No. 13-892

IN THE

Supreme Court of the United States

CHRISTOPHER SEPULVADO,

Petitioner,

v.

BOBBY JINDAL, ET AL.

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITIONER'S FEBRUARY 24 SUPPLEMENTAL BRIEF

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PETITIONER'S SUPPLEMENTAL BRIEF

Pursuant to this Court's Rule 15.8, petitioner respectfully submits this Supplemental Brief to advise the Court of developments that have taken place since he filed his Petition for a Writ of Certiorari. This Supplemental Brief is provided only for the convenience of the Court. Petitioner previously submitted two Supplemental Briefs in support of his parallel Application for a Stay of Execution (No. 13A778) ("the Application Supplements"). When respondents subsequently acquiesced in a temporary restraining order forestalling the execution, petitioner withdrew that application. Petitioner's counsel then discussed with this Court's Clerk's Office how best to advise the Court efficiently of the relevant intervening developments. This Supplemental Brief consolidates and supersedes the information in the Application Supplements in the form of an update to the Petition for a Writ of Certiorari.[1]

I. After The Petition Was Filed, Respondents Substantially Altered The Execution Protocol.

Petitioner was convicted of capital murder in Louisiana and sentenced to death by lethal injection. After attempting – unsuccessfully, and for multiple

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[1] We cite to the Stay Application as "Stay" and its appendix as "Stay App." Citations to "Jan. 30 Supp." refer to petitioner's first supplemental brief, and "Jan. 30 Supp. App." refer to its appendix; citations to "Feb. 3 Supp." refer to the second supplemental brief, and "Feb. 3 Supp. App." refer to its appendix. Citations to "App." refer to the appendix to this brief.

years – to obtain information about how the state planned to execute him through administrative channels and statutory information requests, petitioner intervened in this lawsuit. *See* Stay App. 8a-10a, 12a-14a, 16a, 23a, 30a-33a (detailing petitioner's efforts to obtain the protocol, and the state's refusal to disclose it). This litigation includes two sets of claims: petitioner's due process claim to know the protocol that Louisiana will use to execute him, which the Fifth Circuit denied on the state's interlocutory appeal, and which forms the basis for the petition; and petitioner's Eighth Amendment challenges to the state's current proposed method of execution, which remain pending in the district court.

On January 27, 2014, petitioner filed a Petition for a Writ of Certiorari seeking review of the Fifth Circuit's judgment that condemned inmates have no due process right to know the protocols by which they will be executed. Petitioner argued that the ruling below permitted the state to alter its protocol at the last minute, and to do so in a way that would critically undermine the courts' ability to determine whether the protocol complies with the Eighth Amendment. Petitioner simultaneously filed an Application for a Stay of Execution, then scheduled for February 5, 2014. Louisiana did not immediately respond to this Court's requests for clarification as to when it would respond – ultimately, it informed the Court that it would do so on February 3, just two days before the execution date. Jan. 30 Supp. 5.

At the time the petition was filed, Louisiana had stated its intention to execute petitioner using a lethal

dose of a single drug, pentobarbital. However, it was public knowledge that the sole manufacturer of pentobarbital had stopped selling it in the United States because it opposed the use of the drug in lethal injections. *See* Stay App. 2a, 5a. It was also well known that all available supplies of pentobarbital in the United States had expired, *id*. 35a, and that expired pentobarbital and pentobarbital produced in a compounding pharmacy[2] would be illegal to use in Louisiana, and would raise substantial Eighth Amendment concerns because the efficacy of the drugs could not be assured. *See* Stay App. 74a, 78a, 81a (affidavit of Dr. Larry Sasich, explaining that compounded pentobarbital was likely to be flawed, including having an incorrect pH level, which could cause an intense burning sensation, incorrect potency or purity, which could impair drug efficacy, and a heightened risk of contamination, with unpredictable effects).

Petitioner undertook additional inquiries, including liaising with the Louisiana state board of pharmacy, which determined after investigation that the Louisiana State Penitentiary pharmacy system had no pentobarbital in stock. *Id*. 37a. In response to discovery requests in the Eighth Amendment litigation, the state claimed, as late as January 24, that it was "in the process of procuring at least 15

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[2] A compounding pharmacy is a pharmacy that manufactures small batches of drugs. Compounding pharmacies are not overseen by the Food and Drug Administration.

grams of pentobarbital," but the state refused to disclose from where, and it made no representation that it could legally do so. *Id*. 49a. By failing to acquire pentobarbital by that date, the state had in fact already violated its protocol, which required the state, thirty days before the execution date, to "confirm at least 3 complete sets of the identified execution drugs are in stock," and to "maintain" those doses "at all times." Jan. 30 Supp. App. 57a. Based on these facts, petitioner believed that the state was unlikely to obtain pentobarbital, and therefore likely to alter its execution protocol at the last minute, hastily adopting an unknown protocol that would imperil his Eighth Amendment rights. For that reason and others, petitioner argued that he had a due process right to know of any change in the execution protocol immediately – so that he could prepare, and the courts could adjudicate, an Eighth Amendment challenge to the new protocol. *See* Pet. 25-26.

