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

REPLY TO RESPONSE TO APPLICATION FOR STAYS OF EXECUTION

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Even while ignoring the limitations upon discovery under the Federal Rules of Civil Procedure and their own motion practice in the district court, Respondents still make a less than compelling argument against this Court issuing stays of executions in this case. The fact that Florida has conducted ten executions using midazolam with a paralytic and potassium chloride is irrelevant here. First, as uncontested below, if the paralytic is properly administered and the prisoner becomes conscious, there is no way for anyone to know that fact. (Tr. 12/19/2014 at 600:1-4; Tr. 12/17/2014 at 126:10-17.) In the words of the State's own witness:

> Q. And in Florida, do they give a large dose of a paralytic after injecting the midazolam?
> A. Yes.
> Q. So if somebody were rendered conscious, they would not be able to move from the paralytic; is that correct?
> A. That's true.

(Tr. 12/19/2014 at 678:5-10.)

Second, the State relies on two Florida cases to support the argument that this Court "has declined to address this method further." (Resp. to Petr's Appl. For Stays of Executions at 3.) As this Court has repeatedly stated, "[t]he denial of a writ of certiorari imports no expression of opinion upon the merits of the case." *United States v. Carver*, 260 U.S. 482, 490 (1923). Moreover, the cases cited—*if they even raised a question related to lethal injection*[1]—were from early 2014, before the

[1] Petitioners have been unable to review the petitions for writ of certiorari filed in

execution of Clayton Lockett and before the execution of Joseph Wood. Thus, any potential value that the denial of those cases has is diminished by time and new evidence.

As Petitioners have already set forth in their Petition and Reply, they have demonstrated a meritorious case, even in a preliminary-injunction posture. There are no disputes as to the critical facts regarding midazolam's properties: it is not an analgesic, it has not been approved as general anesthesia because it cannot produce a level of unconsciousness necessary for surgery, and it is never used for this purpose in a surgical setting. Midazolam, therefore, cannot reliably produce a deep comalike unconsciousness that is required by this Court in *Baze*.

Equity, fairness, and the Eighth Amendment favor staying the executions in this case.

Muhammad v. Florida, 134 S. Ct. 894 (2014) (Mem) or *Chavez v. Palmer*, 134 S. Ct. 1156 (2014)(Mem), to determine what questions were presented to this Court. But at least in *Muhammad*, Justice Breyer dissented on the application of a stay of execution based not on a lethal-injection issue, but on a "*Lackey* claim." 134 S. Ct. 894 (Breyer, J., dissenting statement).

Respectfully submitted: January 14, 2015.

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