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 REPLY BRIEF

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PETITIONER'S REPLY BRIEF

The petition for certiorari squarely presents the most significant question in capital litigation in the United States today. Many states that impose the death penalty are making substantial, diverse changes to their lethal injection protocols – often without medical oversight – and condemned inmates are challenging these protocols under the Eighth Amendment. Numerous states have impeded the federal courts' ability to decide those claims by refusing to disclose new protocols in advance of executions. The result is a torrent of litigation over whether and to what extent condemned inmates have a Fourteenth Amendment due process right to know the execution protocol in advance, so that they may bring – and the courts may decide – any appropriate challenge under the Eighth Amendment.[1]

This case is an ideal vehicle to decide that frequently recurring question. Most other cases in which the issue arises are substantively flawed and procedurally fraught. Regularly, the inmate's challenge alleges that although the state has disclosed most information about the execution protocol, it has

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[1] These developments have also generated substantial media scrutiny. *See, e.g.*, Adam Liptak, *Deciding if Death Row Inmates Get to Know How They'll Be Killed*, N.Y. Times, Mar. 10, 2014, http://www.nytimes.com/2014/03/11/us/deciding-if-death-row-inmates-get-to-know-how-theyll-be-killed.html; Gregg Zoroya, *Death Penalty in U.S. Spurs Wild West Scramble for Drugs*, USA Today, Mar. 9, 2014, http://www.usatoday.com/story/news/nation/2014/03/09/executions-lethal-injection-drugs-prisons-death-penalty/5866947/.

withheld some detail such as the name of the compounding pharmacy that will provide the drugs. Further, the dispute often reaches this Court literally on the eve of the execution with undeveloped briefing, raising the specter of this Court entering a stay that creates an unwarranted interference with the state's right to carry out the sentence of death.

Here, the scope of petitioner's due process right to know the manner by which the state will execute him is presented starkly, in a procedural posture that permits this Court to give the issue measured consideration. Louisiana vigorously fought to secure the Fifth Circuit's categorical ruling that the Constitution permits it to withhold its execution protocol. At the state's urging, the district court has now entered an uncontested stay of execution pending a ruling on petitioner's preliminary injunction motion in several months, no doubt followed by further appeals. In the interim, the case presents the perfect opportunity for this Court to resolve this raging national controversy.

Review is particularly warranted because Louisiana's position is more extreme than that of any other state. No other state has done what Louisiana did here: claim for months an intention to implement an untenable protocol, and then, four days before the execution date, adopt a drug combination that raises grave constitutional concerns, without any serious effort to ensure that its staff is properly trained to administer the new protocol – all without any guarantee or assurance that it will not modify the protocol again or even disclose when a change is made.

This case accordingly contrasts with the application for a stay in *Taylor v. Lombardi*, No. 13A867, --- S. Ct. ----, 2014 WL 714014 (Feb. 25, 2014) (mem.), which the Court denied over three dissenting votes. In *Taylor*, the state disclosed the drugs it would use, but withheld the identity of the compounding pharmacy. Here, Louisiana has taken the far more dramatic position – vastly more likely to implicate petitioner's Eighth Amendment interests – that it can refuse to disclose its entire protocol, including the drug combination itself.

Put another way, if the Court is ever going to decide the question presented – rather than permitting it forever to occupy the resources of the lower courts, the states, and counsel for condemned inmates – this is the case and time to do so. Because the state's arguments for denying review lack merit, certiorari should be granted.

1. The petition and supplemental brief demonstrated that this case is an ideal vehicle to decide the question presented because Louisiana refuses to disclose how it will execute petitioner.[2] In response, the state contends:

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[2] Citations to "Supp. Br." refer to petitioner's supplemental brief filed February 24, 2014. Citations to "Stay" refer to petitioner's now-withdrawn application for a stay of execution. Citations to "Stay App." refer to the appendix to that application. Citations to "Feb. 3 Supp. App." refer to the appendix to the supplemental brief filed February 3, 2014.

