No. 13-892
App. No. 13A788

CAPITAL CASE

EXECUTION SET FOR FEBRUARY 5, 2014

In The

Supreme Court of the United States

Christopher Sepulvado,

Petitioner,

v.

Bobby Jindal, et al.

Respondents.

PETITIONER'S JANUARY 30, 2014 SUPPLEMENTAL BRIEF

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PETITIONER'S SUPPLEMENTAL BRIEF

Pursuant to this Court's Rule 15.8, petitioner Christopher Sepulvado respectfully submits this supplemental brief to address five important developments since the filing of his application for a stay of execution and petition for a writ of certiorari in this capital case. First, the state announced a revised execution protocol, in which the state now declines to specify what drug it will use in petitioner's execution. Second, the revised protocol raises the substantial prospect of the state executing petitioner using a combination of drugs that raises grave Eighth Amendment concerns. Third, the state has asserted the prerogative to withhold civil discovery on these matters until the day *after* it executes petitioner. Fourth, the state has declined to respond to this stay application and the petition for certiorari until next Monday, only two days before the date of the execution, when it may well finally disclose the method of execution—but too late to provide timely notice that would permit the federal courts to determine whether the finally disclosed method of execution is constitutional. Finally, although this Court yesterday vacated a stay of execution issued by the Eighth Circuit in *Lombardi v. Smulls*, No. 13A790, that case raises substantially different issues and does not implicate the Court's disposition of this case.

ARGUMENT

On Monday, January 27, 2014, petitioner filed a petition for a writ of certiorari (No. 13-892) and application for a stay of his execution (No. 13A778), presently

scheduled for February 5.[1] In those papers, petitioner predicted that the state of Louisiana would have to alter its execution protocol because the drug the state had specified (pentobarbital) was impossible for the state to legally acquire. Petitioner also noted that the state had failed to timely provide discovery responses indicating how it planned to acquire the drug notwithstanding the legal and practical obstacles to doing so. He therefore argued that Louisiana's disclosure of a protocol specifying pentobarbital failed to satisfy his due process right to know which drug would be used to execute him.

That very evening, petitioner's prediction came true. Louisiana announced a new protocol under which the state declines to confirm what drugs it will use to execute petitioner. *See* App. A. The new protocol provides that the state intends to use pentobarbital, but if pentobarbital is unavailable, the state intends to use a combination of ten milligrams of the sedative midazolam and forty milligrams of the analgesic hydromorphone. App. 3a. The document sets no timetable for the state's determination of availability of pentobarbital or standards for determining availability.

Midazolam and hydromorphone were used together for apparently the first and only time days ago in the January 16, 2014 execution of Dennis McGuire in Ohio. That execution has generated substantial media attention because McGuire "took

[1] In this document, citations to "Pet." are to the petition; citations to "Pet. App." are to the petition appendix; citations to "Stay" are to the application for a stay; and citations to "Stay App." refer to the stay appendix. Citations to "App." refer to the appendix submitted with this brief.

15 minutes to die," an "unusually long" period of time, and because the "new, untested cocktail of drugs" employed may have caused McGuire to "struggl[e], gasp[] loudly, snort[] and mak[e] choking noises for nearly 10 minutes" before falling silent and being declared dead. Rick Lyman, *Ohio Execution Using Untested Drug Cocktail Renews the Debate Over Lethal Injections*, N.Y. Times, Jan. 16, 2014, at A15.

The state's new protocol—adopted just nine days before petitioner's execution—thus does not specify whether the state will use pentobarbital from an unknown and almost certainly illegal source, or perhaps instead an untested combination of drugs—which it has not previously considered, and which appeared to produce prolonged suffering the only time it has ever been employed. The state's recent shift thus establishes the necessity for this Court's review, and for a stay of execution pending that review.

Specifically, Louisiana's shift vividly illustrates how last-minute modifications of execution protocols can deprive courts of the opportunity to review the state's plans for compliance with the Eighth Amendment. It proves that states are willing, even in the face of substantial evidence that their chosen protocols are untenable, to proceed with executions that may violate the Eighth Amendment. And it establishes that petitioner's due process claim is not moot because the state *still*—less than a week before the execution—has not disclosed how it intends to execute him. A robust due process right to notice of the actual protocol, sufficient to

guarantee an opportunity to be heard on the matter, is the only viable means to ensure that states to not exclude the federal courts from their essential role in confirming that executions comport with the Eighth Amendment.

