CASE NO. 17-11536-P

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

GEOFFREY TODD WEST, *et* Plaintiffs-Appellants, COMMISSIONER, *et* Defendants-Appellees.	On Appeal From the United States District Court for the Middle District of Alabama Case No. 2:12-cv-0316-WKW-CSC **CAPITAL CASE** **Execution scheduled for June 8, 2017** **Robert Bryant Melson)**

APPELLANT ROBERT BRYANT MELSON'S EMERGENCY MOTION FOR STAY

John Anthony Palombi
Assistant Federal Defender
Federal Defenders for the Middle District of Alabama
817 South Court Street
Montgomery, Alabama 36104
Telephone (334) 834-2099
Facsimile (334) 834-0353 E-mail:
John_Palombi@fd.org

June 7, 2017

CERTIFICATE OF INTERESTED PERSONS

John Anthony Palombi and Spencer Jay Hahn, counsel of record for Plaintiffs-Appellants Jeffrey Borden, Charles Lee Burton, Robert Bryant Melson, Torrey Twane McNabb, and Geoffrey Todd West, in compliance with Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, certify that the following listed persons and parties may have an interest in the outcome of this case:

1. Brasher, Andrew – Solicitor General of Alabama, Counsel for Appellees;
2. Crenshaw, J. Clayton – Counsel for Defendants in this proceeding;
3. Dunn, Jefferson – Commissioner, Alabama Department of Corrections;
4. Frazier, Demetrius – Co-Plaintiff in underlying proceeding;
5. Freeman, Christine A. – Executive Director, Federal Defenders for the Middle District of Alabama;
6. Govan, Jr., Thomas R. – Counsel for Defendants in this proceeding;
7. Grayson, Carey – Co-plaintiff in underlying proceeding;
8. Houts, James R. – Counsel for Defendants in this proceeding;
9. Hunt, Gregory – Co-plaintiff in underlying proceeding;
10. Marshall, Steve T. – Attorney General for the State of Alabama;
11. Myers, Robin – Co-plaintiff in underlying proceeding;
12. Pryor, Hon. William – Judge, Eleventh Circuit Court of Appeals and Attorney General of Alabama during several plaintiffs' post-conviction proceedings;

13. Roberts, David Lee – Co-plaintiff in underlying proceeding;

14. Simpson, Lauren – Counsel for Defendants in this proceeding;

15. Stewart, Cynthia – Warden, Holman Correctional Facility and, by statute, executioner for the State of Alabama;

16. Strange, Luther – Attorney General of the State of Alabama during underlying proceeding;

17. Watkins, Chief Judge William Keith – United States Chief District Judge for the Middle District of Alabama, presiding judge in underlying proceeding;

No publicly traded company or corporation has an interest in the outcome of this case or appeal.

This Court stayed Robert Melson's execution on June 2, 2017, to allow it to consider the appeal in the normal course without prejudging the case through stay litigation. Even though briefing in this case would be complete by June 28, 2017, Defendants asked the Supreme Court to vacate the stay this Court entered, and at 10:00 p.m. on June 6, 2017, the Supreme Court did so. The Supreme Court's order vacating this Courts reasoned opinion granting the stay contained no reasoning and was done over three dissents.

In its previous ruling this Court found that Mr. Melson met the stay standard on the questions of irreparable injury, whether there would be harm to other parties, and whether granting the stay serves the public interest. The only stay factor this Court did not explicitly find was whether he had a likelihood of success on the merits of his appeal. It did so because it did not want to prejudge the case. Mr. Melson respects this Court's concern about prejudging the case, but a finding that there is a likelihood of success does not necessarily mean the case is prejudged. The moving party must "present a substantial case on the merits when a serious legal question is involved and show that the balance of the equities, [i.e. the other three factors] weighs heavily in the favor of granting the stay."[1]

While the Supreme Court's order vacating the stay does not indicate that lack of an explicit finding on the first prong of the stay test was the basis for the order, the

[1] *O'Bryan v. McCaskle*, 729 F.2d 991, 993 (5th Cir. 1984).

State argued that basis to the Supreme Court. Mr. Melson asks this court to grant him a renewed stay of execution, after making an explicit finding that he has presented a substantial case on the merits and has a likelihood of success in his appeal.

I. Mr. Melson meets the standard for granting a stay of execution.

A stay of execution pending an appeal is appropriate where the movant shows: (1) a "likelihood of success on the merits," (2) "irreparable injury if the stay is not granted," (3) that the stay would not "substantially harm other parties," and (4) that "granting the stay would serve the public interest."[2] As noted above, this Court has already found that Mr. Melson meets the second through fourth factors. Therefore, Mr. Melson will only discuss the first factor in this motion.

A. Mr. Melson has a likelihood of success on the merits of his appeal.

Mr. Melson's separately filed appellate brief[3] sets out the substantive grounds for relief from the District Court's ruling dismissing his complaint on statute of limitations grounds. Because the District Court's order ignored this Court's precedent and misinterpreted Supreme Court precedent, there is a high likelihood of success on the merits of this appeal.

