UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Francis Gerald Grady,
Individually and as Next Friend of
Unborn and Partially Born Individuals
Under Sentence of Death,

Petitioner - Appellant,

v.

United States of America,

Respondent - Appellee.

Case No. 15-2797

USDC Case No. 15-CV-330
(Criminal Case No. 12-CR-77)

DEATH PENALTY CASE

Executions Scheduled: Daily

EMERGENCY MOTION FOR

STAY OF EXECUTION OF SENTENCE OF DEATH

Appellant, Francis Gerald Grady, individually and as next friend of unborn and partially born individuals, respectfully moves this Circuit for a stay of execution of sentence of death on behalf of unborn and partially born individuals, scheduled daily.

A request for a certificate of appealability accompanies this motion pursuant to Circuit Rule 22(h)(2) (7th Cir.).

Grady requests that this Circuit appoint counsel as a guardian *ad litem* pursuant to 18 U.S.C. § 3599 and Fed. R. Civ. P. 17(c)(2) on behalf of unborn and partially born individuals under sentence of death.

Grady contends that Fed. R. Crim. P. 38(a) has not been followed because unborn and partially born individuals have been denied their right to appeal their sentence of death.

He further contends that the death penalty is being freakishly and arbitrarily applied in the United States to execute unborn and partially born individuals in violation of the Eighth Amendment.

OPINIONS BELOW

The opinion of the district court denying the motion to stay execution was entered on 05/19/2015 as a final judgment and appears as Appendix A.

A timely motion for reconsideration was filed on 06/15/2015.

The order of the district court denying reconsideration was entered on 06/24/2015 and appears as Appendix B.

A copy of the motion to stay execution submitted to the district court appears as Appendix C.

JURISDICTION

A timely notice of appeal was filed on 08/21/2015.

The jurisdiction of this Circuit in the above-titled matter is invoked under 28 U.S.C. § 1291.

The jurisdiction of this Circuit is not limited by the nature of the action commenced at the district court because an individual under sentence of death need not file a formal habeas corpus petition in order to invoke his or her right to counsel and to establish this Circuit's jurisdiction to enter a stay of execution. *McFarland v. Scott*, 512 U.S. 849 (1994).

REQUEST FOR COUNSEL IN A CAPITAL CASE

This is properly treated as a capital case. To give an analogy, in *Holtzman v. Schlesinger*, 414 U.S. 1316, 1316 (1972), the case of bombing in Cambodia by Defense Department officials was "treated as a capital case" and an application for a stay of execution of sentence of death was granted because denial "would catapult American airmen and Cambodian peasants into a death zone." Even though no formal death warrant had issued, Justice Douglas, in granting the

application for a stay of execution of sentence of death, emphasized that "this case, in its stark realities, involves the grim consequences of a capital case" because even though "[n]o one knows who they are … [t]he upshot is that we know that someone is about to die." 414 U.S., at 1317. Following his reasoning, because the upshot is that we know someone is about to die, the lethal execution of unborn and partially born individuals is properly treated as a capital case, even when we do not know who they are.

The right to counsel in a capital case is authorized by 18 U.S.C. § 3006A, 18 U.S.C. § 3599, 28 U.S.C. § 2254(h), 28 U.S.C. § 2255(g), and Circuit Rule 22(a)(3) (7th Cir.). This Circuit must appoint a guardian *ad litem*—or issue another appropriate order—to protect a minor or incompetent person who is unrepresented in an action. Fed. R. Civ. P. 17(c)(2).

It is anticipated that counsel *ad litem* appointed on behalf of unborn and partially born individuals may file additional formal habeas corpus petitions or motions, whether under that statute or others, e.g., 28 U.S.C. § 2241, 28 U.S.C. § 2254, and 28 U.S.C. § 2255, actions under 28 U.S.C. § 1331 and 42 U.S.C. § 1983, and motions under Fed. R. Civ. P. 60.

STANDING

In its opinion denying the motion to stay execution, the district court refuted Grady's opinion that he may present such a motion within the scope of challenging his own conviction and sentence under 28 U.S.C. § 2255. See Appendix A at 5-6. For the reasons set forth in the accompanying request for a certificate of appealability at pp. 5-9 ("Second Question"), Grady believes this Circuit should review the opinion of the district court in favor of his standing to present a motion for stay within the scope of 28 U.S.C. § 2255.

REASONS FOR GRANTING THE STAY

In *Roe v. Wade*, 410 U.S. 113 (1973), the Supreme Court established a grace period for child homicide, known commonly as abortion.

However, *Roe* refused to promise that abortion, once legalized, would be incapable of interruption in the ordinary course of judicial affairs. Quite the contrary, having left the suggestion of personhood open to further considerations, the Supreme Court forewarned, 410 U.S., at 156-157, "If this suggestion of personhood is established … the fetus' right to life would then be guaranteed specifically by the [Fourteenth] Amendment." It follows that the authority to stay the execution of those sentenced to death by abortion has been preserved.

Supreme Court Rule 23.3 provides in part:

> Except in the most extraordinary circumstances, an application for a stay will not be entertained unless the relief requested was first sought in the appropriate court or courts below or from a judge or judges thereof.

It is thus evident that the Supreme Court ordinarily expects the lower courts to handle the initial matters concerning an application for a stay. It follows that the lower courts have jurisdiction to stay the execution of those sentenced to death by abortion. Grady suggests that this Circuit grant the motion to stay execution pending instructions from the Supreme Court on a certified question submitted under Supreme Court Rule 19.

Relying on *United States v. Vuitch*, 402 U.S. 62 (1971), *Roe* held that an abortion is not "the termination of life entitled to Fourteenth Amendment protection." 410 U.S., at 159. A subtle facet of *Roe*, however, is that the Supreme Court's policy on abortion denied women the safeguards of *Skinner v. Oklahoma*, 316 U.S. 535 (1942), by way of narrowly defining the meaning of procreation to include only the act of fertilizing, and not the pregnant state itself (see *Roe*, 410 U.S., at 159):

> The pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus, if one accepts the medical definitions of the developing young in the human uterus. See

> Dorland's Illustrated Medical Dictionary 478-479, 547 (24th ed. 1965). The situation therefore is inherently different from … procreation … with which … *Skinner* … [was] concerned.

