CAPITAL CASE: EXECUTION SET NOVEMBER 1, 2018 AT 7:00 P.M.

No. 18-6145
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EDMUND ZAGORSKI

Movant

v.

BILL HASLAM, et al.,

Respondent

MOTION FOR STAY OF EXECUTION

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Pursuant to 28 U.S.C. § 1651, Edmund Zagorski moves this Court to enter a stay of execution in aid of its jurisdiction over the appeal of the two claims dismissed by the district court: (1) the threat of suffering under Tennessee's three-drug lethal injection protocol coerced him to choose that his sentence be carried out by electrocution (Count I), and (2) the Tennessee electrocution protocol, as applied, is cruel and unusual (Count II). Because (a) Mr. Zagorski has a reasonable likelihood of success on the merits, (b) the relative interests of the competing parties favor Mr. Zagorski's position, and (c) he has diligently pursued his legal remedies, equity favors a stay. *Nelson v. Campbell*, 541 U.S. 637 (2004).[1]

[1] Factors that may play a persuasive or even dispositive role in a court's determination of whether to grant a stay of execution might include such considerations as (1) whether the protocol has recently been changed, (2) whether the petitioner has been diligent in pursuing his or her claim, (3) whether the petitioner has taken reasonable steps to ascertain what the protocol is … and (4) whether the traditional factors involved in the balancing test for granting a preliminary injunction weigh in favor of a stay.

Cooey v. Strickland, 479 F. 3d 412, 430 (6th Cir. 2007) (Gilman, J., dissenting).

I. Mr. Zagorski is reasonably likely to succeed on the merits.

The "reasonable likelihood of success on the merits" standard is not onerous. *See Lonchar v. Thomas*, 517 U.S. 314 (1996); *Barefooot v. Estelle*, 463 U.S. 880 (1983). Mr. Zagorski need not prove that he will succeed or even that success is probable. Rather, he need only show a reasonable likelihood. Mr. Zagorski meets this standard. In fact, the district court entered judgment on Counts I and II in response to his motion for entry of judgment brought pursuant to Federal Rule of Civil Procedure 54(b) and also under 28 U.S.C. § 1292(b). R. 17, PageID# 600. The entry of the final order under § 1292(b) indicates that the district judge is "of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation . . . ." 28 U.S.C. § 1292(b). Where the district court acknowledges "there is substantial ground for difference of opinion," by definition, Mr. Zagorski meets the reasonable likelihood threshold standard.

To understand the legal theory of Counts I and II of the underlying complaint, the Court must first understand the current

Tennessee midazolam-based, three-drug protocol and the nature of the state court litigation that challenged its use. Further, the Court requires an understanding of prior challenges to Tennessee's electrocution protocol. Finally, it is important to consider the peculiarities of the Tennessee death penalty statute that preclude Mr. Zagorski from proposing a less painful method of execution at this time.

First, the Tennessee statute authorizing the death penalty has undergone numerous changes over the decades. Currently, lethal injection and electrocution are the only two methods of execution authorized by Tennessee law. The current statute makes lethal injection the default method of execution unless the (a) lethal injection is declared unconstitutional, or (b) the commissioner of correction declares that the Department is unable to obtain lethal chemicals through no fault of the Department. Tenn. Code Ann. §40-23-114. Under the statute, an inmate who was sentenced to death prior to January 1, 1999 may elect to be executed by electrocution, which was the sole method of execution in Tennessee at the time of his sentence. *Id.* Inmates sentenced after January 1, 1999, may also be subject to electrocution if lethal injection is declared unconstitutional or the drugs

are not available. *Id.* Mr. Zagorski and other inmates challenged this statute within months of its passage seeking to have electrocution declared unconstitutional. *West v. Schofield*, 468 S.W. 3d 482 (Tenn. 2015). At the urging of the State of Tennessee, the Tennessee Supreme Court held that the electrocution challenge was not ripe, but that the inmates would be permitted to challenge electrocution as a method of punishment should it become ripe in the future. *Id.* at 491-95.

