Nos. 18-6530, 18A470

IN THE
SUPREME COURT OF THE UNITED STATES

EDMUND ZAGORSKI,
Petitioner,

v.

BILL HASLAM, et al.,
Respondents.

ON APPLICATION FOR STAY OF EXECUTION AND ON PETITION FOR WRIT OF CERTIORARI

RESPONDENTS' BRIEF IN OPPOSITION TO STAY OF EXECUTION AND CERTIORARI

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CAPITAL CASE
QUESTIONS PRESENTED

1. Whether the Court should grant Petitioner a stay of execution under the All Writs Act, 28 U.S.C. § 1651, pending disposition of a petition for writ of certiorari that seeks to challenge a method of execution—electrocution—that petitioner demanded and in fact sued for a federal court order to obtain as the method of his execution.

2. 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?

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

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The October 31, 2018, judgment of the United States Court of Appeals for the Sixth Circuit affirming the district court's summary dismissal of Counts I and II of his prisoner civil rights action is not published. *Zagorski v. Bill Haslam, et al*., No. 18-6145 (6th Cir. Oct. 31, 2018). Petitioner's Appendix ("Pet. Appx.") A. The order of the United States District Court for the Middle District of Tennessee summarily dismissing Counts I and II as frivolous under 28 U.S.C. § 1914(e)(2) is unpublished. *Zagorski v. Haslam, et al*., No. 3:18-cv-01205 (M.D. Tenn.) (Order, Doc. No. 8). Pet. Appx. D. The order of the district court denying petitioner's motion for reconsideration of its order dismissing Counts I and II is not published but may be found at *Zagorski v. Haslam, et al.*, No. 3:18-cv-01205, 2018 WL 5454148 (M.D. Tenn., Order, Oct. 29, 2018). Pet. Appx. C.

STATEMENT OF JURISDICTION

Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254, 28 U.S.C. § 1651, and Sup. Ct. R. 23.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides:

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

Tennessee Code Ann. § 40-23-114 provides:

> (a) For any person who commits an offense for which the person is sentenced to the punishment of death, the method for carrying out this sentence shall be by lethal injection.
>
> (b) Any person who commits an offense prior to January 1, 1999, for which the person is sentenced to the punishment of death may elect to be executed by

> electrocution by signing a written waiver waiving the right to be executed by lethal injection.

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 OF THE CASE

Petitioner Edmund Zagorski was convicted by a Tennessee jury in 1984 of the first-degree murders of John Dale Dotson and Jimmy Porter. The jury sentenced petitioner to death for each of the murders, and the Tennessee Supreme Court affirmed.[1] *State v. Zagorski*, 701 S.W.2d 808 (Tenn. 1985), *cert. denied*, 478 U.S. 1010 (1986).

On March 15, 2018, the Tennessee Supreme Court set petitioner's execution date for October 11, 2018. Because petitioner had been sentenced to death for first-degree murders committed before January 1, 1999, Tenn. Code Ann. § 40-23-114(b) permitted him to choose between two constitutional methods of execution: (1) lethal injection[2] or (2) electrocution.[3]

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[1] Appellant pursued a series of state and federal collateral challenges to the judgment, but all were unsuccessful. *Zagorski v. State*, 983 S.W.2d 654 (Tenn. 1998), *cert. denied*, 528 U.S. 829 (1999) (denying state post-conviction relief); *Zagorski v. Bell*, 326 Fed. Appx. 336 (6th Cir. Apr. 15, 2009), *cert. denied*, 559 U.S. 1068 (2010), *reh. denied*, 561 U.S. 1019 (2010) (affirming the denial of federal habeas relief); *Zagorski v. Mays*, __F.3d __, 2018 WL 5318246 (6th Cir., Oct. 29, 2018) (reh. denied Oct. 30, 2018) (affirming the denial of post-judgment relief under Fed. R. Civ. P. 60(b)(6)).

