No. 13-892

In The
Supreme Court of the United States

CHRISTOPHER SEPULVADO,

Petitioner,

versus

BOBBY JINDAL,
GOVERNOR OF LOUISIANA, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

COUNTERSTATEMENT OF QUESTION PRESENTED

The question presented by the decision below is whether the district court erred in granting a preliminary injunction and stayed an execution on the basis that the Petitioner allegedly has a due process right pursuant to the Fourteenth Amendment to obtain the execution protocols in advance, despite the fact that no legal authority exists to support such claim.

COUNTERSTATEMENT OF PARTIES TO THE PROCEEDINGS BELOW

Petitioner's statement of Respondents in this court is incorrect. The unidentified John Does were never served in this matter and never appeared in this litigation.

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SUPPLEMENTAL CITATION TO OPINIONS BELOW

The February 7, 2013 opinion of the district court, while unpublished, can be found at 2013 WL 489809.

The August 30, 2013 opinion of the U.S. Fifth Circuit Court of Appeals can be found at 729 F.3d 413. The December 23, 2013 opinion of the appellate court denying Petitioner's requests for rehearing can be found at 739 F.3d 716.

COUNTERSTATEMENT OF THE CASE

Because Petitioners' "Statement of the Case" is filled with misstatements and contains numerous omissions, Respondents submit this counterstatement.

Louisiana adopted lethal injection via intravenous administration of lethal drugs as the sole method of execution in 1991. See, La. R.S. 15:569(B). Petitioner's conviction and sentence of death have been final since 1996 and have survived numerous challenges in both state and federal courts. Thus, lethal injection was the mode of capital punishment in effect at the time of Petitioner's conviction and death sentence and has not changed at any time afterwards.

During the more than twenty years since Petitioner was originally sentenced to death, his execution

has been set and stayed on two prior occasions. Furthermore, his criminal case was stayed from July 1, 2008 until December 12, 2012, at which time the district court signed the death warrant at issue in this case, commanding his execution on February 13, 2013.

In an attempt to stall his execution yet again, Petitioner latched onto a claim of a drug shortage, which he admittedly knew of since as early as October, 2011. However, he waited until just days before his execution to institute legal action.

On January 23, 2013, Petitioner intervened in an existing "method of execution" action brought by another Louisiana capital plaintiff. Petitioner further waited until January 31, 2013 – eight days following his intervention, more than seven weeks after his execution warrant was signed and only days before the scheduled execution – to file a preliminary injunction with the Trial Court, seeking to stay his execution. He alleged that he had a due process right to be given notice of the procedures by which he would be executed, an opportunity to review the same, and a chance to lodge legal objections thereto.

On February 7, 2013, a hearing was conducted by the Trial Court on Petitioner's request for preliminary injunction, after which the Trial Court granted the motion for preliminary injunction, finding that Petitioner had a due process right to have a copy of Louisiana's execution protocols. The Trial Court cited to a singular district court case from Maryland, which

was immediately reversed by this Court. The Trial Court claimed that Petitioner had tried "for years" to determine Louisiana's protocols without success, justifying the grant of the preliminary injunction and stay of his execution.[1]

The purported attempts by Petitioner to obtain Louisiana's protocols "for years" fall short. Petitioner's request for a stay in 2008 was made in his state criminal case and is not evidence of an attempt to obtain the protocols. Even so, Petitioner admits in his complaint and motion for injunctive relief that he has Louisiana's 2010 protocols, which refutes his assertion that he had been rebuffed by the State since 2008.

His reference to a 2010 state court lawsuit between the Louisiana Department of Public Safety and Corrections and himself has no bearing, as that litigation concerned whether Louisiana's execution protocol amounted to a "rule" for the purpose of Louisiana's Administrative Procedure Act, requiring said protocols to be published and allowing a period of public comment prior to adoption. Furthermore, at no time during that litigation did Petitioner ever request Louisiana's protocol.

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[1] While Petitioner also raised an Eighth Amendment claim, the Trial Court specifically limited its ruling to Petitioner's due process claims, expressly refusing to address his Eighth Amendment claim.

Furthermore, the public records requests employed by Petitioner's counsel are statutorily prohibited, La. R.S. 44:31.1, and therefore cannot be said to be another example of Louisiana's refusal to produce its protocols.[2]

The only other attempt made by Petitioner was the filing of an Administrative Remedy Procedure ("ARP"), which had also been filed after the signing of the death warrant. However, Petitioner admits that the filing of this ARP was necessary to exhaust his administrative procedure before instituting this lawsuit.

