see Wood v. Ryan,* No. 2:14-cv-1447 (D. Ariz. July 10, 2014), rejecting *Schad* and finding no First Amendment right to identity of manufacturer.

In the appeal of that decision, *Wood v. Ryan,* 759 F.3d 1076, the court of appeals held Arizona inmate Joseph Wood was entitled to a stay of execution and ordered disclosure of a variety of information including the manufacturer of Arizona's lethal injection drugs. The rationale was again the First

Amendment. The court of appeals held that the First Amendment right was no longer just a public right, but one that can be asserted by inmates to block executions. But this Court vacated the opinion and upheld the district court order on July 22, 2014. *Ryan v. Wood,* 135 S. Ct. 21 (2014). *See also Owens v. Hill,* 758 S.E.2d 794 (Ga. 2014) (State's refusal to disclose manufacturer of drugs does not violate First Amendment; anonymity of execution team extends to manufacturers because, without it, manufacturers would refuse to participate); *Wellons v. Commissioner, Ga. Dept. of Corrections,* 754 F.3d 1260 (11th Cir. 2014) (no broad First Amendment right to know where, how, and by whom lethal injection drugs will be manufactured); *American Civil Liberties of Missouri Foundation v. Lombardi,* 23 F.Supp.2d 1055 (W.D. Mo. 2014) (rejecting State's motion to dismiss First Amendment lawsuit brought by media organization); *Phillips v. DeWine,* 2015 WL 6676032 (S.D. Ohio 2015) (statute prohibiting disclosure of manufacturer, pharmacist, distributor, etc., as well as execution team members, does not violate First Amendment. Currently on appeal).

Finally, Masterson overstates the right of public access to executions or information pertaining to them. *See Oklahoma Observer v. Patton*, 73 F.Supp.3d 1318, 1327-30 (W.D. Okla. 2014) (rejecting the premise of *Cal. First Amend. Coalition* and holding that right of the public to attend executions is not comparable to the public's right to attend criminal trials); *see also Smith v.*

Plati, 258 F.3d 1167, 1178 (10th Cir. 2001) ("It is well-settled that there is no general First Amendment right of access to all sources of information within governmental control.").

For the reasons stated above, Masterson has failed to demonstrate a legitimate First Amendment violation.

III. Masterson Is Not Entitled to a Stay of Execution.

Masterson is not entitled to a stay of execution because he cannot demonstrate a substantial denial of a constitutional right which would become moot if he were executed. In *Barefoot v. Estelle,* this Court explained that a stay is appropriate only when there is a "reasonable probability" that certiorari will be granted, a "significant possibility" that the Court will reverse the lower court's decision after hearing the case, and a "likelihood" that the applicant will suffer irreparable harm absent a stay. 463 U.S. 880, 895 (1983). Masterson has met none of these requirements. As discussed above, Masterson's claims are procedurally barred from substantive review in this Court. Thus, there is no possibility that this Court could reverse the judgment of the Court of Criminal Appeals. Masterson's substantive constitutional claims are also without merit. Furthermore, the Court may also "consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief." *Gomez v. United States Dist. Ct. for Northern Dist. of Cal.*, 503 U.S. 653, 654 (1992) (*per curiam*). Under the circumstances of this case, a

stay of execution would be inappropriate and Masterson's motion should be denied.

CONCLUSION

For the above reasons, the Court should deny Masterson's petition for writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the above and foregoing Response has been served electronically to Mandy Miller and Pat McCann, counsel for the Petitioner, on this the 19th day of January, 2016.

/s/ Erich Dryden
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