THIS IS A CAPITAL CASE
EXECUTION SET FOR DECEMBER 6, 2018, AT 7:00 PM, CST

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DAVID EARL MILLER,

Petitioner,

v.

TONY PARKER, Commissioner,
Tennessee Department of Correction, *et al.*,

Respondents.

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

APPLICATION FOR STAY OF EXECUTION

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Dated: December 3, 2018

APPLICATION FOR STAY OF EXECUTION

To the Honorable Sonia Sotomayor, Associate Justice of the United States and Circuit Justice for the Sixth Circuit:

Applicant, David Earl Miller respectfully applies to this Court for an order staying his execution which is set for December 6, 2018, 7:00 p.m., CST, pending this Court's consideration of his Petition for Certiorari review of the decision of the United States Court of Appeals for the Sixth Circuit affirming the District Court for the Middle District of Tennessee's denial of Mr. Miller's motion for a preliminary injunction.

INTRODUCTION

Mr. Miller seeks a stay pending review of the lower court's denial of a preliminary injunction preventing Respondents from carrying out his December 6, 2018 execution. Tennessee's default method of execution is a lethal injection protocol which inflicts a punishment three times more onerous than electrocution, the harshest punishment to which Miller was subjected at the time of his offense. The threat of that *ex post facto* punishment compelled Miller to "choose" electrocution, a method of execution he credibly alleges constitutes cruel and unusual punishment. Respondents then asserted Miller waived his right to challenge electrocution and a majority of the court of appeals' panel agreed.[1]

[1] The district court denied a stay of execution on the ground that Miller had not, at that time, elected the electric chair nor had Respondents refused to execute Miller under their electrocution protocol. Memorandum and Order, *Miller et al., v. Parker et al.*, Case N0. 3:18-cv-01234, 2018 WL6003123 at *3 (M.D. Tenn. Nov. 15, 2018) (Appendix B, pp.8a-9a).

The majority's decision below found it "debatable" that 20 minutes of pain and suffering under Tennessee's new lethal injection protocol was greater than the 6 minutes of pain and suffering in Tennessee's electric chair. *Miller v. Parker*, No. 18-6222, 2018 WL 6191350, at *1 (6th Cir. Nov. 28, 2018) (Appendix A, p.2a), incorporated by *id.*, Doc. 19-2, slip op. p. 3 (6th Cir. Dec. 3, 2018) (Appendix D, p.18a). It failed to inquire into the voluntariness of Miller's "choice" of electrocution and resulting waiver of Eighth Amendment rights. It presumed electrocution is constitutional notwithstanding Miller's well-pled and uncontested allegations showing it is a cruel and unusual punishment. *Id.* at slip op. p.4 (Appx. D, p.19a). By a vote of 2-to-1, the panel adopted a new rule for evaluating *ex post facto* claims which requires the inmate to establish that it is "sure or very likely" that the new punishment is "less humane" than the original punishment. *Id.* at slip op. p.3 (Appx. D, p.18a).

The dissenting opinion observed that Respondents have not disputed Miller's factual allegations, that those allegations demonstrate a likelihood of success on the unconstitutionality of both methods of execution (including lethal injection on both *ex post facto* and Eighth Amendment grounds) and that, accordingly, Miller established a prima facie case that his decision to be executed in Tennessee's electric chair was compelled by the threat of an unconstitutional and harsher punishment. *Id.* at slip op. pp. 5-6, (Appx. D, pp.20a-21a).

Miller comes to this Court with two requests. First, that it reverse the panel's decision to include a new test for ascertaining violations of the *ex post facto* clause

and reaffirm the standard set out in *Calder v. Bull*, 3 U.S. 386, 390 (1798) which has served well for over two centuries. Second, that it clarify and/or reaffirm that any choice of execution method and resulting waiver of Eighth Amendment rights must not be a product of government coercion, like all other valid waivers of constitutional rights.

Because Miller presents important questions that are certain to arise in other Tennessee cases in the near-future, a stay of execution pending consideration of this petition should be granted. Since Miller also demonstrates a strong likelihood that review will be granted and of success on the merits, a stay should continue pending final resolution of the merits of this case.

JUDGMENT FOR WHICH REVIEW IS SOUGHT

The court of appeals' November 28, 2018, order denying by a 2-to-1 vote a stay pending appeal is found at *Miller v. Parker*, No. 18-6222, ___ F.3d ___, 2018 WL 6191350 (6th Cir. Nov. 28, 2018), and is attached hereto as Appendix A. The court of appeal's final judgment on the merits affirms by a 2-to-1 vote the district court's denial of preliminary injunctive relief. (Appendix D).

JURISDICTION

Your Honor and this Court have jurisdiction to grant a stay. Miller has sought, and been denied, a stay in both the district court and the court below.

The All Writs Act gives your Honor and this Court the power to issue a stay to maintain jurisdiction of the underlying matter. "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of

law." 28 U.S.C. § 1651(a). Furthermore, "[i]n any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court." 28 U.S.C. § 2101(f).

STANDARD FOR GRANTING A STAY

Mr. Miller meets the standard for granting a stay because there is a reasonable likelihood this Court will grant review and, absent a stay, he will be executed and denied the benefit of this Court's judgment. Four factors guide the issuance of a stay: (1) whether the Petitioner makes a strong showing of the likelihood of success on the merits; (2) whether the Petitioner will be irreparably injured absent a stay; (3) whether the issuance of a stay will injure the opposing party; and, (4) whether a stay is in the public interest. *Nken v. Holder,* 556 U.S. 418, 434 (2009). When the Government is the opposing party, assessing the harm to the opposing party and weighing the public interest merge. *Id.* at 556 U.S. at 435.

