THIS IS A CAPITAL CASE
EXECUTION SET FOR NOVEMBER 1, 2018 AT 7 PM

IN THE
SUPREME COURT OF THE UNITED STATES
No. 18-_____

IN RE:
EDMUND ZAGORSKI,
Movant,

APPLICATION FOR STAY OF EXECUTION

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November 1, 2018

To the Honorable Sonia Sotomayor, Associate Justice of the United States and Circuit Justice for the Sixth Circuit:

Movant, Edmund Zagorski respectfully moves for an order staying his execution which is set for November 1, 2018, 7 p.m. CDT, in the above-entitled proceeding.

Pursuant to Supreme Court Rules 23.1, 23.2, and 28 U.S.C. § 1651(a), the stay may lawfully be granted.

The All Writs Act gives your Honor and this Court the power to issue a stay to maintain its jurisdiction of the underlying matter. "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." Here, a stay is necessary for this Court to exercise jurisdiction over the Mr. Zagorski's writ wherein the Court is asked to resolve compelling legal questions regarding the voluntariness of Mr. Zagorski's "choice" of the patently unconstitutional method of execution (electric chair) where that "choice" was coerced by the threat of suffering under Tennessee's three-drug lethal injection protocol. Because (a) Mr. Zagorski has a reasonable likelihood of success on the merits, (b) the relative interests of the competing parties favor Zagorski's position, and (c) he has diligently pursued his legal remedies, equity favors a stay. *Nelson v. Campbell*, 541 U.S. 637 (2004).[1]

[1] Factors that may play a persuasive or even dispositive role in a court's determination of whether to grant a stay of execution might include such considerations as (1) whether the protocol has recently been changed, (2) whether the petitioner has been diligent in pursuing his or her claim, (3) whether the petitioner has taken reasonable

In *Barefoot v. Estelle*, 463 U.S. 880 (1983), superseded on other grounds by 28 U.S.C. § 2253(c), this Court held that a stay may be granted when there is "a reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction; ... a significant possibility of reversal of the lower court's decision; and ... a likelihood that irreparable harm will result if that decision is not stayed." *Barefoot*, 463 U.S. at 895. Further, a stay should be granted when necessary to "give non-frivolous claims of constitutional error the careful attention that they deserve" and when a court cannot "resolve the merits [of a claim] before the scheduled date of execution to permit due consideration of the merits." *Id.* at 888–89.

The appeal below raises the following important constitutional questions:

1. Did *Glossip v. Gross,* 135 S.Ct. 2726 (2015), modify centuries-old jurisprudence prohibiting involuntary waiver of constitutional protections in the context of method of execution claims?

2. Does *Stewart v. LaGrand*, 526 U.S. 115 (1999), prevent a death-sentenced inmate from challenging a barbaric method of execution he was coerced into choosing by threat of an even more-barbarous method because he was prevented

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> steps to ascertain what the protocol is … and (4) whether the traditional factors involved in the balancing test for granting a preliminary injunction weigh in favor of a stay.

Cooey v. Strickland, 479 F. 3d 412, 430 (6th Cir. 2007) (Gilman, J., dissenting).

from meeting the alternative-method-pleading-requirement of *Glossip* by state secrecy laws and procedural technicalities?

Mr. Zagorski sought a stay of execution from the Sixth Circuit Court of Appeals. That request was denied on October 31, 2018.

I. Procedural Background

Edmund Zagorski is an inmate under sentence of death. *Zagorski v. State*, 983 S.W.2d 654 (Tenn. 1998), *cert. denied* 528 U.S. 829 (1999). This petition relates solely to the manner in which he will die.

In 2015, Edmund Zagorski was one of thirty-seven plaintiffs, all under sentence of death, in the case of *West v. Schofield*, 468 S.W.3d 482, 485 fn. 2 (Tenn. 2015). The plaintiffs contended that death in Tennessee's electric chair would be cruel and unusual. *Id.* at 484. The Tennessee Supreme Court rejected their suit as unripe, as lethal injection by pentobarbital was the constitutional default option, and the State would only resort to electrocution if it could not obtain lethal injection chemicals or if a court found its lethal injection protocol unconstitutional. *Id.* at 484-85; *see also* Tenn. Code Ann. 40-23-114. The court reasoned that the events needed to trigger use of electrocution might never come to pass and that the pentobarbital protocol "if administered properly, will likely cause death with minimal pain and with quick loss of consciousness." *West v. Schofield*, 519 S.W.3d 550, 562 (Tenn. 2017).

