Nos. 18-6906, 18A578

IN THE
SUPREME COURT OF THE UNITED STATES

DAVID EARL MILLER,
Petitioner,

v.

TONY PARKER, et al.,
Respondent.

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

RESPONDENTS' BRIEF IN OPPOSITION

HERBERT H. SLATERY III
Attorney General and Reporter
State of Tennessee

ANDRÉE SOPHIA BLUMSTEIN
Solicitor General

JENNIFER L. SMITH
Associate Solicitor General
Counsel of Record
P. O. Box 20207
Nashville, Tennessee 37202
Phone: (615) 741-3487
Fax: (615) 741-2009

Counsel for Respondents

CAPITAL CASE
QUESTIONS PRESENTED

1. Whether the Court should grant Petitioner Miller a stay of execution under the All Writs Act, 28 U.S.C. § 1651, or 28 U.S.C. § 2101(f) pending disposition of a petition for writ of certiorari seeking to challenge, as an ex post facto violation, a method of execution that is no longer applicable to him.

2. When an inmate alleges that both his original and later-imposed punishments for the same crime violate the Eighth Amendment but the later-imposed punishment will cause greater pain and suffering, does the Ex Post Facto Clause require the inmate to show the later-imposed punishment is "'sure or very likely' less humane" than the original punishment?

3. Is a waiver of Eighth Amendment rights invalid when induced by a State's threat to impose a harsher punishment than allowed at the time of the crime?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

OPINIONS BELOW

The December 3, 2018 judgment of the United States Court of Appeals for the Sixth Circuit in Case Number 18-6222 affirming the district court's denial of a preliminary injunction is not yet published. Pet. App. 16a. The Sixth Circuit's order denying a stay of execution is not yet published but may be found at 2018 WL 6191350. Pet. App. 1a. The district court's order denying a preliminary injunction is not published but may be found at 2018 WL 6003123. Pet. App. 7a. The district court's order denying reconsideration of its order denying a preliminary injunction is not published but may be found at 2018 WL 6069181. Pet. App. 14a.

STATEMENT OF JURISDICTION

Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254, 28 U.S.C. § 1651(a), and 28 U.S.C. § 2101(f).

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.

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

> 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.

Twenty-eight U.S.C. § 2102(f) provides in pertinent part:

> In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court.

Tennessee Code Annotated section 40-23-114 provides in pertinent part:

> (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 waiver waiving the right to be executed by lethal injection

STATEMENT OF THE CASE

Petitioner's death sentence arises from the May 1981 murder of twenty-three-year-old Lee Standifer in Knoxville, Tennessee. Petitioner was tried by a Knox County jury, which convicted him in 1982 of first-degree murder. The Tennessee Supreme Court affirmed his conviction, and after re-sentencing proceedings, it later affirmed the death sentence.[1] *State v. Miller*, 674 S.W.2d 279 (Tenn. 1984); *State v. Miller*, 771 S.W.2d 401 (Tenn. 1989), *cert. denied*, 497 U.S. 1031 (1990).[2]

When Petitioner was sentenced to death, Tennessee's statutory method for carrying out death sentences was electrocution. But the statute was amended in 1998 to permit an inmate sentenced to die by electrocution to choose lethal injection instead and, in 2000, to make lethal

---

[1]The Tennessee Supreme Court determined that re-sentencing was required because the jury had considered inadmissible evidence during the sentencing hearing. *Miller*, 674 S.W.2d at 284.

