

THIS IS A CAPITAL CASE

EXECUTION SCHEDULED FOR TODAY AT 8:00 P.M. EDT

No. _____

In the Supreme Court of the United States

MARCEL WAYNE WILLIAMS

Petitioner

v.

WENDY KELLEY, Director, Arkansas Department of Correction,
RORY GRIFFIN, Deputy Director, Arkansas Department of Correction, and
DALE REED, Chief Deputy Director, Arkansas Department of Correction,

Respondents

On Petition for a Writ of Certiorari to the
United State Court of Appeals for the Eighth Circuit

Emergency Application for Stay of Execution

To the Honorable Samuel A. Alito, Jr., Associate Justice of the Supreme Court of
the United States and Circuit Justice for the Eighth Circuit:

Petitioner respectfully requests a stay of execution pending the Court's
disposition of his Petition for Writ of Certiorari filed alongside this application. The
Eighth Circuit's decision was issued at 2:18 CDT today. Petitioner is scheduled to be

executed today, April 24, 2017, at 7:00 p.m. CDT.¹ Counsel for the State has informed the undersigned that the State intends to begin the execution at the appointed time even if this application remains pending. In light of the State's intention, if the Court is unable to resolve this application by 7:00 p.m. CDT, it should grant a temporary stay while it considers the application.

JURISDICTION

This Court has jurisdiction to enter a stay under 28 U.S.C. § 2101(f), 28 U.S.C. § 1651, and Supreme Court Rule 23.

INTRODUCTION

On February 27, 2017, the Governor of Arkansas scheduled Petitioner's execution for April 24, 2017. On March 23, 2017, Petitioner was examined by Dr. Joel Zivot, who also reviewed Petitioner's extensive medical records. Dr. Zivot diagnosed Petitioner with diabetes, hypertension, hypertriglyceridemia, hypercholesterolemia, morbid obesity, and obstructive sleep apnea. He had not previously been diagnosed with obstructive sleep apnea.

On April 11, 2017, Dr. Zivot completed an affidavit in which he opined that, using the current protocol, "it is unlikely that the State will succeed in killing" Petitioner and that the "more likely result will be that he is left with disabling, irreversible injuries." Compl. Ex. 7 ¶9. More specifically, Dr. Zivot said:

¹ Respondent has scheduled two executions for tonight: Jack Jones for 7:00 p.m. CDT and Petitioner for 8:15 p.m. CDT. However, if Jones's execution is stayed, it is believed that the State will proceed with Petitioner's execution at 7 p.m. CDT. Thus, Petitioner proceeds as if he is scheduled for execution at 7 p.m. CDT.

- During midazolam administration, Petitioner’s obstructive sleep apnea will cause him to suffer a fall in blood oxygen at a rate that will cause damage to the brain and other vital organs. “Should the execution fail, and it is likely to do so, [Petitioner] will survive with brain damage and other new significant medical problems.” *Id.* ¶17.
- Petitioner’s morbid obesity obstructs venous access and “makes it more likely that the execution will fail and [Petitioner] will be left alive, but disabled from the attempt.” *Id.* ¶15.
- The treatment for Petitioner’s hypertension causes him to have low potassium levels, meaning “it is possible that the administration of Potassium Chloride, which the State intends as the lethal chemical, will not actually kill him.” *Id.* ¶14.
- If Petitioner’s diabetes is not monitored closely, “he could experience a blood-sugar crisis,” which “can have serious and permanent consequences, including brain injury.” *Id.* ¶13.

The same day that Dr. Zivot completed the affidavit, Petitioner filed a complaint alleging that, given his particular health conditions, the State’s lethal-injection protocol is unconstitutional as applied to him. Petitioner also filed a motion for preliminary injunction. On April 21, 2017, the district court held a hearing on the preliminary-injunction motion. Dr. Zivot testified by telephone and elaborated further upon the matters discussed in his affidavit. *See* Pet’n at 3–4. Later that day, the district court denied a preliminary injunction. The district court found that this

evidence did not demonstrate a significant possibility of meeting the *Glossip* standard, that Petitioner hadn't shown an alternative, and that Petitioner had waited too long to bring the claim. Pet'n App. B.

REASONS FOR GRANTING A STAY

In considering whether a stay is warranted to permit litigation of a § 1983 claim, the Court considers “not only the likelihood of success on the merits and the relative harms to the parties, but also the extent to which the inmate has delayed unnecessarily in bringing the claim.” *Nelson v. Campbell*, 541 U.S. 637, 649–50 (2004). Notably, on two separate occasions, the Court issued stays of execution arising from as-applied challenges in the Eighth Circuit. After consideration of the stay factors, a similar result is warranted here.

