

*****THIS IS A CAPITAL CASE*****

*****EXECUTIONS SCHEDULED FOR APRIL 20, 24, and 27, 2017*****

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JASON McGEHEE, STACEY JOHNSON, BRUCE WARD, TERRICK NOONER,
JACK JONES, MARCEL WILLIAMS, KENNETH WILLIAMS, DON DAVIS, and
LEDELL LEE

Petitioners,

v.

ASA HUTCHINSON, Governor of the State of Arkansas, in his official capacity, and
WENDY KELLEY, Director, Arkansas Department of Correction, in her official
capacity,

Respondents.

Emergency Application for Stay of Execution

To the Honorable Samuel A. Alito, Jr., Associate Justice of the Supreme Court of
the United States and Circuit Justice for the Eighth Circuit:

Petitioners respectfully request a stay of their executions pending the Court's
disposition of their Petition for Writ of Certiorari seeking review of the decision of
the United States Court of Appeals for the Eighth Circuit in Case No. 17-1804 (Apr.
17, 2017). The Eighth Circuit's decision, which vacates a preliminary injunction
entered by the district court on Saturday, April 15, 2017, was issued just before 5
p.m. on April 17, 2017. Petitioners have concurrently filed a Petition for Writ of

Certiorari with this application. Petitioner Johnson is scheduled to be executed at **7 p.m. CDT on Thursday, April 20, 2017**. Petitioner Lee is scheduled to be executed at **8:15 p.m. CDT on Thursday, April 20, 2017**. Counsel for the State has informed the undersigned that the State intends to begin the executions at the appointed times even if this application remains pending. In light of the State's intention, if the Court is unable to resolve this application by 7 p.m. CDT on Thursday, April 20, it should grant a temporary stay while it considers the application.

JURISDICTION

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

On February 27, 2017, the Governor of Arkansas scheduled execution dates for each of the Petitioners with the exception of Nooner. These dates are:

- Don Davis and Bruce Ward: April 17, 2017¹
- Stacey Johnson and Ledell Lee: April 20, 2017
- Jack Jones and Marcel Williams: April 24, 2017
- Jason McGehee² and Kenneth Williams: April 27, 2017.

¹ The Arkansas Supreme Court stayed Davis's and Ward's executions. Their execution date passed and they are not currently under warrant.

² The Arkansas Parole Board recommended that the Governor grant McGehee clemency, and the U.S. District Court for the Eastern District of Arkansas granted him a stay so the Governor can consider the recommendation within the statutorily mandated timeframe. McGehee remains under warrant.

On March 27, 2017, Plaintiff initiated this action in the Eastern District of Arkansas, claiming, among other things, that the State's midazolam protocol will cause them cruel and unusual punishment, both by itself and in combination with the compressed (and unprecedented) execution schedule the Governor ordered. The district court conducted a four-day hearing, heard seventeen witnesses covering 1,300 pages of transcripts, and took 90 exhibits totaling more than 2,000 pages.

On April 15, 2017, the district court issued a preliminary injunction against Plaintiffs' executions, finding them likely to succeed on the two midazolam claims. Two days later, the Eighth Circuit, sitting en banc, vacated the preliminary injunction in a six-page opinion. The Eighth Circuit found that the Plaintiffs waited too long to file their federal claims where they promptly sought relief from the state courts; found that the district court abused its discretion in its assessment of the evidence and witnesses regarding midazolam; and applied a standard for identifying "known and available" alternatives that conflicts with an opinion the Sixth Circuit recently issued. Contemporaneous with this motion, Petitioners have filed a Petition for Writ of Certiorari asking the Court to review this split in the circuits and the Eighth Circuit's aberrant standards for assessing a preliminary-injunction order.

A stay of execution is appropriate if there is (1) a "reasonable probability that four Members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari"; (2) a "significant possibility of reversal of the

lower court's decision"; and (3) a "likelihood that irreparable harm will result" without a stay. *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983).

There is a reasonable probability that four Members of the Court will grant the Petition, for at least two reasons.

First, the Eighth Circuit's decision deepens a recent a split in authority on the question of what it means to plead an available alternative execution method. The Courts of Appeals have now articulated three separate approaches to determining whether a given alternative is "available." In the Eleventh Circuit, the question is whether the alternative can be had by the state "now." *Arthur v. Dunn*, 840 F.3d 1268, 1302 (2016). Additionally, the alternative must already be approved by statute. *Id.* at 1317–18. In the Eighth Circuit, the method can be outside the statute, but it cannot be one with "no track record," and the state "must be able to carry out the alternative method relatively quickly." App. 6a–7a. Under the Sixth Circuit's approach, there must be a "reasonable possibility" that a state can implement an alternative. *In re Ohio Execution Protocol*, No. 17-3076, 2017 WL 1279282, at *16-17 (6th Cir. Apr. 6, 2017). The Court is likely to grant certiorari to prevent accidents of geography from determining whether a prisoner's right to be free from cruel and unusual punishment is violated because of his ability, or lack thereof, to procure an immediately available alternative method of execution.

The Court is also likely to grant the Petition because the Eighth Circuit has "so far departed from the accepted and usual course of judicial proceedings" as to require this Court's intervention. Rule 10(a). The Eighth Circuit simply did not

apply the sort of deferential review that is required when reviewing a preliminary injunction—even one that has the effect of staying a death sentence.

There is a significant possibility Petitioners will succeed if the Court considers the case. Were the Eighth Circuit’s approach correct, any Court of Appeals could conduct swift de novo review of a preliminary-injunction motion and substitute its own opinion for the district court’s. Moreover, the Eighth Circuit’s approach toward alternative execution methods would “hamper the adoption of new and more humane methods of executions,” an approach that *Glossip* explicitly condemned. *Glossip*, 135 S. Ct. at 2746.

There is no doubt of irreparable harm. Petitioners will be executed without a stay.

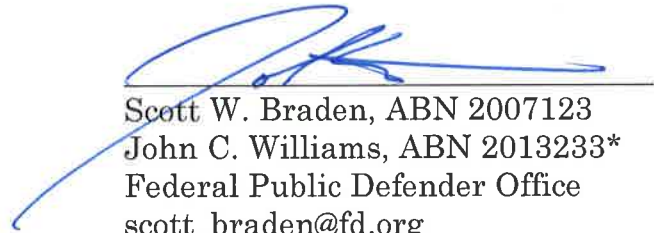
Petitioners have not unduly delayed in this request for a stay. They have challenged the midazolam protocol since its enactment, up to and including this Petition. They have filed their Petition for Writ of Certiorari and this stay motion two days after the Eighth Circuit’s opinion was issued. They ask not for delay but rather for vindication of meritorious claims that will prevent their cruel and unusual executions.

CONCLUSION

The Court should grant this application and stay Petitioners’ executions pending disposition of their Petition for Writ of Certiorari.

DATED: APRIL 19, 2017

Respectfully submitted,



Scott W. Braden, ABN 2007123
John C. Williams, ABN 2013233*
Federal Public Defender Office
scott_braden@fd.org
john_c_williams@fd.org
1401 W. Capitol Ave., Ste. 490
Little Rock, AR 72201
(501) 324-6114

**Counsel of Record for Petitioners*