Supreme Court of Florida

TUESDAY, FEBRUARY 17, 2015

CASE NO.: SC15-147
Lower Tribunal No(s).:
481985CF003550000AOX

JERRY WILLIAM CORRELL vs. STATE OF FLORIDA

Appellant(s) Appellee(s)

The Emergency Petition for Stay of Proceedings and Stay of Execution is hereby granted. The execution of Jerry William Correll, scheduled for 6:00 p.m., Thursday, February 26, 2015, is stayed pending further order of this Court.

LABARGA, C.J., and PARIENTE, LEWIS, QUINCE, and PERRY, JJ., concur.
LABARGA, C.J., concurs with an opinion in which PARIENTE and PERRY, JJ., concur.
CANADY, J., dissents with an opinion, in which POLSTON, J., concurs.

LABARGA, C.J., concurring.

A stay of execution is proper in this case. Florida's interpretation of the cruel and unusual punishment clause is to be construed in conformity with decisions of the United States Supreme Court, as required by article I, section 17 of the Florida Constitution. The Supreme Court unequivocally signaled long ago that the constitutional prohibition against cruel and unusual punishment "is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice." Weems v. U.S., 217 U.S. 349, 373 (1910). This principle was reiterated in Gregg v. Georgia, 428 U.S. 153, 171 (1976), in which Justice Stewart emphasized that the prohibition embodied in the Eighth Amendment has not been

confined to "barbarous" methods of execution, but "has been interpreted in a flexible and dynamic manner." Id.; see also Lightbourne v. McCollum, 969 So. 2d 326, 335 (Fla. 2007).

The United States Supreme Court has now granted certiorari review in Glossip v. Gross, 83 U.S.L.W. 3625 (U.S. Jan. 23, 2015), which involves cases arising out of several pending Oklahoma executions. The question for review in Glossip involves the constitutionality of carrying out an execution using a three-drug protocol in which the first drug is midazolam hydrochloride. The Oklahoma protocol is virtually identical to that proposed to be used to execute Correll in Florida. After granting certiorari review in Glossip, the Supreme Court granted stays of execution for the petitioners involved in that case pending its determination of the constitutionality of Oklahoma's execution protocol. Because the lethal injection protocol under review in the Supreme Court is virtually identical to the Florida three-drug lethal injection protocol, a stay of execution in this case is appropriate.

I write now in concurrence with the stay entered by this Court to emphasize that "death is different," as the Supreme Court has recognized many times over the years. See, e.g., Baze v. Rees, 553 U.S. 35, 84 (2008); Harmelin v. Michigan, 501 U.S. 957, 994 (1991); Gregg, 428 U.S. at 188. When the execution of a death-sentenced individual is at issue, heightened care must be taken, and none more so

than when, as here, the method of execution has a reasonable and realistic chance of being declared to be cruel and unusual punishment by the United States Supreme Court. As the Supreme Court in Gregg reiterated, "There is no question that death as a punishment is unique in its severity and irrevocability." 428 U.S. at 187. Thus, an inmate executed under such a circumstance obviously has no remedy and any constitutional error in an execution is irrevocable.

A stay of execution is warranted when there are substantial grounds upon which relief might be granted. See Chavez v. State, 132 So. 3d 826, 832 (Fla.), cert. denied, 134 S. Ct. 1156 (2014). There must also be a significant possibility of relief on the merits if the Supreme Court, as it has done in this case, grants certiorari review. See Barefoot v. Estelle, 463 U.S. 880, 895-96 (1983). The motion for stay of execution filed by Correll meets these requirements. It sets forth the concerns voiced in the opinion of four Supreme Court justices in dissenting from an earlier denial of a stay of an Oklahoma execution in Warner v. Gross, 135 S. Ct. 824 (Jan. 15, 2015), which preceded the granting of certiorari in Glossip. Notably, those concerns include whether midazolam may "constitutionally be used as the first drug" in Oklahoma's three-drug protocol. Warner, 135 S. Ct. at 827 (Sotomayor, J., dissenting) (joined by Justices Ginsburg, Breyer, and Kagan).

