CAPITAL CASE
EXECUTION SCHEDULED FOR DECEMBER 6, 2018, AT 7:00 P.M., CST

Nos. 18-6906, 18A578

IN THE SUPREME COURT OF THE UNITED STATES

DAVID EARL MILLER,

Petitioner,

v.

TONY PARKER, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND OPPOSITION TO APPLICATION FOR STAY OF EXECUTION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

CAPITAL CASE

REPLY

INTRODUCTION

Respondents urge this Court to deny *certiorari* review and to deny Miller's motion to stay his December 6, 2018 execution by means of a method of execution, electrocution, which can be shown to violate the Eighth and Fourteenth Amendments. Respondents fail to respond to, or even acknowledge, the grounds upon which Miller seeks review. Indeed, they fail to defend, or even acknowledge, the grounds upon which the circuit court based its decision.

Here, the circuit court's decision to depart from existing *Ex Post Facto* jurisprudence demands *certiorari* review because it upends a rule that—for more than two centuries—has established a bright line rule capable of easy application by the lower courts in resolving *Ex Post Facto* claims. In addition, here the lower court's application of its newly-created rule in Miller's case alters the outcome of the dispositive question before this Court. Under this Court's prior precedents, Miller clearly demonstrates a substantial likelihood he can demonstrate that Tennessee's July 5, 2018 Lethal Injection Protocol violates the *Ex Post Facto* clause.

Because it does, Respondents promise to inflict a harsher, and therefore *Ex Post Facto* violative punishment unless Miller waived his rights to be free from Tennessee's Eighth Amendment violative alternative of electrocution renders his subsequent waiver involuntary and void. Under these circumstances, Respondents' citation to cases where courts have given effect to an inmate's (and/or a defendant's) waiver of a constitutional right <u>because</u> the threatened punishment was less harsh,

or because it could be constitutionally inflicted, stand for nothing other than to demonstrate that no effect should be given to Miller's waiver.

The circuit court's introduction of uncertainty into the Constitution's most straight-forward and easily applied limitations on a government's power to inflict punishment upon persons who are subject to its jurisdiction does not disappear simply because Respondents do not defend it. The resulting upheaval to *Ex Post Facto* jurisprudence will not be avoided unless this Court repairs it. *Certiorari* should be granted.

1. Respondents neither defend the decision of the court below, nor offer any reason why the dangerous and disruptive precedent it sets should escape review.

Respondents offer no reason why this Court should not grant *certiorari* review to prevent the circuit court's decision from blurring a bright line in *Ex Post Facto* challenges upon which courts have relied for centuries. Indeed, they neither claim that the decision below conforms to this Court's existing *Ex Post Facto* jurisprudence, nor do they provide reasons why the rule created in the court below should be adopted by this Court. By doing so, they tacitly admit Miller is correct. Not only does the rule created below disrupt over two centuries of this Court's precedent, it is only through ignoring that precedent that the court below can also ignore the clear *Ex Post Facto* violation Miller now presents.

Respondents suggest (*see* BIO at 15) that their *Ex Post Facto* violation is no longer before the Court because Miller has "chosen" electrocution. They ignore, however, that the answer to the question of whether their July 5, 2018 Lethal Injection Protocol violates the clause determines both whether Miller's choice, and

the waiver of his right to be free from the cruel and unusual punishment of electrocution (*see* BIO at 18), were voluntary or, as Miller has now clearly demonstrated, the product of Respondent's threat (by making their July 5, 2018 Protocol the default method of execution) to inflict a three times longer period of pain and suffering unless Miller made that choice.

Respondents' admission that the circuit court's order—which now stands as controlling authority in the Sixth Circuit and persuasive authority elsewhere—does indeed depart from existing precedent and replaces it with a standard so amorphous that clear *Ex Post Facto* violations can be excused gives even greater reason why *certiorari* review is needed here.

2. Respondents' attempt, in this Court, to revive an argument they abandoned below and the Court should not consider any argument upon which the lower courts did not reach.

Respondents, by their silence, also admit neither they, nor the court below, have any basis upon which to suggest the 20 minutes of pain and suffering created by Tennessee's July 5, 2018 Lethal Injection Protocol is not harsher than the 6 minutes of pain and suffering created by electrocution. Instead they claim that it does not matter for the purposes of the *Ex Post Facto* clause whether the July 5, 2018 protocol is harsher than electrocution because the clause does not apply to punishments, but only to sentences. Respondents' argument is incorrect, and indeed it was rejected in the district court and Respondents did not cross-appeal.

