IN THE
SUPREME COURT OF THE UNITED STATES
No. 18A142

IN RE:
BILLY RAY IRICK,
Movant,

REPLY IN RESPONSE TO APPLICATION FOR STAY OF EXECUTION

THIS IS A CAPITAL CASE
EXECUTION SET FOR AUGUST 9, 2018 AT 7 PM

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August 8, 2018

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

In Response to Mr. Irick's application for a stay pursuant to the All Writs Act, Respondent contends that the state court's adjudication of Mr. Irick's challenge to the lethal injection protocol is "in line with this Court's decision in *Glossip* and the decisions of other federal appellate courts that have uniformly rejected Eighth Amendment challenges to lethal injection protocols that use midazolam as the first drug in a three-drug combination." Brief in Opposition at p. 11 (citing *Glossip v. Gross*, 135 S. Ct. 2726, 2739-40 (2015)). In so arguing, Respondent attempts to elide this Court's holding in *Baze v. Rees*, 553 U.S. 35 (2008): "It is uncontested that, *failing a proper dose of sodium thiopental* ***that would render the prisoner unconscious***, there is a substantial, constitutionally unacceptable risk of suffocation from the administration of pancuronium bromide and pain from the injection of potassium chloride." *Id.* at 53 (emphasis supplied). Where the trial court here found that Mr. Irick (and the other petitioners) have "established that midazolam does not elicit strong analgesic effects and the inmate being executed may feel pain from the administration of the second and third drugs," this Court's precedent requires a stay so that the appellate court can rectify the trial court's failure to apply *Baze* to the facts established at the trial. See Attachment C to Stay Motion, July 26, 2018 Order, p.23, *Abdur'Rahman, et al. v. Parker, et al.*, No. 18-183-III (Davidson County Chancery Court).

Respondent's contention that the trial court's order was in line with *Glossip* is mistaken. The evidence presented in the state-court trial challenging Tennessee's method of execution is directly contrary to the record that supported this Court's decision in *Glossip*. The record before this Court in *Glossip* was from an evidentiary hearing on a motion for preliminary injunction (in contrast to the full trial here) and contained a finding, based upon pharmacist Lee Evans' testimony, that midazolam "would make it a virtual certainty that any individual will be at a sufficient level of unconsciousness to resist the noxious stimuli which could occur from the application of the second and third drugs." *Glossip*, 135 S. Ct. at 2736. Dr. Evans no longer takes that position and the record in the state-court trial was to the contrary.

The proof now establishes (and Dr. Evans now concedes) that "midazolam does not elicit strong analgesic effects and [Mr. Irick] may feel pain from the administration of the second and third drugs." *Id.* Dr. Stevens, a pharmacologist credited as credentialed and authoritative by the trial court, testified that midazolam in any dose is incapable of rendering an inmate insensate to pain and that the inmate would feel "pain and terror" from the administration of the second two drugs in the protocol. Dr. Stevens testified, "First and primarily the first drug, midazolam, will not render the inmate insensate to pain . . . Secondly, when the vecuronium is then given, there will be noxious stimuli from the paralysis, the fear, suffocation, and that will cause increased excitation, and therefore, even causing less sedation as midazolam could provide. And then thirdly, the potassium chloride. Again, given that midazolam cannot cause the inmate to be insensate of pain, that

will cause feelings of burning, "fire," as I think it's been called, that won't be as noticeable [to observers] because the vecuronium is on board. But without having a state of general anesthesia, it will be experienced." (Stevens testimony, 160:12 to 161:13).[1] Dr. Greenblatt, the leading authority on benzodiazepines testified, "Midazolam does not produce general anesthesia by itself. It can't be used for that purpose. It's doesn't have that property. And basically all sources agree to that." 497, 22

Dr. Greenblatt also testified that in his almost 50 years of research, he have never met a person who believes, read an article that asserts, or seen research that suggests that any amount of midazolam can induce a state of anesthesia where a person would be insensate to or unaware of noxious stimuli like suffocation from vecuronium bromide or the chemical burn of potassium chloride.

