No. 18A142

IN THE
SUPREME COURT OF THE UNITED STATES

IN RE:
BILLY RAY IRICK,
Movant

ON APPLICATION FOR STAY OF EXECUTION

RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE

CAPITAL CASE
QUESTION PRESENTED

Whether the Court should grant Petitioner a stay of execution under the All Writs Act, 28 U.S.C. § 1651(a), when Petitioner failed to prove an essential element of his Eighth Amendment method-of-execution claim and therefore cannot show that his appeal from the state trial court's decision rejecting his constitutional challenge to Tennessee's lethal injection protocol has a significant possibility of success on the merits.

OPINIONS BELOW

The August 6, 2018, order of the Tennessee Supreme Court denying Petitioner's Motion to Vacate Execution Date is not yet reported. App. A. The Tennessee Supreme Court's order and amended order setting Petitioner's execution date for August 9, 2018, is unreported. *State v. Irick*, No. M1987-00131-SC-DPE-DD (Tenn. Jan. 18, 2010).

STATEMENT OF JURISDICTION

Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1651(a). Sup. Ct. R. 23.1, and Sup. Ct. R. 23.2.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides:

> Excessive ball shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Twenty-eight U.S.C. § 1651(a) provides:

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

STATEMENT

Petitioner Billy Ray Irick was convicted by a Tennessee jury in 1986 of the first-degree murder and aggravated rape of seven-year-old Paula Dyer while she had been entrusted to his care. The jury sentenced Petitioner to death on the strength of four aggravating circumstances, and the Tennessee Supreme Court affirmed. *State v. Irick*, 762 S.W.2d 121 (Tenn. 1988), *cert. denied*, 489 U.S. 1072 (1989). Petitioner sought post-conviction relief, which was denied in state court. *Irick v. State*, 973 S.W.2d 643 (Tenn. Crim. App.), *cert. denied*, 525 U.S. 895 (1998). Petitioner's application for federal habeas corpus relief was denied by the United States District Court, and the Sixth Circuit affirmed. *Irick v. Bell*, 565 F.3d 315 (6th Cir. 2009), *cert. denied*, 559 U.S. 942 (2010).

On July 19, 2010, the Tennessee Supreme Court ordered that Petitioner's sentence be executed on December 7, 2010. *State v. Irick*, No. M1987-00131-SC-DPE-DD (Tenn. Jul. 19, 2010) (setting execution date of Dec. 7, 2010). But the Court later vacated its order after Petitioner intervened in a state-court declaratory judgment action filed by another death-row inmate challenging the constitutionality of Tennessee's lethal injection protocol, which then called for a three-drug combination of sodium thiopental, pancuronium bromide, and potassium. *State v. Irick*, No. M1987-00131-SC-DPE-DD (Tenn. Nov. 29, 2010). That challenge failed in the trial court, and the Tennessee Court of Appeals affirmed, holding that the inmates failed to show that the protocol exposed them to an intolerable risk of severe and unnecessary pain and suffering or to prove an alternative method of execution that is feasible, readily implemented, and significantly reduces any such risk. *West v. Schofield*, 380 S.W.3d 105 (Tenn. Ct. App. 2012) (citing *Baze v. Rees*, 553 U.S. 35 (2008)), *cert. denied*, 569 U.S. 927 (2013).

In September 2013, the Tennessee Department of Correction replaced the three-drug protocol with a single-drug protocol using pentobarbital, a change necessitated by the unavailability of one of the chemicals essential to carrying out a sentence under the previous three-drug protocol. On October 22, 2013, the Tennessee Supreme Court set a new execution date for Petitioner of January 15, 2014. *State v. Irick*, No. M1987-00131-SC-DPE-DD (Tenn. Oct. 29, 2010). But the state court later stayed Petitioner's execution pending the disposition of another state-court declaratory judgment action in which thirty-one death-row inmates challenged the single-drug pentobarbital protocol. *State v. Irick*, No. M1987-00131-SC-DPE-DD (Tenn. Dec. 11, 2013); *State v. Irick*, No. M1987-00131-SC-DPE-DD (Tenn. Sept. 25, 2014). That challenge also failed in the trial court. On appeal, applying this Court's decision in *Glossip v. Gross*, 135 S. Ct. 2726 (2015), the Tennessee Supreme Court ruled that the State's method of execution did not violate the Eighth Amendment and was not otherwise unlawful. *West v. Schofield*, 519 S.W.3d 550 (Tenn. 2017), *cert. denied, West v. Parker*, 138 S. Ct. 476 (2017), and *Abdur'Rahman v. Parker*, 138 S. Ct. 1183 (2018).