In refusing to consider the argument Respondents raise here without full briefing and argument, the district court observed:

> Defendants argue that the Ex Post Facto Clause does not apply to any changes in the Tennessee Department of Correction's execution protocol because they are not enacted by the state legislature in the form of a statute. (Doc. No. 19 at 9–12.) They acknowledge, however, that the Supreme Court has applied the Ex Post Facto prohibition to state and federal regulations that increase the severity of a criminal sentence. (*Id.* at 10 (citing *Peugh v. United States*, 569 U.S. 530 (2013), and *Garner v. Jones*, 529 U.S. 244 (2000).) Moreover, other federal courts have considered Ex Post Facto claims in connection with execution protocols promulgated as corrections department policies. *See, e.g., In re Ohio Execution Protocol Litig.*, No. 2:11-CV-1016, 2018 WL 1033486, at *27 (S.D. Ohio Feb. 22, 2018), *adhered to on reconsideration*, No. 2:11-CV-1016, 2018 WL 2118817 (S.D. Ohio May 8, 2018). Accordingly, while Defendants may yet prevail on this argument upon further development, the Court has not applied any weight to it for the purpose of ruling on the present motion.

(Order, R.20, PageID# 1699, n.1) (Appx. B at 8a).

Respondents' argument was not accepted without further argument by the district court and should not be considered here without development in the lower courts. Respondents' attempt to interject an argument neither raised in the court of appeals, nor reached in its decision, into the decision whether *certiorari* should be granted is a tactic this Court has discouraged even on merits review and one which, at the *certiorari* stage, allows otherwise indefensible precedent to continue to control and/or influence future decisions.

Setting aside the fact that Respondents' argument is contrary to existing law, it should not be considered here because it was not the basis of the circuit court's decision, it was not even presented to the circuit court. In fact, it is an almost verbatim repetition of an argument raised only in the district court and rejected by that court (Order, R.20, PageID# 1699, n.4) and then completely abandoned by Respondents in the court of appeals. Because Respondents abandoned that

argument, and the court of appeals did not address this question, it should not be considered here. *Patrick v. Burget*, 486 U.S. 94, 99 n.5(1988). *See also*, *City of Springfield, Mass. v. Kibbe*, 480 U.S. 257, 259 (1987) (citing *California v. Taylor*, 353 U.S. 553, 556 n.2 (1957)); *Youakim v. Miller*, 425 U.S. 231, 234 (1976) (citing *California v. Taylor*, 353 U.S. at 556 n.2) (The Court ordinarily "does not decide questions not raised or involved in the lower court."); *Medellin v. Dretke*, 544 U.S. 660, 679 (2005) (rejecting Respondent's argument because it was not argued in the court below). Although it is the general rule that a prevailing party may defend its judgment "on any ground properly raised below," *Washington v. Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979), Respondents here did not properly raise the issue in the court of appeals and this Court has even declined to address arguments properly raised in, but not actually addressed by, the court below on the ground that it is "a court of review, not of first review."[1] *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005).

Adherence to the rule is even more important upon application for *certiorari* review. The decisions of the federal courts of appeals are controlling authority within their respective circuits and advisory throughout the nation. When *certiorari* review of an appellate court decision is denied based upon grounds not appearing on

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[1] For example, in *F.C.C. v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 807 n.27 (1978), the question was whether regulations exceeding the rulemaking authority of the Federal Communications Commission. The Court refused to consider an issue raised by the government because the complaining party had not petitioned the Commission for reconsideration of a rule on a particular ground, nor was the issue raised in the Court of Appeals.

its face, it is the face of that opinion which controls and/or influence its sister courts, not the alternate ground raised in the Brief in Opposition. Indeed, such courts will note only what appears on the face of the opinion and that further review has been denied.

Moreover, the very decisions cited by Respondents recognize that increases in the harshness with which a given punishment is administered do indeed implicate the *Ex Post Facto* clause. In *Malloy v. South Carolina*, 237 U.S. 180, 185 (1915), the Court found the *Ex Post Facto* clause was not violated where the execution method was changed from hanging to electrocution which was then-believed to be more humane.[2] For this reason, the Court explained the punishment "was not increased, and some of the odious features incident to the old method were abated." *Malloy v. South Carolina*, 237 U.S. at 185. In *In re Lombardi*, 741 F.3d 888, 897 (8th Cir. 2014), the court determined there was no *Ex Post Facto* violation where the inmates did "not allege that the Director, in the exercise of his discretion, ... employed anything other than the most humane method of execution available." In *Poland v. Stewart*, 117 F.3d 1094, 1105 (9th Cir. 1997) the inmate argued "that by making him choose his method of execution, the state has violated his rights under the Ex

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[2] Today, the overwhelming trend among the states is away from the use of midazolam in lethal injection protocols. Even at its height of use, only eight of the 33 capital-punishment states used midazolam in their execution protocols: Alabama, Arizona, Arkansas, Florida, Ohio, Oklahoma, Tennessee, Virginia. Four states abandoned its use: Arizona, Florida, Ohio, Oklahoma. Despite Ohio's promise never again to use midazolam, it has returned in the state's protocol.