The same day that petitioner filed his petition and application with this Court, his prediction came true as Louisiana announced a change to its execution protocol. *See* Jan. 30 Supp. App. 2a. In its new protocol, the state declined to disclose how it would execute petitioner. Instead, it reiterated its intention to use pentobarbital, but indicated that if pentobarbital was unavailable, it could instead use a combination of midazolam and hydromorphone – drugs that were used in a recent and infamous execution in Ohio. *Id*. 3a. The state did not, however, postpone the execution, which remained scheduled for February 5.

The state's sudden shift validated petitioner's concern that the state was willing to haphazardly adopt a new protocol at the eleventh hour. As of January 27th, the state had not committed to a single method of execution at all – it had instead disclosed a menu of choices, and continued to represent that pentobarbital was its preferred option. *See* Jan. 30 Supp. 4-6. The state's waffling made it incredibly difficult for petitioner to prepare an Eighth Amendment challenge to the protocol because he had to litigate the constitutionality of two distinct scenarios: the use of illegal pentobarbital, or the use of midazolam and hydromorphone of unknown origin. See Feb. 3 Supp. App. 57a (declaration of experienced capital attorney David Rudovsky stating "that no lawyer, no matter how talented, could thoroughly, ethically and competently litigate the Eighth-Amendment issue under the time-constraints in Mr. Sepulvado's case"). Moreover, the state provided no assurances that it would not again change the protocol prior to February 5. Indeed, it had delayed answering several important discovery requests, and claimed that it was not obligated to do so until the day after the execution. Stay App. 44a, 46a. Petitioner raised these issues in his First Supplemental Brief, as well as in the district court in the form of a motion to compel discovery responses and a motion for discovery sanctions.

On the evening of Saturday, February 1, only four days before the scheduled execution date, and facing the threat of imminent sanctions from the district court, the state for the first time disclosed that it "ha[d] been unable to procure pentobarbital." Feb. 3

Supp. App. 5a; *id*. 9a. Additionally, documents released by the state established that it had only adopted the January 27 changes to the protocol after its efforts to procure pentobarbital had already failed, proving that its January 27 statement that pentobarbital remained the first option was false. *See id.* 5a. Unable to implement the protocol that it had for months insisted was correct, the state chose instead to copy Ohio's protocol, and it did so without conducting an independent analysis of whether the protocol was humane, or whether the procedures followed in Ohio could be implemented in Louisiana on a compressed timetable. *See* Feb. 3 Supp. 2.

Petitioner filed a Second Supplemental Brief on February 3, 2014, arguing – among other things – that this new protocol buttresses petitioner's right to know the method of execution in advance because it raises substantial Eighth Amendment questions. Midazolam and hydromorphone have been used only once, in the execution of Dennis McGuire, where they provoked substantial criticism because McGuire "took 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; *see also* Erica Goode, *After a Prolonged Execution in Ohio, Questions Over 'Cruel and Unusual'*, N.Y. Times, Jan. 18, 2014, at A12.

Dr. Jonathan Groner, a professor of clinical surgery at the Ohio State University College of Medicine, explained in press reports that midazolam may not prove to be an effective sedative, and that midazolam and hydromorphone together may have a substantial probability of causing the subject of the execution to experience a prolonged, painful feeling of choking to death. *See* 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.

Petitioner's medical expert, Dr. Mark Heath, a board-certified anesthesiologist practicing at Columbia University, declared that the use of midazolam and hydromorphone "defies common sense, has no basis in prior human or animal clinical practice, and will foreseeably and inevitably result in regrettable and cruel spectacles" because it is likely to "result in a slow, prolonged death," including severely painful drug side effects. Jan. 30 Supp. App. 19a.