A. Likelihood of success on the merits.

Petitioner made a significant showing that the State's midazolam protocol is likely to cause him substantial harm because of his specific medical conditions. Petitioner's morbid obesity makes it likely that either the IV line cannot be placed or that it will be placed in error, thus causing substantial damage (like a collapsed lung). Tr. at 20, 23. Respiratory distress is assured. Tr. 21. In combination with the midazolam, his obstructive sleep apnea will cause him to “struggle,” and “it will be very painful and difficult for him.” Tr. at 28. On top of that, neuropathy, a condition associated with his diabetes, make the consciousness check ineffectual, and his low potassium levels could have an adverse effect during the potassium chloride injection. Tr. at 29–30. Petitioner's presentation of this evidence was rushed given

Petitioner's fast-approaching execution date. This date was scheduled alongside seven others, who also required a considerable amount of Petitioner's attorneys' time. Without an impending execution date or the crush of other end-stage litigation, Petitioner will be able to make an even more robust showing that the midazolam protocol will likely cause him to suffer because of his medical conditions.

While Petitioner disputes the need to propose an alternative in this sort of challenge, *see* Pet'n at 5–7, he has proposed one in the form of sevoflurane gas (and has also identified a supplier of this gas), *see* Pet'n at 7–9. The alternative avoids the negative consequences for Petitioner of lethal injection generally and lethal injection by midazolam protocol more specifically. He is thus likely to succeed on both prongs of the *Glossip* test.

B. Harm to the parties.

The balance of the harms weighs in Petitioner's favor. If he is executed using the midazolam protocol, he is likely to struggle and experience significant pain. This pain cannot be reversed once it begins, nor can any organ failure that may occur if the protocol does not achieve death. Death itself, if achieved, is an irreparable harm. On the other hand, the harm to Respondents is a delay as they implement an alternative means of accommodating Petitioner's specific health conditions. Respondents' harm can be remedied; Petitioner's cannot.

C. Whether there was unnecessary delay.

Petitioner brought his claim at the earliest possible time under the circumstances. The Governor set his execution date on February 27, 2017, thus

triggering his as-applied claim. The earliest Dr. Zivot was able to examine him was March 23, 2017. Dr. Zivot also had to review extensive medical records, which take up hundreds of pages. Compl. Ex. 4. Dr. Zivot was able to complete his affidavit by April 11, 2017, and Petitioner filed suit the same day.

The district court faulted Petitioner for not bringing his as-applied challenge at the same time he and others filed their facial challenges in *McGehee v. Hutchinson*, No. 17-179 (E.D. Ark.), on March 27, 2017. The unavailability of Dr. Zivot's affidavit was one reason. It should also be considered that the State's execution schedule burdened Petitioner's counsel with a crush of end-stage litigation not only for Petitioner, but also for three other men who are represented by the same office and, more tangentially, for others who were part of the *McGehee* litigation. Though the district court faulted Petitioner for not bringing his as-applied challenge with the *McGehee* facial challenge, that would have created less efficiency, not more, by burdening that collective case with individualized issues. There is no rule requiring plaintiffs to bring an as-applied lethal-injection challenge alongside a facial one, particularly where the facial challenge involves other plaintiffs. In any case, the fifteen-day gap between the filing of the facial challenge and Petitioner's filing of his as-applied challenge is not so great as to require outright rejection of a stay—particularly given the circumstances of the execution schedule here.

D. The Court has previously stayed executions in similar circumstances.

This case is substantially similar to *Bucklew v. Lombardi*, 134 S. Ct. 2333 (2014), and *Johnson v. Lombardi*, 136 S. Ct. 443 (2015). In each of these cases, the

Eighth Circuit had denied a motion for stay pending appeal on the ground that the plaintiff had not adequately supported a claim that his particular medical condition made Missouri's lethal-injection protocol unconstitutional as applied to him. In each case, the plaintiff had brought his complaint at least a month after his execution date was set and just weeks before the execution. *See Bucklew v. Lombardi*, 783 F.3d 1120, 1122 (8th Cir. 2015) (execution date of May 21 established April 9; complaint filed May 9); Stay Mot., *Johnson v. Lombardi*, No. 15-3420 (8th Cir. Oct. 28, 2015) (execution date of November 3 established September 18; complaint filed October 22). In each case, this Court imposed its own stay so the lower courts could consider the plaintiff's evidence without the pressure of an execution date.

A similar course is warranted here.

CONCLUSION

The Court should grant this application and stay Petitioner's execution pending the disposition of his petition for writ of certiorari or, in the alternative, pending appeal in the Eighth Circuit.

DATED: APRIL 24, 2017

Respectfully submitted,



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