

CASE NO. _____

IN THE UNITED STATES SUPREME COURT

October 2011, Term

THE STATE OF FLORIDA,

Petitioner,

vs.

MANUEL VALLE,

Respondent.

MOTION TO LIFT STAY

CAPITAL CASE WARRANT SIGNED

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The State of Florida ("State"), hereby moves this Court to vacate the stay of execution entered by the Florida Supreme Court on July 25, 2011. As grounds, therefore the State asserts

On June 30, 2011, a death warrant was signed, scheduling Respondent's execution for August 2, 2011. On July 7, 2011, Respondent filed a successive motion for post conviction relief, claiming, *inter alia*, that Florida's June 8, 2011 execution protocol was unconstitutional. As Respondent admitted before the state trial court, the only difference between the 2011 protocol and the 2007 lethal injection protocol was that pentobarbital was substituted for sodium thiopental. In the initial version of the motion, the only allegation Respondent made regarding the change was a conclusory statement that there were "serious concerns" about using pentobarbital as an anesthetic, that the manufacturer objected to the use of pentobarbital and that there had allegedly been problems during the execution of Roy Blakenship in Georgia using pentobarbital.

On July 10, 2011, Respondent served an amended motion for post conviction, which continued to raise a claim regarding lethal injection. Regarding the use of pentobarbital, Respondent added allegations that a Dr. David Waisel had opined that pentobarbital was not FDA approved for use in lethal injections and that there was "no relevant reference clinical dose." He continued to rely on the manufacturer's objection. Regarding the Blankenship execution,

Respondent allegations based on an affidavit by Dr. Waisel that he had interviewed a witness to the execution who described movements made during the first few minutes of the execution. Based on this interview, Dr. Waisel merely opined that Blankenship was conscious for the first three minutes of the execution and "suffered greatly" without any explanation of why he was suffering or whether the suffering resulted from an isolated mishap in that execution.

On July 11, 2011, the state trial court heard argument on the motion and stated that it was summarily denying the motion. On July 15, 2011, it entered its written order, finding that Respondent had not stated a claim upon which relief could be granted. It noted that Dr. Waisel had offered this same opinion regarding the use of pentobarbital in numerous cases and the opinion had been consistently rejected.

Respondent appealed the denial of his motion for post conviction relief to the Florida Supreme Court. He reiterated his arguments regarding pentobarbital. He argued that the cases rejecting Dr. Waisel's opinion should be ignored because he believed he had plead the claim better and he had not received an evidentiary hearing regarding Dr. Waisel's opinions.

On July 25, 2011, the Florida Supreme Court issued a stay of execution and ordered an evidentiary hearing regarding "efficacy of pentobarbital as an anesthetic." It stated it was doing so because "Dr. Waisel's expert report and affidavit, as well as the

allegations in [Respondent's] 3.851 motion" raised a factual issue regarding whether the use of pentobarbital would "subject him to a 'substantial risk of serious harm.'" *Baze v. Rees*, 553 U.S. 35, 50 (2008)." It also ordered the Department of Corrections to produce "correspondence and documents it had received from the manufacturer of pentobarbital concerning the drug's use in executions."

Because the issuance of this stay is contrary to *Baze*, the State hereby moves to lift the stay. In *Baze*, a plurality of this Court held that an inmate was required to show that the protocol created a "substantial risk of serious harm" that was "objectively intolerable" to demonstrate that a lethal injection protocol was unconstitutional. *Id.* at 49-50. To meet this standard, the Court required a showing that "the conditions presenting the risk must be 'sure or very likely to cause serious illness and needless suffering,' and give rise to 'sufficiently imminent dangers.'" *Id.* at 50 (quoting *Farmer v. Brennan*, 511 U.S. 825, 842, 846, and n.9 (1994)). It noted that the mere fact that an execution method "may result in pain, either by accident or as an inescapable consequence of death" did not meet this standard. *Id.* at 50. It also held that "an isolated mishap alone does not give rise to an Eighth Amendment violation, precisely because such an event, while regrettable, does not suggest cruelty, or that the procedure at issue gives rise to a 'substantial risk of serious harm.'" *Id.* It required a defendant claiming that a risk of serious harm could be avoided by a

different method of execution to show that there was a feasible alternative that addresses a substantial risk of serious harm. *Id.* at 52. It held that no stay was allowed unless the standard was met. *Id.* at 60.