As of January 7, 2018, Tennessee's lethal injection method was a single-drug protocol using pentobarbital. On January 8, 2018, the Department adopted a new protocol retaining the pentobarbital option, but adding a three drug-midazolam based protocol. Mr. Zagorski and other inmates immediately gave notice of their intent to challenge the protocol and did so within weeks. Mr. Zagorski prosecuted his complaint with extraordinary speed and diligence. On the eve of trial, the State changed their protocol again by eliminating the single-drug option. Nevertheless, Mr. Zagorski proceeded to a ten-day trial. At the end of the trial the plaintiffs' proof stood unrebutted: the three-drug protocol will not prevent the inmates from feeling the effects of the second two drugs, and the midazolam will inflict suffering all on its own. This proof

was not meaningfully challenged. Chief Justice John Roberts, writing for the Supreme Court, has held that if an inmate is able to feel the effects of the paralytic and potassium chloride, then such a protocol is constitutionally intolerable. *Baze v. Rees*, 553 U.S. 35 (2008).[2]

Nevertheless, Mr. Zagorski lost his challenge in the state courts, because, according to those courts, he failed to establish the existence of an alternative method under *Glossip v. Gross*, 135 S. Ct. 2126 (2015). *Abdur'Rahman v. Parker*, No. M2018-01385-SC-RDO-CV, 2018 WL 4858002 (Tenn. Oct. 8, 2018); *Zagorski v. Parker*, No. 18-6238, 2018 WL 4900813, at *1 (Oct. 11, 2018) (Sotomayor, J. dissenting).

Mr. Zagorski and his fellow plaintiffs filed their complaint, conducted discovery, tried their case and prosecuted the appeal in less than eight months. The appeal did not become final until the eve of Mr. Zagorski's scheduled execution. Faced with certain pain and suffering

[2] *See also*, *Irick v. Tennessee*, No. 18A142, 2018 WL 3767151, at *3 (Aug. 9, 2018) (Sotomayor, J., dissenting) ("[T]he Court today turns a blind eye to a proven likelihood that the State of Tennessee is on the verge of inflicting several minutes of torturous pain on an inmate in its custody, while shrouding his suffering behind a veneer of paralysis. I cannot in good conscience join in this "rush to execute" without first seeking every assurance that our precedent permits such a result. No. M1987-00131-SC-DPE-DD (Lee, J., dissenting), at 1. If the law permits this execution to go forward in spite of the horrific final minutes that Irick may well experience, then we have stopped being a civilized nation and accepted barbarism.").

lasting from 10-18 minutes, Mr. Zagorski was faced with a terrible choice. He was clear then and has remained clear that, in his view, both methods of execution involve constitutionally intolerable pain, suffering, and torture.

When Mr. Zagorski requested a less awful death by electrocution (in his estimation) on October 8, 2018 (the day the Tennessee Supreme Court ruled that lethal injection had not been proven unconstitutional), he was explicit:

> By signing this affidavit I am not conceding that electrocution is constitutional. I believe that both lethal injection and electrocution violate my rights under the 8th amendment. However, if I am not granted a stay of execution by the courts, as between two unconstitutional choices I choose electrocution. I do not waive my right to continue to appeal my challenge to lethal injection. And, if that appeal is successful, then I will challenge electrocution as unconstitutional. I am signing this document because I do not currently have a stay of execution and I do not want to be subjected to the torture of the current lethal injection method.

R. 1, PageID# 13-14, ¶45.

The lethal injection litigation (and the perverse burden of *Glossip*)[3] left him powerless, except to opt for another method of certain

[3] *See Zagorski v. Parker*, No. 18-6238, 2018 WL 4900813, at *1 (Oct. 11, 2018) (Sotomayor, J., dissenting)("This requirement was legally and morally wrong when

torture that would at least involve a shorter period of time – unless the execution is botched – during which he would experience such pain. Mr. Zagorski acted quickly and alerted the prison that, given the looming execution date, he would rather be electrocuted than be tortured by the three-drug protocol. At the time, Mr. Zagorski was still challenging the three-drug protocol in court. The state initially refused to electrocute him. So, Mr. Zagorski filed suit—not seeking a stay—but rather seeking to enforce this terrible choice. The district court did not stay the execution but did enjoin the state from using the lethal injection protocol to executed Mr. Zagorski. It was the Governor who chose to delay Mr. Zagorski's execution, apparently out of concern that the Department could not carry out an execution in their electric chair. After the reprieve, the United States Supreme Court denied Mr. Zagorski's petition for writ of certiorari. But for the reprieve, Mr. Zagorski would have been executed on October 11, 2018. Prior to that time, under Tennessee law, Mr. Zagorski could not challenge electrocution.

