THIS IS A CAPITAL CASE
EXECUTION SET FOR OCTOBER 11, 2018 AT 7 PM

IN THE
SUPREME COURT OF THE UNITED STATES
No. 18-_____

IN RE:
EDMUND ZAGORSKI,
Movant,

APPLICATION FOR STAY OF EXECUTION

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October 9, 2018

APPLICATION FOR STAY OF EXECUTION

To the Honorable Elena Kagan, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Sixth Circuit:

Petitioner Edmond Zagorski respectfully requests that this Court stay his execution pending disposition of his contemporaneously filed certiorari petition and any proceedings occurring thereafter should this Court grant the petition. Mr. Zagorski is scheduled to be executed on October 11, 2018 at 7 p.m. CST. If this Court is unable to resolve this application by October 11, 2018, it should grant a temporary stay while it considers this application.

Mr. Zagorski has expeditiously pursued his claims that the lethal injection protocol promulgated on July 5, 2018, will subject him to needless pain and suffering. Mr. Zagorski is entitled to a brief stay so that the important constitutional issues raised by his claims may be considered by this Court. *Barefoot v. Estelle* provides that a stay of execution is appropriate upon a showing of a "reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari" as well as a showing of "irreparable harm will result if the decision is not stayed." *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983) (citing *White v. Florida*, 457 U.S. 1301 (1982)) (quoting *Times-Picayune Publishing Corp. v. Schulingkamp*, 419 U.S. 1301, 1305 (1974, Powell, J., in chambers)). Mr. Zagorski meets this standard. Moreover, in light of the importance of the matter at hand, a stay of execution is warranted to

permit thoughtful and studied review of the record and numerous legal issues presented.

JUDGMENT FOR WHICH REVIEW IS SOUGHT

The judgment for which review is sought is *Abu-Ali Abdur'Rahman et al. v. Tony Parker et al.*, M2018-013850-SC-RDO-CV (Tenn. 2018). *Zagorski v. Parker*, No. 18-___, Cert. Apx. A, A001-34.

JURISDICTION

The Tennessee Supreme Court issued its decision affirming the dismissal of Mr. Zagorski's declaratory judgment action in favor of Respondents on October 8, 2018. *Abdur'Rahman, et al. v. Parker, et al.*, No. M2018-01385-SC-RDO-CV (Tenn. 2018). Cert. Apx. A. Mr. Zagorski has concurrently filed a petition for a writ of certiorari with this Application.

On October 9, 2018, Mr. Zagorski moved the Tennessee Supreme Court to enter a stay of execution pending this Court's consideration of his petition for certiorari which it denied on the same day. Exhibit A, Motion; Exhibit B, Order. This Court has jurisdiction to enter a stay under 28 U.S.C. §2101(f), 28 U.S.C. §1651, and Supreme Court Rule 23.

REASONS FOR GRANTING THE STAY

Mr. Zagorski's contemporaneously filed petition for writ of certiorari raises questions of exceptional importance which are worthy of certiorari review. Those questions are:

1. Where the credited, credible, and unassailable evidence at trial proves with certainty that a lethal injection protocol will inflict severe pain and mental anguish on an inmate by causing the inmate to feel and experience pulmonary edema (drowning in one's own fluids) from midazolam, suffocation and paralysis (described as being buried alive) from vecuronium bromide, and chemical burning (the severity of which has been described as being burned alive from the inside) from potassium chloride, does that protocol violate the Eighth Amendment regardless of whether the inmate has demonstrated a feasible readily implemented alternative?

2. Did *Glossip v. Gross*, 576 U.S. __, 135 S.Ct. 2726 (2015), hold that there are no methods of execution which are categorically prohibited by the Eighth Amendment, overruling centuries of precedent?

3. Did *Glossip* relieve states from any obligation under the Eighth Amendment to engage in a good-faith search for humane forms of execution and shift that burden to inmates, transforming the Eighth Amendment prohibition against cruel and unusual punishment of the Eighth Amendment into a conditional protection?

4. Is an inmate deprived of fundamental due process under the Fourteenth Amendment, when he is effectively prevented from establishing the existence of a feasible and readily implemented alternative by 1) state secrecy laws preventing discovery of willing drug suppliers, 2) the state's refusal to affirm or deny their ability to secure alternative drugs, 3) a rushed litigation schedule, which precludes full factual development, and 4) the Tennessee court's perverse and unworkable interpretation of *Glossip*.

5. Where the State deprives an inmate's attorney of telephone access during an execution for the express purpose of preventing the attorney from calling the court, does the State violate the inmate's constitutional right of access to the courts?

Zagorski v. Parker, et. al., No. 18-___, Petition, p.i.

