07A304

IN THE
SUPREME COURT OF THE UNITED STATES

CHRISTOPHER SCOTT EMMETT,
Applicant

v.

GENE M. JOHNSON, Director, Commonwealth of Virginia Department of Corrections; GEORGE M. HINKLE, Warden, Greensville Correctional Center; LORETTA K. KELLY, Warden, Sussex I State Prison; and JOHN DOES 1-100,
Respondents

MOTION TO VACATE STAY OF EXECUTION

The respondents, by counsel, move the Court to vacate the stay of execution entered by this Court on October 17, 2007, for the following reasons:

After all of Christopher Emmett's post-conviction challenges to his death sentence were rejected, and this Court had denied him a stay of execution and a writ of certiorari to review the Fourth Circuit's habeas decision in Emmett v. Kelly, 474 F.3d 154 (4th Cir. 2007), see 127 S.Ct. 2970 (2007) (stay denied), and 128 S.Ct. 1 (2007) (certiorari denied), this Court nevertheless granted Emmett a stay of execution at the same time it granted stays in all the other execution date cases which were before the Court after

the grant of certiorari in Baze v. Rees, 128 U.S. 34 (2007). Because Baze now has been decided, the Court should vacate the stay in Emmett's case.

Background

The state court set Emmett's execution for June 13, 2007, after the Fourth Circuit denied relief in Emmett's habeas corpus case. This Court denied Emmett's request for a stay on June 13, 2007. Emmett v. Kelly, 127 S. Ct. 2970 (2007). On that same date, the Governor of Virginia reprieved the execution date to October 17, 2008, because this Court's Clerk informed the Commonwealth that the Court would be unable to reach a decision on Emmett's then-pending certiorari petition before the execution date expired. This Court subsequently denied certiorari review on October 1, 2007. Emmett v. Kelly, 128 S.Ct. 1 (2007).

Emmett first raised a complaint about Virginia's lethal injection protocol in a 42 U.S.C. § 1983 suit he filed in the federal district court, *and only after his execution date had been scheduled.* The district court treated the complaint as a request for a preliminary injunction, held a hearing, made extensive findings, weighed the equities involved and denied the request. (Copy of June 1, 2007, order attached). After discovery and further briefing, the district court granted summary judgment to the

Commonwealth, making further detailed findings of fact. (Copy of September 20, 2007, opinion attached).

On September 25, 2007, this Court granted certiorari in Baze v. Rees. On the same day, Emmett filed a notice of appeal in the district court from that court's summary judgment order in his § 1983 case. On September 27, 2007, with his October 17 execution imminent, Emmett asked the Fourth Circuit, not to expedite, but instead to temporarily *stop* his appeal and to enjoin the Commonwealth from executing his death sentence solely on the basis of this Court's grant of certiorari in Baze. The Fourth Circuit denied Emmett's motion. (Copy of October 5, 2007, order attached).

On October 10, 2007, Emmett filed in this Court an application asking to stay the execution pending his filing of a petition for a writ of certiorari to review the *district court's* judgment. This Court's Clerk informed Emmett he was required first to make that same request in the Fourth Circuit. Emmett filed another motion in the Fourth Circuit, this time asking for a stay on the grounds cited to this Court in his stay application. The Fourth Circuit denied Emmett's second request for a stay. (Copy of October 15, 2007, order attached).

On October 17, 2007, this Court stayed Emmett's execution, "pending final disposition of the appeal by the United States Court of Appeals for the Fourth Circuit *or further order of this Court.*" Emmett v. Johnson, 169 L. Ed. 2d 327 (2007) (emphasis added). On October 25, 2007, the Commonwealth moved the Fourth Circuit to expedite Emmett's appeal. Emmett *opposed* that motion. On November 1, 2007, the Fourth Circuit denied the motion to expedite but scheduled Emmett's case for oral argument the week of March 18, 2008. However, the Fourth Circuit then *sua sponte* continued the case, apparently awaiting this Court's decision in Baze. Emmett's case currently is set for oral argument on May 14, 2008. The Fourth Circuit has directed the parties now to file supplemental briefs addressing the impact of this Court's decision in Baze.

With no pending execution date in existence in this case, Emmett's appeal will be decided in due course.

