07A304

IN THE
SUPREME COURT OF THE UNITED STATES

Christopher Scott Emmett,

APPLICANT,

v.

Gene M. Johnson, et al.,

RESPONDENTS.

OPPOSITION TO MOTION TO VACATE STAY OF EXECUTION

INTRODUCTION

On October 17, 2007, this Court granted Christopher Emmett a stay of execution to allow the Fourth Circuit the opportunity to consider Emmett's appeal in light of this Court's decision in *Baze v. Rees*. Virginia now seeks to cut off review of Emmett's claims just as the Fourth Circuit prepares to consider them. Conspicuously absent from Virginia's motion is any mention of the fact that the Fourth Circuit has already put Emmett's case on an expedited docket, 4th Cir. L. R. 22(b), received full briefing on the merits of Emmett's case, asked for supplemental briefing by May 2 on the effect of *Baze* on the parties' arguments, and scheduled oral argument for May 14. In short, the Fourth Circuit is expeditiously proceeding to resolve Emmett's appeal, just as this Court envisioned when it initially granted the stay. The Fourth Circuit's imminent review of the merits is sufficient by itself to warrant denial of the State's motion. *Doe v. Gonzales*, 546 U.S. 1301, ---, 126 S. Ct. 1, 4 (2005) (Ginsburg, J., in chambers) (declining to vacate stay pending review by Court of Appeals where "[t]he principal briefs have been filed and I anticipate that the Court of Appeals will hear argument promptly and render its decision with appropriate care and dispatch").

The Fourth Circuit's willingness to hear Emmett's claims also gives the lie to Virginia's dual assertions that keeping the stay in place will cause it injury and interfere with the prerogatives of the Court of Appeals. This Court's stay expires upon "final disposition of the appeal by the . . . Fourth Circuit." *Emmett v. Johnson*, 552 U.S. ---, --- S. Ct. --- (Oct. 17, 2007) (Attachment A). In other words, the stay is in place only as long as the Fourth Circuit permits it to be. Virginia may wish that the Fourth Circuit had chosen to summarily affirm the district court, 4th Cir. L. R. 34(a), rather than having (properly) called for supplemental briefing and setting the case for argument, but the Fourth Circuit's willingness to maintain the stay and hear

Emmett's appeal constitutes no injury to the State. Were this Court to dissolve the stay it would only force the Fourth Circuit to divert its attention to additional stay litigation instead of focusing on the merits of Emmett's claims as it has chosen to do. Moreover, given the nearness of the Fourth Circuit argument date, it is unlikely that Virginia would even be able to carry out Emmett's execution before the argument, at which point the Fourth Circuit would be free to rule on Emmett's appeal. Thus, with argument pending, and no execution date likely beforehand, Virginia's claims of harm are ill-founded.

In any case, in addition to being unable to show any harm from maintaining the stay, Virginia has not come close to showing that Emmett is unlikely to prevail on the merits in the court of appeals. As discussed below, the district court's grant of summary judgment is indefensible in light of the well-documented dangerous practices in which Virginia engages and that go far beyond those approved in *Baze*.

BACKGROUND

On April 19, 2007, Emmett filed a complaint in federal district court challenging Virginia's lethal injection protocol. After denying a preliminary injunction, the district court entered summary judgment for Virginia on September 20, 2007. Although the district court found that "the inconsistencies demonstrated by the evidence are disturbing," District Court Opinion at 14 n.7 (Attachment B), it held that summary judgment was appropriate and repeatedly cited testimony that if the chemicals were properly administered, there would be little risk that the inmate would suffer pain. *E.g.*, *id.* at 11, 13, 15, 19.

While his case was pending before the district court, Emmett filed a timely petition for certiorari on June 5, 2007 from a divided decision of the Fourth Circuit denying his first federal habeas petition. Because Virginia had previously set an execution date of June 13, 2007,

Emmett also sought a stay of execution from this Court to allow his petition for certiorari to be considered. On the day of his execution, this Court denied the stay over the dissenting votes of four Justices, *Emmett v. Kelly*, 127 S. Ct. 2970 (2007), but informed Virginia, through the Clerk of the Court, that it would not be able to rule on Emmett's petition before his execution date of June 13, 2007. Motion at 2. Governor Kaine responded by ordering that Emmett's execution be stayed until October 17, 2007, to allow this Court to consider Emmett's petition for certiorari.