On January 8, 2018, Tennessee modified its lethal injection protocol to add a second option, a three-drug protocol using midazolam, vecuronium bromide, and

potassium chloride. R. 1, PageID # 7-8.[2] On February 20, 2018, Mr. Zagorski joined thirty-two other plaintiffs in filing suit in state court against the midazolam option. *Id.* at 8. The inmates submitted that Tennessee's first enumerated option, single-drug pentobarbital, was a feasible and readily available alternative that had already been found to be constitutional and pain-free. *Abdur'Rahman v. Parker*, -- S.W.3d.__, 2018 WL 4858002, at *3 (Tenn. Oct. 8, 2018).

On March 15, 2018, the Tennessee Supreme Court scheduled Mr. Zagorski to die on October 11, 2018. R. 1, PageID # 8.

On July 5, 2018, four days before trial was to commence, the State of Tennessee amended their lethal injection protocol to delete the single-drug pentobarbital alternative, leaving the midazolam-protocol as the only lethal injection method. R. 1, PageID # 23. On July 9, 2018, through July 24, 2018—over ten days of testimony—proof was presented from six expert witnesses, twelve witnesses to midazolam executions, and three representatives of the State of Tennessee; 151 exhibits were introduced. R. 1, PageID # 8-9.[3]

The proof presented was not rebutted (indeed, in all material respects it was agreed to by the State's expert), and it established that:

> a. Midazolam, regardless of dose, does not possess analgesic properties, and it cannot render a person insensate to pain;
>
> b. The midazolam is dissolved in 100 ml of pH 3.0 acid, and this acid will cause pulmonary edema; the condemned's lungs will fill with fluid, and he will struggle to breathe; other inmates suffering this edema have

[2] Record citations, unless otherwise noted, will be to the underlying record in the Middle District of Tennessee, Case 3:18-cv-01205.

[3] The complaint misstated the number of eyewitnesses as eleven, forgetting that in addition to eleven lawyers, plaintiffs also called one investigator.

> "coughed, gasped, labored to breathe, barked and strained against their restraints;"
>
> c. Following a three-minute wait, and a medically inappropriate "consciousness check," the inmate will be injected with vecuronium bromide, which will cause paralysis and then suffocation;
>
> d. Finally, after two additional minutes of pulmonary edema and paralysis, the inmate will be injected with potassium chloride, which will cause excruciating pain, as it "ignites" every nerve fiber in his body.

Id. at 9-11; R. 9, PageID # 65.

On July 26, 2018, the trial court ruled against the plaintiffs. R. 1, PageID # 11. On July 30, 2018, Mr. Zagorski and the majority of other plaintiffs filed notice of appeal. *Id.*

On August 9, 2018, Tennessee performed its first execution using midazolam on a man named Billy Ray Irick. R. 1, PageID # 11. The prison officials did not follow their protocol. *Id.* The first dose of midazolam was not prepared until 28 minutes after the execution was set to commence. *Id.* The backup dose, ostensibly designed to protect Mr. Irick if he displayed signs of "consciousness," was never prepared at all. *Id.*

Witnesses to Mr. Irick's execution described what the experts had predicted: he gasped for breath, coughed, and strained against his restraints. *Id.* Mr. Irick was clearly sensate to pain and suffering from pulmonary edema. *Id.* After the vecuronium took effect, the degree of suffering he felt from continuing edema, air hunger, paralysis and the chemical burning of potassium chloride is unknown, but was inevitably severe and horrific. *Id.*

On August 13, 2018, the Tennessee Supreme Court "reached down" to take jurisdiction of Mr. Zagorski's appeal. *Id.* at 12. The court set an expedited briefing schedule, with oral argument set for October 3, 2018—eight days before Mr. Zagorski's scheduled execution. *Id.*

On August 30, 2018, with his appeal pending, and his execution looming, Mr. Zagorski delivered a letter to the Warden of his prison, informing him that he was unable to choose a method of execution. *Id.* at 13. Pursuant to Tennessee law, Mr. Zagorski had the option to accept the default—death by some manner of lethal injection—or to choose death in the electric chair. Tenn. Code Ann. §§ 40-23-114, 116.