Reasons Why This Court Must Vacate the Stay

This Court normally grants a stay of execution to preserve its own jurisdiction to hear a case which already is in a posture that is ripe for consideration by this Court. See, e.g., Turner v. Texas, 551 U.S. ___, No. 07A272 (Sept. 27, 2007) (granting a stay until disposition of a petition for a writ of certiorari). In Emmett's case, however, there was, and is, no case

before this Court. The reason for this circumstance is unmistakable: Emmett has been dilatory throughout his § 1983 litigation, waiting years to bring his claim and presenting it for the first time only after an execution date had been set.

Emmett without question benefitted from this Court's decision, made in the aftermath of the grant of certiorari in Baze, to grant all stay applications. This Court now should return Emmett's case to the normal processes and established standards required for stays of execution. Vacatur is particularly called for in a case such as this in which the lower courts which are currently considering Emmett's § 1983 litigation faithfully applied those standards and *all determined that Emmett is not entitled to a stay of execution*.

In Baze, this Court held:

> A stay of execution may not be granted on grounds such as those asserted here unless the condemned prisoner establishes that the State's lethal injection protocol creates a demonstrated risk of severe pain. He must show that the risk is substantial when compared to the known and available alternatives. A State with a lethal injection protocol substantially similar to the protocol we uphold today would not create a risk that meets this standard.

Baze v. Rees, 553 U.S. ___, 2008 U.S. Lexis 3476 at *48 (2008) (Plurality Opinion). At the very least, the Fourth Circuit should be required to make

this determination, especially in a case from Virginia which employs lethal injection procedures virtually identical to those of Kentucky. But, due to this Court's stay, the Commonwealth currently is unable even to set an execution date which would permit such an analysis. It therefore is essential that this Court vacate Emmett's "Baze" stay.

Because Baze now has been decided, and as recognized in Baze itself, see 2008 U.S. Lexis 3476 at *48 (Plurality Opinion), any stay of execution must be governed by the equitable principles so long-recognized by this Court:

> "[I]nmates seeking time to challenge the manner in which the State plans to execute them must satisfy all of the requirements for a stay, including a showing of a significant possibility of success on the merits. See Barefoot v. Estelle, 463 U.S. 880, 895-896 (1983). See also Mazurek v. Armstrong, 520 U.S. 968, 972 (1997) (*per curiam*) (preliminary injunction not granted unless the movant, by a clear showing, carries the burden of persuasion).
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> A court considering a stay must also apply "a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." Nelson, supra, at 650. See also Gomez v. United States Dist. Court for Northern Dist. of Cal., 503 U.S. 653, 654 (1992) (*per curiam*) (noting that the "last-minute nature of an application" or an applicant's "attempt at manipulation" of the judicial process may be grounds for denial of a stay).

Hill v. McDonough, 547 U.S. 573, 584 (2006). This Court has made it unmistakably clear that:

> Filing an action that can proceed under § 1983 does not entitle the complainant to an order staying an execution as a matter of course. Both the State and the victims of crime have an important interest in the timely enforcement of a sentence.... [A] stay of execution is an equitable remedy. It is not available as a matter of right, and equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts.
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> * * *
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> The federal courts can and should protect States from dilatory or speculative suits....

Id.; see also Nelson v. Campbell, 541 U.S. 637, 644 (2004) (the State "retains a significant interest in meting out a sentence of death in a timely fashion"), citing In Re: Blodgett, 502 U.S. 236, 238 (1992) ("In a capital case the grant of a stay of execution directed to a State by a federal court imposes on that court the concomitant duty to take all steps necessary to ensure a prompt resolution of the matter"); McCleskey v. Zant, 499 U.S. 467, 491 (1991) ("[T]he power of a State to pass laws means little if the State cannot enforce them"). These principles require this Court to vacate Emmett's "Baze" stay.

Clearly, Emmett is not entitled to a stay of execution now. The district court made detailed findings of fact that equity disentitled Emmett to a stay.

See Doran v. Salem Inn, Inc., 422 U.S. 922, 931-32 (1975) (standard for preliminary injunctions is careful weighing of the interests of each party, the likelihood of irreparable injury and of prevailing on the merits; standard of review on appeal of a grant or denial of a preliminary injunction is abuse of discretion). The district court found a profound lack of harm which would occur if Emmett were executed under Virginia's much-used, well-established lethal injection protocol:

> The average duration of an execution in Virginia, from the introduction of the first drug to death, is less than five minutes. When the chemicals are properly administered, the chance of an inmate feeling any pain associated with his execution is *less than 3/100 of one percent (.03%)*. Plaintiff has not adduced any evidence that suggests his particular physical characteristics are likely to increase that risk.