[2] *Abdur'Rahman, et al. v. Parker, et al.*, 2018 WL 4858002 (Tenn.), *cert. denied sub nom., Zagorski, et al. v. Parker, et al.*, 2018 WL 4900813 (Oct. 11, 2018) (upholding as constitutional Tennessee's three-drug lethal injection protocol); *Glossip v. Gross*, 135 S.Ct. 2726 (2015).

[3] *In re Kemmler*, 136 U.S. 436 (1890) (affirming New York's imposition of electrocution as a means of capital punishment); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947).

Petitioner chose electrocution as the method of his execution, and he filed a Section 1983 lawsuit in the United States District Court for the Middle District of Tennessee the day before his October 11, 2018, execution to ensure that the State of Tennessee would honor his choice. *Zagorski v. Haslam*, No. 3:18-cv-01035 (M.D. Tenn.).[4]

Petitioner's Complaint and Emergency Motion for Temporary Restraining Order and Preliminary Injunction in that case asked the district court to direct the State of Tennessee to execute him "in accordance with its newest electrocution protocol" and to enjoin the State from carrying out his execution by lethal injection. *Zagorski v. Haslam*, No. 3:18-cv-01035 (M.D. Tenn.) (Complaint, Doc. No. 1, at 2, 17; Emergency Motion, Doc. No. 3). Petitioner pled that "it is his sincere preference to die by the electric chair." *Id.* (Doc. No. 1, at 10-11). And the only relief petitioner requested was that the district court "enjoin the Defendants from executing Mr. Zagorski by using the three-drug protocol outlined in the July 5, 2018, TDOC execution manual." *Id.* (Doc. No. 1, at 17).

On October 11, 2018, the district court "enjoined [Defendants] from proceeding with the [appellent's] execution by lethal injection pending a final judgment in this case." *Id.* (Memorandum and Order, Doc. No. 10). The State did not appeal that order. Later that day and specifically in light of this Court's "decision to honor Zagorski's last-minute decision to choose electrocution as the method of execution," and "to give all involved the time necessary to carry out the sentence in an orderly and careful manner," Tennessee Governor Bill Haslam granted

[4] Copies of all documents filed in the federal district court will be referred to by docket entry number and may be accessed through the Court's PACER/ECF.

petitioner a ten-day Reprieve until October 21, 2018. *See Id.* (Motion, Doc. No. 12, at 2-3, Attachments 1 and 2).

On October 22, 2018, at the conclusion of the ten-day reprieve period, the Tennessee Supreme Court re-set appellant's execution for November 1, 2018. *State v. Zagorski*, No. M1996-00110-SC-DPE-DD (Tenn., Oct. 22, 2018). On October 24, 2018, the State of Tennessee agreed to petitioner's request to make permanent the district court's preliminary injunction "enjoin[ing] [Defendant's] from proceeding with [appellant's] execution by lethal injection." *Id.* (Motion, Doc. No. 15, at 3).

But six days before the new execution date, petitioner initiated yet another lawsuit—the one from which this petition arises—under 42 U.S.C. § 1983, this time challenging the very method he had demanded in the earlier matter. Petitioner's three "causes of action" included a claim that he had been "coerced" into choosing electrocution as his method of execution (Count I) and a claim that electrocution itself violates the Eighth Amendment to the United States Constitution (Count II). *Zagorski v. Haslam, et al.*, No. 3:18-cv-1205 (M.D. Tenn.) (Complaint, Doc. No. 1, at 29-30). That same day, the district court dismissed both counts under 28 U.S.C. § 1914(e)(2) as facially meritless. Pet. Appx. D. The court denied petitioner's "motion to reconsider" the dismissals three days later. Pet. Appx. C.

At petitioner's request—"so that he can appeal the dismissal of [Counts I and II] before his execution scheduled two days from now," R. 16—the district court entered final judgment as to Counts I and II pursuant to Fed. R. Civ. P. 54(b). Pet. Appx. B.

Petitioner filed a notice of appeal on October 30, 2018. Notice, R. 19. After expedited briefing by the parties, the Sixth Circuit affirmed the district court's judgment. Pet. Appx. A.