In *Brewer v. Landrigan*, 131 S. Ct. 445 (2010), this Court reversed a stay that had been granted because Arizona had obtained sodium thiopental from a non-FDA approved source and refused to disclose how it had obtained the sodium thiopental. In doing so, the Court applied the standard set forth in the *Baze* plurality and held that a claim based on speculation that a drug received from a non-FDA source might not be effective was insufficient to state a claim. *Id.*

Applying this standard, the Florida Supreme Court improperly granted the stay. In his report, Dr. Waisel did not explain how the use of five grams of pentobarbital created a substantial risk of serious harm. Instead, he stated that there was insufficient research to determine a clinical dose of pentobarbital sufficient to induce anesthesia. However, Dr. Waisel's report also acknowledged that 100 mg is usually used for sedation and that the total dose for a normal adult would be 500 mg. Since the protocol calls for the use of five grams of pentobarbital, the dosage used is 50 times the normal sedation dose and 10 times the total dose. In fact, Dr. Waisel's opinion summary did not state that these concerns create a substantial risk of serious harm but that the

protocols do not do enough to "protect inmates against a substantial risk of" harm. Moreover, these same concerns by this same expert have been rejected. See *Pavatt v. Jones*, 627 F.3d 1336, 1138-39 (10th Cir. 2010); see also *DeYoung v. Owens*, 2011 WL 2899704 (11th Cir. Jul. 20, 2011); *West v. Brewer*, 2011 WL 2811304 (9th Cir. 2011); *Powell v. Thomas*, 641 F.3d 1255, 1258 (11th Cir. 2011); see also *Beaty v. Brewer*, 2011 WL 2164022 (9th Cir. May 25, 2011). In fact, as the Eleventh Circuit recently stated regarding Dr. Waisel's opinion, "[t]his asserted lack of knowledge obviously cannot satisfy DeYoung's burden of affirmatively showing that a substantial risk of serious harm exists." *DeYoung*, 2011 WL 2899704 at *4 n.5. Instead, this opinion merely reflect speculation that pentobarbital might not render Respondent unconscious. However, this Court has held that such speculation is not sufficient to state a claim that an execution protocol is unconstitutional. *Landrigan*, 131 S. Ct. at 445. Moreover, the speculation was particularly unwarranted, as the protocol continues to contain provisions to check and ensure that Defendant is not conscious after the injection of pentobarbital. Since Dr. Waisel's report did not show that the use of pentobarbital created a substantial risk of serious harm, it was error for the Florida Supreme Court to issue a stay based on it.

Further, Dr. Waisel's affidavit regarding the Blankenship execution also did not make the granting of the stay proper. In the

affidavit, Dr. Waisel merely states that he believes that Blankenship was conscious for the first three minutes of the execution and "suffered greatly" without any explanation of why he was suffering or whether the suffering resulted from an isolated mishap in that execution. However, as *Baze* held, a lethal injection protocol is not unconstitutional simply because a defendant may suffer "pain, either by accident or as an inescapable consequence of death." *Baze*, 553 U.S. at 50. Further, this Court also held that "an isolated mishap alone does not give rise to an Eighth Amendment violation, precisely because such an event, while regrettable, does not suggest cruelty, or that the procedure at issue gives rise to a 'substantial risk of serious harm.'" *Id.* Thus, Dr. Waisel's bare opinion that an inmate suffered without any explanation of how was not sufficient to obtain a stay.

This is particularly because in Georgia, the State that alleged botched the Blankenship execution, Dr. Waisel's opinion has already been in rejected. As the Eleventh Circuit stated:

Even assuming Blankenship's movement was during the administration of the pentobarbital or right after, the evidence in this record does not establish a substantial risk of serious harm from the pentobarbital, or even that Blankenship necessarily suffered any harm, much less serious harm. First, as the district court pointed out, **"Dr. Waisel entirely failed to provide a medical explanation for why pentobarbital might have caused Blankenship pain."** To the contrary, Dr. Waisel testified that a patient will not feel pain at the moment when a drug is introduced intravenously unless it is a drug, such as potassium chloride, which causes a burning sensation."

Second, the district court noted that Dr. Waisel

admitted that "any 'suffering' was short lived as it clearly ended within a few minutes—three minutes at the most—after the pentobarbital was injected." The Eighth Amendment does not protect against all harm, only serious harm; and it does not prohibit all risks, only substantial risks. "Simply because an execution method may result in pain, either by accident or as an inescapable consequence of death, does not establish the sort of 'objectively intolerable risk of harm' that qualifies as cruel and unusual." *Baze*, 553 U.S. at 50, 128 S.Ct. at 1531 (plurality opinion). In any event, Dr. Waisel was not present at the Blankenship execution; rather, he opines from the witnesses' varied descriptions of Blankenship's movements that those movements were a sign of "discomfort," which Dr. Waisel termed "suffering." Dr. Waisel acknowledged that no one reported any movement by Blankenship after the nurse's consciousness check. Further, Blankenship's autopsy revealed no evidence of trauma. The catheters were inside Blankenship's veins and the veins were not burst or broken. There was no infiltration of fluid in the soft tissue of the right arm near the catheter site.