Though subtle at first, the abandonment of *Skinner* for abortion clearly establishes that *Roe* accepts procreation as being complete once fertilization is accomplished. It follows that *Roe* considers an abortion to be the termination of life *after* procreation.

Importantly, this subtle facet of *Roe* can be combined with a relatively recent Supreme Court case to establish the suggestion of personhood.

Being an individual creates a certain standing in law. Despite the many sublime religious and philosophical views on the meaning of the word "person," the Supreme Court in *Mohamad v. Palestinian Authority*, 566 U.S. ____, 132 S.Ct. 1702, 1706-1708 (2012), found that the word "individual" refers unmistakably to a "natural person." See slip op. at 3-5. It follows that unborn and partially born individuals are natural persons.

Despite there being religious and philosophical concepts of the person which are debatable and perhaps more sublime, such as a spiritual person, the fact is that it would nonetheless violate the Fifth, Eighth, and Fourteenth Amendments to summarily terminate the life of a natural person after procreation is completed. It would also violate the Establishment Clause to require a consensus on the spiritual person as a prerequisite to recognition of the natural person.

It goes without saying that the result of procreation is a human individual. Since *Roe* recognized procreation to be complete once fertilization is accomplished, then combined with *Mohamad's* unmistakable recognition of the individual as a natural person, the suggestion of personhood is legally established from the time of procreation.

In other words, the Supreme Court ruled in *Mohamad* that the term "individual" means a "natural person." There are spiritual concepts of the person, like ensoulment. But the basic

secular concept is that of a natural person. Though some who adhere to spiritual concepts of the person have been holding off as to declaring when ensoulment occurs, it would violate the separation of church and state for this Circuit not to recognize a natural person at the beginning of an individual's natural biological life in deference to such debates.

Here, the significance of "individual" is simply that the Supreme Court conceded in *Mohamad* that the word refers "unmistakably to a natural person." 132 S.Ct., at 1707; slip op. at 4. Asking a coroner to find a spiritual person or soul under a microscope is not possible, but he or she can easily detect an individual. Because the Supreme Court has conceded that an individual is a natural person, this removes any question of whether unborn and partially born individuals are persons, since at minimum they are natural persons. This establishes the suggestion of personhood from a natural, secular perspective, while at the same time sidestepping religious and philosophical debates over the issue of spiritual persons or souls.

Having established the suggestion of personhood, *Roe* dictates that the stay of execution of sentence of death must be granted: "If this suggestion of personhood is established … the fetus' right to life would then be guaranteed specifically by the [Fourteenth] Amendment." 410 U.S., at 156-157.

"If there is doubt whether due process has been followed in the procedures, the stay is granted, because death is irrevocable." *Holtzman v. Schlesinger*, 414 U.S., at 1319. "Since there is insufficient time to consider the application's merits, and with an execution so irrevocable, it is best to err on the applicant's side." *Grubbs v. Delo*, 506 U.S. 1301, 1301-1302 (1992).

In *Roe* the Supreme Court took note of a real conflict of interest in the advocacy made by the State of Texas on behalf of the unborn: "When Texas urges that a fetus is entitled to Fourteenth Amendment protection as a person, it faces a dilemma." 410 U.S., at 157-158, n. 54.

In *Planned Parenthood v. Casey*, 505 U.S. 833, 932 (1992), Justice Blackmun reflected again on the lack of authentic advocacy for the unborn:

> No Member of this Court - nor for that matter, the Solicitor General, Tr. of Oral Arg. 42 - has ever questioned our holding in *Roe* that an abortion is not "the termination of life entitled to Fourteenth Amendment protection." 410 U.S., at 159.

Thus there can be no doubt that due process of law and the right to the effective assistance of counsel have not been observed in the procedures leading up to the lethal execution of unborn and partially born persons.

Because due process has not been followed in the procedures, reasonable jurists can debate whether *Roe* qualifies as settled law, for failure to observe a high standard of law.

Even if reasonable jurists could express doubt as to whether the stay of execution requested in this emergency motion, if granted, would be upheld by the Supreme Court, the government is in a position to file a petition within minutes, and closing child homicide clinics for a day or so will not be the end of the world anyway. Failure to grant the stay of execution, on the other hand, will in fact be the end of the world for those who are executed, since death is irrevocable.

In *Dred Scott v. Sandford*, 60 U.S. 393, 407 (1857), in an opinion later superseded by the Fourteenth Amendment, the Supreme Court stated regarding African Americans: "They had for more than a century before been regarded as beings of an inferior order … and so far inferior, that they had no rights which the white man was bound to respect …."

Treatment of the unborn and partially born has paralleled historical treatment of the unwhite in America. Yet even though both of them have been regarded as beings of an inferior order "for more than a century," this is no excuse for a lack of due diligence in staying their wrongful executions today.

In other words, though some may continue to debate the person status of individuals who are colored, unborn, or the like, the legal acknowledgement of the existence of such debates does not provide a valid pretext for conducting their executions.

Due to daily executions, the stay must be granted. See *Lonchar v. Thomas*, 517 U.S. 314 (1996). See also *Cole v. Texas*, 499 U.S. 1301 (1991) (Scalia, J., as Fifth Circuit Justice) (stating, "I will in this case, and in every case on direct review, grant a stay of execution pending disposition by this Court of the petition for certiorari.")

In *Roper v. Simmons*, 543 U.S. 551 (2005), the Supreme Court held that lethal execution of children is unconstitutional. In *Hall v. Florida*, 572 U.S. ___ (2014), the Supreme Court held that a rigid IQ test "threshold requirement" for the execution of individuals with intellectual disability was unconstitutional as interpreted by the Florida Supreme Court. By the same token, it follows that treating the event of birth itself as a rigid "threshold requirement" for respecting the rights of minors not to be executed is also unconstitutional.

This Circuit is respectfully requested to accept the self-evident truth promoted in the Declaration of Independence, which in turn was also intended to be promoted in the Fourteenth Amendment by way of the Emancipation Proclamation and Gettysburg Address—namely, that all of us are *created* equal—rather than mistreating person status as a hereditary title of nobility to be conferred only on the basis of "birth" status, in violation of the constitutional provisions against Titles of Nobility. Moreover, as being born in the United States is not a sole measure of U.S. citizenship, and having U.S. citizenship is not a sole measure of person status, there is no logical constitutional impediment to recognizing the applicability of the Fourteenth Amendment to the unborn and partially born.

