Nos. 19-5561, 19A161

IN THE
SUPREME COURT OF THE UNITED STATES

STEPHEN MICHAEL WEST,
Petitioner,

v.

TONY PARKER, et al.,
Respondents.

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

RESPONDENTS' BRIEF IN OPPOSITION

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CAPITAL CASE
QUESTIONS PRESENTED

The petition for a writ of certiorari presents the following question for review:

> "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?" Pet. ii.

This application for a stay seeks an order staying petitioner's execution pending this Court's consideration of his petition for a writ of certiorari.

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BRIEF IN OPPOSITION

Tony Parker, Commissioner of the Tennessee Department of Correction, and Tony Mays, Warden of the Riverbend Maximum Security Institution, respectfully submit this brief in opposition to Stephen West's petition for a writ of certiorari and application for a stay of execution.

STATEMENT OF THE CASE

Petitioner, Stephen West, is a Tennessee death-row inmate whose execution is scheduled for August 15, 2019. Petitioner was convicted of two counts of first-degree premeditated murder and sentenced to death for brutally stabbing to death Wanda Romines and her teenage daughter, Sheila Romines, more than three decades ago. He was also convicted of kidnapping both victims and raping Sheila Romines. His convictions and sentences were affirmed on direct appeal, *see State v. West*, 767 S.W.2d 387, 390 (Tenn. 1989), *cert. denied*, 497 U.S. 1010 (1990), and his state post-conviction petition and federal habeas petition were denied, *see State v. West*, 19 S.W.3d 753 (Tenn. 2000); *West v. Bell*, 550 F.3d 542 (6th Cir. 2008), *cert. denied*, 559 U.S. 970 (2010).

Petitioner now seeks to prevent the State from executing him by challenging the State's method of execution—a three-drug lethal injection protocol that uses midazolam, vecuronium bromide, and potassium chloride—as cruel and unusual punishment under the Eighth Amendment. He first raised that claim in state court. After the trial court and the Tennessee Supreme Court rejected the claim, *see Abdur'Rahman v. Parker*, 558 S.W.3d 606, 612 (Tenn. 2018),[1] he tried again in federal court. But the district court dismissed his federal action on res

[1] This Court has denied three separate petitions seeking review of the Tennessee Supreme Court's decision. *See Abdur'Rahman v. Parker*, 139 S. Ct. 1533 (2019); *Miller v. Parker*, 139 S. Ct. 626 (2018); *Zagorski v. Parker*, 139 S. Ct. 11 (2018).

judicata grounds, *see* Pet. App. B 9a-29a, and the Sixth Circuit affirmed, *see* Pet. App. A 1a-8a. Petitioner seeks this Court's review of the Sixth Circuit's decision and a stay of execution.

I. Tennessee's Lethal Injection Method

Tennessee adopted lethal injection as the default method of execution in 2000. *See* Tenn. Code Ann. § 40-23-114(a). Like other States, *see Glossip v. Gross*, 135 S. Ct. 2726, 2733-34 (2015), Tennessee has been forced to modify its lethal injection procedures over the years due to the unavailability of the drugs used in those procedures. The Tennessee Department of Correction ("TDOC") originally adopted a three-drug protocol using sodium thiopental, pancuronium bromide, and potassium chloride. In 2013, TDOC replaced that protocol with a new one-drug protocol using pentobarbital. Pet. App. B. 12a.

Petitioner challenged both the original three-drug protocol and the one-drug pentobarbital protocol under the Eighth Amendment, but the challenges were unsuccessful. *See West v. Schofield*, 380 S.W.3d 105, 115-17 (Tenn. Ct. App. 2012) (rejecting challenge to three-drug protocol), *perm. app. denied* (Tenn. 2012), *and cert. denied*, 568 U.S. 1165 (2013); *West v. Schofield*, 519 S.W.3d 550, 563-67 (Tenn. 2017), *cert. denied sub nom. West v. Parker*, 138 S. Ct. 476 (2017), *and Abdur'Rahman v. Parker*, 138 S. Ct. 647 (2018).