> Petitioner's suggestion to this Court that Louisiana has declined to specify what drug it is using is blatantly false. On page 2 of his supplemental brief, Petitioner admits that Louisiana will either execute him with pentobarbital or, alternatively, a combination of midazolam and hydromorphone. Thus, he knows what drugs will be used to execute him.

BIO 6. In fact, there is nothing "blatantly false" about petitioner's submissions, which "admit[]" no such thing. Nor is petitioner's allegation a "red herring" intended to prevent the state "from carrying out the sentence of death." *Id.*

Petitioner does not know what drugs the state will use to execute him; that is the point of the petition and it was the point of the state's appeal to the Fifth Circuit. The state is referring to the fact that, on the eve of the previously scheduled execution, it disclosed under threat of sanctions a just-adopted protocol proposing to execute petitioner using one of two options, without saying which. The state's reliance on that disclosure suffers from two independent flaws.

First, the state has repeatedly changed its execution protocol in the past and claims the right to change it again at the last minute. The last time the state changed its protocol, on January 27, Louisiana requested and received from Ohio a fax of its protocol, which Ohio had used for the first time in a deeply controversial execution in which the inmate gasped for breath for several minutes. Supp. Br. 6; Feb. 3 Supp. App. 63a, 2a. A mere hour and a half later, without any study, Louisiana integrated Ohio's choice of drugs

into its own protocol (except that it deleted Ohio's requirement that the drug choice be disclosed at least two weeks before execution). Supp. Br. 8-9.

By February 1, it had become clear that, of the two options it had disclosed, the state intended to use Ohio's two-drug combination because the state did not then have access to pentobarbital. Supp. Br. 5-6; Feb. 3 Supp. App. 5a, 9a. But there is every likelihood that the state has continued to seek pentobarbital – especially since the two-drug alternative is fraught with constitutional peril. Thus, the state's intention may in fact be to ultimately use pentobarbital – which may be expired or compounded by an unregulated pharmacy. There is no way for the courts to know. And as the brief in opposition illustrates, Louisiana is not telling.

If past is prologue, still more change is in the air. Indeed, Louisiana just advised the district court that "the execution protocol is being revised" and it "could not give a definite date by which the final revision will be completed." Status Conf. Report, *Hoffman v. Jindal*, No. 12-796-JJB-SCR, Doc. No. 144, at 1 (M.D. La. Mar. 6, 2014). Prior to this, the state's consistent position has been that it had no obligation to disclose substantial information about its execution protocol through civil discovery until *after* it executed petitioner. Feb. 3 Supp. App. 2a (state's e-mail indicating its position that it was not obligated to disclose the protocol until the end of the "applicable delay," *i.e.*, the day after execution); *see also* Pet. App. 19a (Louisiana "concedes that it has not officially disclosed what the existing protocol is and it refuses to

do so until formal discovery procedures force it to"). And of course, the Fifth Circuit held that the state has no due process obligation to disclose its revised protocol when it is adopted. Petitioner and the district court truly are in the dark about what the state might do next.

Second, even if the state were not in the midst of changing its protocol yet again, its disclosure that it will use either of two distinct methods of execution – without disclosing which – does not satisfy due process. Under *Baze v. Rees*, 553 U.S. 35, 52 (2008) (plurality opinion), the question is not whether lethal injection violates the Eighth Amendment in the abstract, but whether the particular protocol produces a "substantial risk of serious harm." A federal court cannot be expected to decide that question without knowing which protocol the state actually intends to use.

The state's secrecy also puts the inmate's counsel to the unnecessary and unreasonable burden of investing the time and resources to prepare two distinct Eighth Amendment challenges, only one of which is actually relevant. Feb. 3. Supp. App. 56a-57a (declaration of capital litigator David Rudovsky explaining the difficulties inherent in preparing an Eighth Amendment challenge to "a novel combination of drugs" and 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"). And of course, the state's position is not limited by any principle: if it may disclose two alternative methods of execution and

choose one at the last moment, it can just as easily disclose five – thus effectively disclosing nothing at all.

