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

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
TO THE SIXTH CIRCUIT COURT OF APPEALS

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other

CAPITAL CASE
BRIEF IN REPLY

INTRODUCTION

Respondents' eschew West's reasonable explanation of a court of appeals' decision which otherwise appears to misrepresent a material fact and then, solely on the basis of that misrepresentation, determine that the judgment of the Tennessee Supreme Court in *Abdur'Rahman v. Parker*, 558 S.W.3d 606 (Tenn. 2018), satisfied the long-established "full relief" requirement of the *res judicata* doctrine. Indeed, they insist there is no basis that appears on the face of the opinion to conclude that the lower court had inferred from discussions within this Court's decision in *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019), that they are to treat 42 U.S.C § 1983 challenges to a state's method of execution as though they seek to forestall the imposition of constitutionally-imposed sentences of death. (BIO at 9-10). In its place, however, they offer their own explanation for the lower court's apparent misrepresentation that, like West's, does not appear on the face of the lower court's opinion. In it, they insist first that the lower court's decision merely elevates substance over form by looking to what they speculate must have been West's intent during *Abdur'Rahman*. Having done so, they claim that the lower court was entirely correct in doing so. (BIO at 8-9).

Unlike West's attempt to discern some plausible basis for the lower court's decision, Respondents' explanation of what the court must have been thinking puts its opinion in no better light. If indeed Respondents' novel legal theory was the basis of that decision, the court departed from the straight-forward and easily applicable

"full relief" requirement of the *res judicata* doctrine under which West was undeniably entitled to relief. In its place, it parsed the history of the *Abdur'Rahman* litigation and determined, somehow, that West had "intended" to avoid a cruel and unusual punishment by avoiding (by way of a temporary stay of execution) any punishment at all. Given that West's intent is wholly irrelevant to the "full relief" requirement of the *res judicata* doctrine, Respondents argument is, in essence, that the proper explanation for the court of appeals facially-indefensible opinion is that the court below created a new "full relief" requirement founded on the intent of the plaintiff (as opposed to the jurisdiction of the court rendering the prior decision) and then applied that rule to change the outcome in a case where the integrity of the Eighth Amendment lies at stake. This cannot be.

From their ineffectual denials of their patent lack of candor before the court of appeals (BIO at 8), to their absolute refusal to state what relief was available to Mr. West at any stage of the proceedings in *Abdur'Rahman v. Parker*, 558 S.W.3d 606 (Tenn. 2018), (BIO *in passim*), to their conjecture about what Mr. West "must have wanted" from his participation in *Abdur'Rahman* (BIO at 9), Respondents fail to demonstrate that the decisions of the courts below adhered in any way to the rule of law, and/or rested on anything more substantial than the court's acceptance of Respondents' material misrepresentation of fact.

Respondents' mere hope that this Court will categorize the court of appeals' departure from the rule of law and its material misrepresentation of Mr. West's cause of action and prayer for relief as mere "error" so to deem it unworthy of its

time and effort is not an argument for denying Mr. West's petition. It is a manifestation of their cynical belief that a majority of the members of this Court will not grant review, much less a stay, in a case challenging a State's method of execution, even one where the plaintiff has, as has Mr. West, fastidiously adhered to even the non-controlling requirements of *Bucklew v. Precythe*.

A party's deceit, and a court's refusal to reject it, breeds contempt for the federal courts, including this Court. *Scherer v. Washburn Univ.*, No. 05-2288-CM, 2007 WL 1652178, at *3 (D. Kan. Jun. 7, 2007). Such contempt is also generated by the creation of a new rule of law for method of execution cases for the sole purpose of denying relief. If Respondents are right, the court of appeals inferred a presumption even more in need of this Court's correction, *i.e.*, it presumed that Eighth Amendment challenges to a method of execution are so disfavored, and are to be viewed by such a jaundiced eye, *see Bucklew v. Precythe*, 139 S. Ct. at 1146 (Sotomayor, J., dissenting), that a court's discretion in preventing inmates from pursuing them is neither bounded by the law or by the truth. The pendulum has not swung that far. *Certiorari* should be granted.

ARGUMENT

Respondents' conjecture about the "substance" of the relief sought in *Abdur'Rahman* is wholly irrelevant to the "full relief" requirement of the *res judicata* doctrine. According to Respondents' brief in opposition:

> The Sixth Circuit correctly held that petitioner's claim was barred because . . . he could have ... [sought] relief from the Tennessee Supreme Court."
>
> . . .

> Surely they believed . . . that a ruling in their favor from the state courts would prevent the State from executing them using the midazolam-based protocol.

(BIO at 9).

What Respondents neglect to mention amid their discussion about what they want this Court to believe was "surely" West's "strategy" is its lack of relevance to the very authority upon which the court of appeals relied. As the firmly established law of *res judicata* makes perfectly clear, the "full relief" requirement of the doctrine turns not upon what the Petitioner may have wanted in a prior action, but what relief the prior court had the jurisdiction to grant. Restatement (Second) of Judgments § 26(1)(c). Respondents studiously avoid discussing the injunctive jurisdiction of the Tennessee Supreme Court in connection with collateral proceedings, such as the declaratory judgment action in *Abdur'Rahman*. They do so for a very simple reason—that jurisdiction is limited to the power to stay an execution during the pendency of litigation.

A stay of execution pending completion of the declaratory judgment action is the full extent of the relief which was available to Mr. West in the *Abdur'Rahman* civil case. In every case cited in both the lead opinion and the concurrence, the only relief granted was a stay pending completion of the collateral proceeding. Moreover, the only relief that was available to Mr. West under the explicit language of Tennessee Supreme Court Rule 12(4)(E) (the court rule governing stays of execution in capital cases applicable to Mr. West and applied for the first time in *State v.*

Irick, 556 S.W.3d 686, 689 (Tenn. 2018)) was a stay of execution pending resolution of the *Abdur'Rahman* litigation.