After this Court denied certiorari, the Tennessee Supreme Court reset Petitioner's execution date for August 9, 2018. *State v. Irick*, No. M1987-00131-SC-DPE-DD (Tenn. Jan. 18, 2010).

During the three-year pendency of the litigation challenging Tennessee's single-drug protocol, pentobarbital too became unavailable to the State for use in executions, necessitating yet another change. The Tennessee Supreme Court described this course of events in its August 6, 2018, order:

> It bears noting . . . that TDOC's revisions of its lethal injection protocol since 2010 have been necessitated by the success anti-death-penalty advocates have had

> in convincing drug companies not to provide certain drugs for use in executions. As the United States Supreme Court noted, after legal challenges to the common three-drug protocol that Tennessee initially used were rejected, "a practical obstacle soon emerged, as anti-death-penalty advocates pressured pharmaceutical companies to refuse to supply drugs used to carry out death sentences." *Glossip v. Gross*, __ U.S. __, 135 S. Ct. 2726, 2733 (2015). States, including Tennessee, then adopted the single-drug protocol that utilized Pentobarbital. *Id*. But soon thereafter, "[a]nti-death-penalty advocates lobbied the Danish manufacturer of the drug to stop selling it for use in executions." 135 S. Ct. at 2733-34. TDOC's revisions of its lethal injection protocol, as well as the litigation and delay resulting therefrom, are attributable to the success of anti-death-penalty advocates in convincing pharmaceutical companies not to provide drugs for executions. *Id*.

App. A at 3 n.2.

On January 8, 2018, the Commissioner of Correction approved a revised lethal injection protocol to ensure that the Department of Correction could comply with its statutory obligation to carry out death sentences by lethal injection when ordered to do so. The revised protocol added an alternative protocol, which called for the use of one of two alternative chemical combinations, as determined by the Commissioner: Protocol A, which called for the use of the single drug pentobarbital; or Protocol B, which called for a three-drug sequence, consisting of midazolam, vecuronium bromide, and potassium chloride. The midazolam-based three-drug lethal injection protocol is substantially the same as the protocol reviewed by this Court in *Glossip*.

On February 20, 2018, Petitioner and thirty-two other inmates filed another state-court declaratory judgment action challenging the midazolam-based three-drug protocol. Being aware of Petitioner's pending execution date, the trial court established an expedited litigation schedule to allow for a full adjudication of the inmates' claims by that date. The inmates filed two amended complaints before trial. Plaintiffs' First Amended Complaint and Second Amended Complaint alleged:

C. Available Alternative

288. To the extent that the courts have placed a burden on Plaintiffs to demonstrate a "known and available alternative method of execution that entails a lesser risk of pain[,]" *West v. Schofield*, 519 S.W.3d at 565, quoting *Glossip*, 135 S. Ct. at 2731, Plaintiffs allege as follows:

289. Protocol A is a "known and available alternative method of execution that entails a lesser risk of pain." *West*, 519 S.W.3d at 565, quoting *Glossip*, 135 S. Ct. at 3731.

290. Protocol A is "feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain." *Baze*, 553 U.S. at 52.

* * *

323. On its face Protocol A is an alternative method of execution that is feasible, readily implemented, and in fact significantly reduces a substantial risk of severe pain.

Amended Complaint at 46-47, 51; Second Amended Complaint at 46, 50.[1] The inmate Plaintiffs' pleadings did not allege that any other method of execution would significantly reduce the substantial risk of harm alleged with respect to the midazolam-based protocol and specifically did not plead that a two-drug protocol consisting of midazolam and potassium chloride is a known, feasible, and available alternative method of execution.[2]

On July 5, 2018, the Commissioner of Correction removed Protocol A from the State's execution protocol and made additional changes not relevant to this proceeding. The amendment

[1] Plaintiffs' initial Complaint alleged no alternative method of execution at all. However, facing the prospect of dismissal under Tenn. R. Civ. P. 12.02(6), the Plaintiffs amended their pleading to include the single-drug pentobarbital alternative.