"[A] stay of execution is an equitable remedy." *Hill v. McDonough,* 547 U.S. 573, 584 (2006). The factors considered by the courts in determining the equity of a

stay include: (1) whether there is a likelihood he will succeed on the merits of the appeal; (2) whether there is a likelihood he will suffer irreparable harm absent a stay; (3) whether the stay will cause substantial harm to others; and (4) whether the injunction would serve the public interest. *Id. Nelson v. Campbell*, 541 U.S. 637, 649-50 (2004); and *Nken v. Holder*, 556 U.S. 418, 434 (2009). Additionally, a petitioner's diligence in pursuing the appeal should be considered. *Nelson*, 541 U.S. 637 (2004). Under these equitable considerations, Mr. Zagorski is entitled to a stay.

I. Mr. Zagorski is likely to succeed on the merits of his appeal, as he has raised substantial questions for certiorari warranting this Court's review.

A method of execution violates the Eighth Amendment when it creates "a substantial risk of serious harm." *Baze v. Rees*, 553 U.S. 35, 50 (2008). Here, Mr. Zagorski and the other petitioners have put forth more than proof of a *risk* of unconstitutional pain and suffering, they have proven a *certainty* that they will be able to feel that which Justice Roberts termed the "constitutionally unacceptable risk of suffocation from the administration of [the paralytic] and pain from the injection of potassium chloride." *Baze v. Rees*, 553 U.S. 35, 53 (2008). Where four Justices of this Court are likely to grant certiorari and where issues germane to Mr. Zagorski's petition are currently pending before this Court in *Bucklew v. Precythe*, 883 F. 3d 1087 (8th Cir. 2015), *cert granted*, 138 S. Ct. 1706 (U.S. April 30, 2018) (No. 17-8151), it is important to the administration of justice that Mr. Zagorski not be executed before this Court can consider his petition.

This Court must review the Tennessee court's determination that an inmate's ability to provide a significantly less painful alternative is "a prerequisite to a method of execution claim" without which, apparently, any method of execution is permissible. As Justice Lee pointed out, the case below was decided solely on the basis of Mr. Zagorski's alleged failure to prove an alternative method of execution – his proof that his execution will cause needless pain and suffering and constitutionally intolerable pain was accepted:

> [T]he trial court dismissed the Petitioner's case because they failed to prove the second Glossip prong of an available alternative execution method that would have reduced a substantial risk of severe pain. This *Glossip* requirement has been aptly described as 'perverse' because it replaces the Eighth Amendment's categorical prohibition against cruel and unusual punishment with a conditional one. Thus, under *Glossip*, even if the Petitioners establish that the State's execution method will cause them to experience needless suffering or intolerable pain the State may still carry out the execution unless the Petitioners also prove an available alternative method for their own executions.
>
> Considering the Eighth Amendment's clear prohibition on "cruel and unusual punishments," the focus here should have been on whether the Petitioners proved that the State's execution method was likely to cause needless suffering and pain. Yet the Petitioners' claims and evidence of intolerable pain and torture were not the basis of the trial court's decision and thus not reviewed on appeal.

Abdur'Rahman, Slip. Op. 3, Cert. Apx. A024 (Lee, J., dissenting).

Four justices of this Court have already stated their commitment to upholding the Eighth Amendment's categorical prohibition against cruel and unusual punishment. As Justice Sotomayor wrote for Justices Breyer, Ginsberg, and Kagan, "[T]he Court's conclusion that petitioners' challenge also fails because

they identified no available alternative means by which the State may kill them is legally indefensible." *Glossip v. Gross*, 135 S.Ct., 2726, 2792 (Sotomayor, J., dissenting). At least four justices agree that neither *Baze* nor any Supreme Court jurisprudence prior to *Glossip* establish any condition precedent to the Eighth Amendment ban on a punishment that is cruel and unusual. *Id.* at 2793. "Nowhere did the [*Baze*] plurality suggest that *all* challenges to a State's method of execution would require this sort of comparative-risk analysis. Recognizing the relevant of available alternatives is not at all the same as concluding that their absence precludes a claimant from showing that a chosen method carries objectively intolerable risks." *Id.* at 2794 (emphasis added).

Additionally, as the state court gave *Glossip* preclusive effect, and relied upon it for factual conclusions contrary to those proven at trial, there is a significant possibility that the this Court will grant certiorari and reverse the decision. *See, Irick*, 585 U.S. __ (Sotomayor dissenting) ("At a minimum, [the state courts'] contention that the Constitution tolerates what the State plans to do to Irick is not compelled by *Glossip*, which did not categorically determine whether a lethal injection protocol using midazolam is a constitutional method of execution"). Here, *Glossip* should not have preclusive effect where the proof showed, contrary to that in *Glossip*, "that the State's execution protocol of midazolam, vecuronium bromide, and potassium chloride will cause the inmate being executed to feel severe pain and terror. This is because midazolam has no analgesic effects and will not render the

inmate insensate to pain." *Abdur'Rahman,* Slip Op. 2-3, Cert Apx. A023-24 (Lee, J., dissenting).

