IN THE SUPREME COURT OF ALABAMA

EX PARTE ROBERT B. MELSON In re: State of Alabama, Petitioner, v. Robert Bryant Melson, Respondent.	No. 1981463

EMERGENCY MOTION TO VACATE EXECUTION DATE

Robert Melson is scheduled to be executed on June 8, 2017, using a method of execution that is the subject of two pending cases in Federal District Court[1] and four pending appeals in the Court of Appeals for the Eleventh Circuit.[2] The Eleventh Circuit considered the issues raised by these cases serious enough to grant a stay of execution for Mr. Melson,[3] even though that stay was eventually vacated by the United States Supreme Court.[4] This Court still has power to grant relief by vacating Mr. Melson's execution date.

[1] *Wilson v. Comm'r, et al.*, No. 2:16-cv-364-WKW (M.D. Ala.); *Taylor v. Comm'r, et al.*, No. 2:17-cv-46-WKW (M.D. Ala.).
[2] *Frazier, et al. v. Warden, et al.*, No. 16-16876-P (11th Cir.); *West, et al. v. Warden, et al.*, No. 17-11536-P (11th Cir.); *Grayson v. Comm'r, et al.*, No. 17-11339-P (11th Cir.); *Lee v. Comm'r, et al.*, No. 17-12271-P (11th Cir.).
[3] 11th Circuit Stay Order. A copy of the Order is attached (Ex. A).
[4] On June 7, Mr. Melson intends to file a motion asking the Eleventh Circuit to reinstitute a stay pending resolution of its appeal.

The question of whether Alabama's method of execution is unconstitutional has never been directly addressed by the federal courts. The State has used procedural vehicles to avoid an actual decision on the merits concerning the protocol. This practice may be coming to an end.

In *Frazier, et al. v. Comm'r, et al.*,[5] the District Court granted the State's motion for summary judgment. However, it did so without deciding the constitutionality of the protocol, focusing instead of one aspect of the pleadings – whether the pleadings properly alleged alternative methods of execution. In granting the State's motion, the District Court failed to consider record evidence and made credibility determinations it was not permitted to make at this stage of the process.[6] This case has been fully briefed, argued before the Eleventh Circuit, and is awaiting a decision.

Should the plaintiffs prevail on appeal in *Frazier*, the case will be remanded to the District Court for a trial on the merits of the challenges. These challenges are based on significant evidence that shows that midazolam does not

[5] No. 2:13-cv-0781-WKW (M.D. Ala.) (Doc. 192).
[6] Br. of Appellant, *Frazier, et al. v. Warden, et al.*, No. 16-16876-P (11th Cir.).

anesthetize, and at best renders a person incapable of responding to a painful stimuli, but still feeling.

Despite this pending litigation, the State goaded this Court into setting Mr. Melson's execution date prematurely. Having set Mr. Melson's execution date, this Court has the authority to vacate that setting and stay his execution. Mr. Melson asks this Court to do just that: vacate his execution date and stay his execution pending a resolution of the question of whether the method of execution Alabama plans to use on him is constitutional.

I. Alabama's method of execution violates the Eighth Amendment because midazolam creates the illusion of anesthesia and the consciousness assessment creates the illusion of properly determining whether the inmate is anesthetized.

In *Baze v. Rees*,[7] the United States Supreme Court held that an execution protocol using potassium chloride that did not contain an anesthetic would violate the Eighth Amendment.[8] Alabama's present execution protocol uses potassium chloride and uses a paralytic. Therefore, midazolam must act as an anesthetic for the protocol to satisfy the Eighth Amendment. It does not.

[7] 553 U.S. 35 (2008).
[8] *Id.* at 53.

On December 8, 2016, the State executed Ronald Smith using the execution protocol they intend to use to execute Mr. Melson. This execution, by all accounts, went horribly wrong. Several witnesses to Mr. Smith's execution, including reporter Kent Faulk, observed that it did not go smoothly, and that, for 13 minutes, Mr. Smith heaved, coughed, and moved his arms and hands, including after each of two consciousness checks.[9]

This should not have come to a surprise to the Alabama Department of Corrections. Midazolam is not an anesthetic and was never intended to work as one. It is a sedative used as an adjunct to a true anesthetic. It can render someone so sedated that they will not respond to painful stimuli, even if they are feeling that stimulus.

Plaintiffs challenging Alabama's method of execution have provided evidence to the Federal Courts from anesthesiologists supporting that conclusion.[10] The State's

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[9] http://www.al.com/news/birmingham/index.ssf/2016/12/alabama_death_row_inmate_is_se.html.