[2] Petitioner pursued a series of state and federal collateral challenges to the judgment, but all were unsuccessful. *Miller v. State*, 54 S.W.3d 743 (Tenn. 2001), *cert. denied*, 536 U.S. 927 (2002) (denying state post-conviction relief); *Miller v. Colson*, 694 F.3d 691 (6th Cir. 2012), *cert. denied*, 133 S.Ct. 2739 (2013) (affirming the denial of federal habeas relief); *Miller v. Mays*, 879 F.3d 691 (6th Cir. 2018), *cert. denied*, No. 18-5597, 2018 WL 3900410 (U.S. Nov. 19, 2018) (affirming the denial of post-judgment relief under Fed. R. Civ. P. 60(b)(6)).

injection the default method of execution. *State v. Irick*, 556 S.W.3d 686, 687 (Tenn. 2018). Thus, as of 2000, inmates like the Petitioner whose offenses were committed before January 1, 1999, were permitted to elect to be executed by electrocution by waiving in writing their right to be executed by lethal injection. Tenn. Code Ann. § 40-23-114(b).

Tennessee's first lethal injection protocol called for the use of a three-drug combination consisting of sodium thiopental, pancuronium bromide, and potassium chloride—a method that was ultimately approved by this Court in *Baze v. Rees*, 553 U.S. 35 (2008).

In September 2013, Tennessee moved to a lethal injection protocol using the single drug pentobarbital. The single-drug protocol replaced the State's previous three-drug protocol due to the unavailability of one of the chemicals. The Tennessee Supreme Court rejected claims by state inmates, including the Petitioner, that the State's revised, single-drug method of execution violated the Eighth Amendment or was otherwise unlawful. *West v. Schofield*, 519 S.W.3d 550 (Tenn. 2017), *cert. denied*, *West v. Parker*, 138 S.Ct. 476 (2017), *cert. denied*, *Abdur'Rahman v. Parker*, 138 S.Ct. 647 (2018).

In the meantime, however, the Tennessee Department of Correction was once again forced by drug-supply issues to revise its protocol. On January 8, 2018, the Department adopted a three-drug protocol using midazolam (a sedative in the benzodiazepine family of drugs) followed by vecuronium bromide (a paralytic agent) and potassium chloride (a heart-stopping agent). *Abdur'Rahman v. Parker*, 558 S.W.3d 606, 611 (2018), *cert. denied sub nom., Zagorski v. Parker*, 139 S.Ct. 11 (2018). The January 2018 revision retained the one-drug pentobarbital protocol (identified as Protocol A) in addition to the new midazolam-based protocol (identified as Protocol B). On July 5**,** 2018, the Department eliminated altogether the one-drug pentobarbital protocol,

leaving the midazolam-based, three-drug protocol as the exclusive method of lethal injection in Tennessee. *Abdur'Rahman*, 558 S.W.3d at 612.

In mid-March 2018, the Tennessee Supreme Court ordered the Warden of Riverbend Maximum Security Institution to carry out Petitioner's death sentence on December 6, 2018. *State v. David Earl Miller*, No. E1982-00075-SC-DDT-DD (Tenn., Mar. 15, 2018).

On February 20, 2018, Petitioner and thirty-two other inmates filed an action in the Davidson County, Tennessee, Chancery Court challenging the constitutionality of the midazolam-based protocol under the Eighth and Fourteenth Amendments. After a ten-day trial, the Chancery Court dismissed the complaint because the plaintiffs "failed to prove an essential element—that an available alternative method of execution exists" as required under *Glossip v. Gross*, 135 S.Ct. 2726 (2015). *Abdur'Rahman*, 558 S.W.3d at 610. Although not necessary for its ruling, the Chancery Court also found that the plaintiffs "failed to prove the other essential element [under *Glossip*]—that the three-drug protocol creates a demonstrated risk of severe pain." *Id.* at 613. The Tennessee Supreme Court affirmed the judgment of the Chancery Court on October 8, 2018. *Id.* at 610, 626. This Court denied certiorari and has twice denied stays of executions that were to be carried out using Tennessee's midazolam-based lethal injection protocol. *See Zagorski v. Parker*, 2018 WL 4900813 (U.S. No. 18-6238, Oct. 11, 2018); *Irick v. Tennessee*, 2018 WL 3767151 (U.S. No. 18A142, Aug. 9, 2019).

