

OCTOBER TERM 2016

IN THE SUPREME COURT OF THE UNITED STATES

CASE NO. _____

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.

PETITION FOR WRIT OF CERTIORARI

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

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QUESTION PRESENTED
*****CAPITAL CASE*****

Does a State violate the “evolving standards of decency that mark the progress of a maturing society,” *Trop v. Dulles*, 356 U.S. 86 (1958), by scheduling four double executions to occur over a period of eleven days?

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PETITION FOR WRIT OF CERTIORARI

Petitioners Jason McGehee, Stacey Johnson, Bruce Ward, Terrick Nooner, Jack Jones, Marcel Williams, Kenneth Williams, Don Davis, and Ledell Lee respectfully request that the Court issue a writ of certiorari to review the decision of the United States Court of Appeals for the Eighth Circuit in this capital case.

OPINIONS BELOW

The Eighth Circuit's judgment in No. 17-1805 denying Petitioners a stay on their evolving-standards-of-decency claim is attached as Appendix A (App. 1a–2a). The Eighth Circuit's opinion in a related case (17-1804) contains Judge Kelly's dissent on this claim. It is attached as Appendix B. (App. 3a–33a). The district court's order denying a preliminary injunction on the claim is attached as Appendix C (App. 34a–134a). The district court's order denying Respondents' motion to dismiss the claim for lack of standing is attached as Appendix D (App. 135a–193a).

JURISDICTION

The Court of Appeals entered its judgment denying a stay on April 17, 2017. App. 1a. This petition is timely filed under Rule 13.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. VIII:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT OF THE CASE

On February 27, 2017, Defendant Hutchinson issued eight execution warrants for four double executions to occur from April 17 to 27, 2017. Hutchinson's stated reason for this expedited and unprecedented execution schedule was that the State's supply of midazolam expires on April 30 and it is "uncertain" whether the State can get more. On March 27, 2017, Petitioners filed a complaint in which they alleged, as relevant here, that the State's execution schedule violates the Eighth Amendment because it is contrary to the evolving standards of decency that mark the progress of a maturing society. On April 15, 2017, the district court denied Respondents' motion to dismiss, finding that Petitioners were not asserting the rights of third parties and had not presented "a generalized grievance because the alleged harm is particular to the eight plaintiffs scheduled for execution, rather than harm 'shared in substantially equal measure by all or a large class of citizens.'" App. 157a (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)). However, in an order entered the same day granting a preliminary injunction on other claims, the district court found Petitioners are unlikely to succeed on this claim because "neither the Supreme Court nor the Eighth Circuit Court of Appeals is prepared to recognize an evolving standards of decency claim in this context." App. 86a–87a.

Petitioners filed a notice of cross-appeal on this claim on April 16, 2017. The next day, Petitioners filed a motion for stay pending appeal in the Eighth Circuit. Later the same day, the Eighth Circuit entered judgment denying the motion to stay. In her dissenting opinion under a different case number (17-1804), Judge Kelly explained that "[s]uccessive execution denies all involved the dignity to which he is

entitled.” App. 33a. She concluded that to “permit the state to execute two men per night on four nights over an eleven day period ‘risks [the law’s] sudden descent into brutality, transgressing the constitutional commitment to decency and restraint.” App. 32a (quoting *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008)).

REASON FOR GRANTING THE WRIT

Whether this execution schedule violates evolving standards of decency is an important question that this Court should resolve.

By attempting to conduct four double executions in an eleven-day period, Arkansas has taken a step unprecedented in the post-*Gregg* era. The Court has never assessed the propriety of an execution schedule because it has never been faced with such a problem. It is well established, however, that the Eighth Amendment circumscribes the principles governing a State’s penological practices. The standards for assessing those practices are likewise well-established: “The basic concept underlying the Eighth Amendment is nothing less than the dignity of man The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.” *Atkins v. Virginia*, 536 U.S. 304, 311–12 (2002). The manner in which we execute prisoners is an important reflection on our society and must adhere to reasonable boundaries. The Court should review a practice that both disrespects Petitioners’ dignity and violates established societal norms concerning executions.

First, the Eighth Amendment protects prisoners’ dignity even when they have committed capital murder and have been sentenced to death. “Evolving standards of decency must embrace and express respect for the dignity of the person, and the

punishment of criminals must conform to that rule.” *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008). That dignity interest includes a right not to be treated as “fungible” or “merge[d] with the mass.” *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 400 n.42 (1974) (White, J., dissenting). But that is the result when the State schedules eight men to be executed back-to-back and within days of each other simply to use up a supply of execution drugs. Petitioners have an individual dignity right under the Eighth Amendment to have their executions conducted in an individualized manner and not en masse.

Second, to determine whether a particular capital-punishment practice violates evolving standards of decency, the Court must assess the “objective indicia of society’s standards”—as expressed by “state practice with respect to executions”—and must also consult its own “independent judgment.” *Kennedy*, 554 U.S. at 421. American society at large has ceased to accept double executions and executions by one State within days of each other. More than half a century ago, this sort of practice was common. However, our society has long ago abandoned such barbarism. No State has executed so many people in so short a timeframe since capital punishment resumed in this country in 1977; no state has executed as many men in even a month since Texas did so twenty years ago. There have been only ten multiple executions in the last 40 years, with the last occurring in 2000. The last time a multiple execution was attempted (Clayton Lockett), it failed, causing state investigators to recommend that double executions be abandoned and that executions be spread at least a week apart.

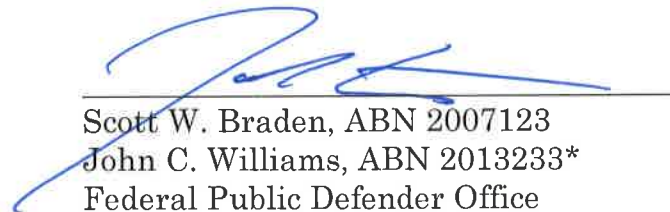
The fact that there have been group executions within the past twenty years does not mean that standards have not evolved to the point that such a practice is now unacceptable under the Eighth Amendment. *Compare Atkins* with *Penry v. Lynaugh*, 492 U.S. 302 (1989) (societal standards evolved within thirteen years to prohibit execution of intellectually disabled); *Roper v. Simmons*, 543 U.S. 551 (2005) with *Stanford v. Kentucky*, 492 U.S. 361 (1989) (societal standards evolved within sixteen years to prohibit execution of juveniles). Just as the Eighth Amendment categorically prohibits the States from executing certain classes of offenders, it categorically prohibits penological practices that evoke a less enlightened time. “The Eighth Amendment stands as a shield against those practices . . . which so offend the moral consensus of this society as to be deemed cruel and unusual.” *Payne v. Tennessee*, 501 U.S. 808, 831 (1991) (O’Connor, J., concurring).

CONCLUSION

The Court should grant the petition for a writ of certiorari.

APRIL 19, 2017

Respectfully submitted,



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