

FILED
OCT 08 2018
Clerk of the Appellate Courts
Rec'd By LM

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

State of Tennessee,)
)
v.)
)
Edmond Zagorski)

CAPITAL CASE
EXECUTION: October 11, 2018

No. M1996-00110-SC-DPE-DD

MOTION TO STAY EXECUTION
(Expedited Review Requested)

Petitioner Edmond Zagorski respectfully requests that this Court stay his execution pending disposition of his petition for writ of certiorari petition in the United States Supreme Court which will be filed by the end of the day, and any subsequent proceedings should the Court grant the petition. Pursuant to this Court's order, the State intends to execute Mr. Zagorski on October 11, 2018 at 7 p.m. CST.

Mr. Zagorski has expeditiously pursued his claims that the lethal injection protocol promulgated on July 5, 2018, will subject him to needless pain and suffering. Mr. Zagorski is entitled to a brief stay so that the important constitutional issues raised by his claims may be considered by the United States Supreme Court. Tennessee Supreme Court Rule 12.04(E) provides that this Court will enter a stay of execution due to the pendency of state court collateral litigation where the defendant can "prove a likelihood of success on the merits." Mr. Zagorski

meets this standard.¹ Where Justice Sotomayor has stated that she would grant certiorari on the question presented by the record here, there is a likelihood that 3 other justices would vote in favor of certiorari. *See Irick v. Tennessee*, 2018 WL 3767151, *3 (2018) (Sotomayor, J., dissenting from denial of stay application).

Moreover, in light of the importance of the matter at hand, a stay of execution is warranted to permit thoughtful and studied review of the record and numerous legal issues presented. This Court's previous practice has been to show respect to the Higher Court by permitting an orderly adjudication of certiorari petitions which raised method of execution claims.

"[A] stay of execution is an equitable remedy." *Hill v. McDonough*, 547 U.S. 573, 584 (2006). The factors considered by the courts in determining the equity of a stay include: (1) whether there is a likelihood he will succeed on the merits of the appeal; (2) whether there is a likelihood he will suffer irreparable harm absent a stay; (3) whether the stay will cause substantial harm to others; and (4) whether the injunction would serve the public interest. *See Workman v. Bell*, 484 F.3d 837, 839 (6th Cir. 2007) (citing *Capobianco v. Summers*, 377 F.3d 559, 561 (6th Cir. 2004)). Additionally, a petitioner's diligence in pursuing the appeal

¹ Notably, the standard under the Tennessee Rules is more lenient than that required to obtain a stay of execution of a state court judgment by a federal court. *Compare* Tennessee Supreme Court Rules, Rule 12E (requiring a likelihood of success on the merits) *with Workman v. Bell*, 484 F.3d 837, 839 (6th. Cir. 2007) (quoting *Hill v. McDonough*, 547 U.S. 573, 584) (requiring a "significant possibility of success on the merits").

should be considered. *Nelson v. Campbell*, 541 U.S. 637 (2004). Under these equitable considerations, Mr. Zagorski is entitled to a stay.

REASONS FOR GRANTING THE STAY

- I. **Mr. Zagorski is likely to succeed on the merits of his appeal, as he has raised substantial questions for certiorari that warrant the United States Supreme Court’s review.**

A method of execution violates the Eighth Amendment when it creates “a substantial risk of serious harm.” *Baze v. Rees*, 553 U.S. 35, 50 (2008). Here, Mr. Zagorski and the other petitioners have put forth more than proof of a *risk* of unconstitutional pain and suffering; they have proven a *certainty* that they will be able to feel what Justice Roberts termed the “constitutionally unacceptable risk of suffocation from the administration of [the paralytic] and pain from the injection of potassium chloride.” *Id.* at 53. As four justices of the United States Supreme Court are likely to grant certiorari and issues germane to Mr. Zagorski’s petition are currently pending before the U.S. Supreme Court in *Bucklew v. Precythe*, 883 F. 3d 1087 (8th Cir. 2015), *cert granted*, 138 S. Ct. 1706 (U.S. April 30, 2018) (No. 17-8151), it is important to the administration of justice that Mr. Zagorski not be executed before the U.S. Supreme Court can consider his petition.

