NO. 18-6145

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EDMUND ZAGORSKI,

Plaintiff-Appellant,

v.

BILL HASLAM, et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

BRIEF OF DEFENDANTS-APPELLEES IN OPPOSITION TO APPEAL

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STATEMENT RE: SIXTH CIRCUIT RULE 26.1

The respondent-appellee is an official of the State of Tennessee. Pursuant to 6 Cir. R. 26.1(a), a statement of disclosure of corporate affiliations and financial interest is not required.

JURISDICTIONAL STATEMENT

This appeal challenges the district court disposition of two counts of a three-count Complaint filed under 42 U.S.C. § 1983. The district court summarily dismissed Counts I and II of the Complaint pursuant to 28 U.S.C. § 1915(e)(2). The district court later ruled that plaintiff has "no likelihood of success" on the merits of those claims. Order, R. 15, at 7. That determination necessarily eliminates 28 U.S.C. § 1292(b) as a basis of jurisdiction to review its interlocutory determination. Nevertheless, the district court entered final judgment as to Counts I and II pursuant to Fed. R. Civ. P. 54(b). It is only pursuant to that certification that this Court has jurisdiction, if at all, under 28 U.S.C. § 1291 to review the issue raised in this appeal.[1]

[1] The appellant is appealing from what is essentially an interlocutory order. The district court's dismissal of two counts of a three-count complaint did not dispose of all the issues in this case. The appellant asked the district court to enter judgment "[p]ursuant to Federal Rule of Civil Procedure 58(d)" "so that he [could] appeal" from that order of dismissal. Motion for Entry of Judgment, Doc. 16. The district court then entered "a final judgment," citing not Rule 58, but Fed. R. Civ. P. 54(b) and 28 U.S.C. § 1292(b). Order, R. 17. To the extent that the district court intended appealability of its otherwise interlocutory order to rest on 1292(b), the order of entry of a "final judgment with regard to Count I and Count II" does not comport with that statute. Section 1292(b) involves a two-step process, neither of which was followed here. First, the district judge must state in writing that she is of the opinion that the order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. Second, the would-be appellant must then apply to the Court of Appeals to then exercise its discretion to permit the appeal to be taken.

STATEMENT OF THE ISSUES

I.

Whether the district court erred in dismissing appellant's coercion claim (Count I)—which claim was specifically premised on an alleged choice between two unconstitutional methods of execution—because appellant was collaterally estopped from re-litigating the constitutionality of Tennessee's three-drug lethal injection protocol.

II.

Whether the district court erred in dismissing appellant's challenge to electrocution as a method of execution under *Stewart v. LaGrand*, 526 U.S. 115 (1999), given that appellant had demanded, and in fact sued for a federal court order to obtain, electrocution as his method of execution.

INTRODUCTION

This brief is being submitted upon direction of the Court that the Defendants file a "brief in opposition to the appeal" that was noticed and docketed yesterday.

STATEMENT OF THE CASE

The appellant, Edmund Zagorski, was convicted by a Tennessee jury in 1984 of the first-degree murders of John Dale Dotson and Jimmy Porter. The jury sentenced appellant to death for each of the murders, and the Tennessee Supreme Court affirmed.[2] *State v. Zagorski*, 701 S.W.2d 808 (Tenn. 1985), *cert. denied*, 478 U.S. 1010 (1986).

On March 15, 2018, the Tennessee Supreme Court set appellant's execution date for October 11, 2018. Because appellant had been sentenced to death for first-degree murders committed before January 1, 1999, Tenn. Code Ann. § 40-23-114(b) permitted him to choose between two constitutional methods of execution: (1) lethal

[2] Appellant pursued a series of state and federal collateral challenges to the judgment, but all were unsuccessful. *Zagorski v. State*, 983 S.W.2d 654 (Tenn. 1998), *cert. denied*, 528 U.S. 829 (1999) (denying state post-conviction relief); *Zagorski v. Bell*, 326 Fed. Appx. 336 (6th Cir. Apr. 15, 2009), *cert. denied*, 559 U.S. 1068 (2010), *reh. denied*, 561 U.S. 1019 (2010) (affirming the denial of federal habeas relief); *Zagorski v. Mays*, __F.3d __, 2018 WL 5318246 (6th Cir., Oct. 29, 2018) (reh. denied Oct. 30, 2018) (affirming the denial of post-judgment relief under Fed. R. Civ. P. 60(b)(6)).

injection[3] or (2) electrocution.[4] Appellant chose electrocution as the method of his execution, and he filed a Section 1983 lawsuit in the United States District Court for the Middle District of Tennessee the day before his October 11, 2018, execution to ensure that the State of Tennessee would honor his choice. *Zagorski v. Haslam,* No. 3:18-cv-01035 (M.D. Tenn.).