On January 8, 2018, TDOC adopted a new protocol that retained the one-drug pentobarbital protocol but added a midazolam-based three-drug protocol as a second option. Pet. App. B 12a. The three-drug protocol uses 500 milligrams of midazolam, followed by vecuronium bromide, and then potassium chloride. *Id.* On July 5, 2018, TDOC revised that protocol to eliminate the pentobarbital option, leaving the midazolam-based three-drug protocol as the sole method of lethal injection in Tennessee. *Id.*

II. State-Court Action Challenging Tennessee's Midazolam-Based Lethal Injection Protocol

On February 20, 2018, petitioner and thirty-two other death-sentenced inmates filed a declaratory judgment action in Davidson County Chancery Court challenging the facial constitutionality of the midazolam-based protocol under the Tennessee and federal constitutions. Their principal claim was that the protocol constitutes cruel and unusual punishment that violates the Eighth Amendment. Pet. App. B 12a. The original complaint did not allege, as required by *Glossip*, the existence of an available alternative method of execution, but the inmates filed a second amended complaint on July 3, 2018, alleging the one-drug pentobarbital protocol as an available alternative. Pet. App. A 2a. A ten-day trial began on July 9, 2018, four days after TDOC revised its protocol to eliminate the one-drug pentobarbital protocol as an option. Pet. App. B 13a.

After the trial concluded, the inmates sought to amend their complaint to conform with the proof at trial by alleging an additional available alternative method of execution—removal of vecuronium bromide from the three-drug protocol. *Id.* The chancery court denied that request but amended the pleadings to reflect that the parties had expressly consented to adjudicate the constitutionality of the revised July 5, 2018, protocol. *Id.* Petitioner and three other inmates asked the court to reconsider that decision, arguing that they should be allowed to adjudicate challenges to the July 5, 2018, protocol in a separate proceeding. Petitioner conceded, however, that the court's adjudication of certain issues common to both protocols—including whether the midazolam-based three-drug protocol poses a substantial risk of severe pain—would bind the parties and that he would "never litigate th[ose] issues again." *Id.* (internal quotation marks omitted). The chancery court denied the motion to reconsider, holding that the July 5th revision

"did not constitute a substantial change to which new causes of action accrued." *Id.* at 14a (internal quotation marks omitted).

The chancery court rejected the inmates' claims. With respect to the Eighth Amendment claim, the court held that the inmates had failed to prove the existence of an available alternative method of execution, as required by this Court's decision in *Glossip*. *Abdur'Rahman*, 558 S.W.3d at 613 (describing the chancery court's decision). The court also held that the inmates had failed to prove the second element required by *Glossip*—"that the three-drug protocol creates a demonstrated risk of severe pain." *Abdur'Rahman*, 558 S.W.3d at 613. The inmates appealed, and the Tennessee Supreme Court assumed jurisdiction over the appeal. *Id.* After expedited proceedings, the Tennessee Supreme Court issued a decision affirming the chancery court's judgment. *Id.*

As a preliminary matter, the Tennessee Supreme Court held that the chancery court did not abuse its discretion by denying the inmates' request to amend their pleadings after trial to add the removal of vecuronium bromide from the three-drug protocol as an available alternative method of execution. *Id.* at 622. The court explained that the inmates "ha[d] no justifiable excuse for their failure to plead a two-drug protocol as an alternative, given their acknowledged recognition of it during discovery and their second opportunity to amend the complaint just six days before the trial started." *Id.* The Tennessee Supreme Court also held that the chancery court did not abuse its discretion in denying petitioner's motion to reconsider. *Id.* at 617. The Tennessee Supreme Court agreed with the chancery court that the July 5th revision "eliminating the alternative one-drug protocol was not a substantial change to the lethal injection protocol for purposes" of the inmates' facial challenge, which had always challenged the three-drug protocol. *Id.*

The Tennessee Supreme Court "agree[d] with the trial court's finding that pentobarbital—the only alternative method of execution that the [inmates] sufficiently pleaded—is not available for use in executions in Tennessee." *Id.* at 625. Because the inmates had "failed to carry their burden of showing availability of their proposed alternative method of execution," the court found it unnecessary to address the inmates' claim "that the three-drug protocol creates a demonstrated risk of severe pain." *Id.*

This Court has denied three separate petitions seeking review of the Tennessee Supreme Court's decision, including one filed by a group of inmates that included petitioner. *See Abdur'Rahman v. Parker*, 139 S. Ct. 1533 (2019); *Miller v. Parker*, 139 S. Ct. 626 (2018); *Zagorski v. Parker*, 139 S. Ct. 11 (2018).