2. The petition demonstrated that certiorari is warranted because the question presented is the subject of heated disagreement between judges in the lower courts. Three judges dissented from the denial of rehearing en banc in this case, Pet. App. 22a; seven dissented from the denial of rehearing en banc in the Ninth Circuit, *see Beaty v. Brewer*, 649 F.3d 1071, 1072 (9th Cir. 2011); three dissented from rehearing en banc in the Eighth Circuit, *Zink v. Bowersox*, No. 14-1388 (8th Cir. Feb. 25, 2014); and district courts have divided as well, *see* Pet. 11-12 (collecting cases). In many cases, "states are delaying executions until they have a better understanding of what chemicals work best," and litigation has been stayed pending the outcome of that process. Zoroya, *supra*. The federal government is likewise revising its protocol. *See* Status Report, *Roane v. Gonzales*, No. 05-cv-2337-RWR-DAR, Doc. No. 331 (D.D.C. Mar. 4, 2014). That significant division in judicial opinion and governmental practice marks this issue as unusually important and difficult, warranting this Court's intervention.

According to the state, "[b]ecause the decision below is consistent with the other appellate courts that have addressed this very issue, review by this Court is not necessary." BIO 7. That argument fails to account for this Court's special role in reviewing questions that determine the disposition of capital litigation in this country. In this context, the Court's role is not reduced merely to the administrative responsibility to

eliminate circuit conflicts. The frequency with which this issue arises, and the number of judges who have gone on record to state their views that the Due Process Clause does not permit a state to keep its execution protocol secret from the condemned inmate, together easily establish that the question is sufficiently important to warrant this Court's attention.

The significance of the question presented is amplified by the fact that it is the gateway to meaningful Eighth Amendment review in the federal courts. If this Court forever denies certiorari, as Louisiana suggests is appropriate, that will provide a path for states to make it impossible to determine the constitutionality of new methods of lethal injection. The absence of any constitutional check on that process can only invite the states to adopt methods of execution with insufficient attention to whether the condemned inmate will experience excessive pain and suffering.

Indeed, the need for judicial oversight has never been greater than it is today, as states take calculated steps "to shroud the circumstances of the lethal injection process in secrecy at the same time as drug shortages have led prison officials to experiment dangerously and irresponsibly with different pharmaceuticals." *Amicus* Br. of Bar Human Rights Comm. of England & Wales 18. "'The states are more secret than they've ever been. And it's a much riskier process than it's ever been'" because this experimentation is typically conducted without substantial medical oversight or safeguards to ensure

compliance with the Constitution. Liptak, *supra* (quoting expert Deborah Denno). A rule that frustrates judicial review thus guarantees Eighth Amendment violations. *See Amicus* Br. of Dr. Allen S. Keller, M.D., et al. 23-24.

There also is no merit to the state's claim that because the circuits are aligned, "the suggestion that lower courts will continue to devote substantial time and energy to this challenge is likewise incorrect." BIO 8. Facts are facts. "Legal challenges across this new capital punishment landscape are flooding courts," Zoroya, *supra*, and the actual, documented volume of litigation on this precise question – collected in the petition at 10 & n.4 – cannot be wished away. The reason is unsurprising: counsel for capital defendants deem themselves ethically obligated to raise every claim not foreclosed by this Court's precedents. As a result, even for those inclined to agree with the Fifth Circuit's decision in this case, the appropriate course is to grant certiorari to bring closure to the question presented.

3. Louisiana does not dispute that if its withholding of its lethal injection protocol implicates any right of the condemned inmate, then under the balancing framework of *Mathews v. Eldridge*, 424 U.S. 319 (1976), due process requires disclosure. Because our justice system depends on adversarial testing of measures that implicate the right to due process, including execution protocols, timely disclosure is the *minimum* amount of process required. If petitioner does not have access to the protocol, then he simply cannot prepare an Eighth Amendment challenge to it,

and the right that this Court recognized in *Baze* will become a dead letter. Moreover, the burden on the state is negligible: to prepare for the execution, the state should know the protocol well in advance of the execution date.