Justice Sotomayor also noted that Florida's success in conducting executions using the same protocol "is subject to question because the injection of the paralytic

vecuronium bromide may mask the ineffectiveness of midazolam as an anesthetic: The inmate may be fully conscious but unable to move." Id. (Sotomayor, J., dissenting). Justice Sotomayor opined that "[t]he deficiency of midazolam may generally be revealed only in an execution, such as [the earlier execution of defendant Lockett], where the IV fails to sufficiently deliver the paralyzing agent." Id. (Sotomayor, J., dissenting). She also cited the existence of scientific studies supporting a conclusion that midazolam has a "ceiling effect" that prevents it from being approved by the Food and Drug Administration as an anesthetic no matter how high the dosage given. Id. (Sotomayor, J., dissenting). Justice Sotomayor and three other justices concluded that the Supreme Court should carefully review the findings of the lower court that upheld the use of midazolam "because of the risk of the needless infliction of severe pain." Id. (Sotomayor, J., dissenting). The Supreme Court has now granted that careful review of the protocol—the same protocol proposed to be used to execute Jerry William Correll.

Because our jurisprudence is bound by the Eighth Amendment jurisprudence of the United States Supreme Court, if use of midazolam as the first drug in a three-drug lethal injection protocol is determined to be cruel and unusual—and therefore unconstitutional—then Florida's precedent approving the use of midazolam and the current Florida three-drug protocol will be subject to serious doubt as to its continuing viability. Without a stay of execution in this case, Florida risks the

unconstitutional execution of Correll, for which there is no remedy. In contrast, a stay pending determination of the issue in the United States Supreme Court will not prejudice the State and, more importantly, will ensure that Florida does not risk an unconstitutional execution, a risk that would threaten the viability of Florida's entire death penalty scheme. For all these reasons—the most significant being the pending Supreme Court review of a protocol for which review had been denied in the past—this Court must err on the side of extreme caution and grant a stay of execution for Correll.

PARIENTE and PERRY, JJ., concur.

CANADY, J., dissenting.

I disagree with the majority's decision to grant Correll a stay of execution based on the grant of certiorari and stays of execution issued by the United States Supreme Court in Glossip v. Gross, 83 U.S.L.W. 3625 (U.S. Jan. 23, 2015), a case from the Tenth Circuit Court of Appeals that upheld the constitutionality of Oklahoma's three-drug lethal injection protocol. Although Florida's protocol is substantially similar to the protocol under review in Glossip, the grant of certiorari on a particular issue does not result in an automatic stay in all cases presenting the same issue, and Correll has not demonstrated that there are substantial grounds upon which relief might be granted. Also, the stay granted here is broader in scope

than the stays issued in Glossip. In my view, if the stay here is based on the stays issued in Glossip, it should be no broader than the stays issued in that case. Finally, as it is the Supreme Court that has taken up the issue regarding midazolam, I believe it should be left to that Court to determine whether a stay is justified in this case. Accordingly, I dissent.

Correll's argument in support of a stay of execution relies mainly on the grant of certiorari and stays issued in Glossip. Glossip arises out of an action brought under 42 U.S.C. § 1983 by twenty-one inmates on Oklahoma's death row, challenging the constitutionality of Oklahoma's lethal injection protocol. Oklahoma, like Florida, uses a series of three drugs to carry out judicial executions: midazolam, vecuronium bromide, and potassium chloride.[1] Four of the plaintiffs in the § 1983 action were facing imminent execution and sought preliminary injunctions in the federal district court to stay their executions. The crux of their

1. Florida's lethal injection protocol calls for the administration of 500 milligrams of midazolam hydrochloride, followed by 100 milligrams of vecuronium bromide, followed by 240 milliequivalents of potassium chloride; 20 milliliters of saline solution is to be administered after the midazolam hydrochloride and the vecuronium bromide. The Oklahoma protocol under review in Glossip calls for the administration of 500 milligrams of midazolam, followed by 100 milligrams of vecuronium bromide (although the State intends to substitute rocuronium bromide for vecuronium bromide for the executions of the petitioners in Glossip, Warner v. Gross, 2015 WL 137627, at *1 n.2 (10th Cir. Jan. 12, 2015)), followed by 240 milliequivalents of potassium chloride; administration of 60 milliliters of a saline/heparin solution is to follow each drug.

