IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EDMUND ZAGORSKI,	)	
	)	
Plaintiff-Appellant,	)	
	)	**No. 18-6145**
v.	)	**CAPITAL CASE**
	)	
BILL HASLAM, et al.,	)	
	)	
Defendants-Appellees.	)	

RESPONSE IN OPPOSITION TO
MOTION FOR STAY OF EXECUTION

Thirty-four hours before his scheduled execution—the second such date in the past three weeks and the fourth since 2010—appellant Edmund Zagorski has moved for a stay of execution so he can challenge the State's use of a method of execution he not only demanded but then sued for and obtained a federal court order mandating the State's compliance with his demand. *Zagorski v. Haslam*, No. 3:18-cv-01035 (M.D. Tenn.).

Appellant seeks the stay based on his appeal of the district court's dismissal of two counts of a subsequent suit in which appellant challenged the method of execution he had demanded. The district court dismissed appellant's claims under 28 U.S.C. § 1915(e)(2) after finding them to be facially meritless (Order, R. 8, at 1-

3), and it rebuked appellant's obvious "gamesmanship" in "raising arguments a few days before execution that could have been presented months ago." Order, R. 15, at 7. Appellant now argues that a stay of execution would aid this Court's jurisdiction because he has "a reasonable likelihood of success" in his appeal of the two claims dismissed by the district court. Motion, 1. But he misstates the standard for a stay of execution, and he is wrong on the merits. There is no likelihood appellant will prevail in this appeal, let alone the significant possibility of success required by *Hill v. McDonough*, 547 U.S. 573 (2006). Appellant's motion for stay should be denied.

PROCEDURAL HISTORY

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.[1] *State v. Zagorski*, 701 S.W.2d 808 (Tenn. 1985), *cert. denied*, 478 U.S. 1010 (1986).

[1] 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)).

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 injection[2] or (2) electrocution.[3] 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

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[2] *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).

[3] *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).

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. 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.

REASONS FOR DENYING A STAY

A. Appellant Can Show No Significant Possibility of Success on the Merits of his Appeal.

Appellant contends that he is entitled to a stay under the All Writs Act, 28 U.S.C. § 1651(a), if he can show a "reasonable likelihood of success" on the merits of his appeal, but he is mistaken.

Pursuant to the All Writs Act, this Court "may issue all writs necessary or appropriate in aid of [its] jurisdiction[] and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). But the Supreme Court has made clear that reliance on the All Writs Act does not excuse an inmate who seeks a stay of execution "'to challenge the manner in which the State plans to execute him'" from "satisfy[ing] all of the requirements for a stay, including a showing of a significant possibility of success on the merits." *Dunn v. McNabb*, 138 S. Ct. 369 (quoting *Hill*, 547 U.S. at 584).

Appellant is not entitled to relief under the All Writs Act because he shows no likelihood of success on the merits of his appeal, let alone the "significant" possibility required by *Hill.* And, because his arguments are meritless, a stay would not aid this Court's jurisdiction

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 the district court correctly found that the Tennessee Supreme Court had ruled less than one month earlier that Tennessee's midazolam-based three-drug protocol was constitutional. Order, R. 8, at 2. The United States Supreme Court also denied certiorari. *See 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). Because Count I of the Complaint was premised on "the very opposite of what the Tennessee Supreme Court has already ruled," the claim was barred by collateral estoppel. Order, R. 15, at 2-3.

Appellant argues that the district court's ruling was not a ruling "on the merits." Motion, 8. But he misses the point. Collateral estoppel bars his claim in this case because the merits have already been decided in an earlier case involving the same parties. Indeed, constitutional challenges to the midazolam-based three-drug lethal injection protocol have been rejected by every court that has considered it, including this Court. *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").

In short, appellant was not "coerced" into choosing electrocution to avoid an unconstitutional method of execution. And, 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.[4] 526 U.S. at 119.

Appellant also suggests that the district court's entry of judgment on Counts I and II indicates that the district judge was of the opinion that "there is a substantial ground for difference of opinion." Motion, at 2. But that is plainly incorrect, as the district court itself made clear: "The court has already dismissed [Counts I and II] and finds that he has *no likelihood of success on their merits*." Order, R. 15, at 7 (emphasis added). The district court finalized Counts I and II only because of the exigency that appellant's late filing created; that action was in no way an endorsement of the merits of his claims.

[4] Despite appellant's contention that *Glossip* somehow changes the rule in *LaGrand*, Motion, at 9-10, this Court is still bound by *LaGrand*, just as the Tennessee Supreme Court was bound by *Glossip*.

The district court's dismissal of appellant's claims was correct in all respects, and Zagorski is not entitled to a stay of his execution.

B. Appellant's Eleventh-Hour Gamesmanship Should Not Be Condoned Through Equitable Relief.

Beyond the obvious legal deficiency of appellant's claims, his request for equitable relief should also be denied for the inexcusable delay in filing. "A court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief." *Gomez v. U.S. Dist. Court of Northern Dist. of California*, 503 U.S. 653, 654 (1992). "[T]here is a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." *Nelson v. Campbell*, 541 U.S. 637, 650 (2004). This Court must "take into consideration the State's strong interest in proceeding with its judgment and [an] obvious attempt at manipulation." *Gomez*, 503 U.S. at 654.

Here, the district court specifically rebuked appellant's "gamesmanship" in "raising arguments a few days before execution that could have been presented months ago." Order, R. 15, at 7. "If the plaintiff found his statutory choice under Tennessee Code Annotated § 40-23-114(b) to be constitutionally objectionable, he could have filed suit long before October 26, 2018." *Id.*

Appellant's obvious delay and manipulation of the federal judicial process—filing successive lawsuits within weeks seeking diametrically opposite relief—weigh heavily against the granting of equitable relief.

C. A Stay of Execution Would Harm Significant State Interests.

The appellant has long since completed state and federal review of his convictions and sentence. The State's interests in finality are now "all but paramount." *Calderon v. Thompson*, 523 U.S. 538, 557 (1998).

Appellant's case has been thoroughly litigated over a span of nearly three decades. He committed double murder more than thirty-five years ago. *Zagorski*, 701 S.W.2d at 810 (crimes occurred April 23, 1983). His conviction became final more than thirty years ago. *Zagorski v. Tennessee*, 478 U.S. 1010 (1986) (cert. denied on June 30, 1986). The judgment in appellant's federal habeas proceedings became final over eight years ago. *Zagorski v. Bell*, 559 U.S. 1068 (2010) (petition for writ of certiorari denied April 19, 2010).

The State's significant interests in enforcing its criminal judgments and the victims' compelling interest in finality weigh heavily against granting a stay of execution. *Calderon v. Thompson*, 523 U.S. 538, 556 (1998).

CONCLUSION

The motion for stay of execution should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been served through the Court's electronic filing system to Kelley J. Henry, Assistant Federal Public Defender, 810 Broadway, Suite 200, Nashville, TN 37203, on the 31st day of October, 2018.

/s/ Jennifer L. Smith
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