At approximately 4:00 p.m. on October 8, 2018, the Tennessee Supreme Court issued its decision. *Id.* It declined to determine whether Tennessee's midazolam protocol would cause severe pain, finding this issue "pretermitted" and moot. *Abdur'Rahman v. Parker,* __ S.W.3d __, 2018 WL 4858002, at *1, 14-15. Instead, the court concluded that the inmates had failed to "plead and prove" a feasible and readily implemented alternative. *Id.* at *1, 7-15. In reaching this decision, the court upheld the application of a discretionary Tennessee procedural bar, Rule 15.02, and declined to consider a two-drug alternative that was feasible and readily implemented. *Id.* at *9-12. The court found that the State of Tennessee's pre-trial maneuver of removing the single-drug pentobarbital protocol as an option four days before trial did not excuse the inmates from having failed to plead an alternative-to-that-alternative prior to trial. *Id.* at *11-12.

In conclusi,on the Tennessee Supreme Court held that "the Plaintiffs failed to establish that Tennessee's current three-drug lethal injection protocol constitutes cruel and unusual punishment." *Id.* at *15. Put another way, the Tennessee Supreme Court held that a discretionary decision of the lower court to apply a procedural rule, and to refuse to consider a clearly feasible and readily implemented alternative, made it constitutionally acceptable to execute inmates under a protocol that they had proven was sure or very likely to inflict severe pain, mental anguish and needless suffering.[4]

Within two-hours of the Tennessee Supreme Court finding that the plaintiffs had not proven the midazolam protocol was unconstitutional, Mr. Zagorski submitted to the Warden his "Affidavit Concerning Method of Execution," wherein he chose death in the electric chair. R. 1, PageID # 13. In this affidavit, he made the following statement:

> By signing this affidavit I am not conceding that electrocution is constitutional. I believe that both lethal injection and electrocution violate my rights under the 8th amendment. However, if I am not granted a stay of execution by the courts, as between two unconstitutional choices I choose electrocution. I do not waive my right to continue to appeal my challenge to lethal injection. And, if that appeal is successful, then I will challenge electrocution as unconstitutional. I am signing this document because I do not currently have a stay of execution and I do not want to be subjected to the torture of the current lethal injection method.

R. 1, PageID # 13-14.

[4] The rightness or wrongness of the Tennessee Supreme Court's decision is not the basis of this petition. However, their elevation of technical pleading rules of dubious application over bedrock constitutional protections animates at least one of the arguments that follows.

On October 9, 2018, the State declined to honor Mr. Zagorski's election and told him he would be killed with midazolam, vecuronium bromide, and potassium chloride. *Id.* at 14. Mr. Zagorski filed suit in federal district court on October 10, 2018, to enjoin the State from killing him with chemical poisons and to require that it use the electric chair. *Id.* at 14. The court granted a temporary injunction enjoining prison officials from executing him by lethal injection contrary to his expressed wishes. *Id.* Prison officials already had conducted required training on the use of the chair on September 27, 2018, and tested the chair itself on October 10, 2018. *Id.* All was set for Mr. Zagorski to die; indeed on the evening of October 11, 2018, this Honorable Court dissolved a separate stay (in his habeas proceedings—unrelated to this particular litigation), and cleared the way for death in the chair. However, some hours earlier, the Governor of Tennessee granted a ten-day reprieve, apparently so that the electric chair could be made ready for use. R. 1, PageID # 14. Mr. Zagorski does not know what prevented its use on October 11, 2018.

Mr. Zagorski's choice of the electric chair was made in light of the alternative. *Id.* at 13. If he had not selected electrocution, he would have suffered over 10 to 18 minutes in a manner that was described by the state trial court as "dreadful and grim." *Id.* The three separate and distinct vehicles of suffering, described above, would all be inflicted upon him—the last two while he appeared insensate and serene because of the paralytic.

Death in the electric chair was comparatively superior, in Mr. Zagorski's estimation. *Id.* Yet, what he chose was also something he believed was unconstitutionally cruel and unusual. *Id.*

From an inmate's perspective there are two major issues with Tennessee's electric chair: (1) it is an electric chair, and (2) it is Tennessee's specific electric chair.