argument, relevant to this case, is that the use of midazolam as the first drug in Oklahoma's lethal injection protocol presents a substantial risk of serious harm because it is not a suitable drug to render an inmate deeply unconscious, and that if the inmate is not unconscious and insensate, the inmate will experience severe pain and suffering from the administration of the second and third drugs. Warner v. Gross, 2015 WL 137627, at *6 (10th Cir. Jan. 12, 2015), cert. granted sub nom. Glossip v. Gross, 83 U.S.L.W. 3625 (U.S. Jan. 23, 2015).

After a three-day evidentiary hearing, the district court denied preliminary injunctive relief. The court found "that the plaintiffs failed to establish that the state's lethal injection protocol creates a demonstrated risk of severe pain and that the risk is substantial when compared to the known and available alternatives[;]" thus, the court concluded that the plaintiffs failed to establish a likelihood of success on the merits of their claims. Id. at *8 (internal quotation omitted). Specifically, the court found "that a 500 milligram dosage of midazolam is highly likely to render the person unconscious and insensate during the remainder of the procedure," and therefore, its use as the first drug in Oklahoma's protocol does not present a substantial risk of serious harm and does not violate the Eighth Amendment. Id. at *6 (internal quotation omitted). The Tenth Circuit affirmed on appeal, finding no error in the factual findings made by the district court. Id. at *1. The circuit court agreed that the plaintiffs failed to establish a likelihood of success

on the merits. Id. Consequently, the plaintiffs filed their petition for a writ of certiorari in the United States Supreme Court on January 13, 2015.

On January 15, 2015, just days before granting certiorari in Glossip, the Supreme Court determined that the petitioners' allegations did not warrant a stay of execution for Charles Warner, the first of the four petitioners to face execution. See Warner v. Gross, 135 S. Ct. 824 (2015) (denying stay of execution). After his application for a stay was denied, Warner's execution was carried out by the State of Oklahoma using the same three-drug protocol at issue in Glossip. Certiorari was granted on January 23, 2015, but the impending executions of the three remaining plaintiffs were not stayed at that time. See Glossip, 83 U.S.L.W. 3625 (granting certiorari).[2]

On January 26, 2015, the Attorney General of Oklahoma requested that the Supreme Court issue stays of execution to the Glossip petitioners pending the Court's decision as to the use of midazolam; or, alternatively, until the Oklahoma Department of Corrections is able to secure an alternative to midazolam, such as sodium thiopental or pentobarbital.[3] The Attorney General reasoned that there

---

2. After the execution of Charles Warner, Richard Glossip became the lead petitioner in the case, and the style was changed to Glossip v. Gross.

3. Sodium thiopental and pentobarbital were both used previously as the first drug in the Oklahoma and Florida protocols, but the switch to midazolam was made by both states when sodium thiopental and pentobarbital became unavailable.

would be no remaining impediment to carrying out the executions if sodium thiopental or pentobarbital is used in lieu of midazolam, because the use of those drugs in lethal injection has previously been upheld[4] and is not at issue in Glossip. On January 28, 2015, the Supreme Court granted the Attorney General's request and "ordered that petitioners' executions using midazolam are stayed pending final disposition of this case." Glossip v. Gross, 2015 WL 341655 (Jan. 28, 2015) (granting stays of executions) (emphasis added).

