

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 MARCH 27
SUPPLEMENTAL BRIEF**

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PETITIONER'S SUPPLEMENTAL BRIEF

Pursuant to this Court's Rule 15.8, petitioner respectfully submits this Supplemental Brief regarding recent developments in capital litigation related to this case.

This Court recently denied two applications for stays of executions from Missouri. *See Ferguson v. Lombardi*, No. 13A965, --- S. Ct. ----, 2014 WL 1224221 (Mar. 25, 2014) (mem.); *Taylor v. Lombardi*, No. 13A867, 134 S. Ct. 1375 (Feb. 25, 2014) (mem.). The petitions underlying these applications nominally presented the same question as this case, but in fact, this case presents a far more extreme set of circumstances that justify this Court's review in a far superior procedural posture. *See* Cert. Reply 3 (contrasting this case with *Taylor*).

Missouri has carried out five consecutive executions using a drug that was disclosed well in advance: compounded pentobarbital. *See Missouri Readies for 5th Execution in 5 Months*, KMBC.com, <http://www.kmbc.com/news/missouri-readies-for-5th-execution-in-5-months/25152488> (Mar. 25, 2014). The judicial challenges from Missouri accordingly all relate to the relatively narrow question of the inmates' right to know the identity of the compounding pharmacy and the laboratory that tested the drug.

While that issue is important because compounding pharmacies are scantily regulated and therefore potentially high-risk sources of drugs, the issue squarely presented by the petition in this case is far graver: Louisiana has repeatedly changed its execution protocol and refuses to identify the drug or drug combination that it will use in the execution.

Instead, the state has revised its protocol to include two options—pentobarbital, or midazolam and hydromorphone—and the Fifth Circuit has empowered the state to change the protocol yet again without notifying petitioner. Even if the state specifies the drug fourteen days before the execution—as is its newest interim plan, subject of course to its right under the Fifth Circuit’s decision to make still further changes and not disclose them—the state does not even *dispute* that such a brief period is obviously nowhere near enough time to permit petitioner’s counsel to develop and the district court to adjudicate a claim under the Eighth Amendment.

Moreover, while Missouri has been relatively consistent in the implementation of its protocol, Louisiana has been anything but. Louisiana’s protocol has repeatedly shifted—hastily and haphazardly, in ways that transparently demonstrate that the state has not given its changes thorough consideration. The state has also consistently obfuscated the truth about its intentions and insisted on its right to secrecy, even as it has embraced a highly controversial protocol that raises grave constitutional concerns. Indeed, these concerns make it highly likely that the state will continue to modify its protocol. And even if it does not, the ambiguities inherent in the protocol itself, and the state’s track record of violating disclosure requirements, prove that due process requires more than Louisiana is willing to provide.

The upshot is that this Court’s denials of stay applications from Missouri do not support a denial of certiorari here. Moreover, precisely because of the

extreme nature of Louisiana's refusal to disclose information regarding the manner of petitioner's execution, this Court's review does not threaten to undermine the orderly administration of the death penalty. The Court need not on the basis of its review in this case grant a stay of execution with respect to cases merely alleging that the inmate has been deprived of the details regarding the source of the execution drug. Petitioner's claim targets Louisiana's wholesale disregard for transparency in capital punishment. This case accordingly contrasts starkly with *Baze v. Rees*, 553 U.S. 35 (2008), which brought executions to a halt because it involved the legality of almost every state's protocol. Moreover, to avoid any due process claim, a state need only disclose its protocol in a timely fashion, so as to permit the federal courts to fulfill their obligation to ensure that the state's procedures comport with the Eighth Amendment.

The ease with which a state can satisfy due process does not, however, mean that the question presented is unimportant. In fact, debate over this issue continues to rage as states, inspired by the Fifth Circuit's ruling, are shrouding new and controversial execution protocols in secrecy. Oklahoma provides a telling example.

Like Louisiana, Oklahoma revised its protocol after it was unable to procure pentobarbital for scheduled executions. See Bailey Elise McBride, *Death Penalty Drug Shortage: Oklahoma Resets Executions Amid Drug Search*, Christian Science Monitor, Mar. 18, 2014, <http://www.csmonitor.com/USA/Latest-News->

Wires/2014/0318/Death-penalty-drug-shortage-Oklahoma-resets-executions-amid-drug-search. Like Louisiana, Oklahoma reacted by adopting a protocol comprising a menu of options, instead of a single clear procedure. See Bailey Elise McBride, *Oklahoma Adds Options to Execution Protocol*, ABC News, Mar. 25, 2014, <http://abcnews.go.com/US/wireStory/oklahoma-adds-options-execution-protocol-23042825?singlePage=true>. In addition to a single dose of pentobarbital, or a dose of midazolam and hydromorphone—the two options in the Louisiana protocol—Oklahoma has specified three additional drug combinations, one of which has never been used before. *Id.* Simultaneously, like Louisiana, the state has taken the position that it is under no obligation to disclose the drug combinations, or critical details about the drugs, to condemned inmates or even to the courts. *See id.*

There is every reason to believe that if the Fifth Circuit's holding is permitted to stand, more states will follow Louisiana and Oklahoma's lead in taking the radical position that the Constitution permits them to overhaul their execution protocols at the last second, without any meaningful notice to condemned inmates—even if, as in Louisiana and Oklahoma, those changes to the protocol involve the use of dangerous and untested drug combinations.

Oklahoma's recent experience also highlights the ongoing judicial disagreement about this issue. On March 26, 2014, in a ruling from the bench, a state district court in Oklahoma County held that Oklahoma's execution secrecy law violates the state

constitution's guarantee of access to the courts. *See* Katie Fretland, *Oklahoma Law Allowing Execution Drug Secrecy Ruled Unconstitutional*, The Guardian, Mar. 26, 2014, <http://www.theguardian.com/world/2014/mar/26/oklahoma-execution-drug-secrecy-unconstitutional>. This ongoing litigation demonstrates that until this Court resolves the question presented, inmates, states, and courts will all be forced to expend substantial resources simply to define the basic contours of due process in this area.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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