

CAPITAL CASE

Execution Date: October 8, 2009

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

TED STRICKLAND, Governor, et al.,

Applicants,

-vs-

LAWRENCE REYNOLDS,

Respondent

APPLICATION TO VACATE STAY OF EXECUTION

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I. Introduction

On June 9, 1994, the Court of Common Pleas of Summit County, Ohio, sentenced Respondent Lawrence Reynolds (hereinafter "Reynolds") to death for the aggravated murder of Loretta Foster. On May 7, 2008, over six years after Ohio amended its death penalty statutes to make lethal injection the exclusive method to execute condemned prisoners, Reynolds filed with the United States District Court for the Southern District of Ohio a complaint under 42 U.S.C. Section 1983 in which he alleged that the procedures used by defendants to carry out the lawfully imposed sentence against him will violate his rights under the Eighth and Fourteenth Amendments. Consistent with governing circuit precedent -- which held that a "method of execution" claim like Reynolds' accrued at the latest when Ohio mandated lethal injection as its sole method of execution -- the district court dismissed Reynolds' suit as beyond the applicable two-year statute of limitations. Reynolds appealed that decision, and requested a stay of his execution pending appeal. On October 5, 2009, a panel of the Sixth Circuit, with Judge Sutton dissenting, granted the stay and remanded to the district court for additional fact finding. The panel majority reasoned that the postponement of the execution of Romell Broom, another condemned inmate, required the stay of Reynolds' execution.

The panel clearly erred. As recognized by Judge Sutton, Reynolds cannot possibly demonstrate a violation of his constitutional rights, solely by virtue of the postponement of Broom's execution. Consistent with Ohio's written execution policy, the State postponed Broom's execution when sufficient access to his veins could not be obtained. Reynolds argued, and the panel majority agreed, that the postponement of Broom's execution required it to stay Reynolds' execution while the district court conducted fact finding concerning Broom's postponed execution. But the postponement of Broom's execution was consistent with Ohio's

written execution protocol, which calls for a postponement in such circumstances. Ohio's requirement mirrors Kentucky's like requirement for a postponement in the event that venous access cannot be obtained. Moreover, the panel majority's interference at this juncture undercuts the authority of Ohio to make reasonable choices as to what steps should be taken in the event that the state's chosen method of execution presents unusual problems in its actual implementation.

Accordingly, the State respectfully asks that the Court vacate the stay.

II. Reynolds cannot possibly demonstrate a violation of his constitutional rights, solely by virtue of the postponement of Broom's execution.

As Reynolds brought his challenge to Ohio's method of execution via a complaint under Title 42 Section 1983, the stay issued by the panel majority is tantamount to a preliminary injunction pending appeal. A preliminary injunction is an "extraordinary and drastic remedy" that is never awarded as of right. *Munaf v. Geren*, __ U.S. __, 128 S. Ct. 2207, 2219 (2008), citing 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2948, p. 129 (2d ed. 1995) and *Yakus v. United States*, 321 U.S. 414, 440 (1944). Rather, a party seeking a preliminary injunction must demonstrate, among other things, "a likelihood of success on the merits." *Id.*, citing *Gonzales v. O Centro Espirita Beneficente Uni o do Vegetal*, 546 U.S. 418, 428 (2006) (citing *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975)).

Applying these principles to the instant case, "one searches the opinions below in vain for any mention of a likelihood of success as to the merits..." *Munaf v. Geren*, 128 S. Ct. at 2219. At most, the panel majority postulates "the *possibility* that *Broom* has already suffered constitutional harm under Ohio's protocol," or that the postponement of Broom's execution "suggest[s]" the existence "of uniquely relevant evidence" or raises serious "concerns."

Concurring Opinion of Judge Cole at page 3 (emphasis added). What the panel majority does *not* say is that the circumstances giving rise to the postponement of Broom's execution present a likelihood that the district court erred in dismissing Reynolds' claim as time-barred, or that it could produce evidence that it is likely Reynolds' rights have or will be violated. Rather, all that was necessary for Reynolds to obtain a stay is to point to the possibility that the State's execution team might have difficulty accessing his veins or that the execution team might otherwise fail to effectively or adequately carry out Ohio's execution procedures.

