NO. 17-12167

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

J.W. LEDFORD,

Appellant/Plaintiff,

v.

GREG DOZIER, COMMISSIONER,
***et al*.,**

Appellee/Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION
Case No. 1:17-cv-1705

RESPONSE IN OPPOSITION TO PLAINTIFF-APPELLANT'S MOTION FOR AN ORDER STAYING HIS EXECUTION

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Rule 28-2(b) of the Rules of the United States Court of Appeals for the Eleventh Circuit, counsel for the Respondent hereby certifies that the following persons have an interest in the outcome of this case:

1. Honorable William T. Boyett, Superior Court of Murray County, Trial Judge;
2. Beth Burton, Deputy Attorney General, Counsel for Respondent;
3. Honorable Julie E. Carnes, Former United States District Court Judge, Northern District of Georgia, Federal Habeas Judge;
4. Bruce Chatman, Warden, Respondent;
5. John D. Cline, Counsel for Petitioner;
6. Sabrina Graham, Senior Assistant Attorney General, Counsel for Respondent;
7. Honorable Michael E. Hancock, State Habeas Judge;
8. Melvin E. Hyde, former Assistant District Attorney;
9. Dr. Harry Buchanan Johnston, Victim (deceased);
10. Honorable Steve C. Jones, United States District Court Judge, Northern District of Georgia, Federal Habeas Judge;
11. J.W. Ledford, Jr., Appellant;
12. Sam F. Little, Trial Counsel for Petitioner;

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13. Samuel S. Olens, Attorney General and Counsel for Respondent;
14. Jack Partain, former District Attorney;
15. Bert Poston, District Attorney;
16. Matthew D. Thames, Trial Counsel for Petitioner; and
17. Mary Elizabeth Wells, Counsel for Petitioner.

ARGUMENT AND CITATION OF AUTHORITY

As found by the District Dourt, in order to obtain a stay of execution, Appellant has to show "(1) he has a substantial likelihood of success on the merits [of his Eighth Amendment claim]; (2) that the [TRO] is necessary to prevent irreparable injury; (3) the threatened injury outweighs the harm the [TRO] would cause the other litigant and (4) the [TRO] would not be averse to the public interest." (ECF Doc. 14, p. 6 (quoting *Chavez v. Florida*, 742 F.3d 1267, 1271 (11th Cir. 2014)).

The District Court properly determined there was no likelihood of success on the merits as Appellant's claim is: time-barred; not properly before the Court for failure to exhaust administrative remedies; and does not establish an Eighth Amendment violation. The court also concluded that a stay would be averse to public interest. This Court should deny Appellant's request for a stay of his execution.

A. No Likelihood of Success on the Merits

1. Claim Is Time-Barred

As set forth more fully in Appellee's response to Appellant's request for en banc review, Appellant's challenge to Georgia lethal injection statute and protocol is time-barred. *See Wellons v. Comm'r, Ga. Dep't of Corr.*, 754 F.3d 1260, 1263-

64 (11th Cir. 2014); *Gissendaner v. Ga. Dep't of Corr.*, 779 F.3d 1275, 1280-1282 (11th Cir. 2015). .

2. Appellant Failed to Exhaust Administrative Remedies

Additionally, as set forth more fully in Appellee's response to Appellant's request for en banc review, Appellant failed to follow the grievance procedure required by Georgia Department of Correction protocol and federal law. *Blankenship v. Owens*, 2011 U.S. Dist. LEXIS 14952, 10-11 (N.D. Ga. Feb. 15, 2011); *Chandler v. Crosby*, 379 F.3d 1278, 1286 (11th Cir. 2004)). Therefore, his Complaint was not properly before the District Court as he failed to exhaust his administrative remedies his request for initial hearing en banc should be denied.

3. Appellant Cannot Prevail on His Claim and His Dilatory Tactics Should Not Be Rewarded With a Stay

Appellant asserts that this Court should grant a stay to give the en banc Court an opportunity to reassess its the panel holdings of *Arthur v. Comm'r, Alabama Dep't of Corr.*, 840 F.3d 1268 (11th Cir. 2016) and *Boyd v. Warden, Holman Corr. Facility*, 2017 U.S. App. LEXIS 8238 (11th Cir. May 9, 2017). However, even ignoring the fact that Georgia has no alternative method that is reasonably available, Appellant still failed to show that: "the state's lethal injection protocol 'creates a demonstrated risk of severe pain,'" as it applies to him; and there is a 'known and available' alternative method of execution that significantly

reduces a substantial risk of severe pain." *See Boyd*, *supra*, at * 6 (quoting *Glossip*, 135 s. Ct. at 2737)). A stay is not warranted.

a. No Demonstrated Risk of Severe Pain

As found by the district court, Appellant failed to show that there was a demonstrated risk of severe pain. Appellant's expert Dr. Zivot speculated that there was a likelihood of severe pain. However, he made these same speculative findings last month in Arkansas, which were shown to be unfounded in the execution of Jack Jones.