To say the Constitution is silent on abortion is facetious and unprofessional, for the Constitution need not enumerate every manner of child homicide using whatever euphemism society accords to it in order for it to be proscribed as an unconstitutional deprivation of life.

Earlier this year in Colorado, a woman attacked a pregnant woman and cut out her baby from the womb with a knife. The baby died but not the mother. But even though it was clear that the baby was a victim of homicide, the coroner was unable to tell whether the baby died outside the womb versus inside, because this is a socio-political distinction—as are the borders between territories—not a medical distinction. See Abby Ohlheiser, "Woman who cut baby from womb potentially faces more than 100 years in prison, DA says," Washington Post, March 27, 2015. To kill the baby by caesarean section is the same as getting chain cutters to open the fence which marks the border between two territories so as to kill the individual on the other side. Even if the individual requires life support which is not available on the other side of the border, this does not excuse the act of homicide. The same is true if the act of homicide is committed via a tunnel (viz. birth canal) linking the two frontiers.

To underscore the harm that will result from the denial of the stay of execution, many more children are executed in the United States each and every day under the Nation's grace period for child homicide than the total number of adults who have been executed since 1976 when the Supreme Court resumed adult executions.

It is crueler to deprive a child of life than an adult, because the adult has already had a turn at being a child. Thus, the younger the child, the crueler is the deprivation of life. For this reason, homicide is crueler the earlier it occurs.

Scheduling a child for homicide violates the Eighth Amendment. Child homicide based on disability violates the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq*. Child

homicide based on procreation resulting from rape, incest, or other crime violates the constitutional provisions against Bills of Attainder.

Even when medical skills are employed, homicide is never a medical act, not even when the law finds it permissible or requires a physician to perform it. See Hippocratic Oath.

When resulting in death, the skillful management of pregnancy, fertility, or procreation, including premature delivery from a life-threatening pregnancy, is not a lethal execution, provided that the performance is such that the cause of death is ruled accidental or natural by the medical examiner, rather than being ruled a homicide. See Californniaa, "Nondestructive means of ectopic pregnancy management," U.S. Patent Application Publication No. 2014/0221735 A1, August 7, 2014, at 31-32, ¶¶ 0488-0494. Thus medical procedures of a non-homicidal nature will not be hampered by the granting of the stay.

The purpose of this emergency motion for stay of execution is not to vindicate the rights of individuals who are victims of abortion and the like, i.e., those already executed, but rather to stay the execution of those about to be put to death by abortion and the like.

SPECIFICS OF THE RELIEF REQUESTED

The specifics of the relief requested include: that a stay of execution of sentence of death shall issue without delay on behalf of unborn and partially born individuals; that counsel *ad litem* shall be appointed on behalf of unborn and partially born individuals under sentence of death; that all grace periods for child homicide shall be ended without delay; that the use of drugs, devices, or treatments in an act to instigate the death of an unborn or partially born individual shall be prohibited; and, that the medical examiner shall be ordered to investigate the suspicious cause of death of any unborn or partially born individual for evidence of homicide, regardless of whether procreation has occurred naturally or artificially or *in vivo* or *in vitro*.

In short, their suggestion of personhood having been established, the unborn and partially born shall be recognized in the law as persons in the whole sense.

CONCLUSION

The stay of execution should be granted.

Dated: September – 18, 2015.

Respectfully submitted,

MR Francis Grady

Mr. Francis G. Grady
Register Number: 11656-089
FMC Butner
FEDERAL MEDICAL CENTER
P.O. BOX 1600
BUTNER, NC 27509

Pro Se and as *Proximus Amicus*

CERTIFICATE OF SERVICE

I certify that all respondents in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system on the date when the foregoing is electronically filed by Clerk of the Court for the United States Court of Appeals for the Seventh Circuit using the CM/ECF system.

In addition, I further certify that I have mailed the foregoing document by First-Class Mail, postage prepaid, to the following:

Jonathan H. Koenig
Office of the US Attorney
517 E. Wisconsin Ave, Rm 530
Milwaukee, WI 53202

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: September 28, 2015.

Respectfully submitted,

BY: E. Cal

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

FRANCIS GRADY,

Petitioner,

v. Case No. 15-C-330

UNITED STATES OF AMERICA,

Respondent.

SCREENING ORDER

On March 31, this court dismissed Petitioner's § 2255 motion, without prejudice, due to its length and improper form. Petitioner has now used the correct form and brought four claims, which I address below.

1. Claim 1

First, Petitioner argues his appellate counsel was ineffective for failing to file a complete transcript that included all of the jury instructions. Specifically, he asserts that there was a discrepancy between how this court instructed the jury and the language of the indictment. This court told the jury: "To sustain the charge of Count 1, the government must prove . . . that the defendant attempted to damage or did damage, by means of fire, the property identified in the indictment." (Case No. 12_CR-177, ECF No. 93, Tr. 190 at 6-10.) In contrast, the indictment charges Grady with maliciously damaging the "building" known as Planned Parenthood, in Grand Chute, Wisconsin.

Grady asserts that the government only proved, at best, that he damaged "non-building property" rather than the building itself, which is what the indictment charges. He is wrong. The government offered undisputed evidence that the building itself was damaged. Mark Teper, the facilities manager for Planned Parenthood described the damage to the building as follows:

> The paint had boiled up on the walls and on the metal. The floor tile was melted, the room was soot covered, ceiling tiles were soot covered. There were some things in the room that had been exposed of, a chair that had been sitting just underneath the window and from the heat of the fire had melted the seat and melted some of the blinds into it.

(*Id.* at 52.) The walls, floor and ceiling are parts of the building.

The evidence would be sufficient even absent this testimony, however. As Grady concedes, the instruction includes the word "attempt," which is also a crime under 18 U.S.C. § 844(i): "Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not less than 5 years and not more than 20 years, fined under this title, or both." Thus, the jury could have found him guilty of attempted damage to the property described in the indictment even if there had been no evidence of damage to the building itself. Since the grand jury charged Grady with maliciously damaging a building, it necessarily charged him with *attempting* to damage a building. Rule 31(c)(1) of the Federal Rules of Criminal Procedure permits a verdict on "an offense necessarily included in the offense charged." Not surprisingly, defense counsel did not object to the instruction, and appellate counsel did not raise the issue on appeal. Since the issue is meritless, it was not ineffective assistance for counsel to fail to raise it.