[2] After the close of proof at trial, the inmates moved to amend their Second Amended Complaint under Tenn. R. Civ. P. 15.02 to assert that the removal of vecuronium bromide from the three-drug protocol is a known, feasible, and available alternative method of execution. But the trial court denied the motion because the plaintiffs failed to meet the Rule 15.02 requirements for a post-trial amendment.

left intact the only method under review in this case, *i.e.*, the midazolam-based three-drug protocol.

After a ten-day trial, on July 26, 2018, the state trial court dismissed the inmates' Second Amended Complaint as meritless. Applying *Glossip*, the state court ruled that the inmates failed to prove an essential element of their Eighth Amendment claim, namely, that there exists an available alternative to the method of execution they are challenging that significantly reduces a substantial risk of severe pain. App. C at 1-2, 9-19.

> The inmates who filed this lawsuit have failed to prove the essential element required by the United States Supreme Court that there exists an available alternative to the execution method they are challenging. On this basis alone, by United States law, this lawsuit must be dismissed.
>
> It is therefore ORDERED that after considering the pleadings, studying the law and the evidence, and listening to arguments of Counsel, the Court finds that the Plaintiffs have failed to establish that Tennessee's three-drug lethal injection protocol issued July 5, 2018, is unconstitutional and/or unlawful, and dismisses the Plaintiffs' Second Amended Complaint for Declaratory Judgment with prejudice.

App. C at 2.

The trial court also found that the Plaintiffs failed to prove the other element of *Glossip*—that the protocol "presents a risk that is 'sure or very likely to cause serious illness and needless suffering and give rise to sufficient imminent dangers.'" *Glossip*, 135 S.Ct. at 2737. App. C at 28.

Twenty-nine of the inmate Plaintiffs, including Petitioner, filed a notice of appeal to the Tennessee Court of Criminal Appeals on July 30, 2018. That same day, Petitioner separately filed a motion in the Tennessee Supreme Court to vacate his execution date pending the disposition of that appeal.

By order filed August 6, 2018, the Tennessee Supreme Court denied Petitioner's motion to vacate his execution date because he had failed to show, as required to obtain a stay of execution under Tenn. Sup. Ct. R. 12.4(E), "a likelihood of success on the merits" of his collateral litigation in state court. App. A at 6.

REASONS FOR DENYING A STAY

PETITIONER IS NOT ENTITLED TO A STAY OF EXECUTION UNDER THE ALL WRITS ACT.

Petitioner contends that the All Writs Act, 28 U.S.C. § 1651(a), gives this Court the power to stay his execution, but he is mistaken. Pursuant to the All Writs Act, this Court "may issue all writs necessary or appropriate in aid of [its] jurisdiction[] and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). But this Court has made clear that reliance on the All Writs Act does not excuse an inmate who seeks a stay of execution "'to challenge the manner in which the State plans to execute him'" from "satisfy[ing] all of the requirements for a stay, including a showing of a significant possibility of success on the merits." *Dunn v. McNabb*, 138 S. Ct. 369 (quoting *Hill v. McDonough*, 547 U.S. 573, 584 (2006)). Petitioner is not entitled to relief under the All Writs Act because he cannot show either that his challenge to the State's lethal injection protocol has a significant possibility of success on the merits or that a stay of his execution would aid this Court's jurisdiction.[3]

[3] Although Petitioner purports to seek only a "stay" of his execution, he is in fact asking this Court not to stay his underlying conviction and death sentence, but rather to enjoin the State from enforcing his death sentence while he litigates a collateral challenge to the State's lethal injection protocol. *See Nken v. Holder*, 556 U.S. 418, 428 (2009) (explaining that "[a] stay 'simply suspend[s] judicial alteration of the status quo,' while injunctive relief 'grants judicial intervention that has been withheld by lower courts'" (alterations in original) (quoting *Ohio Citizens for Responsible Energy, Inc. v. NRC*, 479 U.S. 1312, 1313

A. Petitioner Cannot Show a Significant Possibility of Success on the Merits of His Challenge to Tennessee's Lethal Injection Protocol.