On November 3, 2018, Petitioner and three other inmates filed an action—the one from which this petition arises—in the United States District Court under 42 U.S.C. § 1983 in which they yet again challenge Tennessee's method of execution.[3] *Miller, et al. v. Parker, et al.*, No.

[3] This was the third time in three months that Petitioner invoked federal jurisdiction to bring a method-of-execution claim. He filed his first action in the same district court on August 21, 2018,

3:18-cv-01234 (M.D. Tenn.) (Doc. No. 1, Complaint). Petitioner's causes of action included claims that Tennessee's lethal injection protocol violates the Ex Post Facto Clause and the Eighth Amendment (Counts 1 and 3), that electrocution violates the Eighth Amendment (Count 2), and that the use of lethal injection as the default method of execution "coerces" Petitioner into choosing electrocution as his method of execution (Count 4).[4] *Id.* Petitioner also filed a Motion for Temporary Restraining Order and/or Preliminary Injunction under Fed. R. Civ. P. 65 seeking a stay of execution pending a final order in the action. *Id*., at Doc. No. 7 (Motion).

On November 15, 2018, the district court denied Petitioner's request for injunctive relief after concluding that Petitioner had no likelihood of prevailing on his claims that (1) Tennessee's lethal injection protocol violates the Ex Post Facto Clause and the Eight Amendment, (2) electrocution violates the Eighth Amendment, and (3) the State's statutory provision permitting him to waive lethal injection and elect electrocution as the method of his execution is coercive.[5]

---

but then voluntarily dismissed it on October 22, 2018. *Miller, et al. v. Parker, et al*., No. 3:18-cv-00781 (M.D. Tenn.) (Doc. No. 24). The same day that he moved to dismiss the first case, Petitioner filed a motion to intervene in another Section 1983 action then pending in federal court likewise challenging Tennessee's execution protocol. *Miller, et al. v. Parker, et al*., No. 3:18-cv-01035 (M.D. Tenn.) (Doc. No. 11). But the very next day the United States District Judge before whom that case was pending denied the motion and sternly rebuked Petitioner's manipulative legal maneuvers and "blatant judge-shopping." *Miller, et al. v. Parker, et al*., No. 3:18-cv-01035 (M.D. Tenn.) (Doc. No. 13). Petitioner filed the present case ten days later.

[4] Petitioner also alleged that the Tennessee law violates his right to access the courts because it allows only one attorney-witness and does not allow that witness to have access to a telephone but, as explained in footnote 5, that claim is not a subject of this petition.

[5] The district court did grant injunctive relief to Petitioner on his access-to-the-courts claim. It enjoined the Respondents from carrying out Petitioner's execution without providing his attorney-witness access to a telephone. Pet. App. 7a. Respondents have not appealed that order and have notified the district court that they will provide Petitioner's counsel access to a telephone during his December 6, 2018 execution. *Miller, et al. v. Parker, et al.*, No. 3:18-cv-01234 (M.D. Tenn.) (Doc. No. 30, Notice).

Resp. App. 7a. Petitioner immediately filed a Motion for Reconsideration, which the district court denied on November 20, 2018, finding that Petitioner had presented "no 'new circumstances' that increase [his] likelihood of success or otherwise alter the balance of factors relevant to the Court's previous ruling." Pet. App. 14a.

On November 20, 2018, Petitioner filed a Notice of Appeal from the district court's interlocutory orders denying injunctive relief and denying the motion for reconsideration. *Miller, et al. v. Parker, et al.*, No. 3:18-cv-01234 (M.D. Tenn.) (Doc. No. 29, Notice). Petitioner then moved the Sixth Circuit for a stay of execution while this appeal is pending.

Three days after Petitioner took his interlocutory appeal, he chose to exercise his statutory right under Tenn. Code Ann. § 40-23-114(b); he waived lethal injection and elected electrocution as the method of his execution. Respondent Appendix ("Resp. App."), at 4.

