CAPITAL CASE
EXECUTION SCHEDULED FOR AUGUST 15, 2019, AT 7:00 P.M., CDT

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

STEPHEN MICHAEL WEST,

Petitioner,

v.

TONY PARKER, Commissioner,
Tennessee Department of Corrections,
TONY MAYS, Warden,
Riverbend Maximum Security Institution,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

At first blush, *certiorari* review would appear warranted here because Stephen Michael West faces the imminent infliction of a cruel and unusual method of execution solely because: (1) Respondents repeatedly stated falsely in their briefing below that Mr. West's amended 42 U.S.C. § 1983 complaint seeks a stay of his August 15, 2019 execution; (2) the court of appeals opinion treated their falsehood as the truth; and, (3) solely because it did so, and for no other reason, the court of appeals determined that the Tennessee Supreme Court's decision in *Abdur'Rahman v. Parker*, 558 S.W.3d 606 (Tenn. 2018), a declaratory judgment action to which Mr. West was a party, precluded consideration of West's federal court complaint. It goes without saying that a judgment founded entirely upon what is indisputably untrue which results in a violation of the Eighth Amendment offends the rule of law and brings disrespect to our nation's federal courts. This alone could spur the Court to summarily exercise its *certiorari* jurisdiction (along with its equitable powers) to stay Mr. West's August 15, 2019 execution, to vacate the decision of the Sixth Circuit Court of Appeals and to remand this matter with instructions that Mr. West be allowed to pursue his *Bucklew*-compliant 42 U.S.C. § 1983 challenge to Tennessee's three-drug midazolam-based lethal injection protocol.

There is another explanation for the decision of the court below, one which does not call into question its integrity, yet still calls out for this Court's attention. That is, that the court of appeals construed the language in *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019) to stand for the proposition that, § 1983 complaints

challenging a state's method of execution are, *per se*, to be treated as attempts to delay the imposition of the sentence of death itself. Because the Sixth Circuit is presumed to have acted with honesty and integrity, *see Withrow v. Larkin*, 421 U.S. 35, 47 (1975), this latter explanation must be accepted.

If such is the case, the court below has drawn a rule from this Court's decision in *Bucklew* which not only does not exist, but which also poses an imminent threat to even the most fundamental concepts of due process and endangers the very framework of our judicial system. Rather than such a rule, this Court's *Baze* jurisprudence affords the lower courts specific instruction by which they are to determine whether an inmate's 42 U.S.C. § 1983 action is, in fact, no more than an attempt to delay the imposition of the sentence of death itself. Because a clear understanding of those instructions is critical not only in the application of the *res judicata* doctrine, but also in the application of the heightened scrutiny set forth at *Bucklew v. Precythe*, 139 S. Ct. at 1134, the following question is worthy of review:

1. When an inmate's § 1983 challenge to a state's method of execution meets the timeliness and pleading requirements of this Court's decision in *Bucklew*, is the nature of the relief sought to be determined from the face of the complaint?

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The court of appeals decision affirming the dismissal of West's complaint and denying a stay of execution has not been recommended for publication and is attached as Appendix A, 1a-8a. *West v. Parker*, No. 19-5585, 2019 WL 3564476 (6th Cir. Aug. 6, 2019). The order of the district court dismissing West's complaint is attached as Appendix B, 9a-29a. *West v. Parker*, No. 3:19-cv-00006, 2019 WL 2341406 (M.D. Tenn. June 3, 2019). The court of appeals order denying rehearing is attached as Appendix C, 30a.