(DCT Mem. Op. June 1, 2007, at 10-11, emphasis added). Additionally, "[w]hen an inmate receives two grams of sodium thiopental, his chance of suffering any significant pain associated with his execution is so remote as to be *nonexistent*." (Id. at 20, emphasis added). After discovery and further briefing in the district court, the court denied summary judgment, again finding that,

> When the chemicals are properly administered, the chance of an inmate feeling any pain associated with his execution is less than 3/100 of one percent (.03%). Plaintiff has not adduced any evidence that suggests his particular physical characteristics are likely to increase that risk.

(DCT Mem. Op. Sept. 20, 2007, at 5-6). The district court found further that:

> . . . Virginia has taken considerable precautions to ensure that neither human error nor defective equipment increase the risk that Plaintiff will feel *any* pain.

(Id. at 7, emphasis added). The district court described in detail the skill-level and experience of Virginia's execution team. It reviewed the assessment of the team's abilities by a physician who trains new members and ensures their proficiency in placing IV lines. It addressed the manner in which the team tests the equipment with saline solution after IV lines are placed to ensure that the IV lines flow smoothly. It described the initial and monthly training conducted by team members, including simulations of a variety of contingencies. (Id. at 7-8). These findings by the district court were fully supported by the record. The district court ultimately concluded, based again on the record, that

> There is no persuasive evidence that prior Virginia inmates have experienced an insufficient depth of anesthesia. To conclude that plaintiff *might* be so shallowly sedated as to experience severe pain would be both speculative and contrary to the uncontroverted testimony of Dr. Dershwitz.

(Id. at 15, emphasis in original).

Emmett's § 1983 complaint only challenged the method of lethal injection. It did not challenge Virginia's alternate method: electrocution. Emmett certainly is not entitled to a continued stay of execution *by the very means he elected*, when he could have elected a method upheld for decades as constitutional. See Stewart v. LaGrand, 526 U.S. 115 (1999) (no stay permitted to challenge one method of execution when the inmate could choose another, constitutionally approved method).

Emmett presented in his case no evidence of any substantial risk that he will feel any pain at all, much less that Virginia's procedure creates for him a "wanton exposure to 'objectively intolerable risk'" of "severe pain." See Baze, 2008 U.S. Lexis 3476 at *48 (Plurality Opinion). Indeed, the evidence which was seen, heard and considered by the district court failed even to demonstrate any disputed issue of material fact.

The district court also found profound harm to the Commonwealth:

> Even if the Court were to assume that Plaintiff had demonstrated a sufficient likelihood of harm to satisfy the first factor, Plaintiff's harm would be a thin shadow compared to the certain, profound and irreparable harm to the state if an injunction is issued.

(DCT Mem. Op. June 1, 2001, at 16). This forecast of the district court has come to pass: the Commonwealth has suffered, and continues to suffer, serious and irreparable harm each day the stay remains in effect See

Thompson v. Wainwright, 714 F.2d 1495, 1506 (11th Cir. 1983) ("Each delay, for its span, is a commutation of a death sentence to one of imprisonment"). Seven years ago, on April 26, 2001, Emmett brutally bludgeoned to death an innocent co-worker, John Langley, as Langley slept. Over six years ago, a jury determined that Emmett should be put to death and that determination has been upheld by every federal and state court with authority to review it, including this Court. The Commonwealth's interest in executing Emmett without further delay is profound, and its right to do so immutably established. See Calderon v. Thompson, 523 U.S. 538, 556 (1998) (once federal appellate court denies relief, the state's interest in finality not only is compelling, but "acquires an added moral dimension").

Certainly the Commonwealth should at least be able to set an execution date so that the courts can decide whether a stay is warranted in the aftermath of the Baze decision. This Court should not attempt to speak for the lower courts by continuing its stay simply to allow proceedings in the lower court to take place, *especially where the lower courts expressly have found that Emmett is not entitled to such a stay.* Any further litigation in Emmett's case should take place under a scheduled execution date, not under a stay of execution containing no ending date-certain.

Conclusion

This Court should vacate the stay of execution imposed on October 17, 2007.

Respectfully submitted,

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LORETTA K. KELLY, Warden, Sussex I State Prison; and
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