The Court rejected outright petitioner's claim that he was coerced to "waive his constitutional right against electrocution" because Zagorski waived his right to challenge electrocution by choosing electrocution over lethal injection. Pet. Appx. A, at 3 (citing *Stewart v. LaGrand*, 526 U.S. 115 (1999); *Stanford v. Parker*, 266 F.3d 442 (6th Cir. 2001)). The Court concluded that petitioner's challenge to electrocution failed for the same reason. *Id*.

In a concurring opinion, Circuit Judge Cook concluded that petitioner's claims were frivolous and warranted dismissal under 28 U.S.C. § 1915(e)(2).

> With respect to Count I of his complaint, Zagorski alleged that Tennessee "coerced and compelled" him to choose between two unconstitutional choices: electrocution or lethal injection. On its face, this presents exactly the sort of "clearly baseless" factual contention that Section 1915(e) permits us to dismiss. . . . Tennessee's lethal injection protocol comports with what the Supreme Court blessed as constitutional in *Glossip v. Gross*, 135 S.Ct. 2726, 2739-40 (2015). *See also in re Ohio Execution Protocol Litig.*, 881 F.3d 447, 449 (6th Cir. 2018). Thus, Zagorski could not have been forced to choose "between two unconstitutional choices." Recognizing this, the district court correctly dismissed this count.
>
> As to Count II, the district court noted that *Stewart v. LaGrand*, 526 U.S. 115 (1999), foreclosed Zagorski from challenging the constitutionality of his chosen manner of execution. Zagorski's contention that *Glossip* altered *LaGrand*'s rule has "no arguable basis . . . in law" and presents a similarly frivolous argument.

Pet. Appx. A, at 304.

The Sixth Circuit also denied a stay of execution, finding that "there is no likelihood of success" of petitioner's claims. Pet. Appx. A, at 2.

REASONS FOR DENYING A STAY AND DENYING REVIEW

Less than twelve hours before his scheduled execution—the second such date in the past three weeks and the fourth since 2010—petitioner has moved for a stay of execution under the All Writs Act, 28 U.S.C. § 1651(a). He contends that a stay is necessary pending disposition of a petition for writ of certiorari in which he asks this Court to review the State of Tennessee's use of a method of execution he not only demanded but then sued for and obtained a federal court order mandating the State's compliance with his demand. *Zagorski v. Haslam,* No. 3:18-cv-01035 (M.D. Tenn.). Petitioner asks this Court to review the district court's dismissal of two counts of a subsequent lawsuit in which he challenged the same method of execution he had demanded just two weeks earlier. The district court dismissed petitioner's claims under 28 U.S.C. § 1915(e)(2) after finding them to be facially meritless, Pet. Appx. D, at 1-3, and it rebuked appellant's obvious "gamesmanship" in "raising arguments a few days before execution that could have been presented months ago." Pet. Appx. C, at 7.

Petitioner contends that the All Writs Act, 28 U.S.C. § 1651(a), warrants a stay of 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)).

There is no reason for certiorari review in this case or any likelihood that petitioner will prevail in this appeal, let alone the significant possibility of success required by *Hill v. McDonough*, 547 U.S. 573 (2006). Petitioner's motion for stay should be denied.

A. Petitioner Cannot Show a Significant Possibility of Success on the Merits of this Appeal.

Petitioner asks this Court to stay his execution pending the disposition of a petition for writ of certiorari in this Court challenging the lower courts' refusal to permit him to challenge the constitutionality of a method of execution he had chosen. His application should be denied because he can show no likelihood that review by this Court, even if granted, will result in reversal of the State court's decision.

"[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*.

In Count I of his Complaint, appellant alleged that the State violated his constitutional rights by "forc[ing] Mr. Zagorski to choose between two cruel and unusual punishments." Respondent's Appendix ("Resp. Appx."), at 29. But the district court correctly found that the Tennessee Supreme Court had ruled less than one month earlier that Tennessee's midazolam-based three-drug protocol was constitutional. Pet. Appx. D, at 2. This Court had also denied a petition for writ of certiorari seeking review of that decision. *See Abdur'Rahman, et al. v. Parker, et al.*, 2018 WL 4858002 (Tenn.), *cert. denied sub nom., Zagorski, et al. v. Parker, et al.*, 2018 WL 4900813 (Oct. 11, 2018) (upholding as constitutional Tennessee's three-drug lethal

injection protocol). Because Count I of the petitioner's Complaint was premised on "the very opposite of what the Tennessee Supreme Court has already ruled," the district court ruled that the claim was barred by collateral estoppel. Pet. Appx. C, at 2-3.