Notably too, DeYoung presented no evidence to show that unconsciousness is not achieved after the complete administration of a 5000-mg dose of pentobarbital.

All parties agree that the purpose of the anesthetic in Georgia's three-drug lethal injection protocol is to render the inmate unconscious before administration of the second and third drugs. **As the record demonstrates, and the district court found, a consciousness check was performed on Blankenship after he was administered the pentobarbital and prior to injection of the second drug pancuronium bromide, as Georgia's lethal injection protocol requires. It is clear that Blankenship's execution did not proceed to the second drug until after he was fully unconscious. And as the district court found, DeYoung's execution, or any other under the Georgia protocol, cannot proceed until he is unconscious. To the contrary, Georgia's protocol specifically provides that GDOC officials will not administer the pancuronium bromide but will instead administer more anesthetic—and conduct more consciousness checks—until the inmate has been shown to be unconscious.**

DeYoung has wholly failed to show that pentobarbital, once fully administered and allowed to act, is ineffective as an anesthetic. As the district court succinctly found, Georgia's "use of pentobarbital

does not create a substantial risk of serious harm to inmates.”

DeYoung, 2011 WL 2899704 at *5-*6 (emphasis added, footnote omitted). Since the claim has already been rejected in Georgia and Florida’s protocol contains similar provisions for a consciousness check and not continuing the protocol until an inmate is unconscious (as noted in Justice Cannady’s dissent in the Florida Supreme Court), the Florida Supreme Court erred in finding that this assertion was sufficient to grant a stay. The stay should be vacated.

Moreover, while the Florida Supreme Court seems to be concerned the manufacturer opposes the use of pentobarbital, even Respondent could not allege that this objection shows that there is a substantial risk of serious harm from its use. Instead, he used the objection to argue that lethal injection violated the evolving standards of decency. Moreover, while the manufacturer stated that using pentobarbital for lethal injection was not an approved use, this Court has previously determined that the mere fact that a drug was not FDA approved did not warrant a stay. *Landrigan*, 131 S. Ct. at 445. In fact, this Court has made clear that FDA approval is irrelevant in the context of drugs used in an execution. See *Heckler v. Chaney*, 470 U.S. 821, 823-25 (1985) (holding that the FDA’s refusal to initiate enforcement proceedings under the federal Food, Drug, and Cosmetic Act with respect to drugs used to perform lethal injections is not subject to judicial review). As such, the

granting of a stay on this basis was also improper.

As this Court has 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.” *Baze*, 553 U.S. at 60. Since nothing Respondent alleged established the Florida’s lethal injection protocol creates such a risk, the Florida Supreme Court’s granting of a stay was improper. The stay should be vacated.

To the extent that Respondent may suggest that the Florida Supreme Court properly granted a stay even though he did not establish a right to such a stay under *Baze* because Florida law permits broad protections that does Eighth Amendment, this is not true. In 2002, the people of Florida amended Art. I, §17 of the Florida Constitution to provide:

Excessive fines, cruel and unusual punishment, attainder, forfeiture of estate, indefinite imprisonment, and unreasonable detention of witnesses are forbidden. The death penalty is an authorized punishment for capital crimes designated by the legislature. **The prohibition against cruel or unusual punishment, and the prohibition against cruel and unusual punishment, shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution. Any method of execution shall be allowed, unless prohibited by the United States Constitution.** Methods of execution may be designated by the legislature, and a change in any method of execution may be applied retroactively. A sentence of death shall

not be reduced on the basis that a method of execution is invalid. In any case in which an execution method is declared invalid, the death sentence shall remain in force until the sentence can be lawfully executed by any valid method. This section shall apply retroactively.

(Emphasis added). As the Florida Supreme Court has acknowledged, this provision requires that it consider the claim in conformity with this Court's precedent. *Lightbourne v. McCollum*, 969 So. 2d 326, 335 (Fla. 2007). In fact, the Florida Supreme Court has held that the existence of such conformity clauses require it not only to follow existing United States Supreme Court precedent on an issue but also forbid it from granting greater protection under the Florida Constitution. *Holland v. State*, 696 So. 2d 757, 759 (Fla. 1997). Thus, any attempt that Respondent to suggest that it was proper for the Florida Supreme Court to grant a stay even if he did not satisfy the *Baze* standard should be rejected. Because Respondent did not satisfy the *Baze* standard, the stay should be vacated.

WHEREFORE, based on the foregoing, the State respectfully requests that this Court vacate the Florida Supreme Court's July 25, 2011 stay.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion was furnished by email and U.S. mail to Suzanne Keffer, 101 N.E. 3rd Avenue, Suite 400, Fort Lauderdale, Florida 33301, this ____ day of July, 2011.

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Assistant Attorney General