Appellant's Complaint and Emergency Motion for Temporary Restraining Order and Preliminary Injunction in that case asked the district court to direct the State to execute him "in accordance with its newest electrocution protocol" and to enjoin the State from carrying out his execution by lethal injection. *Zagorski v. Haslam,* No. 3:18-cv-01035 (M.D. Tenn.) (Complaint, Doc. No. 1, at 2, 17; Emergency Motion, Doc. No. 3). Appellant pled that "it is his sincere preference to die by the electric chair." *Id.* (Doc. No. 1, at 10-11). And the only relief appellant requested was that the district court "enjoin the Defendants from executing Mr.

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[3] *Abdur'Rahman, et al. v. Parker, et al*., 2018 WL 4858002 (Tenn.), *cert. denied sub nom., Zagorski, et al. v. Parker, et al*., 2018 WL 4900813 (Oct. 11, 2018) (upholding as constitutional Tennessee's three-drug lethal injection protocol).

[4] *In re Kemmler*, 136 U.S. 436 (1890) (affirming New York's imposition of electrocution as a means of capital punishment); *State v. Black*, 815 S.W.2d 166 (Tenn. 1991) (electrocution is a constitutionally permissible method of execution).

Zagorski by using the three-drug protocol outlined in the July 5, 2018, TDOC execution manual." *Id.* (Doc. No. 1, at 17).

On October 11, 2018, the district court "enjoined [Defendants] from proceeding with the [appellent's] execution by lethal injection pending a final judgment in this case." *Id.* (Memorandum and Order, Doc. No. 10). The State did not appeal that order. Later that day and specifically in light of this Court's "decision to honor Zagorski's last-minute decision to choose electrocution as the method of execution," and "to give all involved the time necessary to carry out the sentence in an orderly and careful manner," Tennessee Governor Bill Haslam granted appellant a ten-day Reprieve until October 21, 2018. *See Id.* (Motion, Doc. No. 12, at 2-3, Attachments 1 and 2).

On October 22, 2018, at the conclusion of the ten-day reprieve period, the Tennessee Supreme Court re-set appellant's execution for November 1, 2018. *State v. Zagorski*, No. M1996-00110-SC-DPE-DD (Tenn., Oct. 22, 2018). On October 24, 2018, the State of Tennessee agreed to appellant's request to make permanent the district court's preliminary injunction "enjoin[ing] [Defendant's] from proceeding with [appellant's] execution by lethal injection." *Id.* (Motion, Doc. No. 15, at 3).

But six days before the new execution date, appellant initiated another suit—the one from which this appeal arises—under 42 U.S.C. § 1983, this time challenging

the very method he had demanded in the earlier matter. Appellant's three "causes of action" included a claim that he had been "coerced" into choosing electrocution as his method of execution (Count I) and a claim that electrocution itself violates the Eighth Amendment to the United States Constitution (Count II). Complaint, R. 1, at 29-30. That same day, the district court dismissed both counts under 28 U.S.C. § 1914(e)(2) as facially meritless. Order, R. 8. The court dismissed appellant's "motion to reconsider" the dismissals three days later. Order, R. 15, at 1-4.

At appellant's request—"so that he can appeal the dismissal of [Counts I and II] before his execution scheduled two days from now," R. 16—the district court entered final judgment as to Counts I and II pursuant to Fed. R. Civ. P. 54(b). Order, R. 17. This appeal followed. Notice of Appeal, R. 19.

SUMMARY OF THE ARGUMENT

The district court correct dismissed Counts I and II of appellant's Complaint. In Count I of his Complaint, appellant alleged that the State violated his constitutional rights by "forc[ing] Mr. Zagorski to choose between two cruel and unusual punishments." Complaint, R. 1, at 29. But appellant had just concluded state-court litigation on the constitutionality of lethal injection—Tennessee's presumptive method of execution—on October 11, 2018, when the United States Supreme Court

denied a petition for writ of certiorari from the decision of the Tennessee Supreme Court upholding Tennessee's three-drug lethal injection protocol. Appellant was thus collaterally estopped from relitigating the constitutionality of that method of execution. And, because appellant's "coercion" claim was specifically premised on an alleged choice between two "constitutionally unacceptable forms of punishment," the district court correctly concluded that the state-court determination was dispositive of appellant's coercion claim.

The district court also correctly dismissed appellant's challenge to electrocution as a method of execution. The decision of the United States Supreme Court in *Stewart v. LaGrand*, 526 U.S. 115 (1999), is clear that, by selecting one method of execution over another, an inmate waives any objection he may have to it. Because appellant bypassed one constitutional method of execution in favor of another method.

STANDARD OF REVIEW

This Court reviews *de novo* a district court's decision to dismiss a claim for failure to state a claim. *Laborers' Local 265 Pension Fund, et al. v. iShares Trust, et al.*, 769 F.3d 399 (6th Cir. 2014).