A unanimous panel of the Fifth Circuit reversed the grant of the preliminary injunction and stay of Petitioner's execution. Particularly, the Fifth Circuit found that Petitioner was not likely to prevail on the merits of his claim that the due process clause entitled him to disclosure of Louisiana's execution protocols. It correctly noted that the only legal authority cited by the Trial Court – *Oken v. Sizer,* 321 F.Supp.2d 658 (D. Md. 2004) – was quickly vacated by this Court. *Sizer v. Oken,* 542 U.S. 916, 124 S.Ct. 2868, 159 L.Ed.2d 290 (2004). The Fifth Circuit also noted that similar claims have been rejected by other courts

[2] This was the precise ruling by the state district court on February 8, 2013, the day after the Trial Court stayed Petitioner's execution, in a public records lawsuit filed by counsel for Petitioner. The lawsuit stemmed from a public records request made by Petitioner's counsel on December 18, 2012, *after Petitioner's death warrant was signed on December 12, 2012.*

nationwide, citing *Beaty v. Brewer*, 791 F.Supp.2d 678 (D. Ariz. 2011), *aff'd*, 649 F.3d 1071 (9th Cir. 2011); *Powell v. Thomas*, 641 F.3d 1255, 1258 (11th Cir. 2011); *Valle v. Singer*, 655 F.3d 1223, 1236, FN 13 (11th Cir. 2011); and *Powell v. Thomas*, 643 F.3d 1300, 1305 (11th Cir. 2011). The Fifth Circuit concluded:

> "In summary, no appellate court has recognized the due process claim on which the district court *a quo* granted relief; we decline to be the first. Sepulvado's assertion of necessity – that Louisiana must disclose its protocol so he can challenge its conformity with the Eighth Amendment – does not substitute for the identification of a cognizable liberty interest. According to the district court, "[i]t is axiomatic that . . . an inmate who is to be executed cannot challenge a protocol as violative of the 8th Amendment until he knows what that protocol contains." We disagree. Adopting the district court's reasoning would frustrate "the State's significant interest in enforcing its criminal judgments." Courts are not supposed to function as "boards of inquiry charged with determining 'best practices'."

Pet. App. 10a-11a. (Internal citations omitted.) Because no due process right of a capital plaintiff to obtain a copy of a state's execution protocols has been recognized, the Fifth Circuit properly found that Petitioner failed to identify an enforceable right and, therefore, was not likely to prevail on the merits. With respect to the stay of Petitioner's execution, the

Fifth Circuit appropriately found that the stay should not have issued, as he was not likely to succeed on the merits and he had waited too long to bring the action.

Petitioner's subsequent Petition for Panel Rehearing and Petition for Rehearing *En Banc* were denied by the Fifth Circuit on December 23, 2013.

On January 27, 2014, Louisiana added an alternative drug combination to its protocol and immediately notified Petitioner that same day of the additional combination. 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. Any statement to the contrary is untrue and inserted only to bolster his otherwise deficient petition, which fails to meet the writ grant consideration threshold.

The additional statement that Petitioner does not know how he will be executed is another false statement. Petitioner has had Louisiana's execution protocol for months. The fact that DOC has amended the protocol to include an alternative drug option is a red herring that Petitioner once again attempts to use to prevent DOC from carrying out the sentence of death that was imposed upon him for the heinous crime

that he committed, namely, the particularly brutal murder of a child.

REASONS FOR DENYING THE WRIT

I. Petitioner Admits That There Is No Circuit Conflict.

While Petitioner asserts that this case presents a legal question that "is the subject of significant disagreement among federal judges," (Petition, p. 5), he likewise admits that "the Question Presented has ***not*** prompted a circuit conflict." (Petition, p. 11.) (Emphasis supplied.) As noted, the Fifth, Eighth, Ninth, and Eleventh Circuits have all ruled that capital plaintiffs do not have a due process right to advance notice of a state's execution procedures. Petitioner has not cited any other circuit court decision that conflicts with the decision issued by the Fifth Circuit in this case. Instead, he incorrectly suggests that invocation of this Court's discretionary review is warranted simply because dissenting opinions were filed in some of those circuit decisions. Because the decision below is consistent with the other appellate courts that have addressed this very issue, review by this Court is not necessary.