Petitioner asks this Court to stay his execution, so he can join twenty-eight other Tennessee death-row inmates in an appeal challenging the constitutionality of the State's lethal injection protocol after their claims were rejected in the state trial court. His application should be denied because he can show no likelihood of success in that appeal. "[A] stay of execution is an equitable remedy," and "equity must be sensitive to the State's interest in enforcing its criminal judgments without undue interference from the federal courts." *Hill*, 547 U.S. at 584. Inmates like Petitioner who seek to challenge how the State plans to execute their sentences must show "a significant possibility of success on the merits" of that collateral litigation. *Id*.

Petitioner cannot make that showing here because he failed to prove an essential element of his Eighth Amendment method-of-execution claim in the state trial court. And that failure was not just one of degree: Petitioner presented *no proof* to the trial court that his proposed method of execution—the single drug pentobarbital—is available to the State of Tennessee for use in executions. App. B at 10-11. Petitioner cannot succeed on appeal for the same reason.

In *Glossip*, this Court instructed that prisoners "cannot successfully challenge a method of execution" unless they (1) establish that the method presents a risk that is "sure or very likely

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(1986) (Scalia, J., in chambers)); *Hill v. McDonough*, 464 F.3d 1256, 1258 n.1 (11th Cir. 2006) (noting that a request for a "stay of execution" pending an appeal of a method-of-execution challenge was in fact a "request for an order temporarily enjoining the State from carrying out Hill's execution"). In other contexts, this Court has required a "significantly higher justification" for an injunction under the All Writs Act than for a stay under 28 U.S.C. § 2101(f), including a showing that the "legal rights at issue are 'indisputably clear.'" *Ohio Citizens*, 479 U.S. at 683 (quoting *Communist Party of Indiana v. Whitcomb*, 409 U.S. 1235 (Rehnquist, J., in chambers)). Given that Petitioner cannot even satisfy the requirements for a stay, he clearly cannot satisfy the more stringent requirements for an injunction either.

to cause serious illness and needless suffering" and (2) identify an alternative that is "feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain." 135 S. Ct. at 2737. This Court was clear that "the Eighth Amendment requires a prisoner to *plead and prove* a known and available alternative" to the method they are challenging. *Id.* at 2739 (emphasis added). Indeed, the Court declined to enjoin Oklahoma's use of midazolam precisely because the inmate there failed to show that "any risk of harm was substantial when compared to a *known and available* alternative method of execution." *Id.* at 2738.

Plaintiffs here affirmatively pled that "Protocol A," a single-drug protocol using pentobarbital, is a feasible and readily implemented alternative to the State's midazolam-based three-drug method. But they presented no witnesses or direct proof that pentobarbital is, in fact, available to the State of Tennessee for executions. App. c at 9. And the trial court specifically accredited the testimony of state officials describing the Department of Correction's exhaustive but unsuccessful efforts to obtain the drug. App. C at 12. In denying Petitioner's motion to vacate his execution date, the Tennessee Supreme Court agreed with the trial court that "the inmates failed to establish this element" of *Glossip*. App. A at 4.

To avoid this deficiency, Petitioner argues that the trial court erred in denying his post-trial motion under Tenn. R. Civ. P. 15.02 to amend his complaint to allege a two-drug protocol consisting of midazolam and potassium chloride. But the State court did not err, and this Court should not disturb a state court's application of a state procedural rule. In denying Petitioner's motion to vacate his execution date, the Tennessee Supreme Court observed that trial courts have broad authority to decide motions to allow late-filed amendments and will not be reversed absent an abuse of discretion. App. A at 4-5. This Court has long recognized that a State's highest

court is the best authority on its own law. *See C.I.R. v. Bosch's Estate*, 387 U.S. 456, 465 (1967).

At various points throughout his Stay Application, Petitioner invokes *Bucklew v. Precythe*, No. 17-8151 (U.S.), a case now pending in this Court, noting with little elaboration that the issues here "overlap" with or "relate[] to" issues raised in that case. Stay Application at 1, 4, 3, 27. But Petitioner is incorrect. *Bucklew* raises a question about a plaintiff's burden to prove "an adequate alternative method of execution *when raising an as-applied challenge to the state's proposed method of execution based on his rare and severe medical condition*." Petition for Writ of Certiorari at (i), *Bucklew v. Precythe*, No. 17-8151 (U.S. Mar. 5, 2018) (emphasis added). None of the Plaintiffs in this case raised that sort of claim. Plaintiffs here asked the state court to declare as a matter of law that the State's midazolam-based three-drug protocol *on its face* violates the Eighth Amendment. And "identify[ing] a known and available alternative method of execution that entails a lesser risk of pain [is] a requirement of *all* Eighth Amendment method-of-execution claims." *Glossip*, 135 S. Ct. at 2731 (emphasis added). *Bucklew* will have no bearing in this case and provides no basis for this Court to interfere with the State's interest in enforcing Petitioner's sentence.