Collateral estoppel bars his claim in this case because the merits have already been decided in an earlier case involving the same parties. *Kremer v. Chemical Const. Corp*., 456 U.S. 461, 467 n.6 (1982) ("[O]nce a court decides an issue of fact or law necessary to its judgment, that decision precludes relitigation of the same issue on a different cause of action between the same parties"). Petitioner's "coercion" claim was entirely premised on the notion that he was forced to choose between two unconstitutional methods of execution. That contention is patently meritless and directly contrary to the outcome of a lawsuit the petitioner has just completed weeks earlier.

And even if that were not the case, constitutional challenges to the midazolam-based three-drug lethal injection protocol have been rejected by every court that has considered it, including this Court. *See Glossip v. Gross*, 135 S.Ct. 2726, 2739-40 (2015) (listing case citations). *See also In re: Ohio Execution Protocol*, 860 F.3d 881 (6th Cir.), *cert. denied*, 137 S.Ct. 2238 (2017) (reversing order enjoining three-drug protocol using midazolam: "[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*."); *McGehee v. Hutchison*, 854 F.3d 488, 492 (8th Cir.), *cert. denied*, 137 S.Ct. 1275 (2017) (evidence falls short of showing a significant possibility that Arkansas' protocol is "sure or very likely" to cause severe pain and needless suffering); *Arthur v. Commissioner, Ala. Dep't of Corr*., 840 F.3d 1268 (11th Cir. 2016), *cert. denied*, 137 S.Ct. 725 (2017) (inmate "has 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").

In short, petitioner was not "coerced" into choosing electrocution to avoid an unconstitutional method of execution. And, when petitioner exercised his statutory right to choose electrocution as the method of his execution, he waived the right to challenge the constitutionality of that method under *Stewart v. LaGrand*, 526 U.S. 115 (1999). The rule of *LaGrand* is clear, unambiguous, and entirely reasonable—by selecting one method of execution over another, an inmate waives any objection he may have to it. 526 U.S. at 119.

B. Petitioner's Eleventh-Hour Gamesmanship Should Not Be Condoned Through Equitable Relief.

Beyond the obvious legal deficiency of petitioner's claims, his request for equitable relief should also be denied for the inexcusable delay in filing. "A court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief." *Gomez v. U.S. Dist. Court of Northern Dist. of California*, 503 U.S. 653, 654 (1992). "[T]here is a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." *Nelson v. Campbell*, 541 U.S. 637, 650 (2004). This Court must "take into consideration the State's strong interest in proceeding with its judgment and [an] obvious attempt at manipulation." *Gomez*, 503 U.S. at 654.

The district court specifically rebuked petitioner's "gamesmanship" in "raising arguments a few days before execution that could have been presented months ago." Pet. Appx. C, at 7. "If the plaintiff found his statutory choice under Tennessee Code Annotated § 40-23-

114(b) to be constitutionally objectionable, he could have filed suit long before October 26, 2018." *Id.*

Petitioner's obvious delay and manipulation of the federal judicial process—filing successive lawsuits within weeks seeking diametrically opposite relief—weigh heavily against the granting of equitable relief.

C. A Stay of Execution Would Harm the Significant State Interests.

Petitioner has long since completed state and federal review of his convictions and sentence. The State's interests in finality are now "all but paramount." *Calderon v. Thompson*, 523 U.S. 538, 557 (1998). Petitioner's case has been thoroughly litigated over a span of nearly three decades. He committed double murder more than thirty-five years ago. *Zagorski*, 701 S.W.2d at 810 (crimes occurred April 23, 1983). His conviction became final more than thirty years ago. *Zagorski v. Tennessee*, 478 U.S. 1010 (1986) (cert. denied on June 30, 1986). The judgment in appellant's federal habeas proceedings became final over eight years ago. *Zagorski v. Bell*, 559 U.S. 1068 (2010) (petition for writ of certiorari denied April 19, 2010).