JURISDICTION

Jurisdiction over the final judgment on the merits of the United States Court of Appeals for the Sixth Circuit is invoked pursuant to 28 U.S.C § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part that: "No state shall make or enforce any law which shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Eighth Amendment to the United States Constitution provides that: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

STATEMENT OF CASE

On February 20, 2018, two groups of Tennessee death row inmates (one of which included Mr. West) filed a complaint for declaratory judgment in the Chancery Court for Davidson County, Tennessee asking the court to declare: (1) the

infliction of Protocol B (a midazolam-based three-drug protocol) of Tennessee's January 8, 2018 Protocol violated the Eighth Amendment to the United States Constitution; and, (2) and that Protocol A (a pentobarbital-based one-drug protocol) constituted a feasible and readily-available alternative. *See generally Abdur'Rahman v. Parker*, 558 S.W.3d 606 (Tenn. 2018). At the time, no date had been set for Mr. West's execution. In fact, shortly after West had filed his declaratory judgment action, the Tennessee Supreme Court explicitly refused to set a date for his execution. (Order, *State v. West*, No. M1987-00130-SC-DPE-DD (Tenn. Mar. 15, 2018)).

On July 5, 2018, four days before trial, Tennessee adopted a new execution protocol which retained the midazolam-based three-drug protocol (former Protocol B) and removed Protocol A (the pentobarbital-based protocol). On July 26, 2018, the chancery court issued an order refusing to declare the new July 5, 2018 protocol unconstitutional. West appealed. On October 8, 2018, the Tennessee Supreme Court issued its final opinion affirming the chancery court's denial of declaratory relief on the sole ground that the plaintiffs had failed to show the availability of their proposed one-drug pentobarbital alternative. *Abdur'Rahman v. Parker*, 558 S.W.3d at 625. The July 5, 2018 Protocol remains in effect and will be used to execute Mr. West in three days.

After his state declaratory judgment action became final, Mr. West (together with three other Tennessee death row inmates) filed a complaint in the United States District Court for the Middle District of Tennessee under 42 U.S.C § 1983

asking the court to enjoin state officials from using Tennessee's July 5, 2018 Protocol to carry out his sentence of death. (Compl., *Miller v. Parker*, No. 3:18-cv-1234 (M.D. Tenn. Nov. 5, 2018)). Ten days later, on November 16, 2018, the Tennessee Supreme Court set Mr. West's execution date for August 15, 2019. (Order, *State v. West*, No. M1987-00130-SC-DPE-DD (Tenn. Nov. 16, 2018)).

West amended his complaint on February 7, 2019, including the claim:

> Count Three: Tennessee's July 5, 2018 lethal injection protocol violates the Eighth and Fourteenth Amendments under *Wilkerson v. Utah*, 99 U.S. 130 (1878), *Baze v. Rees*, 553 U.S. 35 (2008); *Glossip v. Gross*, __ U.S. __, 135 S. Ct. 2726 (2015).

(Am. Compl., *West v. Parker*, No. 3:19-cv-6, R.11, PageID# 1461-93).[1] In it, he alleged that the July 5, 2018 Protocol created constitutionally-impermissible risk of pain and suffering and that the firing squad (among others) constituted a feasible and readily available alternative method of execution that significantly reduced that risk. As to Count Three, Mr. West, as he had in his original complaint, prayed the court enter an order enjoining the use of the July 5, 2018 Protocol to carry out his sentence of death. (*Id.* at PageID# 1534).

On February 21, 2019, Defendants-Appellees moved to dismiss the amended complaint. (Mot. to Dismiss, *West v. Parker*, No. 3:19-cv-6, R.12, PageID# 2773-77; Memo. in Support of Mot. to Dismiss, *West v. Parker*, No. 3:19-cv-6, R.13, PageID# 2778-2804). They argued consideration of this claim was precluded by *res judicata*

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[1] On January 14, 2019, the district court entered an order severing the plaintiffs into separate cases and directed the Clerk to "docket all filings in the new matters filed as of the date the were filed in this case." (Order, *Miller v. Parker*, No. 3:18-cv-1234 (M.D. Tenn. Jan. 4, 2019)).

