No. 14A761

IN THE SUPREME COURT OF THE UNITED STATES

CHARLES F. WARNER; RICHARD E. GLOSSIP; JOHN M. GRANT; and BENJAMIN R. COLE, by and through his next friend, Robert S. Jackson,

Petitioners,

vs.

KEVIN J. GROSS; MICHAEL W. ROACH; STEVE BURRAGE; GENE HAYNES; FRAZIER HENKE; LINDA K. NEAL; EARNEST D. WARE; ROBERT C. PATTON and ANITA K. TRAMMELL,

Respondents.

CAPITAL CASE
EXECUTION OF CHARLES WARNER
SCHEDULED FOR 6:00 PM (CST)
THURSDAY, JANUARY 15, 2015

RESPONSE TO PETITIONERS' APPLICATION FOR STAYS OF EXECUTION

JOHN D. HADDEN, OBA#18716
Assistant Attorney General
Oklahoma Attorney General's Office
Litigation Division
313 NE 21st Street
Oklahoma City, Oklahoma 73105
Telephone: (405) 521-3921
Facsimile: (405) 521-4518
Email: john.hadden@oag.ok.gov
Attorney for Respondents

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To the Honorable Sonia Sotomayor, Associate Justice of the Supreme Court of the United States, and Circuit Justice for the Tenth Circuit:

Respondents respectfully request that this Court deny Petitioners' Application for Stays of their executions, for the reasons set out more fully below. Petitioners fail to establish the necessary elements to obtain stays of execution, therefore the State of Oklahoma must be permitted to fulfill its duty to enforce the capital sentences that the citizens of the State of Oklahoma lawfully imposed on Petitioners.

1. TIMING ISSUES

Petitioners complain that the State requested execution dates while an investigation into the execution of Offender Clayton Lockett was ongoing, and that the State continued to press for

execution dates, despite the litigation filed by Petitioners. The State itself requested a change of execution dates when it became apparent that the Department of Corrections would not be ready for executions by the originally-scheduled dates. Further, the fact that Petitioners filed a lawsuit does not preclude the State from fulfilling its duties to enforce criminal judgments, especially in a challenge where the challenged method has already been determined to be constitutional and used 11 times previously. Otherwise, meritless cases would continuously derail lawfully ordered executions with speculative claims, as opposed to actual evidence. It is the duty of Petitioners to present a meritorious case for a stay of execution, but they failed to do so in this instance, despite having an unprecedented amount of documentation and four taxpayer-funded experts of their choosing.

Further, Petitioners failed to file a motion for stay of execution until a full five (5) months after filing their civil suit, and nearly three months after the revised protocol was signed by the Director of the Department of Corrections. While Petitioners may complain about a truncated schedule, they failed to actually move for a stay until *after* the district court *sua sponte* set a deadline for Petitioners to request a stay. (Dist. Ct. ECF Nos. 79, 92). Absent the district court prodding them, Petitioners might still be laying behind their log, planning an eleventh-hour challenge in an attempt to artificially create exigency.

Petitioners claim that the State stalled "critical discovery" until mid-November, but fail to note that no discovery requests were submitted until the end of September, a full three (3) months *after* Petitioners filed their case. In fact, Petitioners had the *only* critical item for their case, which was the protocol, released on September 30, 2014. Also, Petitioners neglect to mention the fact their discovery requests were so broad that they generated over 15,000 pages of documents, which Respondents reviewed and provided. Petitioners received these documents

from two different State agencies prior to the three-day long hearing on the preliminary injunction in the district court. (Dist. Ct. ECF No. 149) Fifteen thousand pages is an enormous amount of discovery for a method of execution challenge. Even though the discovery was by and large irrelevant to the protocol going forward, Petitioners received the discovery that they demanded. Further, Petitioners had the opportunity to take numerous depositions over multiple months' time, and yet elected to take only one. Therefore, while Petitioners may claim that the timing and discovery issues resulted in an incomplete record, the actual circumstances show that Petitioners had every opportunity to provide the district court with a meritorious case, and were unable to do so. Petitioners are now trying to get additional bites at the apple outside the confines of the district court by recasting the arguments and creating additional "facts" through the use of additional affidavits.

2. PETITIONERS FAIL TO SHOW SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS.

Petitioners omit from their application any comment that the State of Oklahoma will execute Petitioners using the exact same method that has already been implemented in the State of Florida 10 times, with an 11th currently scheduled on January 15, 2015, one hour before the execution of Petitioner Warner.[1] This method of execution has been litigated at the state and federal level, and has been presented for this Court's review. This Court has declined to address the method further. *Muhammed v. Florida*, 134 S.Ct. 894 (2014); *Chavez v. Palmer*, 134 S.Ct. 1156 (2014); *Chavez v. Florida SP Warden*, 742 F.3d 1267 (11th Cir. 2014); *Muhammad v. Florida*, 132 So.3d 176 (Fla. 2013). In fact, the inmate scheduled for execution in Florida one hour before Petitioner Warner has not even challenged the method of his execution.