A stay of execution should only be granted when there are "substantial grounds upon which relief might be granted." Barefoot v. Estelle, 463 U.S. 880, 895 (1983); Chavez v. State, 132 So. 3d 826, 832 (Fla.) (quoting Buenoano v. State, 708 So. 2d 941, 951 (Fla. 1998)), cert. denied, 134 S. Ct. 1156 (2014); see also Chavez v. Florida SP Warden, 742 F.3d 1267, 1273 (11th Cir.) ("A stay should not be granted unless the inmate establishes a substantial likelihood of success on the merits."), cert. denied sub nom. Chavez v. Palmer, 134 S. Ct. 1156 (2014). "Stays of execution are not automatic" even when a petition for a writ of certiorari has been filed. Barefoot, 463 U.S. at 895.

---

4. See, e.g., Baze v. Rees, 553 U.S. 35 (2008) (sodium thiopental); Powell v. Thomas, 641 F.3d 1255, 1257 (11th Cir.), cert. denied sub nom. Williams v. Thomas, 131 S. Ct. 2487 (2011) (pentobarbital); Pavatt v. Jones, 627 F.3d 1336, 1340 (10th Cir. 2010), cert. denied sub nom. Matthews v. Jones, 131 S. Ct. 974 (2011) (pentobarbital).

Correll posits that there are substantial grounds upon which relief might be granted because the Oklahoma and Florida protocols use midazolam in the same manner. He asserts that because the dissent to the denial of a stay in Warner demonstrates that four of the Supreme Court justices have concerns about the use of midazolam in lethal injection, it is likely that a fifth justice will be persuaded that the use of midazolam—as it is used in the Oklahoma and Florida protocols—is unconstitutional. If we were to accept that argument, a grant of certiorari on a particular issue would lead to an automatic stay in every case presenting the same issue. But this Court has previously rejected the argument that we should delay an execution in light of a grant of certiorari by the Supreme Court on a relevant issue. See, e.g., Marek v. State, 8 So. 3d 1123, 1131 (Fla. 2009); King v. State, 808 So. 2d 1237, 1246 (Fla. 2002). A grant of certiorari on a relevant issue does not in itself establish a substantial likelihood of success on the merits or the existence of substantial grounds upon which relief might be granted. It merely means that resolution of the issues could possibly affect the judgment rendered below. Straight v. Wainwright, 476 U.S. 1132, 1133 n.2 (1986) ("[W]hen certiorari is granted, by definition the Court's resolution of the issues presented in that case might affect the judgment rendered below.").

Although the Supreme Court has decided to review the use of midazolam in lethal injection, this Court has repeatedly and authoritatively found that its use in

Florida's protocol is constitutional. See Banks v. State, 150 So. 3d 797, 801 (Fla.) (finding Florida's protocol using midazolam hydrochloride "constitutional as a matter of law"), cert. denied, 135 S. Ct. 511 (2014). Correll "has not presented any new information that would warrant reconsideration of our prior decisions upholding the constitutionality of the current protocol." Id. Thus, our prior decisions should compel a denial of Correll's request for a stay. See Ventura v. State, 2 So. 3d 194, 198 (Fla. 2009) ("This Court has thus previously rejected each of these challenges to Florida's lethal-injection protocol and—based upon the sound principle of stare decisis—we continue the same course here.").

Correll's suggestion that the forthcoming decision in Glossip will have any bearing on Florida executions is purely speculative. "[S]peculation cannot substitute for evidence that the use of the drug is 'sure or very likely to cause serious illness and needless suffering.' " Brewer v. Landrigan, 131 S. Ct. 445 (2010) (quoting Baze v. Rees, 553 U.S. 35, 50 (2008)). And pure speculation does not entitle Correll to a stay. Whatever the majority's speculation about how the Supreme Court may alter the law in the future, this Court should follow our precedent as it exists today since Correll has made no substantive showing that justifies reexamination of that precedent. See Ladd v. Livingston, 2015 WL 364244, at *3 (5th Cir. Jan. 28, 2015) (following that court's own precedent in

denying request for stay of execution based on Supreme Court's grant of certiorari in Glossip), cert. denied, 2015 WL 375732 (Jan. 29, 2015).