On November 28, 2018, the Sixth Circuit entered an order denying Petitioner's motion for stay of execution. Pet. App. 1a. On December 3, 2018, the Sixth Circuit affirmed the district court's order denying a preliminary injunction. Pet. App. 16a.

REASONS FOR DENYING A STAY AND DENYING REVIEW

Petitioner's application for a stay of execution should be denied because he has no likelihood of success on the merits of his petition for certiorari.

Petitioner faces execution by the State of Tennessee on December 6, 2018, and he seeks a stay of execution under the All Writs Act, which empowers this Court to "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). An inmate who relies on the All Writs Act for a stay of execution so that he can "'challenge the manner in which the State plans to execute him'" must still "satisfy 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)). But Petitioner cannot satisfy those requirements; he has no likelihood of success on the merits of his petition, let alone the significant possibility of success required for a stay of execution.

Nor does 28 U.S.C. § 2101(f) provide a basis for a stay, because Petitioner cannot show, as he must, a likelihood that his petition for writ of certiorari will be granted *and* that there is a significant possibility of reversal of the lower court's decision.

Indeed, Petitioner's waiver of lethal injection and his election of electrocution are dispositive of both questions Petitioner now presents to this Court. Because Petitioner has waived his statutory right to execution by lethal injection, he has also waived and rendered moot any ex post facto challenge to Tennessee's lethal injection protocol. Because Petitioner has elected electrocution as the method of his execution, he has waived any Eighth Amendment challenge to electrocution. *Zagorski v. Haslam*, 741 Fed. Appx. 320 (6th Cir. 2018), *cert. denied*, No. 18-6530 (U.S. Nov. 1, 2018); *Stewart v. LaGrand*, 526 U.S. 115 (1999). And because Tennessee's lethal injection protocol is constitutional, Petitioner was not "coerced" to waive it.

A. Petitioner Can Show No Significant Possibility of Success on His Claims.

Petitioner asks this Court to stay his execution pending the disposition of a petition for writ of certiorari. "[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 carry out their sentences must show "a significant possibility of success on the merits" of that collateral litigation. *Id*.

Petitioner has not made and cannot make that showing here.

First, there is no ex post facto violation because Petitioner is not subject to a retrospective law. Tennessee law permits Petitioner to elect the method of execution in effect at the time he committed first-degree murder, and he has affirmatively done so. Beyond that, Tennessee's lethal injection protocol does not alter the quantum of punishment—death—imposed for Petitioner's first-degree murder of Lee Standifer.

Second, Petitioner was not compelled to elect electrocution in order to avoid imposition of an unconstitutional method of execution. Tennessee's lethal injection protocol was upheld as constitutional in *Abdur'Rahman v. Parker*, 558 S.W.3d 606, 611 (2018), *cert. denied sub nom.*, *Zagorski v. Parker*, 139 S.Ct. 11 (2018), and it is substantially identical to the protocol approved by this Court in *Glossip v. Gross*, 135 S.Ct. 2726 (2015). Moreover, 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).

Neither of the issues presented by the Petitioner is worthy of review by this Court, and a stay of execution will not aid this Court's jurisdiction.

1. Petitioner's Ex Post Facto Claim Is Meritless.

Petitioner claims that the use of a midazolam-based three-drug lethal injection protocol violates the Ex Post Facto Clause of the United States Constitution because the duration of an execution by that method exceeds the duration of an electrocution. But Petitioner is entitled under Tennessee law to choose to be executed by electrocution. *See* Tenn. Code Ann. § 40-23-114. And in point of fact, Petitioner has already invoked that right and chosen to be executed by electrocution. Pet. App. 4. Given his election, Petitioner can make no arguable claim that he is subject to the retrospective application of any criminal or penal law.