Post Facto Clause." Similarly, in *Johnson v. Bell*, 457 F. Supp. 2d 839, 841-42 (M.D. Tenn. 2006) the court determined that "providing an inmate with a choice of the method of execution, or permitting him to exercise no choice at all, does not make the death penalty punishment more burdensome or otherwise violate the Ex Post Facto Clause."

Here, Miller has shown Tennessee chose to inflict a harsher punishment than was available at the time Miller was convicted and, as the dissent below observed, Respondents have not even denied that is exactly what they did. *Miller v. Parker*, ___ F.3d ___, 2018 WL 6303781, at *4 (6th Cir. Dec. 3, 2018) (White, J., dissenting). In fact, they still do not deny it. They are not entitled to those benefits reserved for those who have striven for less painful punishments.

3. Respondents' second argument against review cannot be determined on the record below.

Respondents also argue that Tennessee's midazolam-based protocol does not violate the Eighth Amendment and therefore Miller could not be compelled to "choose" electrocution and also waive his Eighth Amendment rights to challenge electrocution. (BIO at 15, 17-19). This argument obviously ignores the unconstitutionality of Tennessee's lethal injection protocol under the *Ex Post Facto* clause. Additionally, this Court cannot properly determine, on the record below, whether Tennessee's July 5th midazolam-based protocol is permissible under the Eighth Amendment because no court has determined its constitutionality under

Glossip's first prong.[3] (Pet. for Cert. pp.16-17; *see also* pp.9-12); (Brief of Appellant, Case No. 18-6222 pp.29-52 (6th Cir. Nov. 27, 2018) (Reply Brief, Case No. 18-6222 pp.9-11 (6th Cir. Nov. 29, 2018)). Importantly, Miller has pending a separate petition for writ of certiorari on the Tennessee Supreme Court's unconstitutional determination of Tennessee's protocol under *Glossip*'s second prong. *Miller v. Parker*, No. 18-6739. For this Court to reach Respondents' second argument, review must be granted in case number 18-6739.

4. Respondents' attempts to suggest complexity where none exists provides no grounds for opposing *certiorari*.

In addition to presenting an improperly raised argument, Respondents include another never-before presented assertion in their BIO to suggest this matter presents something other than the straight forward and important questions Miller presents and Respondents have not denied.

At footnote 6, Respondents hint that Miller's *Ex Post Facto* challenge should have been brought within one year of when Tennessee made lethal injection the default method of execution in 2000. What Respondents "forget" to mention is that the method of lethal injection adopted as a default in 2000, and each method of lethal injection available under Tennessee law from then until January 8, 2018, created less pain and suffering than electrocution. It was only on January 8, 2018, that Tennessee adopted a midazolam-based lethal injection protocol as the second option to a one-drug protocol. The midazolam protocol is harsher than electrocution. On July 5, 2018, Tennessee made the midazolam protocol the sole method of

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[3] The court below presumed Tennessee's lethal injection protocol is constitutional.

execution and, for persons like Miller, the default by which he would be executed unless he acceded to electrocution. Respondents' attempt to insert this new issue at this stage is not merely impermissible, it is made in bad faith.

CONCLUSION

Miller has credibly alleged that execution by lethal injection causes 20 minutes of pain and suffering. If 20 minutes of pain and suffering is greater than 6 minutes of pain and suffering, the machinations undertaken by Respondents and the court below to avoid recognizing their obvious *Ex Post Facto* violation upends two centuries of firmly established jurisprudence. When their *Ex Post Facto* violation is recognized, as it properly must be, their claims that Miller has voluntarily waived his Eighth Amendment right to challenge electrocution falls prostrate under the weight of decisions such as *Fuentes v. Shevin*, 407 U.S. 67, 95 (1972) and its forbearers. Absent any valid waiver, Respondents' argument that Miller's execution by electrocution is permitted under *Kemmler* cannot withstand the advancement in scientific knowledge about execution by electrocution between 1890 and the 2008 decision in *State v. Mata*, 745 N.W.2d 229, 278 (Neb. 2008) and today.

For the foregoing reasons, Petitioners request that this Court grant the Petition for Writ of *Certiorari*.

Dated: December 5, 2018

Respectfully submitted,

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