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DISMISSED COUNT I OF APPELLANT'S CLAIM BECAUSE HE WAS COLLATERALLY ESTOPPED FROM RELITIGATING A DISPOSITIVE COMPONENT OF THAT CLAIM.

Appellant argues that district court's dismissal of Count I was based on an erroneous application of the collateral estoppel. He contends that the Tennessee Supreme Court only resolved the "narrow issue" of the constitutionality of Tennessee's lethal injection issue, but not the "coercion" issue raised in his present Complaint. But appellant's coercion argument was entirely premised on the constitutionality of lethal injection: "It violates the Eighth and Fourteenth Amendments to force Mr. Zagorski to choose between two cruel and unusual punishments." Complaint, R. 1, at 29. And, "[t]he State of Tennessee cannot cloak unconstitutional punishments in the mantle of choice." *Id*. at 30. As the district court explained, "the issue of the constitutionality of Tennessee's lethal injection protocol is a central lynchpin to Count I." Order, R. 15, at 2.

Collateral estoppel "bars the same parties or their privies from relitigating in a later proceeding legal or factual issues that were actually raised and necessarily determined in an earlier proceeding." *Wildasin v. Mathes*, 176 F. Supp. 3d 737, 745 (M.D. Tenn. 2016). To prevail on his "coercion" claim, appellant must necessarily

prove "the very opposite of what the Tennessee Supreme Court has already ruled," Order, R. 15, at 3, i.e., that Tennessee's lethal injection protocol is unconstitutional. The district court thus correctly concluded that Count I must be dismissed because relitigation of its factual premise was barred by collateral estoppel.

Even if that were not the case, the claim would fail as a matter of law in any event because, even beyond the parties in this proceeding, courts have consistently upheld as constitutional a midazolam-based three-drug lethal injection protocol. *See Glossip v. Gross*, 135 S.Ct. 2726, 2739-40 (2015) (listing case citations). *See also In re: Ohio Execution Protocol*, 860 F.3d 881 (6th Cir.), *cert. denied*, 137 S.Ct. 2238 (2017) (reversing order enjoining three-drug protocol using midazolam: "[Ohio's] chosen procedure here is the same procedure (so far as the combination of drugs is concerned) that the Supreme Court upheld in *Glossip*."); *McGehee v. Hutchison*, 854 F.3d 488, 492 (8th Cir.), *cert. denied*, 137 S.Ct. 1275 (2017) (evidence falls short of showing a significant possibility that Arkansas' protocol is "sure or very likely" to cause severe pain and needless suffering); *Arthur v. Commissioner, Ala. Dep't of Corr.*, 840 F.3d 1268 (11th Cir. 2016), *cert. denied*, 137 S.Ct. 725 (2017) (inmate "has not carried his heavy burden to show that Alabama's current three-drug protocol—which is the same as the protocol in *Glossip*—is 'sure or very likely to cause' [inmate] serious illness, needless suffering, or a substantial risk of serious

harm”). The protocol has never been found unconstitutional.

In short, because appellant was not “forced” to choose between two unconstitutional methods of execution, his “coercion” claim fails as a matter of law.

II. THE DISTRICT COURT CORRECTLY DISMISSED APPELLANT’S CHALLENGE TO ELECTROCUTION AS A METHOD OF EXECUTION BECAUSE APPELLANT DEMANDED TO BE EXECUTED BY THAT METHOD.

When appellant exercised his statutory right to choose electrocution as the method of his execution, he waived the right to challenge the constitutionality of that method under *Stewart v. LaGrand*, 526 U.S. 115 (1999). The rule of *LaGrand* is clear, unambiguous, and entirely reasonable—by selecting one method of execution over another, an inmate waives any objection he may have to it. Appellant’s suggestion that *Glossip* has altered *LaGrand* is baseless. The district court’s dismissal of this challenge to electrocution was directly compelled by *LaGrand*, and this Court must affirm for the same reason.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations set forth in Fed. R. App. P. 32(a)(7)(B)(i). The brief contains 5,772 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The brief also complies with the typeface and style requirements of Fed. R. App. P. 32(a)(5) and Fed. R. App. P. 32(a)(6). The brief was prepared in Times New Roman, 14-point, proportional-type font.

/s/ Jennifer L. Smith
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CERTIFICATE OF SERVICE

On October 31, 2018, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a copy in the United States mail, postage prepaid, to their address of record.

/s/ Jennifer L. Smith
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DESIGNATION OF DISTRICT-COURT DOCUMENTS

Pursuant to 6 Cir. R. 30(b), counsel certifies that true copies of relevant district court documents are included as part of the district court's electronic record:

Document Description	District Court Record Entry No.	Page ID Range

Respectfully submitted,

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