Because Tennessee affords Petitioner the right to choose the method of execution in effect at the time of his offense, the lethal injection protocol does not violate the Ex Post Facto Clause. Indeed, Petitioner has already chosen and will receive the very—and only—remedy that would be available to him if there were an ex post facto violation, namely, application of the law in effect at the time of the offense. *See Weaver v. Graham*, 450 U.S. 24, 36 n.22 (1981) ("The proper relief upon a conclusion that a state prisoner is being treated under an ex post facto law is to remand to permit the state court to apply, if possible, the law in place when his crime occurred.").

Moreover, for a law to violate ex post facto principles, it must be "more onerous than the prior law." *Dobbert v. Florida*, 432 U.S. 283, 294 (1977). In *Malloy v. South Carolina*, 237 U.S. 180 (1915), this Court held that a South Carolina statute, which changed the State's method of execution from hanging to electrocution did not violate the Ex Post Facto Clause. "The statute under consideration did not change the penalty—death—for murder, but only the mode of producing this, together with certain nonessential details in respect of surroundings." *Id.*, 237 U.S. at 185. *See also Poland v. Stewart*, 117 F.3d 1094, 1104-05 (9th Cir. 1997) (a change in the method of execution does not make the sentence more burdensome and so does not violate the Ex Post Facto Clause); *In re Lomdardi*, 741 F.3d 888, 897 (8th Cir. 2014) (Missouri's change in its lethal injection protocol does not violate Ex Post Facto: "That a former method of execution is no longer available does not mean that adoption of the next best method is an unconstitutional increase in punishment."); *Johnson v. Bell*, 457 F.Supp. 2d 839, 841 (M.D. Tenn. 2006) (change in the method of execution does not violate the Ex Post Facto Clause).[6]

---

[6] Tennessee's General Assembly made lethal injection the presumptive method of execution in 2000. Tenn. Code Ann. § 40-23-114(a). In *Baze v. Rees*, 553 U.S. 35, 53 (2008), this Court recognized that thirty-six States that sanction capital punishment had adopted lethal injection as the preferred method of execution at that time, a trend that mirrored the change upheld against ex

Tennessee's lethal injection protocol does not alter the quantum of punishment—death—imposed for Petitioner's crime or otherwise undermine his expectations of an established liberty interest. Indeed, the harm Petitioner identifies—prolonged pain and suffering—implicates not ex post facto considerations, but, if anything, Eighth Amendment considerations. Thus, it is not surprising that Petitioner cites no authority whatsoever to support his contention that a change in the chemicals used to carry out lethal injection—a constitutional method of execution—would violate the Ex Post Facto Clause. In short, Petitioner was sentenced to death for first-degree murder, and that sentence remains in place. Because differences between two modes of producing the same result—death—do not change the quantum of punishment attached to first-degree murder, Tennessee's use of a midazolam-based lethal injection protocol does not violate the Ex Post Facto Clause.

2. Petitioner's Coercion Claim Is Meritless.

Petitioner further asserts that he has was coerced to elect electrocution to avoid the harsher punishment of lethal injection. But his claim is entirely premised on the false notion that lethal injection—and in particular, Tennessee's three-drug midazolam protocol—is unconstitutional.

Tennessee's lethal injection protocol *is* constitutional. *Abdur'Rahman v. Parker*, 558 S.W.3d 606, 611 (2018), *cert. denied sub nom., Zagorski v. Parker*, 139 S.Ct. 11 (2018). This Court has twice declined to review that holding and twice denied stays of execution requested by inmates facing execution by the lethal injection protocol that Petitioner, who was a party to

---

post facto challenge in *Malloy*. 237 U.S. at 185 (discussing the trend toward electrocution in the early twentieth century, the Court observed that this legislative change did not alter the penalty for murder, only the mode of producing it). Petitioner has never challenged that legislative action, and any attempt to do so now would be barred by the one-year statute of limitations for actions brought under federal civil rights statutes. Tenn. Code Ann. § 28-3-104.