On September 25, 2007, Emmett filed a timely notice of appeal from the summary judgment order in his lethal injection action. On the same day, this Court granted a writ of certiorari in *Baze v. Rees*. Later, on October 1, 2007, this Court declined to grant certiorari on Emmett's habeas petition. *Emmett v. Kelly*, 128 S. Ct. 1 (2008). Emmett then sought a stay from the Fourth Circuit to allow it to consider his lethal injection appeal. A divided panel declined to enter a stay on October 15, 2007. Emmett then sought a stay from this Court pending its decision in *Baze*. This Court granted a stay on October 17, 2007, which is to expire "upon final disposition of the appeal by the ... Fourth Circuit or by further order of this court." Attachment A.

The Fourth Circuit then set a briefing schedule for Emmett's appeal, and full merits briefing was completed by January 11, 2008. Argument was tentatively set for the March 18-21 session, and then was sua sponte calendared to May 14, 2008, a date during the court of appeals' next regular session. Attachment C. After this Court issued its opinion in *Baze*, the Fourth Circuit ordered that the parties submit briefs discussing the effect of *Baze* on Emmett's claims. Attachment D. Those briefs are due on May 2, 2008.

ARGUMENT

I. STANDARD OF REVIEW.

This Court has not announced a standard for considering motions to vacate stays entered by the Court as a whole. The Court, however, has held that it would vacate a stay of execution ordered by a single justice only in "unusual" circumstances, *Rosenberg v. United States*, 346 U.S. 273, 286 (1953) (per curiam), which is a requirement that would appear even more pertinent when the Court as whole has ordered the stay. In assessing whether vacatur is appropriate, Respondent assumes that this Court's review will consider the traditional factors governing stays -- likelihood of success on the merits, harm to the parties, and other equitable considerations. *E.g.*, *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980). Because Virginia is the movant seeking to have this Court reconsider its decision to grant a stay, it bears the burden of persuasion in showing the equitable factors.

II. EQUITABLE FACTORS FAVOR MAINTAINING THE STAY SO THAT THE FOURTH CIRCUIT MAY RESOLVE THE APPEAL IN AN ORDERLY FASHION.

The equitable factors that Virginia invokes as grounds for dissolving the stay are wholly unpersuasive. First, Virginia cannot show injury from maintenance of the stay. Emmett's appeal has already been briefed, and Virginia likely will not even be able to carry out Emmett's execution prior to the Fourth Circuit's argument on May 14.[1] If the Fourth Circuit then finds Emmett's claims meritless (and Emmett submits that it will not do so) it is free to issue an order affirming the district court's judgment as quickly as it believes justice requires. *E.g.*, *Doe*, 126 S.

[1] Before Virginia can set an execution date, the trial court must convene a hearing at which the condemned prisoner is represented by counsel. The execution cannot be fixed for a date sooner than 10 days after entry of the court order. Va. Code § 53.1-232. Moreover, Virginia must give the prisoner at least 15 days before the scheduled execution in which to choose a method of execution. Va Code § 53.1-234. Virginia's motion to this Court contains no representation that it would even seek to set a date before the Fourth Circuit argument.

Ct. at 4 (Ginsburg, J., in chambers). The notion that this stay is preventing the Fourth Circuit from allowing the execution to go forward is a simple fiction. Instead, it is Emmett who would be harmed by the lifting of the stay, as it would force him to litigate his claim in a warrant posture -- a result that the State freely concedes is its goal. Motion at 11.

Second, Virginia's claim that Emmett's stay should be dissolved on dilatoriness grounds is incorrect. In the first place, Emmett did not delay in filing his suit. This suit was filed before Emmett's first federal habeas proceedings became final, and nearly two months before the execution date of June 13, 2007 that was operative at that time. And while Emmett filed his suit a few days after the June 13, 2007 execution date was set, Virginia subsequently postponed that date until October 17, 2007 because it would have prevented this Court from considering Emmett's first federal habeas claims in the normal course. Having voluntarily postponed that the initial execution date, Virginia cannot now tie a claim of dilatoriness to it.

Moreover, given that the purpose of the stay is to permit orderly appellate review by the Fourth Circuit, the State's assertion of delay makes no sense. Virginia contends that Emmett should have brought his claim "at such a time as to allow consideration of the merits without requiring entry of a stay." Motion at 6. But the merits of Emmett's claim concern whether he has brought a successful Eighth Amendment claim, and those merits now require consideration of the decision in *Baze*. Due to the timing of this Court's grant of certiorari and its later decision in *Baze* (events over which Emmett plainly had no control), that question could not be answered for Emmett without a stay no matter when Emmett had filed his suit. And finally, given Emmett's strong chance of prevailing on the merits, discussed below, equity favors allowing him to proceed with his appeal as the Fourth Circuit has provided.

Third, and finally, the defendants' assertion that Emmett's § 1983 complaint did not challenge Virginia's alternate method of execution (*i.e.*, electrocution) is simply wrong. *See* Complaint at ¶¶ 51-56, 71-72 (challenging electrocution as alternate method) (Attachment E). Emmett's complaint alleges that electrocution is also an unconstitutional method of execution, and thus he has not conceded that an alternative constitutional method of execution remains open to him.