Further, as found by the district court, there is no consensus that there is a demonstrated risk of severe pain as even Appellant's own experts do not agree on the likelihood of the alleged pain. Appellant's second expert, Dr. Sergio Bergese, formulated his opinion, not on firsthand knowledge, but from "an extensive survey of the scientific literature concerning these drugs." (Bergese Affidavit, ¶ 2). However, this "evidence" fails to show a likelihood of success on an Eighth Amendment claim. From the literature Dr. Bergese surveyed, he claims that "there is [] evidence of increased seizure activity following [gabapentin's] administration." (Bergese, ¶ 9). First, the article cited by Bergese to support his opinion is based on a study of patients with epilepsy, not suffering from chronic pain as Plaintiff. Secondly, as Plaintiff has been on gabapentin for 10 years with

no noted seizure-related side-effects, any "increased seizure activity" upon its administration is not a concern.

Dr. Bergese also determined, based on his survey, "that pentobarbital use [should] be avoided in patients with chronic pain as paradoxical reactions are more likely to occur." (Bergese, ¶ 9, n.10 (citing the Physicians' Desk Reference (PDR))). The PDR actually advises physician's to "[a]void the use of pentobarbital in patients with acute or chronic pain, as paradoxical reactions (e.g., **agitation and hyperactivity**) may occur and mask important symptoms. It is important to note that use of pentobarbital as a sedative during the postoperative period and cancer chemotherapy is well established." *See* http://www.pdr.net/drug-summary/nembutal?druglabelid=2052 (emphasis added). Pardoxical seizures are not mentioned in the article cited by Dr. Bergese and clearly, no study was conducted utilizing 5000 mg of pentobarbital.

Finally, as the district correctly found, Dr. Bergese stopped "short of concluding that Ledford is 'sure or very likely' to suffer severe pain." (ECF Doc. 14, p. 11). Instead, Dr. Bergese concluded that the effects of the pentobarbital "will be diminished," but "how much, Bergese never says." *Id.*

Even if this Court chooses to disregard the testimony of Dr. Jacqueline Martin that there is no demonstrated risk of severe pain, Appellant still failed to carry his burden as to the first prong of *Baze v. Rees*, 553 U.S. 35, 47 (2008).

There is no need for a stay of execution to review these facts.

b. No alternative method that significantly reduces a substantial risk of severe pain.

Even disregarding the fact that Georgia has no alternative method of execution provided for by statute, Appellant still failed to show that he has established an alternative that is less painful. His request for stay should be denied.

B. The Stay would be averse to the public interest.

The District Court found that "a stay of execution is an equitable remedy. It is not available as matter of right, and equity must be sensitive to the State's strong interest in enforcing its criminal judgment without undue influence from the federal courts." (ECF Doc. 14, p. 17 (quoting *Hill v. McDonough*, 547 U.S. 573, 584 (2006)). Applying this analysis, the court concluded "[t]he State, the public, and any relatives of Ledford's victim, if still living, have a strong interest in seeing his punishment exacted," and Appellant failed to "show that denying his TRO motions would adversely impact the public interest." (ECF Doc. 14, pp. 17-18). His motion for a stay should be denied.

CONCLUSION

For all of the above and foregoing reasons, Appellee requests that this Court deny Appellant's petition for initial hearing *en banc* and deny his request for a stay of execution.

Respectfully submitted,

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s/Beth Burton
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CERTIFICATE OF COMPLIANCE

This document does not comply with Fed. R. App. P. 27(d)(2)(A) as it contains 16,147 words. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14 point Times New Roman font.

CERTIFICATE OF SERVICE

I do hereby certify that I have this day electronically filed the within and foregoing Pleading, with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorneys of record:

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This 15th day of May, 2017.

s/Beth Burton
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