because it could have been decided in *Abdur'Rahman*. (Memo. in Supp. of Motion to Dismiss, *West v. Parker*, No. 3:19-cv-6, R.13, PageID# 2789-96). Mr. West opposed that motion, arguing that the Tennessee Supreme Court's decision in *Abdur'Rahman* was not entitled to preclusive effect under the *res judicata* doctrine because, *inter alia*, the state courts in *Abdur'Rahman* lacked jurisdiction to afford West the relief he was seeking in his amended complaint, *i.e.*, to enjoin Defendants-Appellees from using Tennessee's three-drug midazolam-based protocol to carry out his sentence of death. (Resp. in Opp. to Mot. to Dis., *West v. Parker*, No. 3:19-cv-6, R.17, PageID# 3060-64). On June 3, 2019, the district court granted Defendants-Appellees' motion, dismissing Count Three on the sole ground it was precluded by the *res judicata* doctrine. *West v. Parker*, 2019 WL 2341406, at *18(Appx. B, 25a).

Mr. West filed his Notice of Appeal the next day (Notice of Appeal, *West v. Parker*, No. 3:19-cv-6, R.26, PageID# 3665-66), and one day later asked the Sixth Circuit Court of Appeals to expedite review. (Mot. for Expedited Review, *West v. Parker*, No. 19-5585, R. 6). The court granted that motion on June 12, 2019, ordering West's initial brief to be filed by June 24, 2019, which he did. Defendants-Appellees filed their answer brief on July 8, 2019, arguing:

> West's principal argument against res judicata is that the state court's judgment is not entitled to res judicata effect because the chancery court could not award him the same relief he seeks in this action—i.e., a stay or injunction preventing the State from executing him.
>
> . . .

> [C]ontrary to West's arguments, that limiting principle is inapplicable here because the relief West seeks in this case—to prevent the State from executing him—was available in the Tennessee courts.

(Answer Brief, *West v. Parker*, No. 19-5585, R. 12, pp. 23, 32).[2]

West's filed his reply brief one day later, on July 9, 2019, and simultaneously moved the court of appeals to stay his execution pending the resolution of his case. Pointing out the falseness of Defendants-Appellees argument, West's reply brief stated:

> The contention that West seeks nothing more than to avoid his August 15, 2019 execution may find favor among those whose cynicism about the objectives of method of execution challenges has clouded their willingness/ability to look at the case before them, but is not what West seeks here. West seeks only what the Constitution demands, that he not be subjected to what the Supreme Court has defined as "cruel and unusual punishment."

(Reply Brief, *West v. Parker*, No. 19-5585, R. 14, p. 5).

On August 6, 2018, the Court of Appeals denied both West's substantive appeal and his motion to stay. *West v. Parker*, 2019 WL 3564476, at *7 (Appx. A, 7a). The court held that a stay of execution (actually a stay of execution *pendent lite*) would have been available in *Abdur'Rahman* had he prevailed at the trial court level. Accepted as fact Defendants-Appellees' claim that West's amended complaint was seeking a stay of execution, the court found the full relief requirement of the *res judicata* doctrine had been met. *West v. Parker*, 2019 WL 3564476, at *5-6 (Appx. A, at 5a-6a).

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[2] Pinpoint citations to documents filed in *West v. Parker*, Sixth Circuit Court of Appeals Case No. 19-5585, are to the actual page number of the document located on the bottom center of each page.

Mr. West sought rehearing. In it, he quoted to the court his prayer for relief seeking not seek a stay of his August 15, 2019 execution. He then pointed out his complaint had, as this Court instructed in *Bucklew*, both alleged a feasible and readily available manner by which Tennessee could have carry out his execution and had done so even before the State of Tennessee had set his now-pending August 15, 2019 execution date. (Pet. for Panel Reh'g and En Banc Review, *West v. Parker*, No. 19-5585, R. 20 (6th Cir. Aug. 7, 2019)). Rehearing was denied on August 9, 2019. (Appx. C, 30a).

This petition follows.

REASONS FOR GRANTING THE WRIT

I. Certiorari should be granted because the decision of the court below, taken on its face, offends the rule of law and brings disrespect to the federal courts.