1. This Court's precedent dictates that Mr. Melson's complaint should not have been dismissed.

[2] *In re Holladay*, 331 F.3d 1169, 1176 (11th Cir. 2003); *see also Hill v. McDonough*, 547 U.S. 573, 584 (2006); *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983).

[3] Appellant's Brief (filed May 16, 2017), attached as Exhibit A.

Under *Arthur*, "[w]hether a significant change has occurred in a state's method of execution is a fact-dependent inquiry."[4] This inquiry requires consideration of the evidence supporting a finding that a drug change constitutes a "significant" one, thus resetting the statute of limitations.[5] In his complaint, Mr. Melson alleged that, within the two years preceding his filing, the ADOC changed the first drug in the lethal injection protocol from the barbiturate pentobarbital to the benzodiazepine midazolam.[6] He further alleged that midazolam is not designed for use as the sole drug in anesthesia, will not anesthetize him, is not an analgesic, and "[t]here is a high likelihood that midazolam will fail to reliably facilitate the sustained anesthetic state necessary to prevent an inmate from feeling the intolerable pain associated with the second and third drugs in Alabama's protocol."[7]

In support of these allegations, Mr. Melson attached and filed affidavits from two experts. The first affidavit was from a tenured professor of anesthesiology at the University of Alabama at Birmingham whose research is focused on "the cognitive effects of sedation and pain." He stated, "In the practice of anesthesia," benzodiazepines like midazolam "are almost exclusively used as anxiolytics, 'to take off the edge' for patients about to enter the operating room.'" They "do not provide

[4] *Arthur v. Thomas*, 674 F.3d 1257, 1260-61 (11th Cir. 2012).

[5] *Id.*

[6] Doc. 1 at p. 6.

[7] Doc. 1 at pp. 8-9.

pain relief and may in fact enhance pain perception."[8] The second affidavit was from a pharmacologist and toxicologist employed as a professor at the University of Georgia's College of Pharmacy.[9] That expert stated, "Midazolam is not an anesthetic or analgesic and has not been approved by the FDA to be used as an analgesic agent."[10]

In addition, Mr. Melson provided evidence that during Christopher Brooks' January 21, 2016 execution, Alabama's first execution using midazolam, Mr. Brooks' eye opened after the consciousness check was completed. According to Mr. Melson's anesthesiology expert, this was an indication that Mr. Brooks was conscious before the administration of the paralytic.[11]

In dismissing Mr. Melson's claim that the use of midazolam as the first drug in the ADOC's three-drug protocol violated the Eighth Amendment, the District Court failed to decide whether the switch from pentobarbital to midazolam in 2014 was a "significant change" that reset the statute of limitations, as it was required to do under *Arthur*.[12] Instead, the court focused on what it believed was Plaintiffs' "conceal[ed]"

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[8] Doc. 1-2 at p. 1.

[9] Doc. 1-6.

[10] Doc. 1-6 at p. 1-2.

[11] Doc. 1-2 at p. 2.

[12] For purposes of dismissal of all three claims in Mr. Melson's complaint on statute of limitations grounds, the District Court adopted its earlier decision in *Smith v. Comm'r*, Case No. 2:12-cv-316 (M.D. Ala. Nov. 18, 2016) (Doc. 205). Mr. Melson will cite to that order for the substantive rulings he references. In an unpublished opinion issued on the eve of Mr. Smith's execution, this Court affirmed the District Court's decision. *Grayson v. Warden*, No. 16-17167, 2016 WL 7118393 (11th Cir.

attempt to revive the statute of limitations on a challenge to the second and third drugs in the protocol.[13]

The District Court's ruling in effect added a requirement to Rule 12(b)(6) that does not exist, namely Mr. Melson's subjective motivation in pleading the alternatives he pleaded in the complaint. Mr. Melson denies the District Court's allegation. More important, Mr. Melson's alleged motive in offering alternatives is irrelevant to whether his claim was brought within the statute of limitations. The District Court's reliance in its opinion on Mr. Melson's alleged mental state was improper.

2. The Supreme Court's ruling in *Glossip* does not dictate that Mr. Melson was required to plead only three-drug alternative methods of execution.

Further, the District Court incorrectly concluded that, under *Glossip*, Mr. Melson was required to plead alternatives that involve three drugs because his challenge was only to the change from pentobarbital to midazolam.[14] Nothing in *Glossip* requires Plaintiffs challenging a state's method of execution to plead an alternative method that mirrors the present method being used by the State. It merely requires pleading an alternative that is known, available and feasible. Mr. Melson did so in his complaint, and the District Court's interpretation of *Glossip* is incorrect.