Ohio itself has acknowledged that this combination of drugs raises constitutional concerns. After McGuire's execution, Governor Kasich granted a reprieve to inmate Gregory Lott, delaying his execution until November 19, 2014 so that a full inquiry into the efficacy and legality of the protocol can be completed. *See* Andrew Welsh-Huggins, *Ohio Governor Delays Inmate's Upcoming Execution*, Associated Press, Feb. 7, 2014. Other states, including Virginia, have stated that they have "no plans to move to the two-drug protocol used in Ohio." *See* Rachel Weiner, *Virginia Approves New Lethal Injection Drug*,

Wash. Post, Feb. 22, 2014, *available* at http://www.washingtonpost.com/local/virginia-politics/virginia-approves-new-lethal-injection-drug/2014/02/21/c93d68b0-9af6-11e3-975d-107dfef7b668_story.html.

The Ohio protocol is inherently questionable because it employs an unproven combination of drugs. But Louisiana's proposal to implement that protocol raises even greater concerns because although the state had copied and pasted Ohio's lethal injection procedures into its own protocol, it had not taken steps to ensure that the execution would be successful. Indeed, documents disclosed by the state showed that it adopted the Ohio protocol hastily – approximately one and a half hours after first receiving a copy of it. *See* Feb. 3 Supp. 2; Feb. 3 Supp. App. 63a, 2a (documents indicating receipt and adoption of protocol); Jan. 30 Supp. App. 6a-7a (Declaration of attorney Gary Clements explaining that Louisiana revised its protocol having never disclosed any document or other information indicating that it was considering a revision).

Thus, Dr. Heath identified several additional substantial problems with Louisiana's adaptation of Ohio's procedure. First, the revised protocol permitted intramuscular injection as an alternative to intravenous injection, but did not specify when that alternative should be used. Louisiana also had not ensured that any of its personnel were trained in that procedure, heightening the risk that the injection would not be effective. Jan. 30 Supp. App. 8a, 19a-20a. Second, the dosages that Louisiana planned to use were copied from Ohio, without any medical

consultation to confirm that they would be appropriate in this case. Feb. 3 Supp. App. 52a-53a. In fact, Louisiana had purchased a far more diluted solution of midazolam than the one Ohio had used, which meant that if Louisiana had simply used the same volume of solution as Ohio had, the injection almost certainly would not have been effective; that discrepancy appears to have been due to "sloppy, disarrayed, and chaotic last-minute planning." *Id*. 53a. Third, the protocol included provisions to stabilize the inmate if the execution was stayed at the last moment, but Louisiana had not modified its protocol to ensure that it would have the necessary drugs and equipment to stabilize petitioner from a dose of midazolam and hydromorphone. Jan. 30 Supp. App. 20a-21a. Fourth, the protocol called for the team administering the injections to wait thirty minutes before administering a second dose of the drugs if the first dose did not result in death; thirty minutes, however, is an extremely long and inhumane time to prolong an execution. *Id*. 21a.

Additionally, Louisiana's adaptation of Ohio's protocol removed an important procedural safeguard: Ohio's protocol requires the warden to provide a condemned inmate with at least fourteen days' notice of which drugs will be used, *id*. 32a. Louisiana pointedly omitted that notice provision from its version of the protocol, signaling the state's ongoing reluctance to disclose even basic details about its plan to condemned inmates, all in an effort to circumvent judicial review.

II. Louisiana Agreed To Postpone The Execution, But Continues To Insist On Secrecy.

On February 3, immediately following petitioner's submission of his second Supplemental Brief, the parties were due to meet for a status conference in the district court regarding the pending discovery motions. Prior to the conference, respondents contacted petitioner's counsel, suggesting the entry of a temporary restraining order forbidding the execution, which the district court entered until May 4, 2014. *See* App. 2a. The order also scheduled a trial on that motion beginning on April 7, not to exceed two weeks in duration. *Id*. On February 5, petitioner submitted a letter to this Court withdrawing his Application for a Stay of Execution.

Discovery in connection with that trial is ongoing. As it proceeds, the state has sought yet another protective order permitting it to conceal the identity of the drug manufacturers that supplied it with midazolam and hydromorphone. The state has argued that public disclosure of the manufacturers' identities would imperil their business and potentially make it harder for the state to acquire drugs. Petitioner has opposed the protective order, arguing that the purported harm to the manufacturer is speculative, and that in any event, the state does not have a right to conduct executions from behind a veil of secrecy.

