

IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
MAY 8 2014
MICHAEL S. RICHIE
CLERK

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

CHARLES WARNER,)
)
 Appellant,)
)
 v.) **Case No. D-2003-829**
)
 STATE OF OKLAHOMA,)
)
 Appellee.)

RESPONSE TO APPELLANT’S MOTION FOR STAY OF EXECUTION

COMES NOW the State of Oklahoma, by and through Seth S. Branham, Assistant Attorney General, and provides the following response to Appellant’s *Objection to the Execution Date and Emergency Application for an Indefinite Stay*, filed with this Court on May 5, 2014.

To summarize: (1) the State will not object to a one hundred eighty (180) day stay to allow completion of Commissioner Michael C. Thompson’s investigation; (2) an indefinite stay is unwarranted because the State has committed to notifying this Court if additional time is needed to complete the investigation and to implement any recommendations that arise from the investigation; and (3) emergency action by this Court is unnecessary because the State has committed that no executions will occur during the pendency of the investigation.

On April 29, 2014, Governor Mary Fallin issued Executive Order 2014-10 staying the execution of Appellant Charles Warner for fourteen (14) days “to allow the Oklahoma Department of Corrections to evaluate the current

execution protocol and to allow exhaustion of all possible legal remedies.” The Governor has ordered an investigation by Michael C. Thompson, Commissioner of the Oklahoma Department of Public Safety, into Clayton Lockett’s recent execution and has directed him to review Oklahoma’s execution protocol and make recommendations for any needed changes or adjustments. See Executive Order 2014-11 (filed Apr. 30, 2014) (attached as Exhibit A).

Notably, the Governor and Attorney General have committed publicly that no executions should occur in this state until Commissioner Thompson’s investigation into Clayton Lockett’s execution is completed. The Governor has committed to granting Warner an additional stay of execution under her constitutional powers. Okla. Const. art. VI, § 10. The Attorney General has publicly stated that, upon the exhaustion of the Governor’s sixty-day stay authority, he would file the appropriate paperwork with this Court to ensure no executions would take place during the pendency of Commissioner Thompson’s investigation.

Charles Warner’s counsel object to this course, instead proposing an indefinite stay be entered or, at the least, that a stay of six (6) months be immediately granted. As discussed below, Warner’s motion for stay should be granted but only for one hundred eighty (180) days. At present, Warner’s execution date is set for May 13, 2014 pursuant to Executive Order 2014-10. See 22 O.S.2011, § 1001.1(G). However, it is obvious Warner will not be

executed on May 13th because Commissioner Thompson's investigation will not be completed by that date.

As such, no emergency arises from Warner's execution date as suggested in the title of his latest motion for stay. In support of his motion for stay, Warner writes that "[t]he Attorney General's office was unable to provide confirmation that it or any other state agency would take any action regarding Mr. Warner's execution date[]" in light of Director Patton's May 1, 2014, correspondence to the Governor. Motion at 2. The public statements by the Governor and Attorney General (discussed above), however, made clear that Warner would not be executed on May 13th.

Director Patton's recommendation to the Governor that an indefinite stay of execution be entered to allow for training of critical Department of Corrections personnel is just that—a recommendation—and alone does not warrant the indefinite stay now requested by defense counsel. This is particularly true considering Warner's total failure to date to challenge the execution protocol at issue in Commissioner Thompson's investigation, *see Lockett v. Evans*, 2014 OK CR 3, ¶ 2 n.8, __P.3d__ ("ODOC has furnished Appellants with the names, dosages and expiration dates of the three drugs it will use for execution. Armed with this information, Appellants have failed to challenge the new protocol on Eighth Amendment grounds and insist only that the identities of the drug suppliers and manufacturers may lead to a basis to

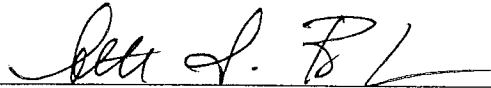
challenge their death sentences.”) and the apparent nature of the problem with Lockett’s execution, i.e., a failed IV.

Also, Warner does not argue in his latest motion for stay that he anticipates filing a state post-conviction relief application challenging Oklahoma’s execution protocol. This is little surprise. Warner’s litigation conduct over the past sixty days demonstrates a strategic choice by his counsel to pursue an endless media campaign against capital punishment in Oklahoma instead of exhausting available legal remedies in the proper court. *See id.*, 2014 OK CR 3, ¶¶ 3-4; *id.*, 2014 OK CR 3, ¶¶ 8-10 (Lumpkin, J., specially concurring). His request for indefinite stay is merely an extension of that strategy.

