

*****THIS IS A CAPITAL CASE*****

***** EXECUTION SCHEDULED FOR DECEMBER 9, 2021, AT 10:00 A.M.CST *****

No. 21A209

IN THE SUPREME COURT OF THE UNITED STATES

BIGLER JOBE STOUFFER,

Applicant,

v.

SCOTT CROW, ET AL.,

Respondents.

To the Honorable Neil M. Gorsuch, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Tenth Circuit:

REPLY IN SUPPORT OF EMERGENCY APPLICATION FOR STAY OF EXECUTION

I. INTRODUCTION

As has been the case from the outset, the State’s response to Bigler Jobe Stouffer’s (“Stouffer”) application makes no attempt to address, much less justify, its sudden reversal of its longstanding commitment to the district court and to the condemned prisoners in the State of Oklahoma that it would allow objections to its much contested three-drug execution protocol to be presented and decided in an orderly way, and would not schedule any executions until the constitutionality of the protocol had been decided. Instead, the response filed by the State proposes that this Court deny relief to Stouffer based on arguments previously made, but which do not

appear in the Motion before this Court¹.

This Court should decline the invitation to deny relief to Stouffer on the false premise set forth in the response filed by the State, consider the unique nature of the claims on which the Motion is actually based, and intervene to prevent an execution until those issues can be given fair consideration.

Specifically, this Court should consider issues never before presented to or decided by this Court in its death penalty jurisprudence, namely; whether Stouffer's claims based on promissory estoppel / determinantal reliance and equal protection serve to prevent the State from proceeding with his execution. As to those claims, the district court's denial of relief was clearly erroneous, as was the refusal of the 10th Circuit even to consider it based on an after-the-fact and sua sponte application of a procedural rule

Finally, the State's invocation of comments from this Court as to the timing of Stouffer's request is disingenuous. Beyond the broad rhetoric in the response, the State's timing argument is that the **three-week period** between the time his execution date was set and the filing of his Complaint amounts to an inexcusable delay, sufficient to make any serious consideration of his claims unnecessary. Obviously, neither the law nor core principles of due process support such a contention.

¹ Stouffer acknowledges that the factual findings made by the district court as to the likelihood of success of proving the Oklahoma protocol is, in fact, unconstitutional effectively – albeit erroneously – closed the door to any interlocutory appeal on the ultimate merits of a method-of-execution claim.

II. STANDARD OF REVIEW

“[A] stay of execution is an equitable remedy, and an inmate is not entitled to a stay of execution as a matter of course.” *Hill v. McDonough*, 547 U.S. 573 (2006). In deciding whether to issue a stay of execution, a court must consider: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other party interested in the proceeding; and (4) where the public interest lies. *See Nken v. Holder*, 556 U.S. 418 (2009). A motion for a stay, however, depends on the operation of equity. *See Hill*, 547 U.S. at 584, 126 S.Ct. at 2104.

In a capital case, the likelihood of success factor is satisfied when the plaintiff makes a “substantial showing of the denial of a federal right.” *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983) (citation and quotation marks omitted). That showing is made if the plaintiff shows that the “issues are debatable among jurists of reason; that a court could resolve the issues in a different manner; or that the questions are adequate to deserve encouragement to proceed further.” *Id.* At 893 n. 4 (citation and quotation marks omitted).

III. ARGUMENT

A. Stouffer is Likely to Succeed on His Claims.

Stouffer has argued and fully briefed his likelihood of success on his claims based on promissory estoppel / determinantal reliance and on his equal protection claim. The Tenth Circuit did not even consider these claims despite Stouffer’s presentation of them at both the district court level and to the appellate court. There can no doubt that

Stouffer would succeed on one or the other because either the State's promise not to execute condemned inmates applies to Stouffer or, in the alternative, Stouffer is being treated differently than all other death row inmates in Oklahoma – a group of people with which he is “similarly situated.”

B. Stouffer Easily Establishes Irreparable Injury.

Stouffer will be irreparably injured if he is executed before this case can be litigated. The end of his life without opportunity to present his claims is the most “irreparable injury” any human could face. Stouffer understands he will ultimately be executed when the State creates a constitutionally permissible method of execution. But being executed now, before he can contest the issue in court, would constitute an irreparable injury. To allow the State to execute him now without holding the State to its promise, or treating him like all other death row inmates, would be an injustice to the ideal of due process and American jurisprudence.

C. The Issuance of a Stay Will Not be Detrimental to the Defendants.

Making the State keep its word by postponing Stouffer's execution would not be detrimental to the State in any way. As noted, Stouffer understands he will be executed someday, but that should occur after a death penalty protocol is deemed constitutional. If that happens, the State will be able to proceed with his execution. Making it wait while Stouffer's constitutional rights are litigated cannot harm the State. It will be as if this Court allowed the State of Texas to execute Mr. John Henry Ramirez without considering his Religious Land Use and Institutionalized Persons Act claim. *See* Supreme Court Case No. 21-5592. There, like here, making the State wait to execute a

condemned prisoner until after his claims were litigated was not detrimental to the defendants.

D. It is not in the Public's Interest to Execute Stouffer Without Maintaining His Constitutional Rights.

The United States Constitution is the backbone of the Great American Experiment. The public interest of our nation is embedded in the belief that all citizens, even those convicted of murder, shall be entitled to constitutional protections. Allowing the Defendants to execute Stouffer without having his "day in court" would be a violation of due process, equal protection, and the Eight Amendment. This Court must grant the stay requested herein.

IV. CONCLUSION

If a stay is not granted, Stouffer will be executed without having his constitutional rights considered by any court, the most irreparable injury one could imagine. Stouffer respectfully requests this Court stay his execution scheduled for December 9, 2021.

Respectfully submitted this 8th day of December, 2021, by

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