Finally, this Court's decision yesterday to grant the state's application to vacate a stay of execution in Missouri, *see* No. 13A790, does not undermine petitioner's application because the two cases are not comparable. *See* Part III, *infra*.

I. The State Continues To Violate Petitioner's Due Process Rights.

Louisiana's sudden change of its execution protocol—after resolutely insisting until the day of petitioner's filing in this Court that it would only use pentobarbital—establishes the need to provide inmates with notice and an opportunity to be heard. In this case, the state has claimed for itself the right to alter the protocol until the last minute, all while keeping its protocol entirely secret from the condemned inmate and the federal courts. Consistent with its belief that it need not provide any information about the execution, the state has "disclosed" its protocol in name only: petitioner has no way of knowing what drugs will actually be used in the execution. The state has also violated its protocol by failing to procure execution drugs in a timely fashion, *see* Stay 16; it has fought or ignored petitioner's discovery requests (insisting it may provide responses the date *after* the execution), *see id*. 26, Stay App. 44a, 46a; and it has denied the existence of his due process rights. Now, and again consistent with its position on its right to secrecy, the state

has changed its protocol at the eleventh hour—with no assurances that it will not do so again.

The point bears added emphasis: As of today's date—one week before the execution—the state still has not explained how it intends to execute petitioner. So far as petitioner's counsel is aware after extensive consultations with counsel experienced in capital litigation, this is an unheard-of circumstance. Challenging the choice of drugs in an execution protocol requires tremendous resources, including obtaining expert opinions, and a court must have time to consider the claim. By disclosing a menu, as opposed to a protocol, the state has made the challenge substantially more difficult in its continuing effort to run out the clock on petitioner's challenge.

The state has also refused to respond to petitioner's petition for a writ of certiorari and application for a stay until Monday, February 3, potentially less than forty hours before it intends to execute petitioner, *see* App. 49a (specifying that executions in Louisiana occur between 6 and 9 p.m.). If certiorari and a stay are not granted, then the state may—or may not—disclose the relevant details closer to the execution date, but by that point it may be too late for any court to intervene. By delaying its response here, the state has again demonstrated its desire to deprive courts, including this one, of an adequate opportunity to evaluate its execution methods.

Moreover, the state's waffling demonstrates that with the execution only a week away, either the state is engaged in deliberate obstruction or it does not even know how it intends to execute petitioner. This has become the case that Deborah Denno described: "It's like going to your kitchen cupboard trying to look for something to prepare for your next meal and just looking for anything." Max Ehrenfreund, *Dennis McGuire Executed in Ohio with New Combination of Lethal Drugs*, Wash. Post, Jan. 16, 2014, *available at* http://www.washingtonpost.com/national/dennis-mcguire-executed-in-ohio-with-new-combination-of-lethal-drugs/2014/01/16/612e22a2-7ede-11e3-93c1-0e888170b723_story.html. Such a haphazard approach is utterly inconsistent with the gravity of the penalty the state seeks to impose.

In addition to refusing to disclose which method of execution it will use, Louisiana continues to conceal important facts about each possible method. In discovery, petitioner requested documents relating to the acquisition of the state's first-choice drug—pentobarbital. The source of the drug is critically important because if it is expired or obtained from a compounding pharmacy, then not only will it be unlawful, but it will not have been produced in a facility regulated by the Food and Drug Administration, and the efficacy of the drug will be an open question, to say the least. *See* App. 11a (Declaration of Dr. Larry Sasich, explaining that without knowledge of the compounding pharmacy and the results of lab tests on the drug, it is impossible to ascertain their efficacy); *id*. 14a (explaining that "[a]ny pharmacy compounded drugs, including pentobarbital sodium, because of