Similarly, Grady argues the evidence was insufficient to convict him because the prosecutor

was "evasive" in response to this Court's question asking whether there was actual evidence of damage. Given the evidence cited above, the argument fails. But again, because Petitioner could have been convicted of the attempt, that does not matter.

Petitioner also argues this Court prejudiced the jury by telling the alternate juror that he might read about the verdict in the newspaper because "it sounds like it's that kind of case." (*Id.*, ECF No. 94 at 153.) This was offered as an alternative to the clerk calling him with the result, if he wanted to know. Petitioner does not explain why telling an alternate juror that the case might be newsworthy would have added any conceivable taint to the case, and thus it is unsurprising that counsel never objected or raised the matter on appeal.

Finally, Grady asserts that jurors could not reasonably infer that the Planned Parenthood purchased office supplies from outside the state. Here again, Grady's argument is belied by the record. Teper explicitly testified that Planned Parenthood purchased office supplies from national office supply stores and medical supplies from throughout the country. (ECF 93 at 58.) This Court instructed the jury that "you may find an effect on interstate commerce if you find that the business purchased medical and office supplies from outside the State of Wisconsin." (*Id.*, Tr. 190, 5-24.) Petitioner argues that the jury therefore had to find that Planned Parenthood purchased medical *and* office supplies from out of state, and because there were office supply stores within close range of the Planned Parenthood facility, it had no basis for so concluding.

This is another frivolous argument. Neither the indictment nor the statute has anything to do with office supplies. In the context of the trial, the purchase of office supplies was simply one way of demonstrating a relationship to interstate commerce. The jury "may" have found that the clinic purchased *both* medical and office supplies (*id.*), but it was not required to.

2. Ground 2

Grady alleges his counsel was ineffective at sentencing. First, he alleges that counsel should have prepared an independent presentence investigation report, but there is no suggestion that such a report would have made a difference. Certainly it is not ineffective assistance.

Second, he asserts that an earlier criminal case should not have been counted in the criminal history because it was based on a warrantless arrest. But a § 2255 proceeding is not the place to re-litigate an eleven-year-old state felony. There is no sound reason why the state charge should not have been considered.

Third, he claims counsel interfered with his right to plead guilty to count two, for intentional damage to the property of Planned Parenthood. He claims he wanted to plead guilty to intentionally damaging the building's window, while pleading not guilty to the arson charge alleged in count one. Count two required a showing of intent to damage property based on the fact that the facility was engaged in providing reproductive health services. Had Grady pled guilty to that charge, he would have been admitting an intent to cause property damage due to the nature of the business housed in the building. A jury would have had a difficult time believing that he did not attempt to cause damage to the same building by means of fire, as charged in count one.

3. Ground 3

Third, Petitioner claims the prosecution failed to turn over evidence favorable to the Petitioner. Specifically, he asserts the Department of Justice had a theory of imminence, set forth in a 2010 memo regarding Shaykh Anwar al-Aulaqi (a U.S. citizen killed in a drone strike in Yemen), that would have allowed Petitioner to argue that his actions in burning an abortion clinic were an effort to prevent an imminent threat against unborn lives. This does not state a claim. A

government's memorandum regarding a drone strike half-way around the world does not constitute "evidence" in a criminal action involving arson at a Wisconsin abortion clinic. The prosecution was in no way obligated to scour all government records and provide the Defendant with memoranda like the one referenced.

4. Ground 4

Finally, Petitioner asserts that the jury could not have found him guilty because he consistently denied wanting to burn the building down. He styles this claim, as he must, as an ineffective assistance claim, but it is unclear how counsel's performance is implicated. In any event, it is true that the Petitioner testified he did not want to burn the building "down," but that was not the charge. Instead, he admitted that he intended to burn the building. (*Id.*, Tr. 170.) That is enough evidence for the jury. In fact, given the circumstances of Grady breaking the building's window, pouring gasoline inside, and starting it on fire, the jury did not need to hear his testimony at all to reach the obvious conclusion. Petitioner's post-verdict explanations about funeral rites are merely quibbles with the obvious and overwhelming fact that he poured gasoline into a building and set it on fire.

For the reasons stated above, the petition is **DISMISSED**. The second motion to alter or amend a judgment [10] is **DENIED**. The Petitioner alleges this court is in league with prosecutors and a larger pro-abortion political movement designed to stifle his arguments, but Grady was convicted of setting fire to a building, not for his moral opposition to abortion. There is no persuasive reason to allow the Petitioner to file the kind of multi-count behemoth § 2255 action he apparently desires, particularly in light of the frivolous nature of the claims described above. The motion for stay of execution [3] is **DENIED**. A § 2255 motion is limited to a federal inmate's

challenge to his own conviction and sentence; it does not encompass victims of abortion or other third parties. 28 U.S.C. § 2255(a).

I do not find that reasonable jurists could debate the outcome of these proceedings, nor is there any denial of a significant constitutional right. Accordingly, a certificate of appealability is **DENIED** as well.

SO ORDERED this 18th day of May, 2015.

/s William C. Griesbach
William C. Griesbach, Chief Judge
United States District Court

AO 450 (Rev. 5/85) Judgment in a Civil Case

United States District Court

EASTERN DISTRICT OF WISCONSIN

FRANCIS GERALD GRADY,

Plaintiff(s),

v.

UNITED STATES OF AMERICA,

Defendant(s).

JUDGMENT IN A CIVIL CASE
Case No. 15-C-330

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict

☒ **Decision by Court.** This action came before the Court for consideration.

IT IS HEREBY ORDERED AND ADJUDGED that Francis Gerald Grady's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2255 is DENIED and this action is DISMISSED.

Approved: s/ William C. Griesbach
William C. Griesbach, Chief Judge
United States District Court

Dated: May 19, 2015

JON W. SANFILIPPO
Clerk of Court

s/ Terri Lynn Ficek
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

FRANCIS GRADY,

Petitioner,

v. Case No. 15-C-330

UNITED STATES OF AMERICA,

Respondent.

ORDER

Francis Grady, who is currently serving a federal sentence for arson of an abortion clinic, has filed a third motion to alter or amend a judgment. The motion raises essentially the same arguments that have already been addressed by the Court. Accordingly, the motion is denied.

