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, Anita K. Trammell, Respondents.

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

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APPLICATION FOR STAYS OF EXECUTION

JON M. SANDS
Federal Public Defender
District of Arizona
DALE A. BAICH, Ohio Bar # 0025070
ROBIN C. KONRAD, Ala. Bar # 2194-N76K*
850 W. Adams St., Ste. 201
Phoenix, AZ 85007
Telephone: (602)382-2816
Facsimile: (602)889-3960
robin_konrad@fd.org
dale_baich@fd.org

**Counsel of Record*

Attorneys for Petitioners Warner, Glossip, Grant and Cole

(additional counsel listed on following page)

SUSAN OTTO
Federal Public Defender
Western District of Oklahoma
PATTI PALMER GHEZZI,
OBA # 6875
RANDY A. BAUMAN,
OBA # 610
215 Dean A. McGee, Suite 707
Oklahoma City, OK 73102
Telephone: (405) 609-5975
Facsimile: (405) 609-5976
patti.ghezzi@fd.org
randy.bauman@fd.org

Attorneys for Petitioners Cole and Grant

MARK HENRICKSEN,
OBA # 4102
Henricksen & Henricksen
600 N. Walker Ave., Ste. 200
Oklahoma City, OK 73102
Telephone: (405)609-1970
Facsimile: (405)609-1973
Mark@henricksenlaw.com

Attorney for Petitioner Glossip

LANITA HENRICKSEN,
OBA # 15016
Henricksen & Henricksen
600 N. Walker Ave., Ste. 200
Oklahoma City, OK 73102
Telephone: (405)609-1970
Facsimile: (405)609-1973
Lanita.Henricksen@coxinet.net

Attorney for Petitioner Warner

APPLICATION FOR STAY

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

Petitioners Charles Warner, Richard Glossip, John Grant, and Benjamin Cole respectfully request stays of their executions, which are scheduled for **January 15 at 6:00 p.m. CST**, January 29, February 19, and March 5, 2015, respectively. (Tr. 12/22/2014 at 9:5-10.)

Petitioners ask this Court to stay their executions in order to permit this Court to consider their Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit. Petitioners have filed the Petition for Writ of Certiorari concurrently with this Application for Stay of Execution. Pursuant to Supreme Court Rules 23.1 and 23.2, and under the authority of 28 U.S.C. § 2101(f), the stay may be lawfully granted.[1]

In the accompanying Petition for Writ of Certiorari, Petitioners ask this Court to review an opinion of the United States Court of Appeals for the Tenth Circuit affirming the denial of their motion for preliminary injunction. In the district court, Petitioners alleged that the use of midazolam, which cannot reliably produce and sustain a deep, comalike unconsciousness, in a three-drug protocol is

[1] Petitioners filed a stay motion in the Tenth Circuit, explaining why it would be impracticable to have filed the stay motion in the district court. (*See* Am. Mot. for Stays of Executions Pending Appeal at 7-8, Jan. 9, 2015.) The Tenth Circuit denied the stay motion on the basis that Petitioners could not show a likelihood of success on the merits of their claim. (Pet'n for Writ of Cert., App. A at 28-29.)

unconstitutional under the Eighth Amendment and *Baze v. Rees*, 553 U.S. 35 (2008). Petitioners' constitutional claims will become moot if Petitioners are executed as scheduled. *See Wainwright v. Booker*, 473 U.S. 935, 936 (1985) (Mem.) (Powell, J., concurring).

Petitioners also assert here that there is a reasonable probability that four members of the Court will consider the issue sufficiently meritorious to grant certiorari. *See, e.g.*, *Multimedia Holdings Corp. v. Cir. Ct. of Fla.*, 544 U.S. 1301 (2005) (Kennedy, J.). And, upon granting certiorari and resolving the constitutional issues presented, Petitioners assert that five Justices are likely to conclude that the case was erroneously decided below. *See, e.g.*, *Barefoot v. Estelle*, 463 U.S. 880, 895-96 (1983). As is more fully explained in the Petition, the time is now for the Court to revisit its decision in *Baze v. Rees*, and provide guidance to lower courts to aid in resolving litigation necessarily brought on the eve of executions.

This case presents itself, through no fault of Petitioners, in a preliminary-injunction posture. Principles of equity favor staying the executions in this case. Petitioners have made no "last-minute attempts to manipulate the judicial process." *Nelson v. Campbell*, 541 U.S. 637, 649 (2004) (quoting *Gomez v. United States Dist. Court for Northern Dist. of Cal.,* 503 U.S. 653, 654 (1992) (per curium)). Rather, the State requested execution dates for each of the Petitioners despite the fact that an investigation into the execution of Clayton Lockett ordered by the Governor was in its initial stages. And the State continued to press forward with

execution dates, even though Petitioners had filed a lawsuit challenging the use of midazolam in light of the bungled execution of Mr. Lockett.