Further, where *Bucklew v. Precythe* is set for argument within weeks to explore the nature and quantum of proof a court must consider in determining whether a proposed alternative method of execution poses a substantially reduced risk of pain, there is a reasonable probability that Mr. Zagorski will be granted certiorari. The question presented by *Bucklew* asks whether a court should consider the record as a whole in determining whether an alternative method has been proven to substantially reduce the risk of pain. Mr. Zagorski's petition for writ of certiorari raises similar issues. *See* Petition, pp. #-#.

II. Without a stay of execution, Mr. Zagorski will be irreparably injured pending this Court's decision on the petition.

In evaluating whether a movant will suffer irreparable harm absent a stay, courts have considered: 1) the substantiality of the injury alleged; 2) the likelihood of its occurrence; and 3) the adequacy of the proof provided. *Michigan Coalition of Radioactive Materials Uses, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991) (holding that the probability of success on appeal that must be shown for a stay is inversely proportional to the amount of irreparable injury that will be suffered absent a stay). Each of those factors favors a stay in this case. Irreparable harm will occur if the execution is not stayed until the petition is considered. *Wainwright v. Booker*, 473 U.S. 935 (1985) (Powell, J., concurring) (recognizing that there is

little double that a prisoner facing execution will suffer irreparable injury if the stay is not granted).

III. Issuance of the stay will not substantially injure the state, and the public interest lies in favor of granting the stay.

The issuance of a brief stay pending this Court's consideration of Mr. Zagorski's petition serves both the state and the public's interesting in ensuring that capital punishment is carried out in accord with the Eighth Amendment.

When the Government is the opposing party, assessment of the harm to the opposing party and the weighing of the public interest merge. *Nken v. Holder*, 556 U.S. 418, 435 (2009). Although the public has an interest in the finality of criminal convictions, a brief stay to allow this Court the opportunity to consider Mr. Zagorski's petition does not infringe on that interest. There is no question that the State will execute Mr. Zagorski; the question is the whether the method it uses will be constitutional.

IV. Mr. Zagorski has exercised extreme diligence.

Mr. Zagorski challenged the State's new lethal injection protocol without delay. *Nelson v. Campbell*, 541 U.S. 637 (2004) (courts must consider whether petitioner dilatory in bringing claim in equitable determination of whether to grant stay of execution). Since January 8, 2018 when the state of Tennessee issued an execution protocol involving the potential use of midazolam, Mr. Zagorski has

pressed for speedy resolution of this issue at every instance.[1] Indeed, as established by the timeline of litigation below, Mr. Zagorski and the other petitioners filed suit on February 20, forty-three days after the state published a protocol with a midazolam option. When asked by the Chancellor for possible trial dates, Zagorski and the other petitioners pressed for a trial twenty-eight days before the trial date suggested by Respondents. Mr. Zagorski filed an amended complaint and a trial brief and were ready for trial less than five months after filing their initial complaint. When the state amended the protocol on July 5, 2018, four days before trial, Mr. Zagorski and the other petitioners did not seek a continuance of the trial date, rather they pressed on to trial against the new, changed, protocol. The Chancellor dismissed the suit two days after the conclusion of the trial, and Mr. Zagorski and the other petitioners filed notice of appeal four days later. Mr. Zagorski and the other petitioners met each of the deadlines in the expedited appeal set by the Tennessee Supreme Court and argued the case on October 3, 3018. When the Tennessee Court affirmed the dismissal of Mr. Zagorski's suit on October 8, Mr. Zagorski filed his petition for writ of certiorari within hours.

[1] Dissenting Tennessee Supreme Court Justice Sharon Lee has found that the "super expedited" time constraints imposed on Zagorski and the other petitioners were so "extraordinary and unnecessary" that, in combination with the state court's application of its secrecy statute, Zagorski was denied fundamental due process. *Abdur'Rahman, et al. v. Parker, et al.*, No. M2018-01385-SC-RDO-CV (Tenn. 2018) (Lee, J., dissenting).

CONCLUSION

For these reasons, Mr. Zagorski respectfully requests that this Court stay his execution pending this Court's disposition of his certiorari petition and any proceedings occurring thereafter should this Court grant the petition.

Respectfully Submitted,

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BY: */s/ Kelley J. Henry*
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I. CERTIFICATE OF SERIVCE

I, Kelley J. Henry, hereby certify that a true and correct copy of the foregoing document was electronically filed and sent to the following via email on this the 9th day of October, 2018, to:

Andree Blumstein
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