

THIS IS A CAPITAL CASE

EXECUTIONS SCHEDULED FOR APRIL 17, 20, 24, and 27, 2017

No. 16-6496

IN THE SUPREME COURT OF THE UNITED STATES

STACEY JOHNSON, JASON McGEHEE, BRUCE WARD, TERRICK NOONER,
JACK JONES, MARCEL WILLIAMS, KENNETH WILLIAMS, DON DAVIS, and
LEDELL LEE

Petitioners,

v.

WENDY KELLEY, in her official capacity as Director, Arkansas Department of
Correction, and ARKANSAS DEPARTMENT OF CORRECTION,

Respondents.

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:

Petitioners respectfully request a stay of their executions, which are scheduled
for April 17, 20, 24, and 27, 2017, pending the Court's disposition of their Petition
for Rehearing from denial of their Petition for Writ of Certiorari.

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.

REASONS FOR GRANTING THE STAY

On February 21, 2017, this Court denied Petitioners' Petition for Writ of Certiorari from the Arkansas Supreme Court's decision in *Kelley v. Johnson*, 496 S.W.3d 346 (Ark. 2016), with Justices Sotomayor and Breyer dissenting. *Johnson v. Kelley*, 137 S. Ct. 1067 (2017). Six days later, on February 27, 2017, the Governor of Arkansas scheduled execution dates for each of the Petitioners with the exception of Nooner. These dates are:

- Don Davis and Bruce Ward: April 17, 2017
- Stacey Johnson and Ledell Lee: April 20, 2017
- Jack Jones and Marcel Williams: April 24, 2017
- Jason McGehee and Kenneth Williams: April 27, 2017.

On March 20, 2017, Petitioners filed a Petition for Rehearing. The Petition for Rehearing was originally scheduled to be considered at the conference of April 13, 2017, before the executions of Davis and Ward. On April 10, 2017, Petitioners filed a Supplemental Brief to the Petition for Rehearing to address the Sixth Circuit's opinion in *In re Ohio Execution Protocol*, No. 17-3076. On April 12, 2017, the Court rescheduled consideration of the Petition for Rehearing. The Petition for Rehearing is now scheduled for the conference of April, 21, 2017.

A stay of execution is appropriate if there is (1) a "reasonable probability that four Members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari"; (2) a "significant possibility of reversal of the

lower court's decision"; and (3) a "likelihood that irreparable harm will result" without a stay. *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983).

In the specific context of this application, there is a reasonable probability that five Members of the Court will grant rehearing of the order denying certiorari. *Cf. Morgan v. Georgia*, 444 U.S. 976 (1979) (denying rehearing from denial of certiorari over four dissents). There are at least two Justices who would have granted certiorari in this case. It is likely that three other Justices will join them in light of two separate considerations previously discussed in the Petition for Rehearing and the Supplemental Brief to the Petition for Rehearing.

First, the State's unprecedented decision to execute eight men within a span of ten days fails to treat the Prisoners with the dignity the State owes even to a person convicted of capital murder. The executions have been scheduled in this fashion to exhaust Arkansas's supply of midazolam—a drug that is intended to, but that does not, render the general anesthesia necessary to prevent a torturous execution. The State's scheduling choice and its reason for that choice fall outside the bounds of accepted penological practice.

Second, the Sixth Circuit's recent decision creates a split in authority on the question of what it means to plead an available alternative execution method. Under the Sixth Circuit's approach—which recognizes that secrecy laws have facilitated acquisition of execution drugs—there must be a "reasonable possibility" that a state can acquire an alternative. *In re Ohio Execution Protocol*, slip op. at 16–17. Under the approach adopted by the Arkansas Supreme Court and the

Eleventh Circuit, the “reasonable possibility” of obtaining an alternative execution method is irrelevant if state law does not already authorize the method. *See Johnson*, 496 S.W.3d at 359–60; *Arthur v. Dunn*, 840 F.3d 1268, 1315–18 (11th Cir. 2016). Besides that, any alternative must “now” be available, regardless of whether the state has made a good-faith effort to acquire it (with the help of their secrecy laws). *Arthur*, 840 F.3d at 1302. As it currently stands, death-row inmates in Alabama and Arkansas may be executed with a protocol that, as is increasingly understood, causes excruciating suffering—simply because they are not imprisoned in a jurisdiction that employs the “reasonable possibility” standard for available alternatives. Petitioners’ Eighth Amendment interests are too important to hinge on an accident of geography.