III. Federal-Court Action Challenging Tennessee's Midazolam-Based Lethal Injection Protocol

Less than a month after the Tennessee Supreme Court affirmed the chancery court's judgment, petitioner and three other inmates—Terry King, David Miller, Nicholas Sutton—filed an action in federal court challenging the State's midazolam-based three-drug protocol under the Eighth Amendment and asserting various other claims related to their anticipated executions. Pet. App. B. 14a. The district court denied the inmates' request for preliminary relief to the extent it sought to prevent use of the three-drug protocol, holding that they had not shown a likelihood of success on the merits, and the Sixth Circuit affirmed. *Miller v. Parker*, 910 F.3d 259, 260 (6th Cir. 2018). Miller filed a petition for a writ of certiorari and sought a stay of execution before his scheduled execution date of December 6, 2018. This Court denied relief. *See Miller v. Parker*, 139 S. Ct. 626 (2018).

After Miller's execution, the district court severed the complaints of the remaining three inmates. Petitioner filed an amended complaint asserting seven claims, only one of which is

relevant to the petition. That claim alleges that the State's midazolam-based lethal injection protocol, both on its face and as applied to petitioner, constitutes cruel and unusual punishment in violation of the Eighth Amendment. Pet. App. A 2a.

The State sought dismissal of the Eighth Amendment claim based on the res judicata effect of the state court's judgment in *Abdur'Rahman*. Pet. App. B 16a. Petitioner did not dispute that the state-court action satisfied the traditional requirements for res judicata—i.e., that it involved the same parties and cause of action and was final and on the merits. Instead, he argued that various exceptions to ordinary principles of res judicata should apply in this case. *Id.*

The district court rejected those arguments and dismissed the Eighth Amendment claim on res judicata grounds. *Id.* at 16a-20a. As relevant to the petition,[2] the district court rejected petitioner's argument that res judicata should not apply because the chancery court lacked authority to grant the same relief that he sought in the federal-court action. *Id.* 18a-19a. Relying on *Lien v. Couch*, 993 S.W.2d 53 (Tenn. Ct. App. 1998),[3] petitioner contended that res judicata does not bar a second action if it seeks relief that was not available in the first action. He argued that the injunctive relief he sought in the federal action was not available in the state-court action because the Tennessee Supreme Court had previously held that the chancery court, as an inferior

[2] The district court rejected petitioner's arguments that res judicata should not apply because (1) petitioner had objected to the chancery court's amendment of the pleadings to include a challenge to the July 5, 2018, protocol and thus was only a "nominal party" to the court's adjudication of that challenge; (2) petitioner was denied an opportunity to be heard in the chancery court on removal of vecuronium bromide from the three-drug protocol as an available alternative; and (3) petitioner's claim in federal court relied on new facts that could not have been presented in state court. Pet. App. B. 16a-21a. Petitioner renewed the first two arguments on appeal, and the Sixth Circuit likewise rejected them. Pet. App. A 6a-7a.

[3] The res judicata effect of a state-court action in federal court is governed by state law. *See Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 80-81 (1984).

court, lacks the authority to stay or enjoin an execution date set by the Tennessee Supreme Court. Pet. App. B 18a.