[1] The district court record states that Florida has used the method 11 times, but Respondents have only been able to determine that 10 have occurred.

Finally, Petitioners' appeal to this Court is mainly an attack on the factual determinations made by the district court, and Petitioners' dissatisfaction with the consistent application of *Baze v. Rees* by the various courts of appeal. As detailed in Respondents' Brief in Opposition to Petitioners' Petition for a Writ of Certiorari, Petitioners fail to present anything to this Court that would either precipitate a review and reversal of *Baze*, or justify a finding of abuse of discretion in the factual determinations of the district court or Tenth Circuit.

3. PETITIONERS FAIL TO DEMONSTRATE A NON-SPECULATIVE HARM.

Petitioners cannot show a non-speculative harm in the absence of a stay of execution. Petitioners will be executed, even if they receive all their requested relief. A stay would simply delay their executions, based upon the assertion of a purely speculative harm in the method of their execution. Petitioners are far beyond the point of challenging their sentences or convictions and, at this point, the question is not whether they will be executed, but when and by what method. Therefore, the only harm this Court should evaluate is the one actually being challenged and asserted by Petitioners, applying the standard of clearest proof.

Petitioners have no legal or factual basis for their allegations that their executions will violate the Eighth Amendment, as noted at the district and appeals court levels. They offer only speculations about possibilities, rather than concrete proof of a substantial risk of serious harm. Therefore, Petitioners fail to show that they will suffer a non-speculative, irreparable harm.

4. A STAY OF EXECUTION WOULD CREATE HARM TO RESPONDENTS.

The United States Supreme Court has recognized that any state has a "strong interest in proceeding with its judgment…." *Gomez v. U.S. Dist. Ct. for N. Dist. of Cal.*, 503 U.S. 653, 654 (1992). The State of Oklahoma has a strong interest in carrying out its judgments, and proceeds under an order properly issued by the Oklahoma Court of Criminal Appeals, ("OCCA") which reset the execution dates of P/I Plaintiffs to January 15, January 29, February 19, and March 5,

2015. (Dist. Ct. ECF No. 71-1). A preliminary injunction would violate and frustrate this strong interest of the State of Oklahoma.

Petitioners cite a news article regarding *one* victims' family member that opposes the death penalty as evidence that the State lacks an interest in rendering justice for victims' families. First, this is one family member, related to *one* of the four executions scheduled. Further, with all due respect to the opposition of that individual, such opposition was presented during the State's clemency process, and the State still has significant interest in rendering justice for the people of Oklahoma and maintaining the integrity of its system of justice. This is especially true in the case of Petitioner Warner, who committed grotesque rape and murder of an eleventh-month old baby girl.

5. PUBLIC POLICY WEIGHS AGAINST A STAY OF EXECUTION.

While Petitioners note that there is a public interest in prevention of possible violation of constitutional rights, the speculative nature of that interest, based on mere possibilities, is outweighed by the definite, strong, and clear public justice interest that the people of the State of Oklahoma have in ensuring timely enforcement of their laws and judgments. This policy is far stronger than any purported public policy Petitioners' put forth. Both the State and the victims of crime, whether they are the family of Petitioners' murder victims, or citizens who are shocked by the depravity of Petitioners' actions, have an important interest in the timely enforcement of a sentence. *Hill v. McDonough*, 126 S.Ct. 2096, 2104 (2004). Therefore, the equities of the public policy interests weigh against Petitioners' requested stay.

CONCLUSION

Petitioners fail to show any entitlement to a stay of execution. Their case at the lower court was meritless, as was their Tenth Circuit appeal, and as is their current Petition to this

Court. Petitioners fail to establish any of the four elements required for a stay of execution. Therefore, this Court should deny Petitioners' Application for Stay of Execution.

Respectfully submitted,

/s/John D. Hadden
JOHN D. HADDEN, OBA#18716
Assistant Attorneys General
Oklahoma Attorney General's Office
Litigation Division
313 NE 21st Street
Oklahoma City, OK 73105
Telephone: (405) 521-3921
Facsimile: (405) 521-4518
Email: john.hadden@oag.ok.gov
Attorney for Defendants Burrage, Gross, Haynes, Henke, Neal, Patton, Roach, Trammell and Ware