[10] Doc. 1-2, p.3, *Melson v. Comm'r, et al.*, No. 2:16-cv-268-WKW (M.D. Ala.) (anesthesiologist noting that "[t]he lack of visible response to painful stimuli after benzodiazepine injection does not rule out pain perception," discussing reports of patients having experienced pain while unable to respond, and that such reports "have helped raise awareness of the importance to co-administer pain-relieving medications (opioids) alongside with sedative drugs").

only response, made at oral argument in *Frazier*, is to claim that midazolam can render someone non-responsive. 'Non-responsive' is not the same as 'anesthetized.' Non-responsive means just that – you do not respond to painful stimuli. It does not mean you do not feel pain. It is an illusion of anesthesia, without someone truly being anesthetized.

Similarly, the State's method of assessing whether the condemned inmate is anesthetized is an illusion. The State does not use an EKG, or a blood pressure monitor, or any modern piece of equipment for assessing anesthetic depth, such as a BIS (bi-spectral index) monitor.[11] Instead, the State relies on a corrections officer to call out the inmate's name, brush his eyelashes, and pinch his arm. This corrections officer has no medical training and is being asked to do a task that requires years of medical school, and to do it without equipment.

The failure of this method was evident during Ronald Smith's execution. The corrections officer administered the consciousness assessment to Mr. Smith, and Mr. Smith moved and reacted. The officer waited a period of time,

[11] Doc. 1, p.20, *Melson v. Comm'r, et al.*, No. 2:16-cv-268-WKW (M.D. Ala.)

presumably for a second dose of midazolam to be administered. Mr. Smith continued to cough and wheeze and move. He did so even after the second consciousness assessment was performed.

Instead of halting the execution, the Department of Corrections continued by injecting the paralytic, effectively masking any evidence that Mr. Smith felt the torturous effects of being injected with potassium chloride. The paralytic adds to the illusion that all is proceeding normally, by preventing the witnesses from seeing any type of movement.

The illusion of the paralytic is best described by reference to executions with midazolam that did *not* use a paralytic. In Arizona, Joseph Wood was executed with a protocol using midazolam and hydrocodone. He coughed and reacted over 600 times, and was injected 15 times with midazolam and hydrocodone before he died two hours after the execution began.[12] Dennis McGuire in Ohio was also

[12] Mauricio Marin, *Witness to a 2-hour Arizona execution: Joseph Wood's final 117 minutes*, The Guardian (July 24, 2014), https://www.theguardian.com/commentisfree/2014/jul/24/witness-arizona-execution-joseph-wood-died; Tom Dart, *Arizona inmate Joseph Wood was injected 15 times with execution drugs*, The Guardian (Aug. 2, 2014), https://www.theguardian.com/world/2014/aug/02/arizona-inmate-injected-15-times-execution-drugs-joseph-wood.

executed with midazolam without a paralytic, and he too coughed and wheezed and struggled before finally dying.[13]

Alabama's execution protocol is an illusion. It creates the illusion of a peaceful death when in truth, it is anything but. The federal courts have these facts before them and are deciding whether there should be a hearing on the question of whether the protocol is constitutional. This Court should vacate Mr. Melson's execution date and maintain the status quo, in order for it to be assured that Alabama is not violating the Constitution.

This Court has the ultimate authority for setting execution dates. It can set them, and it can vacate them. It has vacated them in the past when there is a pending federal case challenging the method of execution.[14] There is no reason it should not do so again.

This Court is the ultimate arbiter of justice in Alabama. It should not allow Mr. Melson's execution to go forward in the face of botched executions and significant

[13] Lawrence Hummer, *I witnessed Ohio's execution of Dennis McGuire. What I saw was inhumane*, The Guardian (Jan. 22, 2014), https://www.theguardian.com/commentisfree/2014/jan/22/ohio-mcguire-execution-untested-lethal-injection-inhumane.

[14] On April 9, 2012, this Court stayed the execution of Carey Dale Grayson to permit the federal courts to consider his challenge to the lethal injection protocol.

challenges to the constitutionality of Alabama's execution protocol. While there is certainly a valid interest in enforcing judgments, there is no valid interest in enforcing them in a matter that violates the constitutional protection against cruel and unusual punishment.

II. CONCLUSION

There are serious constitutional issues surrounding the method the State intends to use to carry out Mr. Melson's death sentence. Given the events of Ronald Smith's execution, and the likelihood that there will be a trial on the merits of the question of whether Alabama's method of execution is constitutional, it is prudent for this Court to vacate Mr. Melson's execution date.

Respectfully submitted this 7th day of June, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on June 7, 2017, I electronically filed the foregoing pleading with the Clerk of the Court using the ACIS system, a copy has been served upon the following, via first class postal service:

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EXHIBIT A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-11536-P

CHARLES LEE BURTON, 2:16-cv-0267

Consol Plaintiff - Appellant,

versus

WARDEN,
COMMISSIONER, ALABAMA DOC,

Defendants - Appellees.