SO ORDERED this 24th day of June, 2015.

s/ William C. Griesbach
William C. Griesbach, Chief Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

Francis Gerald Grady,
Individually and as Next Friend of
Unborn and Partially Born Individuals
Under Sentence of Death,

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v.

United States of America,

Respondent.

Case No. 15-C-330
(Criminal Case No. 12-CR-77)

DEATH PENALTY CASE

Executions Scheduled: Daily

EMERGENCY MOTION FOR

STAY OF EXECUTION OF SENTENCE OF DEATH

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INTRODUCTION

Francis G. Grady respectfully applies to this Court for a stay of execution of sentence of death on behalf of unborn and partially born individuals, scheduled daily. Mr. Grady requests that the Court appoint counsel as a guardian *ad litem* pursuant to 18 U.S.C. § 3599 and Fed. R. Civ. P. 17(c)(2) on behalf of unborn and partially born individuals under sentence of death.

JURISDICTION

The jurisdiction of this Court in the above-titled matter has been invoked under 28 U.S.C. § 2255. Though Mr. Grady has filed the above-titled matter under 28 U.S.C. § 2255, it is anticipated that counsel *ad litem* appointed on behalf of unborn and partially born individuals may file additional formal habeas corpus petitions or motions, whether under that statute or others, e.g., 28 U.S.C. § 2241, 28 U.S.C. § 2254, and 28 U.S.C. § 2255, actions under 28 U.S.C. § 1331 and 42 U.S.C. § 1983, and motions under Fed. R. Civ. P. 60. The right to counsel in a capital case is authorized by 18 U.S.C. § 3006A, 18 U.S.C. § 3599, 28 U.S.C. § 2254(h), and 28 U.S.C. § 2255(g). The Court must appoint a guardian *ad litem*—or issue another appropriate order—to protect a minor or incompetent person who is unrepresented in an action. See Fed. R. Civ. P. 17(c)(2). An individual under sentence of death need not file a formal habeas corpus petition in order to invoke his or her right to counsel and to establish the Court's jurisdiction to enter a stay of execution. See *McFarland v. Scott*, 512 U.S. 849 (1994).

A. Identification of the Judgment Sought to be Reviewed.

The judgment of the United States District Court for the Eastern District of Wisconsin appears at Appendix A to this Emergency Motion and is unpublished.

The opinion of the United States Court of Appeals for the Seventh Circuit on direct appeal appears at Appendix B to this Emergency Motion and is unpublished.

The date on which the Court of Appeals decided the direct appeal was March 27, 2014. No petition for rehearing was timely filed.

B. This is Properly Treated as a Capital Case.

In *Holtzman v. Schlesinger*, 414 U.S. 1316 (1972), the case of bombing in Cambodia by Defense Department officials was "treated as a capital case" and an application for a stay of execution of sentence of death was granted because denial "would catapult American airmen and Cambodian peasants into a death zone." Even though no formal death warrant had issued, Justice Douglas, in granting the application for a stay of execution of sentence of death, emphasized that "this case, in its stark realities, involves the grim consequences of a capital case" because even though "[n]o one knows who they are … [t]he upshot is that we know that someone is about to die." 414 U.S., at 1317. Following his reasoning, because the upshot is that we know someone is about to die, the lethal execution of unborn and partially born individuals is properly treated as a capital case, even when we do not know who they are.

STANDING

The action challenged by this Emergency Motion is the sentence of death imposed upon unborn and partially born individuals without issue of a formal death warrant. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973). The injury in fact which Mr. Grady has suffered is his present imprisonment, which is concrete in both a qualitative and temporal sense. The injury can be fairly traced to the challenged action, given that his imprisonment was imposed because he performed a beneficent religious ceremony to release by means of fire the souls of victims who were executed by imposition of the sentence of death at a Planned Parenthood clinic. A favorable decision on the challenged action would vindicate the right to life of the victims. The injury suffered by Mr. Grady is likely to be redressed by a favorable decision, given that a vindication

of the right to life of the executed would entitle him to an affirmative defense. Because his principal claim of injury in fact can be fairly traced to the challenged action and is likely to be redressed by a favorable decision, Mr. Grady has standing in his individual capacity to present a judiciable case or controversy by means of this Emergency Motion. See *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38, 41 (1976); *Whitmore v. Arkansas*, 495 U.S. 149 (1990).

In addition to having standing in his individual capacity, Mr. Grady also meets both of the prerequisites for "next friend" standing.

First, the real party of interest, viz. unborn and partially born individuals under sentence of death, is unable to litigate their own cause due to mental incapacity, lack of access to court, or other similar disability. Neither unborn nor partially born individuals are ever going to up-and-file a motion or petition on their own, whether for habeas corpus or a stay of execution of sentence of death. It is therefore legally proper that such motions and petitions be presented on their behalf since they cannot appear on their own behalf to prosecute the action. It is also legally proper that counsel *ad litem* be appointed for unborn and partially born individuals in all cases or controversies where their rights or concerns hang in the balance.

Second, Mr. Grady is truly dedicated to the best interests of the individuals on whose behalf he seeks to litigate. He contends that the death penalty is being freakishly and arbitrarily applied in the United States to execute unborn and partially born individuals in violation of the Eighth Amendment. By presenting this Emergency Motion, he is the best friend they have before the Court at the moment to stay their impending executions. He also has a significant relationship with the real party of interest: as their benefactor, he has presented this Emergency Motion on their behalf, whereas others have not. As further evidence of his dedication to the best interests

of unborn and partially born individuals, the cause of his imprisonment is that he personally attended to their essential spiritual needs at great risk to himself.

Clearly the real party of interest is unable to litigate their own cause, and Mr. Grady is no hint of an intruder or uninvited meddler styling himself as their next friend. Having requested the appointment of counsel *ad litem* pursuant to 18 U.S.C. § 3599, he seeks a writ of habeas corpus on behalf of unborn and partially born individuals under sentence of death. See 28 U.S.C. § 2242 and Fed. R. Civ. P. 17(c)(2), which authorize the participation of next friends. He therefore satisfies both prerequisites for next friend standing. See *Whitmore v. Arkansas*, *ibid.*

REASONS FOR GRANTING THE STAY

Roe refused to promise that abortion, once legalized, would be incapable of interruption in the ordinary course of judicial affairs. Quite the contrary, having left the suggestion of personhood open to further considerations, the Court forewarned, 410 U.S., at 156-157, "If this suggestion of personhood is established … the fetus' right to life would then be guaranteed specifically by the [Fourteenth] Amendment." It follows that the authority to stay the execution of those sentenced to death by abortion has been preserved.