Based on the totality of the circumstances, however, the Attorney General will not object to a one hundred eighty (180) day stay by this Court to allow for completion of Commissioner Thompson’s investigation. Warner’s execution date should therefore be reset to Thursday, November 13, 2014. Prior to that date, the Attorney General will advise this Court, to the best of his ability, of the status of Commissioner Thompson’s investigation into Clayton Lockett’s execution. Should an additional stay of Warner’s execution date be needed to allow for completion of Commissioner Thompson’s investigation, the Attorney General will so notify this Court. If the investigation has been completed, the Attorney General will advise the Court of the appropriateness of the execution date in light of the mandate given to the Department of Corrections by the

Governor to implement any needed changes or adjustments to its execution protocol recommended by Commissioner Thompson's investigation. Should additional time be needed for the implementation of any changes or adjustments, the State will request it.

Respectfully submitted,



**SETH S. BRANHAM, OBA #18019
ASSISTANT ATTORNEY GENERAL**

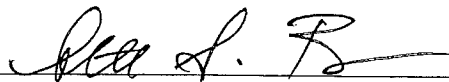
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COUNSEL FOR THE STATE

CERTIFICATE OF SERVICE

On this 8th day of May, 2014, a true and correct copy of the foregoing was mailed, with full first-class postage pre-paid, to:

Susanna M. Gattoni
Seth A. Day
Hall, Estill, Hardwick, Gable,
Golden & Nelson, P.C.
Chase Tower
100 North Broadway, Suite 2900
Oklahoma City, OK 73102-8865



SETH S. BRANHAM



Mary Fallin
Governor

FILED

APR 30 2014

OKLAHOMA SECRETARY
OF STATE

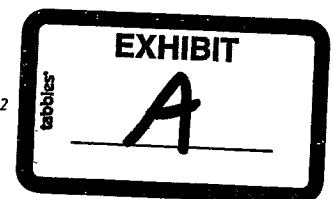
**EXECUTIVE DEPARTMENT
EXECUTIVE ORDER 2014-11**

I, Mary Fallin, Governor of the State of Oklahoma, pursuant to the power vested in me by Sections 1 and 2 of Article VI of the Oklahoma Constitution, hereby appoint Michael C. Thompson, Commissioner of the Oklahoma Department of Public Safety, to conduct an independent review of the events leading up to and during the execution of Clayton Derrell Lockett. The review shall include first, an inquiry into the cause of death of Clayton Derrell Lockett through a thorough examination by a forensic pathologist. Second, an inquiry addressing whether the Oklahoma Department of Corrections correctly followed the agency's current protocol for executions. Lastly, the review shall contain any recommendations to improve the current execution protocol used by the Oklahoma Department of Corrections.

Further, pursuant to the authority in Title 63 section 938 of the Oklahoma Statutes, I direct the Chief Medical Examiner to authorize the examination and autopsy of Clayton Derrell Lockett. Specifically, I hereby direct the Chief Medical Examiner to authorize the Southwestern Institute of Forensic Science (SWIFS) in Dallas, Texas to perform the autopsy, additional examination, and all other related testing on the remains of Clayton Derrell Lockett. In order to effectuate this examination, I direct the Office of the Chief Medical Examiner to transport the remains of Clayton Derrell Lockett to and from this facility for this purpose. The Chief Medical Examiner is ordered to appropriately maintain the remains of Clayton Derrell Lockett until released to his family.

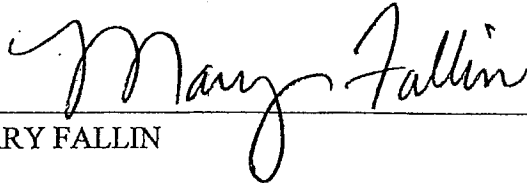
Copies of this Executive Order shall be distributed to the Commissioner of the Oklahoma Department of Public Safety, the Executive Director of the Oklahoma Department of Corrections, the Oklahoma Office of the Chief Medical Examiner, the Southwestern Institute of Forensic Science in Dallas, Texas, and the Oklahoma Attorney General who shall cause the provisions of this order to be implemented by all appropriate agencies of state government.

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IN WITNESS WHEREOF, I have hereunto set my hand and caused the Great Seal of the State of Oklahoma to be affixed at Oklahoma City, Oklahoma, this 30th day of April, 2014.

BY THE GOVERNOR OF THE STATE OF OKLAHOMA



MARY FALLIN