A party's submission of demonstrably false representations in support of an argument raised in federal court breeds contempt not just for the court to which it is submitted, but to the entirety of the federal court system. *See generally*, *Scherer v. Washburn Univ.*, No. 05-2288-CM, 2007 WL 1652178, at *3 (D. Kan. Jun. 7, 2007). It is even more so when the federal court relies on that party's candor when reaching its decision. In a case where adherence to the Constitution is at issue, as in this matter, it is intolerable.

Here, it was agreed the proper application of the *res judicata* doctrine was the controlling legal question before the court of appeals. It was further agreed the doctrine affords preclusive effect to only those prior actions in which a plaintiff could have received the full relief he seeks in a second lawsuit. Finally, it was

agreed the Tennessee Supreme Court was empowered to grant a stay of execution pending the outcome of West's declaratory judgment in *Abdur'Rahman v. Parker*, 558 S.W.3d 606 (Tenn. 2018) (Appendix A, 5a). Neither Respondents, nor the district court, nor the court below have thus far claimed the Tennessee Supreme Court had the power to grant any further relief in *Abdur'Rahman* (or in any other proceeding) other than a stay of execution pending the completion of collateral proceedings. For this reason, the truth of Respondents' representation that West's amended § 1983 complaint sought a stay of his August 15, 2019 execution was completely determinative of the court of appeals' resolution of West's appeal and motion to stay.

Respondents' representation, however, was false.

It is indisputable that West's 42 U.S.C. § 1983 complaint below did not seek a stay of execution at all, but rather an injunction prohibiting Tennessee officials, the Respondents here, from using a constitutionally-impermissible method of carrying out that execution. The prayer of West's amended complaint stated:

> WHEREFORE, Plaintiff West requests that this Court:
>
> (1) issue a preliminary and permanent injunction, preventing Defendants from carrying out the Plaintiff West's execution utilizing Tennessee's July 5, 2018 midazolam-based three-drug lethal injection protocol;

(Am. Compl., *West v. Parker*, No. 3:19-cv-6, R.11, PageID# 1534 (M.D. Tenn. Feb. 7, 2019)).

Given the court of appeals' original opinion was based upon Respondents' material misrepresentation and the court refused to alter its opinion after

Respondents' misrepresentation was brought to the court's attention, certiorari should be granted. Even if the Court should agree with the outcome, a conclusion West submits cannot be reached under the law, *certiorari* review would allow this Court to provide grounds for such a result which do not rest upon a falsehood.

II. Certiorari should be granted to determine whether pleading and timing requirements of this Court's decision in *Bucklew v. Precythe* sets forth the test by which *de facto* nature of the relief sought in a 42 U.S.C. § 1983 challenge to a method of execution is to be determined.

Whether a § 1983 challenge to a state's method of execution constitutes a "real" and/or good faith effort to insure that an inmate's execution be carried out in accordance with the Eighth Amendment of the Constitution is an issue with far-reaching implications. Obviously it is a question of great importance here where the question of the nature of the relief sought by Mr. West in his § 1983 complaint is determinative of the outcome. This is especially true here because that outcome will determine whether Mr. West is allowed to challenge Respondents' infliction of Tennessee's July 5, 2018 Protocol to carry out his sentence of death, or must instead turn to one of the five alternate methods of execution West provided to them over nine months ago. It is of equal importance to those inmates facing sentences of death in other states where their courts have rejected the offer of jurisdiction afforded their courts of equity by 42 U.S.C. § 1983 and, like Tennessee, afford no other judicial procedure by which a plaintiff may obtain the same relief. It is also of great importance if this Court is to apply the heightened scrutiny of such actions discussed in Section IV of the *Bucklew* decision in a manner that does not constitute what Justice Sotomayor described in her dissent in *Bucklew* as, "a radical

reinvention of established law and the judicial role." *Bucklew v. Precythe*, 139 S. Ct. at 1146 (Sotomayor, J. dissenting). An issue of such importance and far-reaching application requires clear and unambiguous standards by which it is resolved. Nowhere is that more clearly presented as here.