III. EMMETT HAS A SUBSTANTIAL CHANCE OF SUCCESS ON THE MERITS.

Virginia has also failed to show that Emmett lacks a substantial chance of succeeding on the merits of his claim. The *Baze* plurality found that a challenge to a method of execution would be successful where the plaintiff can demonstrate a "substantial risk of serious harm." *Baze v. Rees*, 128 S. Ct. 1520, 1532 (2008) (plurality opinion). Virginia's motion utterly fails to address the *Baze* standard, relying instead on the shibboleth that because the chemicals -- if properly administered -- will not cause pain and suffering, that is the end of the Eighth Amendment inquiry. Motion at 7-8. *Baze* made clear, however, that the relevant question is whether there is a substantial risk that the chemicals would *not* be properly administered. *Baze*, 128 S. Ct. at 1532 (plurality opinion). The evidence before the district court powerfully demonstrated that this risk exists because of Virginia's unique and uniquely dangerous lethal injection practices.

Notably, when inmates in Virginia take longer than expected to die, Virginia responds by giving more pancuronium and potassium, but *not* more thiopental. *See* Attachment B at 5. This happens routinely in Virginia. *Id.* at 7 (noting that second doses have been given in ten executions). Where the potassium fails to kill within the expected time, it suggests that the full dose did not reach the inmate, which in turn suggests that the inmate also did not receive the full

dose of thiopental. Emmett presented expert testimony that under those circumstances, an inmate may be insufficiently anesthetized and therefore in pain, but may be unable to express that pain because of the paralytic effect of the pancuronium and/or the depressive effect of an incomplete dose of thiopental. *Id.* at 6. Virginia has never explained why it does not give an additional dose of thiopental in this context. Indeed, Emmett is unaware of any other jurisdiction that excludes thiopental from a back-up dose as part of its protocol.

In particular, Virginia's practice of failing to re-administer thiopental when it injects a second round of pancuronium and potassium is notably different from Kentucky's practice. In finding Kentucky's methods adequate, this Court praised the fact that Kentucky used a back-up line to "ensure that if an insufficient dose of sodium thiopental is initially administered through the primary line, *an additional dose* can be given through the backup line *before* the last two drugs are injected." *Baze*, 128 S. Ct. at 1534 (plurality opinion) (emphases added). In contrast, Virginia's response to a possibly insufficient dose of thiopental is to give additional doses of the second two drugs. That practice is far more dangerous than Kentucky's procedures.

A related and equally serious problem with Virginia's procedures is that it frequently administers the pancuronium and the potassium within a minute of the thiopental. Emmett presented substantial and highly detailed testimony that thiopental takes more than a minute to cause the inmate to be sufficiently unconscious -- a state known as "burst suppression" -- such that he will be unable to feel the pain caused by the second two chemicals. Testimony of Dr. Thomas Henthorn, reprinted in Fourth Circuit Joint Appendix at 295-296 (excerpted pharmacokinetics testimony given in federal court in Missouri stating that it would be "unlikely" that 2 grams of thiopental would cause burst suppression in less than a minute and a half) (Attachment F). Dr. Henthorn's testimony is more than sufficient to survive summary judgment.

Baze had no occasion to address such evidence because Kentucky has performed only a single execution by lethal injection, *Baze*, 128 S. Ct. at 1528 (plurality opinion), and there was no allegation before the Court concerning drug administration times. Emmett notes, however, that Missouri responded to Dr. Henthorn's testimony by modifying its protocol to require a three minute pause between the administration of thiopental and the other two drugs. *Taylor v. Crawford*, 487 F.3d 1072, 1083 (8th Cir. 2007). Indeed, there can be no dispute that these dangerous practices are entirely remediable.

* * *

At bottom, the State's motion is an ill-founded attempt to disrupt the orderly consideration of Emmett's issues. Virginia is frank in conceding that it believes that Emmett's claims should be litigated in a warrant posture. Motion at 11. Given the Fourth Circuit's request for additional briefing, the imminence of its review, and the seriousness of Emmett's claims, Emmett respectfully submits that the equities favor maintaining the *status quo* and allowing the Fourth Circuit to consider Emmett's claims in an orderly fashion and without the distraction of further stay litigation.

CONCLUSION

For the above reasons, Emmett requests that the Court deny the State's motion to vacate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I am a member in good standing of the Bar of this Court and I have served this day via overnight mail one copy of the foregoing document and attachments thereto on

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I further certify that all parties required to be served have been served.

Michele J. Brace

April 28, 2008