Further, in addition to the finding based on Dr. Evans' now-discredited testimony, the *Glossip* Court cited to 12 other midazolam executions that "**appear[ed]** to have been conducted without any significant problems." *Glossip*, 135 S. Ct. at 2745-46 (emphasis added). The Tennessee plaintiffs presented testimony from eleven witnesses to midazolam-based executions—at least one from every jurisdiction that has used midazolam—who observed indications of inmates being sensate and aware during the administration of the second two drugs. Order at 27-28. As the record in Tennessee now demonstrates, 24 of the 27 autopsied inmates

[1] Portions of the Trial Transcript were received today and filed with the Chancery Court for purposes of preparing the record on appeal.

executed with midazolam showed clear signs of pulmonary edema.[2] The "appear[ance]" of no significant problems this Court relied upon in *Glossip* has been When this Court relied on the fact that 12 midazolam executions (other than Lockett and Wood) "appear[ed]" to have gone as intended, this Court did not have a record of the pulmonary edema nor of the fact that inmates have shown signs of being aware and sensate during the administration of the constitutionally unacceptable, final two drugs.

Despite the procedurally distinct postures and the resulting differences in the records, Respondent points to litigation from the Sixth, Eighth and Eleventh Circuits as further support for this position. None of the cases cited, however, presented this Court with a record wherein midazolam was conceded to lack analgesic properties or where it was found that midazolam would not render the inmate insensate.

- Respondent misrepresents and vastly overstates the import of the Sixth Circuit's decision in *In re: Ohio Execution Protocol*, 860 F.3d 881 (6th Cir. 2017). There the appellate court reversed a preliminary

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[2] As Dr. Greenblatt explained, "[In the Protocol] you're injecting a total of 100 milliliters of a highly acidic solution. . . . The whole injection is carried first to the heart and then immediately to the lungs, so it will be a high acid load in the lungs. . . . That's a very thin and delicate membrane, sensitive to acid. So when that much acid gets into the lungs, it causes damage to those membranes and makes it leaky so that it's no longer an adequate barrier to fluid from the circulation. So fluid leaks from the blood into the [] alveoli, the airspaces in the lungs, that are supposed to have only air. So the lungs acquire fluid. We call that pulmonary edema. And that makes air exchange difficult if maybe not impossible. . . . That would be immediate in the Protocol." 542, 18

injunction finding that the district court magistrate, in determining the inmates' likelihood of success on the merits, had not applied the proper standard of risk of pain set forth in Glossip or made explicit findings in support of its decision. *See Ohio Execution Protocol*, 860 F.3d at 855. See also Id. at 886 ("To some extent [the district court's] omission [to offer much reasoning in support of its decision] is understandable, given the tight timelines applicable here.") The Sixth Circuit's decision – rendered by the *en banc* court with six of 13 judges dissenting – was that the science presented in the "tight timelines" of the preliminary injunction hearing "could go either way," and that showing was insufficient for the district court to have granted the injunction. In fact, the Ohio lethal injection litigation is ongoing and a full merits hearing has yet to be held. The case offers no support for Respondent's position.

- In *McGhee v. Hutchison*, 854 F.3d 488 (8th Cir. 2017) the Eighth Circuit denied relief for three independent legal grounds: primarily, a failure to timely file a challenge to Arkansas' lethal injection protocol, secondly, due to the use of the wrong standard of proof, and thirdly, based on the Eighth Circuit's specific interpretation of the readily feasible alternative requirement. *Id.* at 491-93. In passing, and without any development, the court simply called the underlying proof

"equivocal;" which, as it was significantly less-developed than that presented in Tennessee, may have been a fair statement. *Id.* at 492.