This case is perfectly illustrates the critical role of due process. As explained in petitioner's supplemental brief, the state has hastily and haphazardly integrated an untested and unsafe combination of drugs into its protocol, creating a significant risk that petitioner will endure unnecessary pain and suffering. Supp. Br. 6-8. A likely side effect of these drugs is "a prolonged, painful feeling of choking to death," *id*. 7, substantially identical to the suffocation that this Court acknowledged would be unconstitutional in *Baze*, 553 U.S. at 53. Indeed, the only time the Ohio protocol has been used, it resulted in a prolonged death and visible suffering. Supp. Br. 6-8. It is so problematic that Ohio itself is reviewing it, and has granted a reprieve from execution in the interim. *See id.* 7. Louisiana's rushed adoption of the protocol only aggravates these risks. Not only has the state removed the notice provision that would facilitate judicial review, but it has failed to conform the remainder of its protocol to the new drug options, leaving the state unprepared to implement the protocol without imposing an unacceptable risk that the execution will fail, or will be exceedingly painful. *Id*. 8-9. Judicial review is the only safeguard petitioner and society have against these threats to the Eighth Amendment.

The state responds that "[w]hile procedural due process is triggered when there is a governmental

decision which affects a protected right, Petitioner fails to identify a protected right." BIO 9. But the petition did just that. There is no single on-point decision – which is why this Court's review is necessary – but this Court's precedents establish petitioner's right. This Court has held that condemned inmates have a residual life interest in avoiding excessive pain and suffering. *See Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 281 (1998) (plurality opinion). *Baze* establishes that this interest extends to the state's selection of its lethal injection protocol. *See* 553 U.S. at 53. And that Eighth Amendment interest gives rise to a procedural due process right to receive the information necessary for federal courts to determine the constitutionality of the protocol. *See Ford v. Wainwright*, 477 U.S. 399, 413-14 (1986).

Contrary to the state's assertion, this argument does not "confuse the due process claim . . . with an Eighth Amendment claim." BIO 10. Petitioner's Eighth Amendment right not to be subject to an unconstitutional execution does underlie his Fourteenth Amendment due process right to know the protocol. But that is no different than an inmate's right not to be executed while incompetent or mentally retarded, which underlies a due process right to a hearing on that question. *See Ford*, *supra*. More broadly, as the petition established, courts have found that due process protects far less weighty interests than the condemned inmate's residual life interest in a humane execution, and the state has cited no authority undermining the importance of petitioner's interest here. *See* Pet. 20.

4. The state's only remaining argument is that petitioner delayed in bringing his claim. Even if that were right, it would be irrelevant. Delay relates to whether an inmate is entitled to a stay of execution, not the merits of his constitutional claim. *Compare, e.g.*, Pet. App. 10a-12a (court of appeals' analysis of the merits), *with id.* 13a-15a (analysis of stay factors, including petitioner's supposed delay). And the assertion that petitioner delayed is belied by the fact that the state itself recently proposed a stay of execution.

The state is also wrong for reasons detailed in petitioner's since-withdrawn application for a stay of execution. In sum, petitioner has been attempting for years to learn the state's protocol – as a party to an administrative law action in 2010, Stay 6-7, through two requests under the Louisiana Public Records Act (in April and December 2012), Stay 23-24, Stay App. 8a-10a, through motions in his criminal case, Stay 25 (citing C.A. R. 188, 218), by requesting relief from the state supreme court, *id*. 8 (citing C.A. R. 249), and via administrative request to the warden, Stay 25, Stay App. 30a-31a. At every turn, the state and its courts have refused him. The state's commitment to secrecy is unyielding, and this Court's review is warranted to shed light on this critically important area of the law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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