Following a series of botched electrocutions this 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. *Bryan v. Moore*, 528 U.S. 1133 (2000). There has been an overwhelming movement of states discontinuing use of the electric chair as a means of execution. In 1974, nineteen states used the electric chair as their sole method of execution. R. 1, PageID # 21-22. Today, no state uses it as the primary method, and only a small handful even keep it as an alternative. *Id.* The supreme courts of Georgia and Nebraska have both found the electric chair to be cruel and unusual under their respective state constitutions. *State v. Mata*, 745 N.W.2d 229, 278 (Neb. 2008); *Dawson v. State*, 554 S.E.2d 137, 143-44 (Ga. 2001). Georgia concluded that, factually, the electric chair carries the "specter of excruciating pain" and the "certainty of cooked brains

and blistered bodies." *Dawson*, 554 S.E.2d at 144. Nebraska held it violative of its state constitution for two major reasons. First:

> There is also no question that [the electric chair's] continued use will result in unnecessary pain, suffering, and torture for some, but not all of [the] condemned murderers in this state. Which ones or how many will experience this gruesome form of death and suffer unnecessarily; and which ones will pass with little conscious suffering cannot be known.

Mata, 745 N.W.2d at 272.

Second,

> Besides presenting a substantial risk of unnecessary pain, we conclude that electrocution is unnecessarily cruel in its purposeless infliction of physical violence and mutilation of the prisoner's body. Electrocution's proven history of burning and charring bodies is inconsistent with both the concepts of evolving standards of decency and the dignity of man.

Id. at 279.

Thus, when Mr. Zagorski chose death in the electric chair, he chose a method that had been found to cause extreme suffering, and physical mutilation. Yet, he chose it based on his hope that the duration of suffering would be shorter. R. 1, PageID # 3.

He also chose it as preferable to the midazolam protocol, despite the fact that the chair to be used was Tennessee's electric chair. This chair was designed and installed by Fred Leuchter, who falsely held himself out to be an electrical engineer. *Id.* at 17. He also held himself out to be an expert on the Holocaust (or its absence), having published a denial report entitled "An Engineering Report on the Alleged Execution Gas Chambers at Auschwitz, Birkenau, and Majdanek." *Id.* But for the

zeal of the State of Massachusetts, this charlatan might still be trying to sell implements of death. That state forced him into a consent decree wherein he agreed to cease (1) pretending to be an electrical engineer, and (2) distributing his Holocaust denial report. *Id.*

For Tennessee, however, the damage was done. Leuchter's chair has been tested and found wanting by two separate engineering firms (apparently real ones). *Id.* at 17-18. Tennessee has made some of the modifications those engineers suggested, but not all. *Id.* at 18. Whatever was done, on October 11, 2018, Tennessee was not comfortable using it. *Id.* at 14.

This history of the chair leads to the next developments. On October 22, 2018, the Tennessee Supreme Court issued a new execution date: November 1, 2018. *Id.* at 15. On October 24, 2018, the State moved the district court to make permanent its temporary injunction against use of midazolam, and requirement that the State use the electric chair in Mr. Zagorski's execution. M.D. Tenn. 3:18-cv-01035, R. 15, PageID # 464-68.

On October 26, 2018, with his challenge to the electric chair finally ripe, Mr. Zagorski did what he had said he would do in his affidavit of October 8, 2018, and what he had tried to do back in 2014—he filed suit challenging the constitutionality of the electric chair. R. 1, PageID # 1-33. He also filed suit challenging the coercive

pressure that had been placed upon him, which had compelled him to choose such a gruesome method of death. R. 1, PageID # 29-30.[5]

Within hours of filing suit, the district court dismissed these two counts. R. 8, PageID # 48-50. In regards to his due process coercion claim, the court found that collateral estoppel precluded such suit. *Id.* at 48-49. As to his challenge to the electric chair, the court held that *Stewart v. LaGrand*, 526 U.S. 115, 119 (1999), required dismissal without consideration of the (in)voluntariness of the alleged waived. On October 28, 2018, Mr. Zagorski filed a Motion to Alter or Amend, with supporting documents. R. 9, PageID # 52-448. On October 29, 2018, the district court denied this motion. R. 15, PageID # 589-597. Respondents did not file a responses to any of these pleadings.[6]

On October 30, 2018, the District Court issued final judgment, and Mr. Zagorski promptly filed Notice of Appeal. Briefing was completed on October 31, 2018, and the Court of Appeals denied relief at 8:20 p.m. EST that evening, holding in substantive part:

> To prevail on his coercion claim (count I), Zagorski would have to show that he was coerced to waive *his constitutional right against electrocution*—and a challenge to the constitutionality of electrocution is precisely the one we are bound to conclude Zagorski waived. *See Stanford v. Parker*, 266 F.3d 442, 462 (6th Cir. 2001) ("[W]e need not consider whether electrocution is cruel and unusual punishment because, for that issue to be relevant, Stanford would first have to waive it.") (citing *Stewart v. LaGrand*, 526 U.S. 115 (1999)). His stand alone Eighth Amendment challenge to his electrocution (count II) fails for the same reason.