Supreme Court Rule 23.3 provides in part:

> Except in the most extraordinary circumstances, an application for a stay will not be entertained unless the relief requested was first sought in the appropriate court or courts below or from a judge or judges thereof.

It is thus evident that the Supreme Court ordinarily expects the lower courts to handle the initial matters concerning an application for a stay. It follows that the lower courts have jurisdiction to stay the execution of those sentenced to death by abortion.

Relying on *United States v. Vuitch*, 402 U.S. 62 (1971), *Roe* held that an abortion is not "the termination of life entitled to Fourteenth Amendment protection." 410 U.S., at 159. A subtle

facet of *Roe*, however, is that the Court's policy on abortion denied women the safeguards of *Skinner v. Oklahoma*, 316 U.S. 535 (1942), by way of narrowly defining the meaning of procreation to include only the act of fertilizing (see *Roe*, 410 U.S., at 159):

> The pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus, if one accepts the medical definitions of the developing young in the human uterus. See Dorland's Illustrated Medical Dictionary 478-479, 547 (24th ed. 1965). The situation [of abortion] therefore is inherently different from … procreation … with which … *Skinner* … [was] concerned.

Though subtle at first, the abandonment of *Skinner* for abortion clearly establishes that *Roe* accepts procreation as being complete once fertilization is accomplished. It follows that *Roe* considers an abortion to be the termination of life *after* procreation.

Importantly, this subtle facet of *Roe* can be combined with a recent Supreme Court case to establish the suggestion of personhood.

Being an individual creates a certain standing in law. Despite the many sublime religious and philosophical views on the meaning of the word "person," the Supreme Court in *Mohamad v. Palestinian Authority*, 566 U.S. ____, 132 S.Ct. 1702, 1706-1708 (2012), found that the word "individual" refers unmistakably to a "natural person." See slip op. at 3-5. It follows that unborn and partially born individuals are natural persons.

Despite there being more sublime religious or philosophical concepts of the person which are debatable, such as a spiritual person, the fact is it would nonetheless violate the Fifth, Eighth, and Fourteenth Amendments to summarily terminate the life of a natural person after procreation is completed. It would also violate the Establishment Clause to require consensus on the spiritual person as a prerequisite to recognition of the natural person.

It goes without saying that the result of procreation is a human individual. Since *Roe* recognized procreation to be complete once fertilization is accomplished, then combined with

Mohamad's unmistakable recognition of the individual as a natural person, the suggestion of personhood is legally established from the time of procreation.

Having established the suggestion of personhood, *Roe* dictates that the stay of execution of sentence of death must be granted: "If this suggestion of personhood is established … the fetus' right to life would then be guaranteed specifically by the [Fourteenth] Amendment." 410 U.S., at 156-157.

"If there is doubt whether due process has been followed in the procedures, the stay is granted, because death is irrevocable." *Holtzman v. Schlesinger*, 414 U.S., at 1319. "Since there is insufficient time to consider the application's merits, and with an execution so irrevocable, it is best to err on the applicant's side." *Grubbs v. Delo*, 506 U.S. 1301, 1301-1302 (1992).

In *Roe* the Court took note of a conflict of interest in the advocacy made by the State of Texas on behalf of the unborn: "When Texas urges that a fetus is entitled to Fourteenth Amendment protection as a person, it faces a dilemma." 410 U.S., 157-158, n. 54.

In *Planned Parenthood v. Casey*, 505 U.S. 833, 932 (1992), Justice Blackmun reflected again on the lack of authentic advocacy for the unborn:

> No Member of this Court - nor for that matter, the Solicitor General, Tr. of Oral Arg. 42 - has ever questioned our holding in *Roe* that an abortion is not "the termination of life entitled to Fourteenth Amendment protection." 410 U.S., at 159.

Thus there can be no doubt that due process has not been followed in the procedures leading up to the lethal execution of unborn and partially born persons.

Even if reasonable jurists could express doubt as to whether the stay, if granted, would be upheld on appeal, the Government is in a position to file an appeal within minutes, and closing abortion clinics for a day or so will not be the end of the world anyway. Failure to grant the stay, on the other hand, will be the end of the world for those who are executed.

When resulting in death, the skillful management of pregnancy, fertility, or procreation, including premature delivery from a life-threatening pregnancy, is not a lethal execution, provided that the performance is such that the cause of death is ruled accidental or natural by the medical examiner, rather than homicide or negligent homicide.

In *Dred Scott v. Sandford*, 60 U.S. 393, 407 (1857), in an opinion later superseded by the Fourteenth Amendment, the Court stated regarding African Americans: "They had for more than a century before been regarded as beings of an inferior order … and so far inferior, that they had no rights which the white man was bound to respect..."

Treatment of the unborn today parallels historical treatment of the unwhite. Yet even though both of them have been regarded as beings of an inferior order "for more than a century," this is no excuse for a lack of due diligence in staying their wrongful executions.

Mr. Grady contends that Fed. R. Crim. P. 38(a) has not been followed because unborn and partially born persons have been denied their right to appeal their sentence of death. Due to daily executions, the stay must be granted. See *Lonchar v. Thomas*, 517 U.S. 314 (1996).

SPECIFICS OF THE RELIEF REQUESTED

The specifics of the relief requested include: that a stay of execution of sentence of death shall issue without delay on behalf of unborn and partially born individuals; that counsel *ad litem* shall be appointed on behalf of unborn and partially born individuals under sentence of death; that all grace periods for child homicide shall be ended without delay; that the use of drugs, devices, or treatments in an act to instigate the death of an unborn or partially born individual shall be prohibited; and, that the medical examiner shall be ordered to investigate the suspicious cause of death of any unborn or partially born individual for evidence of homicide, regardless of whether procreation has occurred naturally or artificially or *in vivo* or *in vitro*.

In short, their suggestion of personhood having been established, the unborn shall be recognized in the law as persons in the whole sense.

CONCLUSION

The stay should be granted.

Dated: March 26, 2015.