In *West v. Schofield*, cited in the concurrence, the Tennessee Court of Appeals noted that the relief afforded Mr. West, the resetting of his execution date, was for the purpose of allowing the trial court to take evidence relevant to his pending declaratory judgment action.

> In so doing, the supreme court observed that the State had not been afforded the opportunity to present evidence to counter the opinion testimony of Dr. Lubarsky, and that the record currently before the court contained no evidence defending the adequacy of the existing procedures. The supreme court reset the date of Mr. West's execution to November 30, 2010.

380 S.W.3d 105, 109 (Tenn. Ct. App. 2012). In *West v. Ray*, also cited in the concurrence, West's execution was reset to allow time for the chancery court to, "tak[e] proof and issu[e] a declaratory judgment on the issue of whether Tennessee's three-drug protocol constitute[d] cruel and unusual punishment...." *West v. Ray*, No. M2010-02275-SC-R11-CV, 2010 Tenn. LEXIS 1072, at *3 (Tenn. Nov. 6, 2010).

Finally, in *State v. Irick*, all that was sought was an order vacating his execution date to allow time for the appeal in *Abdur'Rahman* to be decided. *State v. Irick*, 556 S.W.3d at 688-89. Additionally, in *Irick*, the Tennessee Supreme Court explicitly held that the availability of a stay of execution after 2015 was controlled by Tennessee Supreme Court Rule 12(4)(E). *Irick*, 556 S.W.3d at 689. That rule states:

> After a date of execution is set . . . the Court will not grant a stay or delay of an execution date pending resolution of collateral litigation in

> state court unless the prisoner can prove a likelihood of success on the merits in that litigation.

Tenn. Sup. Ct. R. 12(4)(E).

In short, Respondents have not identified any state court process by which Mr. West could have obtained an injunction prohibiting the infliction of an unconstitutional punishment, much less one that was available in the *Abdur'Rahman* proceedings.[1]

Not only do Respondents fail to provide any cogent argument that could have supported the court of appeals' decision, it is clear that the court did not rely on the theory Respondents now claim it did. The panel explicitly held that the "full relief" West sought in his federal complaint was a stay of execution

> [W]est reasons that since the Tennessee chancery court could not grant him "the same measure of relief" he seeks in federal court—a stay of his execution—res judicata should not bar his § 1983 suit in federal district court.

(*West v. Parker*, No. 19-5585, 2019 WL 3564476, at *5 (6th Cir. Aug. 6, 2019) (Appx. A, 5a)). So too, the court of appeals explicitly denied relief because a stay of execution was also available in *Abdur'Rahman*. (*West v. Parker*, 2019 WL 3564476, at *3, 5) (Appx. A, 3a-5a)).

The court of appeals did not rely upon Respondents' newly created version of the "full relief" requirement. If it did not apply the language from *Bucklew*

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[1] The Tennessee court explicitly refused to accept 42 U.S.C § 1983's grant of concurrent state court jurisdiction in its courts of equity. *Tennessee Downs, Inc. v. William L. Gibbons*, 15 S.W.3d 843, 847 (Tenn. Ct. App. 1999).

discussed in Mr. West's petition, then it relied upon Respondents' deceitful[2] argument that Mr. West sought only a stay of execution in the court below. That fact, even Respondents' brief in opposition cannot disguise. *See* BIO at 8 ("The Sixth Circuit acknowledged, after describing the claims in petitioner's amended complaint, that petitioner had 'sought preliminary and permanent injunctive relief.'").

The better interpretation of the decision of the court of appeals remains that as set out in Mr. West's second reason for granting the writ. On its face, the opinion of the court of appeals appears the product of a ruse by Respondents which would have been easily discernible by any jurist who had even read Mr. West's complaint and would have been corrected when brought to the court's attention. Respondents' alternate interpretation, however, requires this Court to conclude that the court of appeals: (1) departed from the law of *res judicata* and did not consider whether the Tennessee Supreme Court's injunctive authority was limited to the granting of a

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[2] Respondents continue such conduct here. The quote at Page 8 of Respondents BIO is cobbled out of a longer passage in the statement of facts in their brief in the court below. That passage states:

> As relief, West requested an injunction preventing the State from carrying out his execution using either the midazolam-based three-drug protocol or electrocution and preventing the State from carrying out his execution in any manner unless he is allowed two attorney witnesses with immediate access to a telephone.
> allowed two attorney witnesses with immediate access to a telephone.

Brief of Appellees at 16, *West v. Parker*, No. 19-5585 (6th Cir. July 8, 2019). That passage, even on its face, fails to contradict the fact that Respondents misled the court below. This is even more true in light of Respondents' repeatedly misleading argument. *See* Petition at 4.

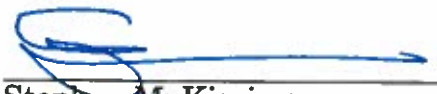
stay of execution; (2) *sub silencio* looked instead to whether Mr. West's "plan" was to avoid an unconstitutional execution by avoiding any execution at all; and, (3) wrote an opinion in which it said the basis for its ruling was because Mr. West was sought a stay of execution both proceedings. Such an interpretation implies a level of venality to the court of appeals, no less than what appears on the face of the record. Even if it is to be believed, *certiorari* review should be granted for the same reasons is should be granted if the lower court's opinion are accepted at face value. Whichever of those explanations is accepted, a firmly-established rule of law has fallen in order to reach a particular result.

CONCLUSION

For the foregoing reasons, Petitioner requests that this Court grant the Petition for Writ of Certiorari.

Dated: August 14, 2019

Respectfully submitted,



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