CAPITAL CASE: EXECUTION SET NOVEMBER 1, 2018 AT 7:00 P.M.

No. 18-6145
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EDMUND ZAGORSKI

Appellant-Petitioner

v.

BILL HASLAM, et al.

Appellee-Respondent

REPLY TO RESPONSE IN OPPOSITION TO MOTION FOR STAY OF EXECUTION

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It is beyond debate that the midazolam-based three-drug protocol will result in an execution where "the prisoner [will feel] as if he is 'drowning, suffocating, and being burned alive from the inside out' during a process that could last as long as 18 minutes." *Zagorski v. Parker*, No. 18-6238, 2018 WL 4900813, at *1 (Oct. 11, 2018) (Sotomayor, J. dissenting). Zagorski proved this point convincingly in state court litigation. The Tennessee Supreme Court found this reality irrelevant because Zagorski was unable to provide direct evidence of an alternative source of pentobarbital and was prevented from producing evidence through the use of state secrecy laws. On this basis alone –the failure to satisfy the judicially created pleading requirement grafted onto the Eighth Amendment by the majority opinion in *Glossip v. Gross*, 135 S.Ct. 2726 (2015)–the Tennessee Supreme Court upheld the state's three-drug protocol as "constitutional." This holding does not answer the question raised by Zagorski's complaint. Moreover, this holding was appropriately criticized, "[w]hen the prisoners tasked with asking the State to kill them another way are denied by the State information crucial to establishing the availability of that other means of killing, a grotesque requirement has become Kafkaesque as well."

Zagorski, 2018 WL 4900813, at *2.

Faced with certain torture, Zagorski sued to avoid the barbarity of that protocol. He did not demand anything except his rights under the law. He also consistently and repeatedly maintained that he believed that the electric chair is also unconstitutional. He is not alone in that belief. Following a series of botched electrocutions the United States Supreme Court granted certiorari to address whether execution by electrocution is unconstitutional under the Eighth Amendment because it constitutes cruel and unusual punishment and violates evolving standards of decency. *Bryan v. Moore*, 528 U.S. 960 (1999). In response to the grant of certiorari, the state of Florida abandoned electrocution as its default method of punishment resulting in the case being dismissed. *Byran v. Moore*, 528 U.S. 1133 (2000).

Zagorski sought to challenge the electric chair in 2014 and the state sued successfully to stop his lawsuit. Having prevented his electrocution challenge four years ago, they blame him for bringing his challenge within days of it meeting the ripeness requirements that they insisted upon. Zagorski is playing by the rules created by the State. This is what we have come to.

Appellees have failed to comply with this Court's order to file their brief by 1:00 PM EDT on October 31, 2018. Their rhetoric does not negate the soundness of Zagorski's legal arguments. The district court is flatly wrong that the issue in Zagorski's case is barred by collateral estoppel. A finding that pentobarbital is not available is not a finding that the current three-drug protocol is certain torture. In fact, the mounting evidence shows that it is.

The issue in Count I of the complaint is tethered to due process. By denying Zagorski the litigation tools to meet *Glossip's* pleading requirement, Zagorski faced certain torture. He did his best to minimize that torture. He stands by that decision. But that does not mean that his choice was not coerced by the threat of torture. The availability of pentobarbital is irrelevant to his complaint.

The viability of *Stewart v. LaGrand*, 526 U.S. 115 (1999), in a post-*Glossip* jurisprudential world is a complex legal issue that this Court should answer because it will surely repeat. The question of whether a waiver obtained by threat of torture constitutes a waiver under *LaGrand* in light of *Johnson v. Zerbst*, 304 U.S. 458 (1938), and its progeny is not

a question that can be answered in mere hours. Indeed the Appellees ignore this entire inconvenient argument.

Where the Appellees have failed to timely file their brief and where Appellant has satisfied the standard for a stay of execution, the Motion for Stay should be granted and Appellants should be given additional time to refine the arguments in their principle brief.

Respectfully submitted,

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CERTIFICATE OF SERIVCE

I, Kelley J. Henry, hereby certify that a true and correct copy of the foregoing document was electronically filed and sent to the following via email on this the 31st day of October 2018 to:

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