ROBERT BRYANT MELSON, 2:16-cv-0268

Consol Plaintiff - Appellant,

versus

WARDEN,
COMMISSIONER, ALABAMA DOC,

Defendants - Appellees.

GEOFFREY TODD WEST, 2:16-cv-0270

Consol Plaintiff - Appellant,

versus

WARDEN,
COMMISSIONER, ALABAMA DOC,

Defendants - Appellees.

TORREY TWANE MCNABB, 2:16-cv-0284

Consol Plaintiff - Appellant,

versus

WARDEN,
COMMISSIONER, ALABAMA DOC,

Defendants - Appellees.

JEFFREY LYNN BORDEN, 2:16-cv-0733

Consol Plaintiff - Appellant,

versus

WARDEN,
COMMISSIONER, ALABAMA DOC,

Defendants - Appellees.

Appeal from the United States District Court
for the Middle District of Alabama

BEFORE: TJOFLAT, ROSENBAUM and JILL PRYOR, Circuit Judges.

BY THE COURT:

These consolidated appeals are of an order of the District Court dismissing identical complaints in five consolidated cases pursuant to Federal Rule of Civil Procedure 12(b)(6).[1] The appellants' consolidated brief has been filed.[2] The appellees' answer brief is due on June 14, 2017, and appellants' reply brief will be due on June 28, 2017.

Appellant Melson's execution is scheduled for June 8, 2017. He asks us to stay his execution pending the disposition of his appeal.[3] Four factors govern our discretion to grant a stay: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be

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[1] The complaints in the five cases before us, all seeking injunctive relief under 42 U.S.C. § 1983 for the State's anticipated violation of the Eighth and Fourteenth Amendments in connection with their executions, were filed in the District Court on the following dates: April 15, 2016, Charles Lee Burton, Robert Bryant Melson, and Geoffrey Todd West; April 19, 2016, Torrey Twane McNabb; September 7, 2016, Jeffrey Lynn Borden.

On April 27, 2016, Burton, Melson, West and McNabb jointly moved the District Court to consolidate their cases. The Court granted the motion the next day, April 28, and the cases became part of a group of cases the District Court labeled "Midazolam Litigation."
On May 31, 2016, the State moved the District Court to dismiss the cases (with the exception of Borden's) pursuant to Fed. R. Civ. P. 12(b)(6).

On January 16, 2017, the District Court, noting that Borden's complaint was virtually identical to those in the cases it consolidated on April 28, 2016, added Borden's case to the consolidated group and to the Midazolam Litigation and considered the State's May 31, 2016, motion to dismiss as having been filed in response to Borden's complaint.

On March 31, 2017, the District Court granted the State's motion to dismiss the five cases here pursuant to Fed. R. Civ. P. 12(b)(6) on the ground that their complaints failed to state a claim for relief.

On April 6, 2017, the plaintiffs in all five cases filed a notice of appeal, challenging the District Court's dismissal order of March 31.

[2] Appellants are represented by the Federal Defender for the Middle District of Alabama.

[3] On February 26, 2016, the State filed a motion with the Supreme Court of Alabama to set Melson's execution, but the Court did not grant the motion. On January 18, 2017, the State filed a second motion to set Melson's execution. The Supreme Court granted the motion on April 4, 2017, setting Melson's execution for June 8, 2017.

irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 434, 129 S. Ct. 1749, 1761, 173 L. Ed. 2d 550 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776, 107 S. Ct. 2113, 2119, 95 L. Ed. 2d 724 (1987)).

Turning to the first factor, which we consider the controlling factor,[4] it is apparent that in deciding whether Melson is likely to succeed on the merits, we would, in effect, be prejudging the merits of his co-appellants' appeals. That is, the decision we reached would, in effect, telegraph the outcome of Melson's co-appellants' appeals, and that would be untenable. We have authority under the All Writs Act[5] to avoid the problem. *Nken*, 556 U.S. at 426, 129 S. Ct at 1756. "[A]s part of its traditional equipment for the administration of justice, a federal court can stay the enforcement of a judgment pending the outcome of an appeal." *Scripps-Howard Radio v. FCC*, 316 U.S. 4, 9–10, 62 S. Ct. 875, 880, 86 L. Ed. 1229 (1942). "That authority was 'firmly imbedded in our judicial system,' 'consonant with the historic procedures of federal appellate courts,' and 'a power as old as the judicial system of the nation.'" *Nken*, 556 U.S. at 427, 129 S. Ct. at 1757 (quoting *Scripps-Howard Radio*, 316 U.S. at 13, 17, 62 S. Ct. at 881, 883). To enable us to

[4] In the circumstances of this case, the remaining factors counsel the granting of a stay.

[5] 28 U.S.C. § 1651(a) ("The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.").

process these consolidated appeals in an orderly fashion, we GRANT Melson's application for a stay. His execution is accordingly stayed pending our resolution of these appeals.