In point of law and fact, the postponement of Broom's execution certainly cannot give rise to any compelling evidence in support of Reynolds' claims. Indeed, it was a step consistent with ensuring that Broom's execution is carried out in a lawful and humane way. The written directive setting forth Ohio's procedures for the conduct of executions by lethal injection provides as follows:

The team members who establish the IV sites shall be allowed as much time as is necessary to establish two sites. If the passage of time and the difficulty of the undertaking cause the team members to question the feasibility of two or even one site, the team will consult with the warden. The warden, upon consultation with the Director and others as necessary, will make the decision whether or how long to continue efforts to establish an IV site. The Director shall consult with legal counsel, the office of the Governor or any others as necessary to discuss the issues and alternatives.

Ohio Department of Rehabilitation and Policy Directive No. 01-COM-11, Effective May 14, 2009.

The postponement of the execution of Romell Broom is completely consistent with the procedures outlined in Ohio's written policy directive. Consistent with those procedures, the State proceeded cautiously when it became apparent that the "medical members" of the team, certified Emergency Medical Technicians, were experiencing difficulties establishing IV sites. After taking a reasonable time to establish IV sites to administer the lethal drugs, and after being

unable to do so, the Warden and the Director determined the appropriate course of action was to postpone the execution. Consistent with this determination, the Governor of Ohio exercised his executive authority and postponed Broom's execution via the issuance of a reprieve. When attorneys for Broom filed suit in an attempt to permanently block his execution, Defendants elected not to oppose a temporary delay beyond the date specified in the warrant of reprieve.

In *Baze v. Rees*, __ U.S. __, 128 S. Ct. 1520 (2008), this Court held that Kentucky's "three-drug" protocol for the execution of condemned prisoners was consistent with the Eighth Amendment. For the purposes of the instant case it is highly relevant that Kentucky's written "protocol" required expressly that the IV team had one hour to establish both the primary and backup IVs, a length of time that the trial court found to be "not excessive but rather necessary." *Baze v. Rees*, 128 S. Ct. at 1534. It further provided that "[i]f the IV team cannot secure one (1) or more sites within one (1) hour, the Governor's Office shall be contacted by the Commissioner and a request shall be made that the execution be scheduled for a later date." See Joint Appendix, Vol. IV of *Baze v. Rees*, Case No. 07-5439, page 976. Noticeably absent in *Baze* is any suggestion by this Court that postponement of the execution would constitute a violation of the prisoners' rights, or that such a claim was even made by the prisoners. That is hardly surprising. Like Reynolds, the prisoners in *Baze* alleged that the risk of maladministration of the first drug posed the potential violation of their rights, and that therefore the state's protocol was constitutionally deficient because it should have required efforts to cease and obtain a postponement much sooner than after an hour of unsuccessful attempts to access the prisoners' veins. 128 S. Ct. at 1534.

Nor can it be said that the problem of accessing a prisoner's veins is so unique as to require further extensive factual development concerning Ohio's procedures. The problem of obtaining access to the veins of some prisoners has been long recognized as an inherent but acceptable risk in the use of lethal injection as a method of execution. In *Heckler v. Chaney*, 470 U.S. 821 (1985), the Court considered a suit by several death-row prisoners, brought in 1981, in which the prisoners sought regulation by the Food and Drug Administration to ensure that the States only use "safe and effective drugs" for their execution. According to an amicus brief filed in their support, the prisoners claimed that "the technique of intravenous injection is fraught with dangers;" that it "is extremely difficult, if not impossible, to give lethal injections to persons with certain common physical conditions and abnormalities;" that "even people without abnormalities experience some constriction of the veins in anticipation of intravenous injections;" and it "is expected that prisoners facing execution will manifest similar reactions, magnifying the difficulty of achieving effective venipuncture." *Heckler v. Chaney*, 1983 U.S. Briefs 1878 (September 29, 1984).