3. Mr. Melson's claim concerning Defendants' consciousness

Dec. 7, 2016) (unpublished). Pursuant to the rules of this Court, *Grayson* is not binding and has no precedential value. 11th Cir. R. 36-2; IOP 11th Cir. R. 36(6).

[13] Doc. 205, p. 10.

[14] *Id.*

assessment is also timely and should not have been dismissed by the District Court.

Mr. Melson is also likely to obtain relief on the second claim in his complaint – that Defendants' consciousness assessment is inadequate to assess whether Mr. Melson is sufficiently anesthetized following the administration of midazolam. The District Court's dismissal of that claim on statute of limitations grounds was based on clearly erroneous findings of fact with regard to Mr. Melson's complaint. Specifically, the District Court erroneously concluded that Mr. Melson had made no allegations specific to midazolam such that he could reset the statute of limitations, which the District Court concluded expired in 2009.[15] Because, on its face, Mr. Melson's complaint does contain specific allegations concerning midazolam vis-à-vis the consciousness assessment,[16] the Court's finding was incorrect and it was improper for the District Court to dismiss this claim without an evidentiary hearing on the statute of limitations issue. Mr. Melson is thus likely to obtain relief on that claim in this Court, resulting in a remand to the District Court to require Defendants to answer his complaint.

4. Mr. Melson is likely to obtain relief in this Court on his claim that his right to access to the courts is abridged by ADOC's refusal to allow his attorneys any means of communicating with the outside world during an execution.

[15] Doc. 205, p. 12.

[16] Doc. 1, p. 2 ("Defendants do not intend to anesthetize Plaintiff; rather, they intend to use a sedative with no analgesic properties to create the illusion of adequate anesthesia), p.9 ("Midazolam will not anesthetize Plaintiff, and regardless of the dose, will not eliminate the risk that he will experience pain from the paralytic or potassium chloride.").

Mr. Melson is likely to obtain relief on his claim that the ADOC rule prohibiting an attorney for Mr. Melson who attends his execution from having access to a cellular or landline telephone during the execution in order to have access to the courts, violates his right to access to the Courts.

The District Court summarily dismissed this claim using non-record, non-existent facts. Without any support in the record, the District Court concluded that the statute of limitations had expired on this claim in 2004 because of an unspecified and unidentified policy or regulation[17] whose date of adoption and terms are unidentified, unspecified and changeable at Defendants' whim.

5. Mr. Melson is likely to obtain relief on his claim that he should have been allowed to amend his complaint with the facts of Ronald Smith's execution.

Finally, the District Court refused to allow Mr. Melson to amend his complaint with the facts of Ronald Smith's execution, where midazolam again did not work as intended. The District Court did so on the ground that the amendment would be futile.[18] But this ruling on futility was based on the District Court's misinterpretation of this Court's previous precedent.

The facts of Mr. Smith's execution are relevant to Mr. Melson's claims, because they describe the horrific results of using midazolam in a way it was never intended to

[17] Doc. 205, p. 15.

[18] Doc. 249, p. 10.

be used – as an anesthetic. Mr. Smith's execution, during which Mr. Smith was not anesthetized, but responded to two consciousness tests and coughed and heaved for 13 minutes during the execution,[19] illustrates the unreliability of midazolam as the first drug in a three-drug execution protocol. Mr. Melson should have been allowed to amend his complaint. He is likely to obtain relief from this Court on that ground and be permitted to amend his complaint.

II. Conclusion

Mr. Melson meets the standards for a stay of execution. He is likely to succeed on the merits of his appeal because the District Court did not apply this Court's precedent and misinterpreted Supreme Court precedent. In addition, the District Court was incorrect about facts in the case and used non-existent facts in support of its order of dismissal. For the above reasons, Mr. Melson respectfully requests that this Court stay his execution pending resolution of the appeal.

Respectfully submitted,

/s/ John Anthony Palombi
Assistant Federal Defender
Federal Defenders for the Middle District of Alabama
817 S. Court St.
Montgomery, AL 36104
Telephone: 334.834.2099
Fax: 334.834.0353
KY Bar No. 86784
Email: john_palombi@fd.org

[19] Kent Faulk, Alabama Death Row inmate Ronald Bert Smith heaved, coughed for 13 minutes during execution, (Dec. 8, 2016), http://www.al.com/news/birmingham/index.ssf/2016/12/alabama_death_row_inmate_is_se.html.

CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the word limit requirements of Fed. R. App. P. 27(d)(2)(A) in that it consists of 2247 words as calculated by a word processing program.

/s/ John Anthony Palombi
Counsel for Robert Bryant Melson

CERTIFICATE OF SERVICE

I certify that on June 7, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which effectuated service on the following:

J. Clayton Crenshaw
Thomas Govan
James R. Houts
Lauren Simpson
Office of the Attorney General
501 Washington Avenue
Montgomery, Alabama 36130-0152

/s/ John Anthony Palombi
Counsel for Robert Bryant Melson