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it was promulgated, and it has been proved even crueler in light of the obstacles that have prevented capital prisoners from satisfying this precondition.").

On October 22, 2018, the Tennessee Supreme Court set a November 1, 2018 execution date and the State informed Mr. Zagorski that it would electrocute him. On October 24, 2018, the State moved for a permanent injunction in favor of Mr. Zagorski to permanently enjoin the use of the three-drug protocol in his case. At that time, Mr. Zagorski's challenge to the electrocution protocol became ripe under Tennessee law. On October 26, 2018, Mr. Zagorski initiated the underlying lawsuit.

A. Count I: Coercion.

As explained in detail in the accompanying brief, Mr. Zagorski is reasonably likely to succeed on the appeal of the district court's order. The district court did not rule against Mr. Zagorski on the merits of this claim. Instead, it found the claim was barred by collateral estoppel. However, as explained in the brief, the district court misunderstood the essential issue and applicable law, which led to its erroneous collateral estoppel finding. This Court is reasonably likely to reverse her erroneous decision and remand the case for trial on the merits of this claim.

B. Count II: Unconstitutionality of the Tennessee Electrocution Protocol.

Mr. Zagorski is reasonably likely to prevail on this claim as well. Nebraska and Georgia have both found electrocution unconstitutional. *Nebraska v. Mata,* 745 N.W.2d 229 (Neb., 2008); *Dawson v. State,* 554 S.E. 2d 137 (Ga., 2001). "Objective indicia of society's standards" reveal that the electric chair has been renounced across this nation. *Graham v. Florida*, 560 U.S. 48, 61 (2010).

The district court did not disagree with any of the facts in Mr. Zagorski's complaint, which establish the risk of torture posed by electrocution. Rather, without allowing either party to brief the issue, the court applied *Stewart v. LaGrand*, 526 U.S. 115 (1999), and erroneously found that Mr. Zagorski waived his claim. The district court's reliance on *LaGrand* is erroneous. *LaGrand* involved an uncoerced, knowing, and voluntary choice of a painful method of execution that had already been declared unconstitutional (lethal gas), when a pain-free method existed and was available to him (sodium thiopental). Further, at the time *LaGrand* was decided, *Glossip* did not exist.

The court should take this opportunity to consider the continued viability of *LaGrand* in light of *Glossip*.

The equities weigh in favor of a stay on this factor.

II. The minimal risk of harm to the State of Tennessee is outweighed by the threat of irreparable harm to Mr. Zagorski.

The threat of irreparable harm to Mr. Zagorski is clear and patent. He stands to be executed in an electric chair created by holocaust denier, Fred Leuchter. The execution will internally cook his organs, burn and blister his skin, and set every nerve in his body ablaze. *See* Exhibits in Support of Motion to Reconsider, R. 9-1 to 9-6, PageID# 91-440.

By contrast, the State's interest is not as weighty. Moreover, this is an issue that is not going away in the State of Tennessee. The State and public interest is served by conducting a full appeal of this matter to provide guidance to the lower courts in the inevitable event that future, similar challenges are brought.

III. Mr. Zagorski has been diligent.

The State did not change its protocol and eliminate the possibility of a single-drug protocol until July 5, 2018. This specific suit did not become ripe until October 24, 2018, and on October 26, 2018, Mr.

Zagorski filed suit—as he had previously told the Appellees he would do, if given the legal opportunity.

IV. Conclusion

The State and the lower court see an inconsistency in Mr. Zagorski's position. They are wrong. Mr. Zagorski has been clear. The intersection of *Glossip*, Tennessee case law, the Tennessee statute, and a "rocket docket" over which he had no control, have forced him into a classic Hobson's choice (no real choice at all). He tried to challenge electrocution in 2015, but was thwarted. He proved that midazolam will not protect him from the effects of the second and third drugs and will independently inflict pain and suffering. Mr. Zagorski has not played games. The State and the system of laws that puts the burden on an indigent death row inmate to bring his own drug to his execution or face certain horror is the one who has set the rules. Mr. Zagorski is merely navigating a legal labyrinth as best he can. This Court should issue a stay of execution to permit the orderly adjudication of this appeal.

Respectfully submitted,

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BY: */s/ Kelley J. Henry*
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CERTIFICATE OF SERIVCE

I, Kelley J. Henry, hereby certify that a true and correct copy of the foregoing document was electronically filed and sent to the following via email on this the 31st day of October 2018 to:

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