The circumstances involved in Glossip are strikingly different from the circumstances presented here. One of the Glossip petitioners, raising the same arguments as the others, was denied a stay and executed. The remaining petitioners were not granted stays until the State of Oklahoma requested the stays. It is significant that the State sought the stays in Glossip. Essentially, the request constituted a waiver by the State of the requirement that the petitioners demonstrate that there is a significant possibility that the Supreme Court will reverse the Tenth Circuit's decision in Warner. Here, the State has not made such a waiver.

I also disagree with the majority's decision to issue a stay that is inexplicably broader than the stays issued in Glossip. The Supreme Court in Glossip limited the scope of the stays, ordering only "that petitioners' executions using midazolam are stayed pending final disposition of this case." Glossip, 2015 WL 341655, at *1 (granting stays of executions) (emphasis added). Instead of tailoring the stay here to prohibit the use of midazolam while review is pending in Glossip, the majority has prohibited the State from carrying out Correll's lawful sentence in any manner. The State has a legitimate interest in carrying out Correll's execution in any manner that does not violate the constitution. See Nelson v. Campbell, 541 U.S. 637, 644, 650 (2004) (noting that the State has significant interests in enforcing criminal

judgments and carrying out death sentences in a timely fashion). By prohibiting the execution of Correll in a manner that neither offends the constitution nor is under review by the Supreme Court, the majority has improperly impeded the State's right to carry out the sentence.

Article I, section 17 of the Florida Constitution provides that "[a]ny method of execution shall be allowed, unless prohibited by the United States Constitution. . . . In any case in which an execution method is declared invalid, the death sentence shall remain in force until the sentence can be lawfully executed by any valid method." Similarly, section 922.105(3), Florida Statutes (2014), provides that "all persons sentenced to death for a capital crime shall be executed by any constitutional method of execution." Thus, even if the use of midazolam in Florida's lethal injection protocol were unconstitutional, the authority remains with the State to carry out the execution by any constitutional method. The stay granted today removes that authority without justification.

Finally, in my view, the Supreme Court is in the best position to assess whether a stay is justified in this case based on the proceedings in Glossip. This Court has reviewed an exhaustive amount of litigation in a number of cases regarding the efficacy of midazolam in Florida's lethal injection protocol, and we have not had concerns about its ability to produce an execution that comports with the Eighth Amendment. Perhaps the Supreme Court is concerned with the

"botched" executions of Dennis McGuire in Ohio, Joseph Wood in Arizona, and Clayton Lockett in Oklahoma; but none of those executions used midazolam in the same manner or dosage as it is used in Florida's protocol.[5] There is no reason to assume that the stays were granted in Glossip because the Supreme Court intended to impose a de facto moratorium on the use of midazolam in lethal injection, rather than because the State of Oklahoma agreed to the stays. Only the Supreme Court can decide whether the proceedings in Glossip justify a stay of Correll's execution. See Schwab v. State, 973 So. 2d 427, 428 (Fla. 2007) (Pariente, J., concurring) ("Schwab should seek a stay from the United States Supreme Court and it should be that Court's decision to determine whether it intends a de facto moratorium on the death penalty and whether the issues it is presently reviewing regarding lethal injection justify a stay of Schwab's execution."). Correll's request for a stay is therefore best directed "to the Supreme Court, the body most aware of Glossip's potential." Ladd, 2015 WL 364244, at *3.

POLSTON, J., concurs.

---

5. McGuire and Wood were executed using a combination of midazolam and hydromorphone. Lockett was executed using a three-drug protocol similar to Florida's, but which used only 100 milligrams of midazolam while Florida uses 500 milligrams. Further, an investigation into Lockett's execution revealed that the IV was improperly placed and infiltrated, meaning that the IV fluid went not directly into Lockett's bloodstream, but leaked into the nearby tissue.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

tw
Served:

MARIA PERINETTI
RAHEELA AHMED
DONNA E. VENABLE
CAROLYN MARIE SNURKOWSKI
CANDANCE SABELLA
CAROL MARIE DITTMAR
HON. TIFFANY MOORE RUSSELL, CLERK
HON. JENIFER MELANDER DAVIS, JUDGE
KENNETH SLOAN NUNNELLEY
JEFFREY LEE ASHTON