Respectfully submitted,

(Electronic Signature via Corrlinks)

BY: /FGG/

Mr. Francis G. Grady
#11656-089
USP COLEMAN II
P.O. BOX 1034
COLEMAN, FL 33521-1034

Pro Se and as *Proximus Amicus*

CERTIFICATE OF SERVICE

I, Eurica Californiaa, do declare that on this date, March 27, 2015, I have served the foregoing EMERGENCY MOTION FOR STAY OF EXECUTION OF SENTENCE OF DEATH on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing with prison authorities an envelope properly addressed to each of them containing the above document for mailing in the United States mail with first-class postage prepaid, using the prison's system for legal mail if it has one.

The names and addresses of those served are as follows:

Attn: Stay of Execution
William J. Roach
Office of the US Attorney
205 Doty St., Ste 301
Green Bay, WI 54301-4538

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: March 27, 2015. Respectfully submitted,

BY: E. Cal

Mr. Eurica Californiaa
PO Box 791
Haleiwa, HI 96712
(310) 804-0727
amb@juridic.org

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA

v.

FRANCIS GERALD GRADY

JUDGMENT IN A CRIMINAL CASE

Case Number: 12-CR-77

USM Number: 11656-089

Thomas E. Phillip
Defendant's Attorney

William J. Roach
Assistant United States Attorney

THE DEFENDANT was found guilty on counts one (1) and two (2), after a plea of not guilty.

The defendant is adjudicated guilty of these offense(s):

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 844(i)	Arson of building used in interstate commerce	April 1, 2012	1
18 U.S.C. §§ 248(a)(3) and (b)(1)	Freedom of Access to Clinic Entrance	April 1, 2012	2

The defendant is sentenced as provided in Pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

IT IS ORDERED that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and the United States Attorney of material changes in economic circumstances.

Date of Imposition of Judgment
February 14, 2013

s/ William C. Griesbach, Chief Judge, United States District Court
Signature of Judicial Officer
February 20, 2013
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of one hundred and twenty months (120) as to count one and twelve (12) months as to count 2 to be served consecutively, for a total of one hundred and thirty-two (132) months.

☒ The court makes the following recommendations to the Bureau of Prisons: placement in a facility close to defendant's home.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district.

- ☐ at ____ a.m./p.m. on ____.
- ☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons,

- ☐ before ____ a.m./p.m. on ____.
- ☐ as notified by the United States Marshal.
- ☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____
at _____ with a certified copy of this judgment.

UNITED STATES MARSHAL

By: _____
Deputy United States Marshal

Defendant: FRANCIS GERALD GRADY Page 3 of 6
Case Number: 12-CR-77

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of three (3) years as to count one and one (1) year as to count two to be served concurrently, for a total term of three (3) years.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance.

☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer.

☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense.

☐ The defendant shall participate in an approved program for domestic violence.

If this judgment imposes a fine or a restitution obligation, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. the defendant shall not leave the judicial district without the permission of the court or probation officer;
2. the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;
3. the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. the defendant shall support his or her dependents and meet other family responsibilities;
5. the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7. the defendant shall refrain from the use of all alcoholic beverages and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10. the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11. the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12. the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13. as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

ADDITIONAL SUPERVISED RELEASE TERMS

1. The defendant is to participate in a program of testing to include not more than six urinalysis tests per month and residential or outpatient treatment for drug and alcohol abuse, as approved by the supervising probation officer, until such time as he or she is released from such program. The defendant shall pay the cost of this program under the guidance and supervision of the supervising probation officer. The defendant is to refrain from use of all alcoholic beverages throughout the supervised release term.
2. The defendant is to pay restitution at a rate of not less than $50.00 per month or 10% of his or her net earnings, whichever is greater. The defendant will also apply 100 percent of his or her yearly federal and state tax refunds toward the payment of restitution. The defendant shall not change exemptions without prior notice of the supervising probation officer.
3. The defendant is to provide access to all financial information requested by the supervising probation officer including, but not limited to, copies of all federal and state tax returns. All tax returns shall be filed in a timely manner. The defendant shall also submit monthly financial reports to the supervising probation officer.
4. The defendant shall participate in a mental health treatment program and shall take any and all prescribed medications as directed by the treatment provider and participate in any psychological/psychiatric evaluation and counseling as approved by the supervising probation officer. The defendant shall pay the cost of such treatment under the guidance and supervision of the supervising probation officer.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments on the attached page.

	Assessment	Fine	Restitution
Totals:	**$125.00**	$0.00	**$650.00**

☐ The determination of restitution is deferred until ___. An *Amended Judgement in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If a defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all non-federal victims must be paid before the United States is paid.

Name of Payee	**Total Loss	Restitution Ordered	Priority or Percentage
Planned Parenthood Attn: Joanne Krueger (Francis Grady case)		$650.00	
Totals:	$	$$650.00	

☐ Restitution amount ordered pursuant to plea agreement: $_____.

☐ The defendant must pay interest on any fine or restitution of more than $2,500.00, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on the Schedule of Payments may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution, is modified as follows:

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994 but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A ☒ Lump sum payment of $125.00 due immediately.

B ☒ Payment to begin immediately (may be combined with ☐ C, ☒ D, ☐ E, or ☐ F below; or

C ☐ Payment in equal monthly installments of not less than $___ or 10% of the defendant's net earnings, whichever is greater, until paid in full, to commence 30 days after the date of this judgment; or

D ☒ Payment in equal monthly installments of not less than $50.00 or 10% of the defendant's net earnings, whichever is greater, until paid in full, to commence 30 days after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within 30 days after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several
Defendant and Co-Defendant Names, Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate:

☐ The defendant shall pay the cost of prosecution

☐ The defendant shall pay the following court costs

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

In the

United States Court of Appeals

For the Seventh Circuit

No. 13-1390

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

FRANCIS G. GRADY,

Defendant-Appellant.

Appeal from the United States District Court for the
Eastern District of Wisconsin.
No. 1:12-cr-00077 — **William C. Griesbach**, *Chief Judge.*

ARGUED DECEMBER 6, 2013 — DECIDED MARCH 27, 2014

Before KANNE and ROVNER, *Circuit Judges*, and DURKIN, *District Judge.*[*]

KANNE, *Circuit Judge.* Francis Grady was convicted of arson and intentionally damaging the property of a facility providing reproductive health services. Grady now appeals, arguing that the district court erred in defining the term "maliciously" in the jury instructions. For the following reasons, we affirm.