haphazard state and federal oversight is likely to be contaminated and not sterile and should not be administered for any purpose as there is a high likelihood of causing pain and suffering to the recipient"); App. 18a (Declaration of Dr. Mark Heath, explaining that unless it is thoroughly tested, compounded pentobarbital should not be used, in part because compounding pharmacies have a track record of errors); *see also* Chris McDaniel, *New Report Calls Into Question Quality Of Execution Drug*, News for St. Louis, Jan. 24, 2014, http://news.stlpublicradio.org/post/new-report-calls-question-quality-execution-drug (noting that lab results for compounded pentobarbital used in Missouri contained unknown solvents); Stay App. P (Affidavit of Dr. Larry Sasich, describing the lack of control in compounding pharmacies and the risks inherent in the use of compounded drugs). That is especially so if the pharmacy compounding the drug (in secret) knows that its intended use is not actually as an effective sedative, but instead a dose for lethal injection. The state had originally promised to deliver those documents by January 24, but after that deadline passed, the state reneged and instead stated that it would do so by February 6, the day after petitioner is executed. *See* Stay 26, Stay App. 44a, 46a. Thus, the state still has not provided petitioner with the information he needs for a court to assess an Eighth Amendment challenge to execution by pentobarbital. *See* App. 7a-8a (Declaration of Gary Clements, detailing information about pentobarbital requested in discovery that the state has not disclosed, including information about the source and purity

of the drugs, as well as information about how the drugs will be stored and administered); App. 11a, 21a (declarations of physicians explaining that without more information, it is difficult to assess the likely efficacy of the drugs).

The state's alternative protocol raises even more grave concerns. Indeed, in the only execution in which midazolam and hydromorphone were used, they resulted in visible prolonged suffering. *See, e.g.*, Lyman, *supra*. And that is no surprise. Dr. Mark Heath, an expert in the field, has testified that this combination of drugs "defies common sense, has no basis in prior human or animal clinical practice, and will foreseeably and inevitably result in regrettable and cruel spectacles." App. 19a. He further states that:

> [T]his combination of drugs would result in a slow, prolonged death, and that the prisoner was at risk for experiencing a gradual onset of intoxication with side effects of confusion, combativeness, disinhibited speech, delirium, anxiety, fear, euphoria, dysphoria, delusional ideation, hallucinations, sensory distortions, disorientation, nausea, and vomiting."

Id. According to Jonathan Groner, an expert in the field and a professor of clinical surgery at the Ohio State University College of Medicine, midazolam is not nearly as effective an anesthetic as sodium thiopental—indeed, it may not result in a loss of awareness. Molly Redden, *New Lethal Injections Could Cause Extreme Pain, Make Deaths "Drag On" for Hours*, Mother Jones, Nov. 13, 2013, *available at* http://www.motherjones.com/politics/2013/11/ohio-lethal-injection-cocktail-execution-drugs. Indeed, midazolam has been known to cause a "paradoxical reaction" in some patients whereby it does not, in fact, result in sedation, but

instead agitates the patient; the risk of such reactions increases if doses are either too low or too high, or are not administered properly. App. 11a. Moreover, Louisiana's protocol specifies that the drugs may be administered through intramuscular injection. App. 4a. Even when done properly, intramuscular injection typically results in much slower absorption of the drug—and therefore a prolonged death. App. 19a. But even more alarming in this case, the protocol—including the revised protocol—does not disclose that any member of its execution team has actually been trained to administer intramuscular injections. *See* App. 8a. Indeed, in disclosures made in the course of discovery, the state admitted that its last execution training was on January 17, 2014, ten days before it revised its protocol. And the original protocol refers only to intravenous injection. *See* App. 51a. There is accordingly a substantial prospect that the sedative will not have its intended effect, producing an unnecessary and unconstitutional degree of suffering.

The other drug in the revised protocol is hydromorphone. The side effects of an overdose of hydromorphone include "soft tissue collapse" which would cause an inmate to "feel as though he were choking to death." Redden, *supra*. Other possible side effects include "an extreme burning sensation, seizures, hallucination, panic attacks, vomiting, and muscle pain or spasms." *Id*. Experience validates these contentions. When midazolam and hydromorphone were used in the Ohio execution of Dennis McGuire, the execution was prolonged, and McGuire gasped, heaved, and convulsed throughout the process. *See, e.g.*, Erica Goode, *After a Prolonged*

Execution in Ohio, Questions Over 'Cruel and Unusual', N.Y. Times, Jan. 18, 2014, at A12; Lyman, *supra*; Ehrenfreund, *supra*. Thus, without knowing material facts regarding which drug the state plans to administer, and how it plans to administer it, petitioner's Eighth Amendment interest in a humane death, and his concomitant due process interest in knowing how he will be killed, remain significantly impaired.

