

**THIS IS A CAPITAL CASE
EXECUTION SET FOR NOVEMBER 1, 2018 AT 7 PM**

IN THE
SUPREME COURT OF THE UNITED STATES
No. 18-6530/18A470

EDMUND ZAGORSKI,
Petitioner,
v.

BILL HASLAM, et al.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE TENNESSEE SUPREME COURT

REPLY TO RESPONSE IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI
AND MOTION FOR STAY OF EXECUTION

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November 1, 2018

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Respondent.

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I. Respondents misrepresent the issue in this case.

Respondents contend that the Tennessee courts' adjudication of Mr. Zagorski (and the other plaintiffs') challenge to lethal injection is dispositive of the constitutionality of Mr. Zagorski's waiver issue. Respondents are wrong. The issue posed by Mr. Zagorski's waiver hinges not on whether the lethal injection protocol is constitutional, but whether the pain inherent in that protocol was coercive such that the waiver itself violates the constitution. That is, Mr. Zagorski is not trying to

prove that the midazolam-based-lethal injection protocol is unconstitutional—the courts have held he failed to do that because he cannot find his own drugs for the execution—rather he is making a totally distinct claim: the certainty of pain inherent in the lethal injection protocol unconstitutionally forced Mr. Zagorski to choose electrocution, rendering his “choice” involuntary. This issue has not been tried by any court, indeed it has not even been addressed.

II. Zagorski did not demand anything, he sought protection from the certain torture of a midazolam-based lethal injection.

Respondents have never –and do not now –meaningfully dispute the mounting evidence that a midazolam-based lethal injection results in drowning, suffocation, and the chemical equivalent of being burned at the stake all hidden under the shroud of chemically induced paralysis.

Instead, Respondents used every trick in a litigator’s toolkit to prevent Zagorski from establishing the alternative-method pleading requirement grafted on the Eighth Amendment by *Glossip*. Having succeeded, Zagorski did what he had to do to protect himself from what Respondents planned to put him through. He filed suit. A meritorious suit at that. And one which Respondents did not announce that they would not appeal until Oct. 24, 2018.

Having used their litigator’s toolkit to create a justiciability ruling that electrocution claims were not ripe until the petitioner faced electrocution, Respondents now complain that Zagorski has done what he said he would do 4 years ago, and repeated three times this year.

III. Zagorski is playing by the rules laid down by Respondents. He has no control over the timeline.

Respondents hid their protocol change. They hid the evidence of alternative drugs. They sought and obtained an inhumanly tight litigation schedule. They changed the protocol on the eve of trial. They failed to follow that protocol in the execution of Billy Ray Irick who did, in fact, suffer during execution. When Zagorski sought to avoid Irick's fate, as was his right under the law, they refused to honor his choice. Respondents do not have clean hands.

Zagorski has no control over when the Tennessee Supreme Court would choose to set his execution date. The Governor has no control over the Tennessee Attorney General and what litigation decisions they may or may not make. In Tennessee, the Attorney General is an arm of the Tennessee Supreme Court. Equity lies with Zagorski.

Zagorski has a reasonable likelihood of success. This Court should grant certiorari to address a growing problem of the lower courts' (mis)application of *Glossip* which will inevitably lead to increasingly barbarous executions.

The application for stay should be granted. The petition for writ of certiorari should be granted.

Respectfully submitted,

/s/ Kelley J. Henry

Kelley J. Henry*

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing reply was served upon counsel for Respondent, Jennifer Smith, Assistant Solicitor General, 425 Fifth Avenue North, Nashville, Tennessee, 37203, via email and United States Mail, this 1st day of November, 2018.

/s/ Kelley J. Henry
Kelley J. Henry