The need for this Court's action was presaged by two passages from this Court's decision in *Bucklew*. There, the majority opinion stated:

> The proper role of courts is to ensure that method-of-execution challenges to lawfully issued sentences are resolved fairly and expeditiously. Courts should police carefully against attempts to use such challenges as tools to interpose unjustified delay. Last-minute stays should be the extreme exception, not the norm, and "the last-minute nature of an application" that "could have been brought" earlier, or "an applicant's attempt at manipulation," "may be grounds for denial of a stay." [*Hill v. McDonough*, 547 U.S. 573, 584] (internal quotation marks omitted). ... If litigation is allowed to proceed, federal courts "can and should" protect settled state judgments from "undue interference" by invoking their "equitable powers" to dismiss or curtail suits that are pursued in a "dilatory" fashion or based on "speculative" theories. *Id.*, at 584–585, 126 S.Ct. 2096.

Id. at 1134 (footnotes omitted) (emphasis added).

However, in a dissenting opinion, Justice Sotomayor observed:

> Given the majority's ominous words about late-arising death penalty litigation, *ante*, at 1133–1134, one might assume there is some legal question before us concerning delay. Make no mistake: There is not. The majority's commentary on once and future stay applications is not only inessential but also wholly irrelevant to its resolution of any issue before us.
>
> . . .
>
> I am especially troubled by the majority's statement that "[l]ast-minute stays should be the extreme exception," which could be read to intimate that late-occurring stay requests from capital prisoners should be reviewed with an especially jaundiced eye. *See ante*, at 1134. Were those comments to be mistaken for a new governing standard, they

> would effect a radical reinvention of established law and the judicial role.

Bucklew v. Precythe, 139 S. Ct. at 1146 (Sotomayor, J., dissenting) (emphasis added).

If the majority's language is interpreted to single out method of execution § 1983 actions as a group for higher scrutiny than other § 1983 actions, or other even other civil actions, Justice Sotomayor's opinion would be correct. Such a blanket rule would raise substantial equal protection concerns, if not others. Of course, those concerns exist only if that were what the majority intended that language to mean or, as the dissent stated, the language "could be read to intimate that late-occurring stay requests from capital prisoners should be reviewed with an especially jaundiced eye." *Id.*

In light of the context of this Court's capital jurisprudence, Mr. West submits that the Court's language does not call for disparate and harsher treatment of all method of execution challenges. However, it is now beyond question that the Court's language could, as the dissent warned, be interpreted to treat all § 1983 challenges to a state's method of execution as *de facto* attempts to delay the imposition of sentence. Here, the court of appeals did exactly that. Rather than look to the substance of West's complaint, it presumed it had been filed solely for the purposes of delay and, because delay would have been equally available to him had he prevailed in *Abdur'Rahman*, found his complaint barred by *res judicata*. For the reasons expressed in the forgoing dissenting opinion, this could not be what the majority of this Court intended. Rather, a § 1983 method of execution challenge is to

be viewed as seeking no more than delay of an inmate's execution only when it fails to meet the pleading and timeliness requirements set out in *Bucklew*.

This rule is consistent not merely with *Bucklew* itself, but with this Court's recent history of capital jurisprudence. In the years following this Court's decision in *Baze v. Rees*, 553 U.S. 35 (2008), and even before, this Court has expressed increasing skepticism regarding Eighth Amendment method of execution litigation under 42 U.S.C. § 1983 which appears more focused on avoiding any execution at all than in protecting the plaintiff from a cruel and unusual one. Indeed, it has long recognized that an action which would prevent a sentence of death from being carried out at all does not sound in § 1983, but in habeas corpus. *Nelson v. Campbell*, 541 U.S. 637, 646 (2004). It has also observed that, "because it is settled that capital punishment is constitutional, '[i]t necessarily follows that there must be a [constitutional] means of carrying it out.'" *Glossip v. Gross*, 135 S. Ct. 2726, 2732-33 (2015). To this end, *i.e.*, that § 1983 not devolve into a vehicle for avoiding a pending execution date, it requires an inmate seeking injunctive relief from an unconstitutional method of execution to allege sufficient facts to demonstrate that relief in their case will not, if granted, prevent their execution. That is, it requires the inmate to plead "an alternative [method of execution] that is 'feasible, readily implemented, and in fact significantly reduces a substantial risk of severe pain." *Bucklew v. Precythe*, 139 S. Ct. at 1121 (quoting *Glossip v. Gross*, 135 S. Ct. at 2737). Moreover, it requires that the inmate provide that alternative in a timely manner and not so late as to require the state to delay his execution. *Id.* at 1134.