There is a significant possibility Petitioners will succeed if the Court considers the case. The Arkansas Supreme Court’s approach contradicts *Baze v. Rees*, 553 U.S. 35, 52 (2008), which *requires* a state to adopt safer available alternatives. Pet’n at 10–12. It permits states to insulate themselves from Eighth Amendment review of their execution methods. Pet’n at 12–16. And it imposes a pleading burden that all but assures denial of relief—no matter how painful the state’s current execution method. Pet’n at 16–19. Each is a compelling reason for the Court to reverse.

There is no doubt of irreparable harm. Petitioners will be executed without a stay.

Petitioners have not unduly delayed in this request for a stay. They have challenged the midazolam protocol since its enactment, up to and including the

timely filed Petition for Rehearing. Petitioners originally believed the Court would consider and decide the Petition for Rehearing before the first executions. On April 12, they learned the Petition for Rehearing would be rescheduled. On April 14, they sought a stay from the Arkansas Supreme Court so this Court may consider the Petition for Rehearing before their executions.

Per Rule 23.3, absent extraordinary circumstances, “an application for a stay will not be entertained unless the relief requested was first sought in the appropriate courts below or from a judge or judges thereof.” The appropriate court in this case is the Arkansas Supreme Court. On April 17, 2017, at 1:54 p.m., the Arkansas Supreme Court denied Petitioners’ motion for a stay of execution. A copy of the order is attached hereto as Exhibit A.

For the reasons stated herein, in their Petition for Rehearing, and in their Supplemental Brief to the Petition for Rehearing, Petitioners respectfully request that their executions be stayed pending the Court’s decision on their Petition for Rehearing.

CONCLUSION

The Court should grant this application and stay Petitioners’ executions.

DATED: APRIL 17, 2017

Respectfully submitted,



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**Counsel of Record for Petitioners*

EXHIBIT A

FORMAL ORDER

STATE OF ARKANSAS,)
) SCT.
SUPREME COURT)

BE IT REMEMBERED, THAT A SESSION OF THE SUPREME COURT BEGUN AND HELD IN THE CITY OF LITTLE ROCK, ON APRIL 17, 2017, AMONGST OTHERS WERE THE FOLLOWING PROCEEDINGS, TO-WIT:

SUPREME COURT CASE NO. CV-15-992

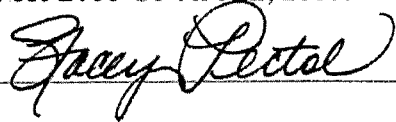
WENDY KELLEY, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION AND ARKANSAS DEPARTMENT OF CORRECTION APPELLANTS

V. APPEAL FROM PULASKI COUNTY CIRCUIT COURT, FIFTH DIVISION – 60CV-15-2921

STACEY JOHNSON, JASON MCGEHEE, BRUCE WARD, TERRICK NOONER, JACK HAROLD JONES, MARCEL WAYNE WILLIAMS, KENNETH WILLIAMS, DON WILLIAM DAVIS, AND LEDELL LEE APPELLEES

APPELLEES' MOTION TO RECALL THE MANDATE AND STAY EXECUTIONS IS DENIED. GOODSON, HART, AND WYNNE, JJ., WOULD GRANT THE MOTION TO STAY PENDING RESOLUTION OF REHEARING OF PETITION FOR WRIT OF CERTIORARI IN UNITED STATES SUPREME COURT CASE NO. 16-6496.

IN TESTIMONY, THAT THE ABOVE IS A TRUE COPY OF THE ORDER OF SAID SUPREME COURT, RENDERED IN THE CASE HEREIN STATED, I, STACEY PECTOL, CLERK OF SAID SUPREME COURT, HEREUNTO SET MY HAND AND AFFIX THE SEAL OF SAID SUPREME COURT, AT MY OFFICE IN THE CITY OF LITTLE ROCK, THIS 17TH DAY OF APRIL, 2017.



CLERK

BY: _____

DEPUTY CLERK

ORIGINAL TO CLERK

- CC: JOHN C. WILLIAMS
- JEFF ROSENZWEIG
- DEBORAH RUTH SALLINGS
- LEE RUDOFSKY, SOLICITOR GENERAL
- COLIN JORGENSEN, SENIOR ASSISTANT ATTORNEY GENERAL
- GOVERNOR ASA HUTCHINSON
- WENDY KELLEY, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION
- MARK CASHION, WARDEN, VARNER SUPERMAX UNIT
- WILLIAM STRAUGHN, WARDEN, CUMMINS UNIT
- HON. WENDELL GRIFFEN, CIRCUIT JUDGE