This Court has held that an inmate’s ability to provide a significantly less painful alternative is “a prerequisite to a method of execution claim” – without which, apparently, any method of execution is permissible. *Abdur’Rahman v. Parker*, No. M2018-01385-SC-RDO-CV (Tenn. Oct. 3, 2018), Slip. Op. 11. To the contrary, at least four justices of the United States Supreme Court have consistently maintained that

the Eighth Amendment categorically prohibits cruel and unusual punishments – without regard to an inmate’s ability to provide a less painful alternative. As Justice Sotomayor wrote for Justices Breyer, Ginsberg, and Kagan, “[T]he Court’s conclusion that petitioners’ challenge also fails because they identified no available alternative means by which the State may kill them is legally indefensible.” *Glossip v. Gross*, 135 S.Ct., 2726, 2792 (Sotomayor, J., dissenting). At least four justices agree that neither *Baze* nor any Supreme Court jurisprudence prior to *Glossip* establish any condition precedent to the Eighth Amendment ban on a punishment that is cruel and unusual. *Id.* at 2793 “Nowhere did the [*Baze*] plurality suggest that *all* challenges to a State’s method of execution would require this sort of comparative-risk analysis. Recognizing the relevance of available alternatives is not at all the same as concluding that their absence precludes a claimant from showing that a chosen method carries objectively intolerable risks.” *Id.* at 2794 (emphasis added). There is a significant possibility that the United States Supreme Court will grant certiorari, because this Court’s holding is contrary to the Eighth Amendment’s categorical ban on cruel and unusual punishment.

Additionally, as the state court gave *Glossip* preclusive effect, and relied upon it for factual conclusions contrary to those proven at trial, there is a significant possibility that the U.S. Supreme Court will grant certiorari and reverse the decision. *See, Irick*, 585 U.S. __ (Sotomayor dissenting) (“At a minimum, [the state courts’] contention that the Constitution tolerates what the State plans to do to Irick is not compelled by *Glossip*, which did not categorically determine whether a lethal

injection protocol using midazolam is a constitutional method of execution.”).

Further, as *Bucklew* is set for argument within weeks to explore the nature and quantum of proof a court must consider in determining whether a proposed alternative method of execution poses a substantially reduced risk of pain, there is a reasonable probability that the U.S. Supreme Court will grant Mr. Zagorski certiorari.

II. Without a stay of execution, Mr. Zagorski will be irreparably injured pending the U.S. Supreme Court’s decision on the petition.

In evaluating whether a movant will suffer irreparable harm absent a stay, courts have considered: 1) the substantiality of the injury alleged; 2) the likelihood of its occurrence; and 3) the adequacy of the proof provided. *Michigan Coalition of Radioactive Materials Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991) (holding that the probability of success on appeal that must be shown for a stay is inversely proportional to the amount of irreparable injury that will be suffered absent a stay). Each of those factors favors a stay in this case. Indeed, the United States Supreme Court has recognized that irreparable harm will occur if an execution is not stayed until a pending petition for certiorari is considered. *Wainwright v. Booker*, 473 U.S. 935 (1985) (Powell, J., concurring) (recognizing that there is little doubt that a prisoner facing execution will suffer irreparable injury if the stay is not granted).

III. Issuance of the stay will not substantially injure the State, and the public interest lies in favor of granting the stay.

Issuance of a brief stay of execution pending the United States Supreme Court's consideration of Mr. Zagorski's petition serves the State and the public's interest in ensuring that capital punishment is carried out in compliance with the Eighth Amendment. Where the Government is the opposing party, assessment of the harm to the opposing party and the weighing of the public interest merge. *Nken v. Holder*, 556 U.S. 418, 435 (2009). Although the public has an interest in the finality of criminal convictions, a brief stay to allow the U.S. Supreme Court the opportunity to consider Mr. Zagorski's petition does not infringe on that interest. There is no question that the State will execute Mr. Zagorski; the question is the whether the method it uses will be constitutional. This Court has historically placed importance on the full adjudication of execution protocol challenges. In 2015, this Court acknowledged the importance of the appellate process when it stayed executions "pending the conclusion of [the declaratory judgment action], through appeal of the trial court's final judgment."²