The fact that Louisiana has revised only part of its protocol at the last minute gives rise to additional risks, because its alternate procedure is simply inconsistent with features of its existing protocol. The state does not appear to have put any substantial thought or research into its choice of drugs. *See* App. 6a-7a. Instead, as Dr. Heath explains, Louisiana appears to have simply copied Ohio's protocol verbatim, including that state's choice of dosages. App. 19a. But the state has not harmonized its changes with its existing procedures. For example, the revised protocol does not state whether intravenous or intramuscular injection should be used, does not state who should make that determination, and does not state how he or she should make it. *Id*. 20a. The protocol does not require that a member of the IV team be trained in inserting a catheter into the neck, even though the protocol permits that outcome. *Id*. And the protocol provides that if a stay is granted, medical staff should stabilize the inmate—but it does not provide for the necessary drugs and materials that would permit stabilization if the state uses midazolam and hydromorphone, which means that stabilization will be impossible.

Id. Finally, the protocol instructs the team to wait 30 minutes between injections of drugs—an extremely long time to permit an inmate to suffer if the drugs prove ineffective. *Id*. 21a. Taken together, these concerns—as well as those set forth above—establish that Louisiana's "lethal injection protocol represents a substantial risk of producing an inhumane and degrading execution and therefore should not be used to govern the conduct of a lethal injection procedure." *Id*.

Louisiana's revised protocol stands in stark contrast with that of Ohio—the state it purportedly seeks to emulate. In Ohio, the protocol similarly recognizes the prospect of an alternative drug, but mandates the final disclosure of the drug that the state will actually use fourteen days prior to the execution date. *See* App. 32a ("Notice of the Warden's determination concerning the execution drugs to be used for intravenous administration shall be provided to the prisoner."). Louisiana, on the other hand, has not committed to providing any notice at all. In Ohio, the protocol provides that the "Drug Administrator" must be qualified under Ohio law to administer both intravenous and intramuscular injections, *id*. 26a, and the "medical team" must comprise individuals who have that same qualification, as well as "at least one year experience as a certified medical assistant, phlebotomist, EMT, paramedic, or military corpsman." *id*. Louisiana's revised protocol, as noted, imposes no such requirement regarding the team's familiarity with intramuscular injection.

Louisiana's intransigence in discovery and its haphazard last-minute protocol revision prove that the only way to provide a meaningful check on violations of the Eighth Amendment is to ensure that inmates have a stand-alone claim to meaningful notice of the protocols that will actually be used to execute them. The inmates must know the material details of the protocol, and they must have sufficient time to make out an Eighth Amendment violation to a court. Otherwise, there is every reason to believe that far from being a humane method of execution, lethal injection will reproduce many of the horrors that it seeks to remedy. *See, e.g.*, Editorial Board, *Secrecy Behind Executions*, N.Y. Times, Jan. 30, 2014, at A26. Petitioner's execution should be stayed, and certiorari should be granted to establish that due process does not permit Louisiana to execute prisoners without first submitting its methods to judicial scrutiny.

II. The State's Shift In Position Establishes That Petitioner's Claim Is Not Moot.

Three judges dissenting from the denial of rehearing *en banc* in this case would have held that the state's appeal from the injunction requiring it to disclose the protocol it would use to execute petitioner was moot because before the panel issued its decision, the state disclosed that it intended to use pentobarbital to execute petitioner. *See* Pet. App. 25a-29a. In the petition for certiorari, petitioner demonstrated that such a view was erroneous because the state had not in fact disclosed the protocol that it would use to execute petitioner. There was moreover a significant prospect that the state would change the protocol because all lawfully

available supplies of pentobarbital had expired, and Louisiana would be unable to procure more, such that it would almost certainly have to execute him some other way. *See* Pet. 31-34; Stay 12-15a. Citing a long line of this Court's authorities, petitioner explained that partial compliance with the district court's order to disclose the protocol would not render the case moot, and that his need for information would persist until the state disclosed an authoritative protocol. *See* Pet. 31-34.

