

**CAPITAL CASE
EXECUTION SET FOR AUGUST 15, 2019, AT 7:00 PM, CDT**

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

STEPHEN MICHAEL WEST,

Petitioner,

v.

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

Respondents.

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

APPLICATION FOR STAY OF EXECUTION

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Dated: August 12, 2019

APPLICATION FOR STAY OF EXECUTION

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

Applicant, Stephen M. West respectfully applies to this Court for an order staying his execution which is set for August 15, 2019, at 7:00 p.m., CDT, 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 dismissal of Mr. West's Amended Complaint for Injunctive Relief.

INTRODUCTION

Mr. West seeks a stay pending review of the court of appeals' decision affirming the dismissal of Mr. West's Amended Complaint for Injunctive Relief preventing Respondents from carrying out his August 15, 2019 execution.

In his petition for certiorari review, West comes to this Court with two requests. First, that it reverse the panel's decision affirming the dismissal of his *Bucklew*-compliant 42 U.S.C. § 1983 challenge to Tennessee's July 5, 2018 three-drug midazolam-based lethal injection protocol. The decision either rests upon a misrepresentation of a material fact or the application of a presumption which could, but should not, have been drawn from the *Bucklew* decision. Second, that it set forth the pleading and timeliness requirements of *Bucklew* as the criteria by which nature of the relief sought is to be determined.

Because West presents important questions that are certain to arise in at least one other Tennessee case in the near-future and are likely to arise in all future

§ 1983 challenges to a state’s method of execution, a stay of execution pending consideration of this petition should be granted. Since West also demonstrates a strong likelihood that review will be granted and of success on the merits, both in this Court and upon remand, a stay should continue pending final resolution of the merits of this case.

JUDGMENT FOR WHICH REVIEW IS SOUGHT

The court of appeals’ August 6, 2019 merits decision is attached hereto as Appendix A. West sought a petition for rehearing and en banc review, which was denied on August 9, 2019, and is attached hereto as Appendix B.

JURISDICTION

Your Honor and this Court have jurisdiction to grant a stay. West has sought, and was denied, a stay in 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. West 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) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). When the Government is the opposing party, assessing the harm to the opposing party and weighing the public interest merge. *Nken*, 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) (citations omitted). 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 (citations omitted). 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. West’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. West 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. West’s likelihood of success is supported with the truth, unacknowledged by the Sixth Circuit Court of Appeals, that the relief he sought in the court below was not the same as the only relief available to him during the state court declaratory judgment action reported at *Abdur’Rahman v. Parker*, 558 S.W.3d 606 (Tenn. 2018). It is further supported by the Court’s need to correct the court of appeals’ application of the presumption, arguably inferred by the language of this Court’s *Bucklew* decision at *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019), that his action below had been filed with the purpose of avoiding and/or delaying a constitutionally-imposed sentence of death and by the need to establish clear and unambiguous criteria for making such a finding.

Mr. West’s likelihood of success upon remand is demonstrated by the well-pled allegations of his complaint below (filed before his execution date had even been set, and more than nine months prior to the filing of this motion) which: (1) parallel evidence previously found to establish the first prong of the

Baze/Glossip/Bucklew inquiry; and, (2) include an alternate method of execution previously found by this Court to satisfy the Eighth Amendment and repeatedly acknowledged as feasible and readily available.

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

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

There can be no dispute that without a stay of execution, Mr. West 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 the 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 enjoinder.” *Deja Vu of Nashville, Inc. v. Metro. Gov’t of Nashville & Davidson Cty., Tennessee*, 274 F.3d 377, 400 (6th Cir. 2001).

Mr. West seeks a stay of execution to allow this Court to resolve important and far-reaching questions regarding the existence of a *per se* presumption regarding the purpose and intent of actions brought under 42 U.S.C. § 1983 which on their face challenge whether a state may carry out a constitutionally-imposed

sentence of death by the infliction of a method of punishment which violates the Eighth Amendment to the Constitution of the United States.

A stay should issue.

CONCLUSION

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

Dated: August 12, 2019

Respectfully submitted,



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