² See Orders Granting Defendants' Motions to Vacate Execution Dates in *Abu-Ali Abdur'Rahman v. State*, No. M1988-00026-SC-DPE-PD (Tenn. Apr. 10, 2015); *State v. Lee Hall*, No. E1997-00344-SC-DDT-DD (Tenn. Apr. 10, 2015); *Donald Wayne Strouth v. State*, No. E1997-00348-SC-DDT-DD (Tenn. Apr. 10, 2015); *State v. Nicholas Todd Sutton*, No. E2000-00712-SC-DDT-DD (Tenn. Apr. 10, 2015); *State v. David Earl Miller*, No. E1982-00075-SC-DDT-DD (Tenn. Mar. 31, 2015); *Charles Walton Wright v. State*, No. M1985-00008-DDT-DD (Tenn. Feb. 26, 2015); *State v. Donnie Edward Johnson*, No. M1987-00072-SC-DPE-DD (Tenn. Dec. 22, 2014); *State v. Stephen Michael West*, No. M1987-00130-SC-DPE-DD (Tenn. Nov. 24, 2014); *State v. Edmund Zagorski*, No.

IV. Mr. Zagorski has exercised extreme diligence in bringing these issues before the Court.

Mr. Zagorski challenged the State's new lethal injection protocol as quickly as possible. *See Nelson v. Campbell*, 541 U.S. 637 (2004) (courts must consider whether petitioner dilatory in bringing claim in equitable determination of whether to grant stay of execution). Since January 8, 2018, when the State of Tennessee issued an execution protocol involving the potential use of midazolam, Mr. Zagorski has pressed for speedy resolution of the constitutionality of a midazolam-based protocol at every instance. Mr. Zagorski and the other petitioners filed suit on February 20, 2018, forty-three days after the state published a protocol with a midazolam option. When asked by the Chancellor for possible trial dates, Zagorski and the other petitioners pressed for a trial twenty-eight days before the trial date suggested by Respondents. Mr. Zagorski and the other petitioners filed an amended complaint and a trial brief and were ready for trial less than five months after filing their initial complaint. When the State amended the protocol on July 5, 2018, four days before

M1996-00110-SC-DPE-DD (Tenn. Oct. 22, 2014); *State v. Billy Ray Irick*, No. M1987-00131-SC-DPE-DD (Tenn. Sep. 25, 2014).

trial, Mr. Zagorski and the other petitioners did not seek a continuance of the trial date, but instead pressed on to trial against the new, changed, protocol. The Chancellor dismissed the suit two days after the conclusion of the trial, and Mr. Zagorski and the other petitioners filed notice of appeal four days later. Mr. Zagorski and the other petitioners met each of the deadlines in the expedited appeal set by this Court and argued the case on October 3, 2018. This Court affirmed the dismissal of Mr. Zagorski's suit on October 8 at 4:00 PM. Mr. Zagorski will file his petition for writ of certiorari by the end of the day on October 9, 2018.

Conclusion

Equity demands a stay of execution enter to prevent Mr. Zagorski's execution before the appellate process has been exhausted. To deny this motion is to deny Mr. Zagorski his right to appeal. The motion should be granted.

Respectfully submitted,

**OFFICE OF THE FEDERAL PUBLIC
DEFENDER FOR THE MIDDLE
DISTRICT OF TENNESSEE**

**KELLEY J. HENRY, BPR#21113
Supervisory Asst. Federal Public
Defender
AMY D. HARWELL, BPR#18691
Asst. Chief, Capital Habeas Unit
RICHARD TENNENT, BPR# 16931
KATHERINE DIX, BPR#022778**

JAMES O. MARTIN, BPR#18014
Asst. Federal Public Defenders

810 Broadway, Suite 200
Nashville, TN 37203
Phone: (615) 736-5047
Fax: (615) 736-5265

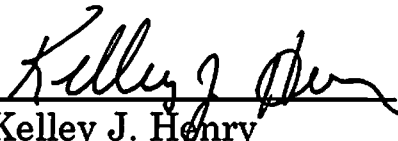
BY: 
Counsel for Edmond Zagorski

CERTIFICATE OF SERVICE

I, Kelley J. Henry, hereby certify that a true and correct copy of the foregoing document was filed and sent to the following via email on this the 9th day of October, 2018, to:

Andree Blumstein
Solicitor General

Jennifer Smith
Asst. Solicitor General
P.O. Box 20207
Nashville, TN 37202-0207


Kelley J. Henry
Supervisory Asst. Federal Public
Defender