This most recent discovery dispute, viewed in the light of previous similar disputes, demonstrates that civil discovery is an inadequate substitute for due process rights. The state and the attorneys

representing it have engaged in a pattern of discovery abuse – both in this case, in which they failed to turn over critical information and improperly asserted privilege, *see Hoffman v. Jindal*, No. 12-cv-00796-JJB-SCR, ECF No. 102 (M.D. La. Jan. 13, 2014), and in another recent case for the spoliation of evidence, *see Ball v. LeBlanc*, No. 13-cv-00368-BAJ-SCR, 2013 WL 6705154, at *1 (M.D. La. Dec. 19, 2013) (order to show cause why sanctions should not be imposed on respondents' counsel for their "alarming lack of candor . . . throughout this litigation"). Petitioner has had to fight – tooth and nail – for every disclosure, and throughout the process, the state has dragged its feet, offered misleading disclosures, and delayed revealing the truth until the last possible moment. These disputes have drained resources and focus away from the merits of the case, and have imperiled petitioner's constitutional rights time and again. Throughout the process, Louisiana has demonstrated that it is institutionally committed to a policy of secrecy, even as the disclosures it has made prove that its policies have not been well-conceived and implemented.

III. There Is An Ongoing Risk That The State Will Again Change Its Protocol Without Providing Constitutionally Adequate Notice.

The temporary restraining order ameliorates some of the urgency that previously characterized these proceedings, but it does not diminish the importance of the Question Presented, or the need for this Court's review. On the contrary, the developments in this case

after the petition was filed only highlight the need for certiorari.

Critically, the Question Presented is not moot. The fact that the state has hastily changed its protocol once makes it likely that it will change again. That could happen if, for example, the district court determines that the new protocol violates the Eighth Amendment, if the state's drug manufacturers succumb to public pressure not to supply the relevant drugs, or if the state decides that an alternate protocol might be less controversial. As long as the Fifth Circuit's ruling stands, the state is free to alter the protocol at any time, with no due process obligation to even disclose the changes to petitioner.

As the record in this case proves, hasty changes are fraught with constitutional peril. Because doctors are not permitted to assist states in executions, many states, including Louisiana, are flying blind: designing execution protocols with little to no medical supervision. Under these conditions, the risk of error is high – drug combinations may not work, the quality of drugs is not assured, procedures are unlikely to be clear, and personnel may not be trained properly. Deborah Denno has described the process: "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. A due process right guaranteeing a condemned inmate timely notice – *i.e.*, notice that would permit him to prepare, and the court to consider, an Eighth Amendment challenge to the protocol – is the only way to guarantee that the state respects the constitution.

In sum, the state's conduct since the petition was filed has only validated petitioner's contentions, and illustrated the need for this Court's intervention.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 24, 2014

APPENDIX

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

JESSIE HOFFMAN

CIVIL ACTION

VERSUS

NO. 12-796-JJB

BOBBY JINDAL, ET AL

ORDER

Considering the *Motion for Stay of Execution, a Temporary Restraining Order, a Preliminary Injunction, and an Order Under the All Writs Act Staying His Execution* recently filed on behalf of Plaintiff, CHRISTOPHER SEPULVADO; that Plaintiff's execution is currently scheduled for Wednesday, February 5, 2014, as scheduled per the *Amended Warrant of Execution in Capital Case* signed by Hon. Robert E. Burgess, Judge of the 42nd Judicial District Court of Louisiana on January 6, 2014; and that counsel for Defendants, BURL CAIN, Warden, Louisiana State Penitentiary, JAMES LEBLANC, Secretary, Louisiana Department of Public Safety and Corrections ("DOC"), and ANGELIA NORWOOD, Warden, Death Row, have conferred with Plaintiff's counsel and have agreed and consented to the issuance of a Temporary Restraining Order in this matter lasting for a period of 90 days from today's date;

IT IS ORDERED that the Temporary Restraining Order be issued in this matter, thereby restraining, enjoining, and prohibiting Defendants, their officers, agents, employees, servants, attorneys,

and all persons in active concert or participation with them, from executing Plaintiff, CHRISTOPHER SEPULVADO, per the January 6, 2014 *Amended Warrant of Execution in Capital Case*, for a period of 90 days or through May 4, 2014, which will not require renewal by either party until such date; or until such time as this Court shall rule on the merits of Plaintiff's Motion for Preliminary Injunction, if it should be sooner than that date.

IT IS FURTHER ORDERED that the trial of Plaintiff's, CHRISTOPHER SEPULVADO, Motion for Preliminary Injunction shall begin on April 7 and shall last no more than 2 weeks.

IT IS FURTHER ORDERED that this Order is without prejudice to the rights of any party to seek from the Court the modification of this Order.

Signed in Baton Rouge, Louisiana, on February 3, 2014.

/s/ James J. Brady
Judge James J. Brady

United States District Court
Middle District of Louisiana

Send notice to the following:

Hon. Robert E. Burgess, Judge of the 42nd JDC

Clerk of Court for the Louisiana Supreme Court

Clerk of Court for the United States Court of Appeals for the Fifth Circuit

Clerk of Court for the United States Supreme Court