- The Eleventh Circuit's decision in the *Arthur* case cited by the State has no relevance to Mr. Irick's Eighth Amendment challenge. Resp. at 12 (citing *Arthur v. Comm'r, Alabama Dep't of Corr.*, 840 F.3d 1268, 1282 (11th Cir. 2016), *cert. denied*, 137 S. Ct. 725 (2017)). Arthur challenged the adequacy of Alabama's consciousness check, presenting an expert who testified that the prison officials did not pinch the inmates hard enough to check for consciousness. *Id.* at 1281-82. Arthur also raised an as-applied challenge, presenting a cardiologist to testify that he had reviewed Arthur's medical records and concluded that, as a result of Arthur's history of heart problems, he would likely have a heart attack before the midazolam could take effect, which would render the execution protocol cruel and unusual as applied to him. *Id.* at 1288. The Eleventh Circuit's rejection of Arthur's challenges to Alabama's midazolam-based method of execution has no applicability to the issues presented in Mr. Irick's challenge to the Tennessee protocol. Mr. Irick presented four highly-esteemed experts who established in a facial challenge that a midazolam-based protocol is sure or very likely to cause needless suffering

Respondent claims that this Court's pending resolution of the issues presented in *Bucklew v. Precythe*, No. 17-8151 (U.S.) will have "no bearing on this

case." Response at 11. Respectfully, Respondent's attempt to cabin this Court's inquiry in *Bucklew* is not persuasive. Though the issues presented in Bucklew arose in the context of an "as applied" challenge to a lethal injection protocol, where this Court *sua sponte* has asked the parties to address the petitioner's burden under *Glossip* and where Respondents seek to rebuff Mr. Irick's constitutional claims with those very requirements, this Court's resolution of *Bucklew* will directly affect the resolution of the appeal of the other petitioners in the action below – and Mr. Irick should remain alive to benefit from the just resolution of those issues.

Respondent claims that Mr. Irick cannot show a "significant possibility of success on the merits" without affirmatively presenting proof as to where the State of Tennessee could purchase pentobarbital. Response at 9. Respondent is wrong. Mr. Irick presented proof of an alternative method of lethal injection that would "significantly reduce a substantial risk of severe pain," to wit a two drug protocol eliminating the vecuronium bromide. The trial court found the petitioners' experts to be highly credentialed and "imminent": Dr. Stevens, a pharmacologist testified that vecuronium bromide as used in the protocol does not hasten death, but rather prolongs the inmate's suffering:

> Q. · · · From a pharmacological perspective and to a reasonable degree of scientific certainty, will vecuronium bromide do anything to expedite the inmate's death or make it less painful?
>
> A. · · · No, it wouldn't.

> Q. · · · From a pharmacological perspective and to a reasonable degree of scientific certainty, would a two-drug protocol involving just midazolam and potassium chloride, but removing the three-minute interlude with vecuronium, be less painful and cause less suffering than the present three-drug protocol?
>
> A. It would in the sense of death comes sooner.

(162:14 to 163:2).

Where Mr. Irick has presented compelling proof, credited by the trial court and unrebutted by comparable experts,[3] that a 2 drug protocol would significantly reduce a substantial risk of severe pain, Mr. Irick has shown a significant possibility of success on the merits such that a stay should issue.

Respondent's cynical position that a stay under the All Writs Act is not necessary because some of the other plaintiffs will still be alive after Mr. Irick is executed is shocking and incorrect.[4] Mr. Irick faces irreparable harm. The record developed below in a 10 day trial with four experts –all of whom are credited- establishes a likelihood of success. The harm to the state is negligible. Mr. Irick remains on death row. He is being punished every single day.

Conclusion

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[3] The trial court noted that respondents' experts, while qualified to testify, "did not have the research knowledge and imminent publications that Plaintiff's counsel did." Order at 21.

[4] Nothing in the application requires the Court to interpret State Law.

Based upon the evidence in the record and existing law, it is more likely than not that Mr. Irick will prevail on appeal. Equity demands a stay of execution enter to prevent Mr. Irick's execution so that his rights may be vindicated. Accordingly, the motion should be granted.

Respectfully submitted,

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CERTIFICATE OF SERIVCE

I hereby certify that a true and correct copy of the foregoing document was sent to the following via email on this the 8th day of August, 2018, to:

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Ms. Jennifer Smith
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Hard copies will follow in the United States Mail.

/s/ *Kelley J. Henry*
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