Abdur'Rahman v. Parker, claims is unconstitutional. *See Zagorski v. Parker*, 2018 WL 4900813 (U.S. No. 18-6238, Oct. 11, 2018); *Irick v. Tennessee*, 2018 WL 3767151 (U.S. No. 18A142, Aug. 9, 2019).

Indeed, 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").

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.[7] 526 U.S. at 119.

---

[7] This Court has also upheld the constitutionality of electrocution as a method of execution. *See In re Kemmler*, 136 U.S. 436 (1890) (affirming New York's imposition of electrocution as a means

In fact, this Court declined to review a Sixth Circuit decision rejecting substantially the same "coercion" claim in *Zagorski v. Haslam*, 741 Fed. Appx. 320 (2018), *cert. denied*, No. 18-6530 (U.S. Nov. 1, 2018). In *Zagorski*, Judge Cook described the inmate's claim that he had been "coerced and compelled" to choose between two unconstitutional methods of execution as "clearly baseless"— "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.'" *Zagorski*, 741 F. App'x at 321-22 (Cook, J., concurring).

Neither of the two issues raised in this petition requires or warrants review by the Court, let alone a stay of execution. Moreover, this Court has already twice declined to intervene when Billy Ray Irick and Edmund Zagorski sought stays of execution using Tennessee's midazolam-based lethal injection protocol, and this Court has already denied certiorari when Edmund Zagorski sought review of a decision of the Sixth Circuit raising substantially the same "coercion" question now presented by the Petitioner. This petition provides no basis for a different result and should, likewise, be denied.

In sum, there is no likelihood that Petitioner can prevail on his claim that the imposition of a constitutional method of execution—lethal injection—which does not increase the punishment for murder, violates the Ex Post Facto Clause. And because neither of the issues presented by the Petitioner is worthy of review, a stay of execution will not aid this Court's jurisdiction.

---

of capital punishment).

B. A Stay of Execution Will Harm the Significant State Interests.

A stay of execution is an equitable remedy, and equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts. *Hill*, 547 U.S. at 584. Petitioner has engaged in three rounds of litigation—over more than a decade—aimed at undermining the method by which Tennessee will carry out his lawful death sentence. He has never before alleged that Tennessee's use of lethal injection as a method of execution violates the Ex Post Facto Clause, and the claim he now makes is patently frivolous because he has elected the method of execution that was in place when he murdered Lee Standifer more than thirty-five years ago. *Miller*, 694 F.3d at 693 (murder occurred on May 20, 1981). Petitioner's conviction became final over twenty-eight years ago. *Miller v. Tennessee,* 497 U.S. 1031 (1990) (cert. denied on June 28, 1990). The judgment in his federal habeas proceedings became final more than five years ago. *Miller v. Colson*, 133 S.Ct. 2739 (U.S. May 28, 2013) (denying petition for writ of certiorari).

Tennessee has a strong interest in enforcing its criminal judgments without undue interference from the federal courts. At this juncture, Petitioners have long since completed state and federal review of their convictions and sentences. The State's interests in finality are "all but paramount." *Calderon v. Thompson*, 523 U.S. 538, 557 (1998).

CONCLUSION

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

Respectfully submitted,

HERBERT H. SLATERY III
Attorney General and Reporter
State of Tennessee

Andree Sophia Blumstein
ANDRÉE S. BLUMSTEIN
Solicitor General

Jennifer L. Smith
JENNIFER L. SMITH
Associate Solicitor General
Counsel of Record
P. O. Box 20207
Nashville, Tennessee 37202
Phone: (615) 741-3487
Fax: (615) 741-2009

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 4th day of December, 2018, to the following:

Stephen M. Kissinger
Asst. Federal Community Defender
800 S. Gay Street, Suite 2400
Knoxville, TN 37929

Jennifer L. Smith

JENNIFER L. SMITH
Associate Solicitor General