Petitioner also erroneously suggests that review is warranted due to divided decisions by federal district courts. However, there is no actual district court division, as represented by Petitioner. He cites *Dickens v. Brewer,* CV 07-1770-PHX-NVM, *aff'd*, 642

F.3d 1139 (9th Cir. 2011) and *Oken v. Sizer, supra* as examples of district court decisions that have recognized a due process right to a state's protocols in advance. However, the district court in *Dickens*, faced with a summary judgment on an Eighth Amendment claim, stated in dicta in a footnote that these capital plaintiffs are entitled to notice of amendment to Arizona's protocols, citing *Oken,* the other case relied upon by Petitioner. However, the *Oken* district court expressly stated that it "located no cases specifically establishing a right of production." *Oken*, 321 F.Supp.2d at 664. Thus, this case was not even based on solid legal ground and the stay granted by the *Oken* district court was vacated by this Court only two days later, *Sizer v. Oken,* 542 U.S. 916, 124 S.Ct. 2868, 159 L.Ed.2d 290 (2004), as was properly recognized by the Fifth Circuit below in this case. Furthermore, the Ninth Circuit subsequently affirmed another district court opinion squarely presented with the issue, rejecting the reliance upon *Oken.* See, *Beaty v. Brewer,* 791 F.Supp.2d 678 (D. Ariz. 2011), *aff'd*, 649 F.3d 1071 (9th Cir. 2011).

Moreover, granting a writ in this case is not necessary to avoid uncertainty in capital litigation, as indicated by Petitioner. Because there is no conflict in the federal appellate courts, there is no uncertainty that can be resolved by granting the writ in this case. For the same reason, the suggestion that lower courts will continue to devote substantial time and energy to this challenge is likewise incorrect.

Because the Fifth Circuit's decision in this case is consistent with cases across the country and because review on a writ of certiorari is not a matter of right, but of judicial discretion, Sup. Ct. R. 10, no writ of certiorari should issue.

II. The Fifth Circuit's Decision Does Not Conflict with Prior Precedent of This Court.

While Petitioner states that "under this Court's precedents, a condemned inmate has a due process right to timely notice of the protocol that will be used to execute him" (Petition, p. 5-6), he fails to cite any authority of this Court that establishes such a right. He simply recites general legal principles concerning due process and therefore concludes that he has a due process right to Louisiana's execution procedure. However, his Petition is devoid of any legal authority that supports the specific question presented therein. It is simply a recitation of argument previously rejected by the Fifth Circuit. Most importantly, it does not contain any authority from this Court that contradicts the decision below.

While procedural due process is triggered when there is a governmental decision which affects a protected right, Petitioner fails to identify a protected right. As the Fifth Circuit pointed out, an assertion of necessity does not substitute for a cognizable liberty interest. Pet. App. 10a. "The types of interests that constitute 'liberty' and 'property' for Fourteenth

Amendment purposes are not unlimited." *Kentucky Department of Corrections v. Thompson,* 490 U.S. 454, 460, 109 S.Ct. 1904, 104 L.Ed.2d 506 (1989). "An individual claiming a protected interest must have a legitimate claim of entitlement to it." *Id.* Because he can cite no authority giving him a legitimate claim of entitlement to Louisiana's execution protocols, the protections of due process do not attach.

Instead, he tries to confuse the due process claim on which the Trial Court granted relief (and which the Fifth Circuit reversed) with an Eighth Amendment claim. Petitioner contends that the Eighth Amendment demands production of an execution protocol. However, not only did the Trial Court and Fifth Circuit expressly refuse to address Petitioner's Eighth Amendment claim, but also the Fifth Circuit properly noted that at least one other appellate court has rejected the argument that the Eighth Amendment demands such production. See, *Powell v. Thomas,* 641 F.3d 1255, 1258 (11th Cir. 2011).

What Petitioner is actually contesting is the Fifth Circuit's conclusion that his assertion of necessity does not substitute for a cognizable liberty interest sufficient to stay an execution. Thus, he is asserting that the Fifth Circuit erroneously applied a properly stated rule of law, which is rarely sufficient for the grant of a writ of certiorari. Sup. Ct. R. 10.

CONCLUSION

Because Petitioner has failed to set forth any compelling reason why this writ should be granted, Respondents request that this Court deny Petitioner's Petition for a Writ of Certiorari.

Respectfully submitted,

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