This Court "has never invalidated a State's chosen procedure for carrying out a sentence of death as the infliction of cruel and unusual punishment." *Glossip*, 135 S. Ct. at 2732. The state trial court's rejection of Petitioner's challenge to Tennessee's lethal injection protocol is in line with this Court's decision in *Glossip* and the decisions of other federal appellate courts that have uniformly rejected Eighth Amendment challenges to lethal injection protocols that use midazolam as the first drug in a three-drug combination. *See Glossip*, 135 S. Ct. at 2739-40

(observing that "numerous courts have concluded that the use of midazolam as the first drug in a three-drug protocol is likely to render an inmate insensate to pain that might result from the administration of the paralytic agent and potassium chloride"). *See also In re: Ohio Execution Protocol*, 860 F.3d 881 (6th Cir. 2017) (reversing order enjoining three-drug protocol using midazolam and explaining that "[Ohio's] chosen procedure here is the same procedure (so far as the combination of drugs is concerned) that the Supreme Court upheld in *Glossip*"), *cert. denied*, 137 S. Ct. 2238 (2017); *McGehee v. Hutchison*, 854 F.3d 488, 492 (8th Cir. 2017) (concluding that evidence fell short of showing a significant possibility that Arkansas protocol is "sure or very likely" to cause severe pain and needless suffering), *cert. denied*, 137 S. Ct. 1275 (2017); *Arthur v. Comm'r, Ala. Dep't of Corr.*, 840 F.3d 1268 (11th Cir. 2016) (inmate "ha[d] not carried his heavy burden to show that Alabama's current three-drug protocol—which is the same as the protocol in *Glossip*—is 'sure or very likely to cause' [inmate] serious illness, needless suffering, or a substantial risk of serious harm"), *cert. denied*, 137 S. Ct. 725 (2017).[4]

B. A Stay of Execution Will Not Aid This Court's Jurisdiction.

Petitioner summarily asserts that a stay is warranted "so that his right to appeal and ultimately to seek certiorari from this Court is preserved." Stay Application at 27. But a stay of Petitioner's execution is not necessary to preserve this Court's ability to eventually consider a

[4] Although not necessary to its disposition of Petitioner's Eighth Amendment claim, the trial court also found that the Plaintiffs failed to prove the other element of *Glossip*—that the protocol "presents a risk that is 'sure or very likely to cause serious illness and needless suffering and give rise to sufficient imminent dangers.'" *West*, 519 S.W.3d at 563-64 (citing *Glossip*, 135 S.Ct. at 2737). The trial court explained that "the Inmates have not established the other *Glossip* prong that with the use of midazolam there is an objectively intolerable risk of harm." App. C at 28. And the Tennessee Supreme Court's order denying Petitioner's motion to vacate his execution date observed that this Court in *Glossip* "upheld Oklahoma's three-drug protocol that used the same procedure with the same combination of drugs as that found in the current Tennessee protocol." App. A at 5.

petition for certiorari from an appellate court's decision in the state-court proceedings. The state-court action was brought by thirty-three Tennessee death-row inmates, and twenty-nine inmates are parties to the state-court appeal. Execution dates have been set for only three of those inmates, including Petitioner.

Even if Petitioner's execution proceeds as scheduled, the state-court appeal presumably will continue unabated as to the remaining inmates. And nothing will prevent those inmates from seeking certiorari after appellate review in the state courts has concluded. Thus, to the extent this Court has authority under 28 U.S.C. § 1651(a) to issue writs in aid of jurisdiction that it does not currently possess but might potentially exercise in the future, that authority is lacking here because the State's enforcement of Petitioner's death sentence will not interfere with this Court's eventual jurisdiction over the method-of-execution claims asserted in the state-court proceedings.

CONCLUSION

Petitioner's Application for Stay of Execution should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Response was forwarded by United States mail, first-class postage prepaid, and by email on the 8th day of August, 2018, to the following:

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