The district court concluded that petitioner could not "avoid preclusion on this basis" because there was "no doubt that [his] ultimate goal in the state-court litigation was to avoid execution by the three-drug protocol or that a victory in the state case would have led to that result." *Id.* The district court found that, had petitioner prevailed on the merits in the chancery court, that "would have provided the basis . . . to seek a stay of execution from the Tennessee Supreme Court." *Id.* Moreover, "the appeal process arising from the Chancery Court's ruling inevitably involved the Tennessee Supreme Court, which has unquestioned authority to vacate its own orders setting execution dates." *Id.*

The Sixth Circuit affirmed. The Sixth Circuit held that res judicata barred petitioner's Eighth Amendment claim because, "while the chancery court could not stay [petitioner's] execution, the Tennessee Supreme Court was more than capable of doing so in *Abdur'Rahman*." Pet. App. A 5a. "Had [petitioner] and the other plaintiffs prevailed in *Abdur'Rahman*," the court explained, they would have obtained a declaratory judgment that the midazolam-based three-drug protocol violated the Eighth Amendment. *Id.* "Armed with that judgment," petitioner could have "obtain[ed] a stay of execution from the Tennessee Supreme Court." *Id.* The Sixth Circuit found *Lien* distinguishable because, there, the plaintiffs could not have obtained full relief at any step in the prior litigation. *Id.* at 6a.

Judge Moore concurred in the judgment. She agreed with the majority that, "[a]lthough the trial-level chancery court . . . did not have the authority to grant injunctive relief staying [petitioner's] execution, the Tennessee Supreme Court would have had that power had it determined that his challenge to the lethal-injection protocol was meritorious." *Id.* at 8a. She

therefore "conclude[d] that the application of claim preclusion [was] appropriate . . . because full relief would have been available to [petitioner] had he been successful in his 2018 challenge in state court." *Id.*

The Sixth Circuit denied petitioner's petition for rehearing en banc. Pet. App. C 30a.

REASONS FOR DENYING THE PETITION

Petitioner first contends that certiorari is warranted because, in his view, the Sixth Circuit's decision "offends the rule of law and brings disrespect to the federal courts." Pet. 6. Petitioner contends that the Sixth Circuit's decision holding his Eighth Amendment claim barred by res judicata rested entirely on the State's "representation that [petitioner's] amended § 1983 complaint [in the federal court action] sought a stay of his August 15, 2019 execution." *Id.* at 7. Petitioner asserts that this representation was "false" because it was "indisputable" that his complaint "did not seek a stay of execution at all, but rather an injunction prohibiting Tennessee officials . . . from using a constitutionally-impermissible method of carrying out that execution." *Id.*

Review on this ground is not warranted. As an initial matter, petitioner's assertion that the Sixth Circuit was unaware that his federal-court complaint sought injunctive relief is contradicted by the Sixth Circuit's opinion and the parties' briefs. The Sixth Circuit acknowledged, after describing the claims in petitioner's amended complaint, that petitioner had "sought preliminary and permanent injunctive relief." Pet. App. A 3a. And the State's brief plainly stated that petitioner's amended complaint "requested an injunction preventing the State from carrying out his execution using . . . the midazolam-based three-drug protocol." Brief of Appellees at 16, *West v. Parker*, No. 19-5585 (6th Cir. July 8, 2019).

In any event, the Sixth Circuit's analysis and ultimate holding that petitioner's Eighth Amendment claim is barred by res judicata did not turn on the label attached to his request for relief. The Sixth Circuit correctly held that petitioner's claim was barred because, had he prevailed in *Abdur'Rahman*, he would have obtained a declaratory judgment that the midazolam-based three-drug protocol was unconstitutional, and he could have used that judgment to "avoid the three-drug protocol as a means of execution" by seeking relief from the Tennessee Supreme Court. Pet. App. A 5a. The Sixth Circuit properly focused on the substance of the relief that was available in the state courts, not, as petitioner urges, on its form.

Finally, although petitioner now suggests that the relief available from the state court would have been inferior to that available in federal court, his litigation strategy belies that claim. Petitioner and dozens of other inmates chose to litigate their Eighth Amendment challenge to the midazolam-based protocol in state court in the first instance, notwithstanding the limitations on the chancery court's authority. Surely they believed then—correctly—that a ruling in their favor from the state courts would prevent the State from executing them using the midazolam-based protocol.

Petitioner also argues that 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 [on] the imposition of a lawful sentence." Pet. 13. Petitioner contends that, in affirming the district court's dismissal of his federal complaint, the Sixth Circuit at least implicitly "dr[ew] a rule from this Court's decision" in *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019) "that does not exist"—namely, that method-of-execution challenges should be evaluated with greater scrutiny than other challenges. Pet. 10-11.