[5] In a third count, which is not subject to this petition, Mr. Zagorski sued so that during his execution he would have two attorneys present and/or his attorney(s) would have access to a telephone, so that his right to access the courts would be respected. R. 1, PageID # 31.
[6] The district court ordered Respondents to reply only to the access-to-courts claim.

18-6145, R. 11-1, Page 3 (emphasis in original).

The Sixth Circuit did not address the collateral estoppel ground relied upon by the district court. *Id.* Similarly, the court did not decide whether Mr. Zagorski was in fact coerced, or whether that coercion led to his waiver. *Id.* By failing to address the substance of the legal arguments presented by Zagorski in his appeal to the Sixth Circuit (the district court's error in finding Count I barred by collateral estoppel and whether the constitution tolerates and involuntary waiver of a constitutional right), the Court has essentially ruled that though Zagorski may be legally correct, *Glossip* modified centuries old jurisprudence mandating that constitutional rights can only be waived if done so voluntarily.

Absent a stay from this Court, Mr. Zagorski will be denied his right to review in this Court and will be executed tonight.

The appeal in this case will presents an important and nuanced claim of legal and constitutional error, determining whether centuries old precedent regarding the voluntariness requirement for relinquishment of a constitutional right has been abrogated by *Glossip v. Gross*.

II. Entitlement to a Stay

Mr. Zagorski is entitled to a stay. As this Court held in *Nken v. Holder*, 556 U.S. 418, 434 (2009), there are four primary considerations governing the determination of the equities: 1) whether the movant has a likelihood of success on the merits; 2) whether the movant will suffer irreparable harm in the absence of a stay; 3) whether the requested stay will substantially injure other interested

parties; and 4) where the public interest lies. These factors have been interpreted as interrelated considerations rather than prerequisites. *Serv. Emps. Int'l Union Local 1 v. Husted*, 698 F.3d 341, 343 (6th Cir. 2012) (per curiam). Mr. Zagorski's interest in the adjudication of this question is compelling. Mr. Zagorski initially attempted to litigate the unconstitutionality of the electric chair in 2015 and was prevented from doing so by the state's claim that the issue was not ripe. *West v. Schofield*, 468 S.W.3d 482, 485 fn. 2 (Tenn. 2015). He brought this challenge immediately when it became ripe. *Nelson v. Campell*, 541 U.S. 637 (2004)); *Gomez v. United States Dist. Court for Northern Dist. of Cal.,* 503 U.S. 653, 654 (1992) (per curiam)). Finally Mr. Zagorski has shown a significant possibility of success on the merits. See *Barefoot v. Estelle,* 463 U.S. 880, 895–896 (1983). See also *Mazurek v. Armstrong,* 520 U.S. 968, 972 (1997) *(per curiam)* (preliminary injunction not granted unless the movant, by a clear showing, carries the burden of persuasion).

Further the threat of irreparable harm weighs heavily in his favor where absent a stay he will be electrocuted – a method that this Court was on the brink of declaring unconstitutional in *Bryan* before the state of Florida mooted the question. The public interest also weighs in favor of a stay as this issue is likely to repeat in light of the growing trend of death row inmates who face death insurmountable challenges to barbaric methods of execution because of the lower court's (mis)application of the alternative-method-of-execution pleading requirement of *Glossip*. The state's interest in carrying out this capital sentence against this inmate – who has been a model prisoner for 34 years, who save the life of a prison

guard, and who 6 of the original jurors support a sentence of life without parole is — not great.

III. Conclusion

The state coerced Mr. Zagorski's election of an unconstitutional method of execution. Based upon the evidence in the record and existing law, it is more likely than not that Mr. Zagorski will prevail on appeal. Moreover, the other issues to be decided on appeal are weighty and should only be decided after a studied review of the voluminous record. Equity demands a stay of execution. Denial of this motion will deny Mr. Zagorski his right to appeal and to seek certiorari from this this Court. Accordingly, the motion should be granted.

Respectfully submitted,

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CERTIFICATE OF SERIVCE

I hereby certify that a true and correct copy of the foregoing document was sent to the following via email on this the 1st day of November, 2018, to:

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