The State's significant interests in enforcing its criminal judgments and the victims' compelling interest in finality weigh heavily against granting a stay of execution. *Calderon v. Thompson*, 523 U.S. 538, 556 (1998).

D. A Stay of Execution Will Not Aid This Court's Jurisdiction Because There is No Basis for Certiorari Review.

A stay of Petitioner's execution is also not necessary to preserve this Court's ability to consider a petition for certiorari from the state court's decision because neither of the issues presented by the petitioner is worthy of review. The lower court's rulings were entirely consistent with decisions of this Court and provide no basis for certiorari review.

First, the district court correctly dismissed petitioner's claim that the State of Tennessee violated his constitutional rights by "forc[ing] [him] to choose between two cruel and unusual punishments" (Count I). Resp. Appx. 29. Petitioner's coercion argument was entirely premised on the constitutionality of lethal injection: "It violates the Eighth and Fourteenth Amendments to force Mr. Zagorski to choose between two cruel and unusual punishments." Resp. Appx, 29. He further alleged, "[t]he State of Tennessee cannot cloak unconstitutional punishments in the mantle of choice." *Id*. at 30. As the district court explained, "the issue of the constitutionality of Tennessee's lethal injection protocol is a central lynchpin to Count I." Pet. Appx. C, at 2.

But petitioner recently concluded state-court litigation on that very issue. On October 11, 2018, this Court denied a petition for writ of certiorari from the decision of the Tennessee Supreme Court upholding as constitutional Tennessee's three-drug lethal injection protocol. *See Abdur'Rahman, et al. v. Parker, et al*., 2018 WL 4858002 (Tenn.), *cert. denied sub nom., Zagorski, et al. v. Parker, et al.,* 2018 WL 4900813 (Oct. 11, 2018). Because petitioner's "coercion" claim was specifically premised on an alleged choice between two "constitutionally unacceptable forms of punishment," the district court correctly concluded that the state-court determination was dispositive of appellant's coercion claim.

Second, the district court correctly dismissed petitioner's challenge to electrocution as a method of execution (Count II). This Court's decision in *Stewart v. LaGrand*, 526 U.S. 115 (1999), is clear that, by selecting one method of execution over another, an inmate waives any objection he may have to it. In short, petitioner is foreclosed from challenging electrocution because he demanded to be executed by that method of execution rather than by a method that has been consistently upheld as constitutional by this Court and multiple other courts.

Moreover, petitioner's complaints about the application—in earlier litigation challenging lethal injection—of Tennessee's statutory provisions protecting the confidentiality of execution participants were not presented or passed upon below and provide no basis for certiorari review. Indeed, this Court denied review of those same claims in petitioner's earlier challenge to Tennessee's lethal injection protocol. See *Zagorski, et al. v. Parker, et al.*, No. 18-6238/18A376, 2018 WL 4900813 (Oct. 11, 2018). Further, this Court has long recognized that a State's highest court is the best authority on the State's own law. *See C.I.R. v. Bosch's Estate*, 387 U.S. 456, 465 (1967).

At its core, this case is about choice. Tennessee's midazolam-based three-drug lethal injection protocol has been upheld by this Court, the Tennessee Supreme Court, and numerous other courts. It has *never* been held unconstitutional. The fact that petitioner chose to bypass that method based on his view that lethal injection would be more painful than electrocution does not negate the constitutionality of lethal injection, and it does not negate his waiver under *LaGrand*. The Constitution does not demand "the avoidance of all risk of pain in carrying out executions." *Baze v. Rees*, 553 U.S. 35, 47 (2008).

Neither of the issues raised by petitioner requires or warrants review by the Court, and his petition for writ of certiorari should be denied.

CONCLUSION

Petitioner's Application for Stay of Execution and Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Brief in Opposition was forwarded by United States mail, first-class postage prepaid, and by email on the 1st day of November, 2018, to the following:

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