Despite these inherent drawbacks, execution by lethal injection has universally been adopted by the states as the preferred method for executing condemned prisoners. See *Baze v. Rees*, *supra*, 128 S. Ct. at 1526-1527 (Noting that a total of 36 States have now adopted lethal injection as the exclusive or primary means of implementing the death penalty, making it by far the most prevalent method of execution in the United States); *Gomez v. United States District Court*, 503 U.S. 653, 658 at n. 9 (1992) ("Notably, a memorandum prepared by California corrections officials correctly observes that 'lethal injection is considered to be more humane than other methods of execution (e. g., hanging, firing squad, lethal gas, or electrocution).'" (Stevens, J., Dissenting); *Chaney v. Heckler*, 718 F.3d 1174, 1197 (D.C. Circuit 1983)

("Moreover, it is not a matter of pain versus no pain, but rather pain of one sort substituted for pain of another -- and in all likelihood substitution of a lesser pain, since that is the principal purpose of the lethal injection statutes.") (Scalia, Circuit Judge, Dissenting).

In short, Reynolds cannot possibly demonstrate a violation of his constitutional rights, solely by virtue of the postponement of Broom's execution. Accordingly, the panel majority below clearly erred in staying Reynolds' execution on this basis alone.

III. The panel majority's interference at this juncture undercuts the authority of Ohio to make reasonable choices as to what steps should be taken in the event that the state's chosen method of execution presents unusual problems in its actual implementation.

As recognized by Judge Sutton in his dissent below, the State amended its written directive governing executions to provide for the possibility of postponement, in part due to the complaints of other prisoners that Ohio's procedures failed to prevent the possibility of repeated attempts to access the prisoner's veins which in and of themselves allegedly amounted to a violation of the Eighth Amendment. That very issue was the subject of extensive testimony during a five-day evidentiary hearing conducted by the district court concerning the issuance of a preliminary injunction on behalf of another inmate. The district court ultimately vacated the previously issued injunction. But, in any event, the State altered its written directive to more thoroughly address the alleged problem. As observed by Judge Sutton, the State's implementation of a possibility for postponement "removes the foundation for an Eighth Amendment claim; it does not lay the groundwork for one." Dissenting Opinion of Judge Sutton at page 12.

But most importantly, as also recognized by Judge Sutton, the panel majority's issuance of a stay to Reynolds, based merely on the possibility that "something could go wrong," in accessing his veins, effectively amounts to a judicially imposed moratorium on Ohio's death

penalty, as the possibility exists in all executions that due to the particular physical condition of the inmate a postponement of the execution might be necessary for this reason. As to the wisdom of letting the State's mechanism work, the words of Judge Sutton cannot be improved upon:

But the constitution allows the people to make policy mistakes, if policy mistakes they are, and correct them for themselves over time, and we should let that process run its course unless or until their representatives cross a cognizable constitutional limit. That is particularly so in the area of capital punishment, where the Supreme Court has long "tolerated continuity" and "the democratic processes" nonetheless frequently have "demanded change."

Opinion of Judge Sutton at page 13, citing *Workman v. Bredeisen*, 486 F.3d 896, 907 (6th Cir. 2007).

Ultimately, the issue presented by the stay ordered in this case is broader than the question of whether the execution of Reynolds or that of any specific prisoner should be halted or permitted to go forward. The Governor of Ohio could conceivably determine that the executions of prisoners like Reynolds scheduled in the future should also be delayed, pending further review of the State's procedures. By the same token, the State's interest in the execution of final criminal judgments is compelling, and such interest could reasonably be found to override the indefinite delay of future executions, for the possible overhaul of procedures that are constitutionally adequate. What is important is that the State be free to make these critical choices, where a federal court's stay of a prisoner's execution is not justified as a matter of law. Because the stay issued by the panel majority is legally insupportable, the panel majority's interference at this juncture undercuts the authority of Ohio to make reasonable choices as to what steps should be taken in the event that the State's chosen method of execution presents unusual problems in its actual implementation.

IV. Conclusion

The application to vacate the stay of Reynolds' execution should be granted.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on counsel for Lawrence Reynolds on this 5th day of October, 2009, via electronic mail.

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