Review is not warranted on this ground either. The only "rule" the Sixth Circuit purported to draw from *Bucklew* was that "whether a proposed alternative method of execution is available does not depend on whether it is listed in a state's execution protocols." Pet. App. A 6a. The Sixth Circuit did not so much as mention the language from *Bucklew* that petitioner finds problematic. Pet. 9 (quoting *Bucklew*, 139 S. Ct. at 1134). Nor did it apply any sort of heightened standard in evaluating petitioner's complaint. The Sixth Circuit's decision was based on a straightforward application of principles of res judicata. That decision was correct, and there is no reason for this Court to review it.

REASONS FOR DENYING A STAY

Petitioner's stay application should also be denied. A stay of execution "is not available as a matter of right." *Hill v. McDonough*, 547 U.S. 573, 584 (2006). It is instead "an equitable remedy." *Id.* "[E]quity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts," and to the "important interest" of "[b]oth the State and the victims of crime" in the "timely enforcement of a sentence." *Id.* Suits that are "dilatory or speculative" impinge on those interests, as does "[r]epetitive or piecemeal litigation." *Id.* at 584-85. Accordingly, a court must apply "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." *Id.* at 584.

Like other stay applicants, "inmates seeking time to challenge the manner in which the State plans to execute them must satisfy all of the requirements for a stay." *Id.* To obtain a stay of execution pending this Court's consideration of a petition for a writ of certiorari, a petitioner must establish "a reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari," a "significant possibility of

reversal of the lower court's decision," and "a likelihood that irreparable harm will result if that decision is not stayed." *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983) (internal quotation marks omitted).

Petitioner has not satisfied those requirements. As explained above, the question presented in the petition does not warrant this Court's review, and there is not a reasonable probability that four members of this Court would find the issue sufficiently meritorious to grant certiorari. Even if the Court were to grant review, there is not a significant possibility of reversal of the Sixth Circuit's decision. The Sixth Circuit correctly held, under a straightforward application of res judicata principles, that the state court's judgment in *Abdur'Rahman* precludes him from relitigating his Eighth Amendment claim in federal court.

Even if petitioner could relitigate his Eighth Amendment claim, moreover, he would be unlikely to prevail. The chancery court already considered petitioner's Eighth Amendment claim after a full trial on the merits and held that he failed to satisfy either of *Glossip*'s two requirements. *Abdur'Rahman*, 558 S.W.3d at 613. And this Court and the circuit courts have uniformly rejected similar Eighth Amendment challenges to midazolam-based protocols. *See, e.g.*, *Glossip*, 135 S. Ct. at 2731 (rejecting challenge to Oklahoma's midazolam-based protocol); *In re Ohio Execution Protocol*, 860 F.3d 881, 885-92 (6th Cir. 2017) (en banc) (rejecting challenge to Ohio's midazolam-based protocol), *cert. denied sub nom. Otte v. Morgan*, 137 S. Ct. 2238 (2017); *McGehee v. Hutchison*, 854 F.3d 488, 492 (8th Cir. 2017) (rejecting challenge to Arkansas' midazolam-based protocol), *cert. denied*, 137 S. Ct. 1275 (2017); *Arthur v. Comm'r, Ala. Dep't of Corr.*, 840 F.3d 1268, 1303-04 (11th Cir. 2016) (rejecting challenge to Alabama's midazolam-based protocol), *cert. denied*, 137 S. Ct. 725 (2017).

The equities also weigh against a stay. Petitioner could have brought his claims in federal court in January 2018, as soon as the State adopted the midazolam-based protocol. Instead, he opted to pursue his claims in state court first and turned to federal court only when that strategy proved unsuccessful. Because petitioner's use of "piecemeal litigation" and dilatory tactics has interfered with the interest of the State and petitioner's victims in timely enforcement of his sentences, this Court should deny his stay application. *Hill*, 547 U.S. at 584.

CONCLUSION

The petition for a writ of certiorari and stay application 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 13th day of August, 2019, to the following:

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