To the extent there were any remaining doubt, the state's shift in protocol proves that the case is not moot. The state's proposed alternative method of execution demonstrates the incompleteness and inaccuracy of its prior disclosure. But for several reasons, the revised protocol does not cure it. For the reasons stated in Part I, *supra*, the state has released something it labels a "protocol," but the district court's order remains unfulfilled: the state still has not disclosed how it actually intends to execute petitioner, and therefore has not complied with the district court's injunction. Moreover, to the extent the state has disclosed any useful information, it has omitted material facts that would permit petitioner to mount an Eighth Amendment challenge.

Additionally, the state's shift in position illustrates that this case falls within the exceptions to mootness for voluntary cessation, or for conduct that is capable of repetition, yet evading review. The state's decision to specify midazolam and hydromorphone is a bolt from the blue. *See* App. 6a-7a. There is no indication in

any of the discovery furnished by the state that it was even contemplating using these drugs prior to three days ago. *Id*. Indeed, the state's attorneys repeatedly stated that the execution would use pentobarbital. *Id*. The decision to add an alternative protocol was apparently made at the last minute, without substantial deliberation, because the state is only now realizing what petitioner has been saying for months: that pentobarbital is unavailable. But last-minute changes have a way of being revisited. Thus, there is every reason to believe that the state may revise its protocol again—for example once it realizes that its training procedures are inadequate to administer intramuscular injections, or that the remainder of its procedures are incompatible with its new choice of drugs, or if the district court, recognizing the high likelihood that the use of midazolam and hydromorphone violated the Eighth Amendment in Ohio, enjoins the use of those drugs.

III. This Court's Vacatur Of The Stay In *Lombardi v. Smulls* Does Not Undermine Petitioner's Position.

Yesterday, this Court granted the state's application to vacate the stay of execution imposed by the Eighth Circuit in *Lombardi v. Smulls*, No. 13A790. That decision does not undermine petitioner's case for a stay or for certiorari. In *Smulls*, the inmate knew that he would be executed using pentobarbital. He also knew most other details about his execution. He sought disclosure of the identity of the prescribing physician, the compounding pharmacy, and the state's testing lab. *See* Herbert Smulls' Application for Stay of Execution 2, *Zink v. Lombardi*, No. 13A784.

While the case was pending before the Eleventh Circuit, the state disclosed the identity of both the compounding pharmacy and the testing lab. *Id*. at 3. The Eighth Circuit nevertheless issued a writ of mandamus, holding that the inmate was not entitled to disclosure because his underlying Eighth Amendment claim could not succeed. That court then issued a stay pending this Court's resolution of a petition for a writ of certiorari.[2]

Lombardi is fundamentally different from this case. First and foremost, the petition for a writ of certiorari in *Lombardi* did not raise a due process issue—instead, it argued only that the Eighth Circuit had misapplied the pleading standards in an Eighth Amendment claim, had decided a case that was moot, and had improperly addressed the merits of the claim.[3] This Court therefore had no opportunity to consider the Question Presented by this case, which is whether the Fourteenth Amendment requires the state to disclose its execution protocol.

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[2] This Court also denied a separate petition for a writ of certiorari and application for stay in that case, which raised the issue of a *Batson* challenge to the jury. *See* Nos. 13-8432, 13A783. Those issues, of course, are even farther afield from this case, and therefore do not affect the consideration of this petition and stay application.

[3] The three questions presented in *Lonbardi*, verbatim, are:

> I. Whether *Baze v. Rees* requires a plaintiff alleging an Eighth Amendment violation predicated on one method of execution to allege an alternative to the challenged method in order to avoid dismissal?
>
> II. Whether the Court of Appeals lost jurisdiction over the mandamus action when the identities of the pharmacy and laboratory became publicly known?
>
> III. Whether the Court of Appeals wrongly encroached on the merits of a nonfinal order under the guise of resolving a petition for extraordinary relief?

The cases are also factually distinguishable. Unlike the inmate in *Lombardi*, petitioner does not know how he will be executed—including which drug will be used. In contrast with the state's near-complete disclosure in *Lombardi*, Louisiana has refused to disclose virtually every material fact. And unlike the protocol at issue in *Lombardi*, Louisiana's new protocol calls for the possible use of an untested combination of drugs by a team that has not been trained to administer them—and therefore raises grave Eighth Amendment concerns.

CONCLUSION

The stay and writ of certiorari should be granted.

Respectfully submitted,

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