If an inmate's complaint meets each of these requirements, the concern, expressed by this Court since *Nelson*, that the action is being used to forestall and/or avoid an otherwise constitutional sentence vanishes. An inmate who both proposes a feasible and readily available method of execution and presents it to the state, either before a date for the inmate's execution is set (as here), or sufficiently before that date so as to allow the state to implement that method, has not sought to delay the imposition of his sentence, he has instead drawn a roadmap to how it may be implemented in a constitutional manner.

West's complaint in this matter meets the forgoing test.

The allegations supporting West's claim that Tennessee's July 5, 2018 Protocol creates a substantial risk of severe pain trace the evidence presented in *In re Ohio Execution Protocol Litig. (Henness)*, No. 2:11-CV-1016, 2019 WL 244488, at *63 (S.D. Ohio Jan. 14, 2019), decision modified on other grounds, 2019 WL 275646 (S.D. Ohio Jan. 22, 2019), and there found to establish such a risk.

West's first two alternatives, the single bullet to the head and the firing squad, especially at this point in these proceedings, cannot be seriously argued to be anything other than feasible and readily available. West's proposed execution by firing squad alternative, was—in Justice Kavanaugh's concurring opinion in *Bucklew*—offered as an example of the ease with which an inmate truly exposed to the infliction of cruel and unusual punishment could meet the *Baze / Glossip* feasible-and-readily-available alternative requirement. *Bucklew v. Precythe*, 139 S. Ct. at 1136 (Kavanaugh, J. concurring) (citing *Arthur v. Dunn*, 137 S. Ct. 725, 733-

34 (2017)); *Arthur v. Dunn*, 137 S. Ct. at 733-34 (Sotomayor, J., dissenting from denial of *certiorari*) ("'a competently performed shooting may cause nearly instant death.' In addition to being near instant, death by shooting may also be comparatively painless.") (citations omitted). Indeed, the firing squad has been expressly recognized by this Court to not cause a constitutionally-impermissible amount of pain and suffering. *Wilkerson v. Utah*, 99 U.S. 130, 134 (1878).

As importantly, West provided these two easily-implemented alternatives, together with three others, on November 5, 2018, ten days before the Tennessee Supreme Court even set his execution date. As of today, they have had possession of West's roadmap to a constitutional execution for nine months and seven days. If Mr. West's execution must be stayed even one minute to allow Tennessee to implement any of these alternatives, the blame lies entirely at the feet of the Respondents.

In short, West complaint does everything this Court's *Bucklew* decision required. It should not have been treated as merely an attempt to delay his execution. The court of appeals applied a presumption that *Bucklew* does not require, but which could have been, and still can be, drawn from its language. *Certiorari* should be granted to clarify that no presumption exists that a challenge to a state's method brought under 42 U.S.C § 1983 is to be treated as an attack the imposition of a lawful sentence. It should be granted to set forth the pleading and timeliness requirements of this Court's decision in *Bucklew v. Precythe* as the criteria by which the nature of such an action is to be determined. Finally, it should be granted to do justice here, where—either through an inexcusable error of fact or

the application of a presumption which does not, and cannot consistent with the Fourteenth Amendment, exist—it has been denied.

CONCLUSION

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

Dated: August 12, 2019

Respectfully submitted,

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