Indeed, Petitioners have been diligently attempting to develop the factual basis for their case for the past six months. Their lawsuit was filed on June 25, 2014, and the preliminary injunction motion filed on November 10 (Dist. Ct. ECF Nos. 1, 92). Respondents stalled critical discovery until mid-November, taking the position that Petitioners had no right to discover any information about the Lockett execution. (Dist. Ct. ECF No. 64 at 7-10.) The district court ordered the State to comply with discovery, including providing information about the Lockett execution (Dist. Ct. ECF No. 94.) In the face of pending executions beginning mid-January (Dist. Ct. ECF Nos. 61-1, 62-1),[2] the district court created an expedited schedule for the preliminary injunction motion. (Dist. Ct. ECF No. 88.)

1. Despite the truncated schedule and necessarily incomplete record, Petitioners presented evidence and demonstrated a likelihood of success on the merits of their claims. The State intends to execute Petitioners using 500 milligrams of midazolam, followed by rocuronium bromide (a drug that causes complete paralysis) and then potassium chloride (a drug that will stop the heart). It

[2] The State received a sixty-day postponement of executions from the state court because it did not have the drugs to carry out executions; it did not have medical personnel to participate in executions; and it had not conducted training. (Dist. Ct. ECF No. 61-1 at 3.)

is uncontested that the administration of either the paralytic or potassium chloride to a conscious person is unconstitutional. *Baze*, 553 U.S. at 53.

In *Baze*, the Court upheld Kentucky's lethal injection protocol against a challenge based on concerns about faulty administration. The protocol at issue in *Baze* used sodium thiopental as the first drug, followed by a paralytic and potassium chloride. This Court found that the proper administration of sodium thiopental "ensures that the prisoner does not experience any pain" caused by the second and third drugs. *Id.* at 44.

The key to the constitutionality of the three-drug protocol upheld in *Baze* was the use of sodium thiopental as the first drug. Sodium thiopental is a "fast-acting barbiturate," and its purpose in the execution protocol was to produce "a deep, comalike unconsciousness." *Id.* at 44. If properly administered, sodium thiopental indisputably has that effect. *Id.* at 53.

Here, Petitioners have demonstrated that this case is not like *Baze*. Unlike the petitioners in *Baze*, Petitioners here have not—and in light of medical data cannot—concede that the use of 500 milligrams of midazolam, even if "properly administered," will reliably ensure a "deep, comalike unconsciousness," such that the prisoner will not feel pain and suffering from the paralytic and/or potassium chloride. The State's own witness agreed both that the FDA has not approved midazolam for use as the sole drug to produce and maintain anesthesia in surgical proceedings (Tr. 12/19/2014 at 653:12-14), and that he would advise against using

midazolam for general anesthesia in a painful procedure. (Tr. 12/19/2014 at 674:12-17). Because the drug formula Oklahoma intends to use to execute Petitioners is materially different from the one this Court reviewed in *Baze*, and because midazolam does not have the unconsciousness-producing properties of sodium thiopental that led this Court to uphold the protocol in *Baze,* Petitioners can show a likelihood of success on the merits of their claim.

2. Petitioners also will suffer great harm if this Court does not stay their executions. *See Booker*, 473 U.S. at 936 (Powell, J., concurring) (irreparable harm that will result if stay is not granted "is necessarily present in capital cases"). If the State is permitted to execute Petitioners before the constitutionality of Oklahoma's protocol has been fully reviewed by the courts, the effects are irreversible. The executions would violate Petitioners' constitutional rights and cause them to die a slow death by asphyxiation, while being subjected to burning and intense pain. *See Baze,* 553 U.S. at 49.

Further demonstrating the harm to Petitioners is that the State's only witness who is not a medical doctor provided testimony that is flat-out incorrect, and the lower courts relied entirely on this testimony to deny relief. The State's expert, Dr. R. Lee Evans, is a pharmacist who has been in academic administration for many years. Dr. Evans opined that 500 milligrams of midazolam is sufficient to produce unconsciousness. He explained his opinion:

> The 'ceiling effect' that's been referred to is an effect specifically on the spinal cord, and there are studies to show that, you know, you can eliminate a significant portion of an inhaled anesthetic with the use of midazolam, but you can't completely eliminate it, and that's really to maintain a plane of surgical -- a surgical plane, and that's all at a spinal cord level. What we're talking about here is at the reticular activating system, the part of the brain that controls respiration, so we're basically shutting down respiration centers. There is no ceiling effect at that level.

(Tr. 12/19/2014 at 636:13-19.)

Dr. Evans' opinion has no basis in science. Petitioners' expert, Dr. David Lubarsky, is the Chair of the Department of Anesthesiology at the University of Miami Miller School of Medicine, one of the largest training programs in the country, and has been a practicing anesthesiologist for a quarter of a century. He explained that "the ceiling effect is scientifically proven **as fact** and does not occur at the spinal cord level, nor has it been extensively studied there. Primary modes of anesthetic action of midazolam occur in the brain (Perouansky, Pearce & Hemmings, 2015) where electrical activity *(the basis of consciousness and human and animal awareness)* is not further diminished with larger doses." (*See* Pet'n for Writ of Cert., App. F ¶ 6.)