Where a stay is sought pending a petition for certiorari, the petitioner need only show a "reasonable probability" that this Court will grant certiorari and a "fair prospect" that the decision below will be reversed. *Maryland v. King,* 567 U.S. 1301, 133 S. Ct. 1, 2 (2012) (Chief Justice Roberts, as Circuit Justice). In *Barefoot v. Estelle*, 463 U.S. 880 (1983) (superseded on other grounds by 28 U.S.C. § 2253(c)), the Court held that a stay may be granted when there is: "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*, 463 U.S. at 895 (quoting *White v. Florida*, 458 U.S. 1301, 1302 (1982)). Further, a stay should be granted when necessary to "give non-frivolous claims of constitutional error the careful attention that they deserve" and, when a court cannot "resolve the merits [of a claim] before the scheduled date of execution, ... to permit due consideration of the merits." *Id.* at 888-89. These factors weigh in favor of a stay in Mr. Miller's case.

REASONS FOR GRANTING A STAY

1. There is a reasonable probability that this Court will grant certiorari and a fair prospect that Mr. Miller will succeed on the merits.

There is a reasonable probability that the lower court's decision will be reviewed and overturned by this Court. The matters here are not trivial and if review is not granted the issues will recur.

Mr. Miller's likelihood of success is supported with the truth that Tennessee's midazolam protocol will cause inmates to experience "a substantial, constitutionally unacceptable risk of suffocation from the administration of [a paralytic drug] and pain from the injection of potassium chloride," *Baze v. Rees*, 553 U.S. 35, 53 (2008), and worse. The expert proof in this case from world-renowned scientists and medical professionals has been credited, it is not contested, and it is significantly different from the evidence presented and relied on by the majority in *Glossip*. The significant pain and suffering caused by Tennessee's lethal injection protocol and the fact that the procedure will last 14 minutes longer than execution in Tennessee's electric chair necessarily means the new lethal injection protocol is a

greater, harsher, and more onerous punishment than electrocution. The same facts establish the unconstitutional and imminent threat that compelled Mr. Miller to "choose" electrocution and render involuntary any waiver of his Eighth Amendment right to challenge the constitutionality of electrocution. Moreover, Mr. Miller's well-pled allegations establish a prima facie case that electrocution is a cruel and unusual punishment.

There is a reasonable probability this Court will grant Mr. Miller's petition for certiorari and there is a fair prospect that he will prevail on the merits.

2. Without a stay of execution, Mr. Miller will be irreparably injured.

There can be no dispute that without a stay of execution, Mr. Miller plainly faces irreparable injury. *See Wainwright v. Booker,* 473 U.S. 935, 935 n.1 (1985) (mem.) (Powell. J., concurring) (a prisoner facing execution will suffer irreparable injury if the stay is not granted).

3. The public interest lies in favor of granting a stay and issuance of a stay will not substantially prejudice the State.

"[I]t is always in the public interest to prevent violation of a party's constitutional rights." *G & V Lounge, Inc. v. Michigan Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994) (citing *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 383 (1979); *see also In re Morris*, 328 F.3d 739, 741 (5th Cir. 2003) (the public interest is served when an applicant for a stay makes a showing of a likelihood of success on the merits).

In particular, the Eighth Amendment issues at stake in this case directly affect society's interest that cruel and unusual punishments not be imposed. While

the public may have an interest in seeing judgments carried out, it also has an interest that its citizens not be tortured to death in the name of the people. *See Whitmore v. Arkansas*, 495 U.S. 149, 173 (1990) (Marshall, J., dissenting) ("Certainly a defendant's consent to being drawn and quartered or burned at the stake would not license the State to exact such punishments."). This interest "cannot be overridden by a [capital] defendant's purported waiver[.]" *See Lenhard v. Wolf*, 444 U.S. 807, 811 (1979) (Marshall, J., dissenting). "[T]he consent of a convicted defendant in a criminal case does not privilege a State to impose a punishment otherwise forbidden by the Eighth Amendment." *Gilmore v. Utah*, 429 U.S. 1012, 1018 (1976) (White, J., joined by Brennan and Marshall, JJ., dissenting). *See also* Stephen Blum, *Public Executions: Understanding the "Cruel and Unusual Punishments" Clause*, 19 Hastings Const. L.Q. 413, 451 (1992) ("[O]ne may not consent to cruel and unusual punishment. For example, even if given the choice of punishments between torture and death, the prisoner could not choose torture.").

Likewise, a State suffers no substantial harm when, as in this case, an execution is delayed in order to determine whether the execution would be unconstitutional. *In re Holladay*, 331 F.3d 1169, 1177 (11th Cir. 2003); *In re Morris*, *supra*. And "if the plaintiff shows a substantial likelihood that the challenged law is unconstitutional, no substantial harm to others can be said to inhere in its enjoinment." *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson Cty., Tennessee*, 274 F.3d 377, 400 (6th Cir. 2001).

Mr. Miller seeks a stay of execution for a prompt and accurate determination as to whether Tennessee's execution protocol violates his constitutional rights. Without a stay Mr. Miller will be put to death without having had an opportunity for a full and fair hearing on the issues presented. A stay serves the State and the public interest in ensuring that capital punishment is carried out in compliance with the Eighth and Fourteenth Amendments and the *ex post facto* clause of the United States Constitution.

CONCLUSION

For the foregoing reasons, the Court should grant this Application and stay Mr. Miller's execution pending a decision and disposition of his Petition for Writ of Certiorari.

Dated: December 3, 2018

Respectfully submitted,

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