Dr. Lubarsky, the anesthesiologist, further stressed that the State's witness is wrong about the facts of where general anesthetics primarily produce anesthesia. (Pet'n for Writ of Cert., App. F ¶ 5.) Anesthesia is the deep, comalike unconsciousness found in *Baze* to avoid constitutional harm from a paralytic or potassium chloride. *See* 553 U.S. at 64 (Alito, J., concurring) ("The first step in the

lethal injection protocols currently in use is the anesthetization of the prisoner."). Dr. Lubarsky explained why Dr. Evans was wrong regarding anesthesia: "This occurs via the suppression of the cerebral cortex and most likely the reticular activating system which is involved in consciousness. *The spinal cord is not considered by any authoritative publication to be the primary site of anesthetic action*, although it may contribute indirectly to anesthetic action and influence immobility during an anesthetic state (Perouansky, Pearce & Hemmings, 2015)." (Pet'n for Writ of Cert., App. F ¶ 5) (emphasis added).

The State's witness's "opinions are not scientifically valid, and given his many factual mistakes, dispute his ability to serve as an expert about a field of medicine he does not practice and in which he was never trained." (Pet'n for Writ of Cert., App. F ¶ 9.) Given the procedural posture of this case, this information must be considered in determining whether, in fact, harm will occur if the State is permitted to carry out the executions of Petitioners using midazolam.

3. While the harm to Petitioners would be great if a stay is not granted, the State will suffer little appreciable harm. If a stay is granted, the only potential harm to the State is that it will have to wait for review of this case before it can carry out Petitioners' executions. That delay is an insignificant and temporary harm compared to the irreparable harm of permitting an unconstitutional execution to take place. What is more, in this case, at least one of the victims involved in the

underlying criminal cases has actively opposed the death penalty in that case,[3] undermining the State's oft-used argument that execution delays "postpone justice" for the victims' families.

4. Finally, staying the currently scheduled executions for Petitioners would be in the interest of the public. All citizens have an interest in ensuring that the Constitution is upheld. *See Gannett Co., Inc. v. DePasquale,* 443 U.S. 368, 383 (1979). The public interest is even greater where, as here, the ultimate punishment of death is being carried out. *Cf. Woodson v. North Carolina,* 428 U.S. 280, 303-04 (1976).

Conclusion

The reasons set forth above demonstrate that this case is not like *Baze,* and the method by which Oklahoma intends to execute the Petitioners is inherently unconstitutional, because it relies on a drug that cannot reliably produce or maintain a deep, comalike unconsciousness. Petitioners have demonstrated a likelihood of success on the merits of their claims, and they will suffer the most irreparable harm imaginable if their executions proceed. This Court should stay the Petitioners' executions.

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[3] At Mr. Warner's clemency hearing, the mother of his victim said, "'I don't want to see him to be sentenced to death.' [Shonda] Waller said. 'If they truly want to honor me then they will do away with the death penalty for him and they will give him life in prison without the possibility of parole because that's the only thing that's going to honor me.'" *See* Ali Meyer, *Mother of infant who was raped and murdered speaks out on man convicted of the crime*, News Channel Four, KFOR.com, Oct. 31, 2014, *available at* http://kfor.com/2014/10/31/mother-of-infant-who-was-raped-and-murdered-speaks-out-on-man-convicted-of-the-crime/ (last visited Jan. 7, 2015).

Respectfully submitted: January 13, 2015.

SUSAN OTTO
Federal Public Defender
Western District of Oklahoma

Randy A. Bauman
Patti Palmer Ghezzi
Assistant Federal Public Defender
215 Dean A. McGee Ave., Suite 707
Oklahoma City, OK 73102
phone: (405)-609-5975
fax: (405)-609-5976

Attorneys for Petitioners Cole and Grant

JON M. SANDS
Federal Public Defender
District of Arizona

Dale A. Baich
Robin C. Konrad*
Assistant Federal Public Defenders
850 W. Adams St., Ste. 201
Phoenix, AZ 85007
phone: (602)-382-2816
fax: (602)-889-3960

s/ Robin C. Konrad
Attorneys for Petitioners Warner, Glossip, Grant and Cole

LANITA HENRICKSEN, OBA # 15016
Henricksen & Henricksen
600 N. Walker Ave., Ste. 200
Oklahoma City, OK 73102
Telephone: (405)609-1970
Facsimile: (405)609-1973

Attorney for Petitioner Warner

MARK HENRICKSEN, OBA # 4102
Henricksen & Henricksen
600 N. Walker Ave., Ste. 200
Oklahoma City, OK 73102
phone: (405)-609-1970
fax: (405)-609-1973

Attorney for Petitioner Glossip

**Counsel of Record*