[*] Of the Northern District of Illinois, sitting by designation.

I. BACKGROUND

On April 1, 2012, Grady drove to Daniel Wolf's house and told Wolf that he wanted to blow up the Planned Parenthood clinic in Grand Chute, Wisconsin. After Wolf refused to provide him gasoline, Grady drove to a nearby gas station and made two separate gasoline purchases, depositing some in his van and a smaller amount in a plastic bottle. He then drove to the Planned Parenthood clinic, parked his van, and approached the facility with a hammer and the plastic container of gasoline. Grady broke a window with the hammer, poured the gasoline into the building, and set it on fire.

The next morning, after seeing news reports of the fire, Wolf called police and informed them that Grady may have been responsible. The police arrested Grady and then questioned him in a videotaped interview. During the interview, Grady admitted that he "lit the clinic up" and that his "intention was to light the building." He also stated that he told friends shortly after lighting the fire, he "thought as far as I know I thought it f*****' burned right down."

Grady was charged with arson and intentionally damaging the property of a facility providing reproductive health services. At trial, Grady continued to express his discomfort at what was happening at Planned Parenthood and reiterated that it was his desire to burn down the clinic. He also claimed, prior to lighting the fire, to have "said a prayer for all them children that passed away in there from abortion." Nonetheless, he admitted that his intent was to damage the building. A Planned Parenthood facilities coordinator testified that the fire caused considerable damage to the building, which required

extensive repairs and forced Planned Parenthood to cancel all clinic services the following day.

The parties disputed how to define the term "maliciously" under 18 U.S.C. § 844(i) for the arson charge in the proposed jury instructions. Neither the Seventh Circuit Pattern Jury Instructions nor this court has defined the term. Grady wanted to utilize the definition found in the Eighth Circuit Pattern Jury Instructions whereas the government proposed use of the definition from the Eleventh and Fourth Circuit Pattern Jury Instructions.

The district court elected to use the government's definition, explaining that Grady's proposed instruction would shift the burden to the government to prove that the defendant acted without justification.

The jury found Grady guilty of both arson and intentionally damaging the property of a facility providing reproductive health services. Grady now appeals, asserting that the district court erred in instructing the jury regarding the definition of the term "maliciously" as it appears in the arson statute, 18 U.S.C. § 844(i).

II. ANALYSIS

We review jury instructions as a whole to determine whether they fairly and accurately summarize the law. *United States v. Swan*, 250 F.3d 495, 499 (7th Cir. 2000). In making this determination, our review of the instructions is *de novo*. *United States v. Quintero*, 618 F.3d 746, 753 (7th Cir. 2010). We afford considerable discretion to the district court "with respect to the precise wording of instructions so long as the final result, read

as a whole, completely and correctly states the law." *United States v. Lee*, 439 F.3d 381, 387 (7th Cir. 2006). We will reverse "only if the instructions, when viewed in their entirety, so misguided the jury that they led to appellant's prejudice." *Quintero*, 618 F.3d at 753.

The sole issue on appeal is whether the district court fairly and accurately summarized the law with respect to the meaning of the word "maliciously" in the jury instructions. The arson statute under which Grady was charged punishes anyone who "*maliciously* damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce." 18 U.S.C. § 844(i) (emphasis added). The statute does not define the term "maliciously." Grady proposed that the term be defined as "intentionally caus[ing] damage without just cause or reason." This definition was taken from the 2011 Model Criminal Jury Instructions of the Eighth Circuit. The district court adopted the government's proposed instruction, however, which defined the term as "[acting] intentionally or with deliberate disregard of the likelihood that damage or injury will result." Grady objected to the definition and argued that his proposed instruction offered a more common sense definition of the term.

Though our circuit does not define "maliciously" in our jury instructions, the definition used by the district court is not without a legal basis. As we recently noted, this definition of the term is "indeed a common definition of the word (or cognates of it, such as 'malice'), and makes perfectly good sense when the damage involves a harm to a third person." *United States v. McBride*, 724 F.3d 754, 759 (7th Cir. 2013)

(citations omitted). Moreover, Grady's proposed instruction is taken from the Eighth Circuit's 2011 model instructions, which has since adopted the definition that was used by the district court. *See* Eighth Circuit Manual of Model Jury Instructions (Criminal) § 6.18.844 (2013); *see also United States v. Whaley*, 552 F.3d 904, 907 (8th Cir. 2009). The definition is also found in both the Fourth and Eleventh Circuit Pattern Jury Instructions and is how the common law traditionally defined the term. *See United States v. Gullet*, 75 F.3d 941, 947 (4th Cir. 1996). Finally, numerous other circuits have employed this same definition in construing "maliciously" in the arson statute. *See, e.g., United States v. Monroe*, 178 F.3d 304, 307–08 (5th Cir. 1999); *United States v. Wiktor*, 146 F.3d 815, 818 (10th Cir. 1998); *Gullet*, 75 F.3d at 947–48; *United States v. McFadden*, 814 F.2d 144, 145–46 (3d Cir. 1987).

The instruction told the jury that Grady acted "maliciously" if he acted intentionally or with deliberate disregard of the likelihood that damage or injury would result in setting the fire at the Planned Parenthood facility. This allowed the jury to properly weigh the intent of Grady in starting the fire. We find no error by the district court in applying this definition.

Grady contends that the district court erred in rejecting his proposed instruction and in particular the phrase "without just cause or reason." His argument relies on our recent opinion *United States v. McBride*, which held that for "the federal arson statute to make sense, 'maliciously' has to mean deliberately (or in willful disregard of known or suspected consequences) using fire *to do a harmful act*." 724 F.3d at 759. Yet nothing in *McBride*—which concerned the sufficiency of evidence to establish malicious intent rather than jury instructions—creates

the need for a specific jury instruction now. And as the court in *McBride* recognized, the definition used by the district court is perfectly rational when the harm done is to a third party. *Id.* Grady clearly caused harm to a third party, Planned Parenthood, when he set the fire in their building that resulted in extensive damage and forced the facility to cancel all services for a whole day.

Regardless, the district court's decision to omit the "without just cause or reason" language from the instruction is well-supported by the record. A "jury instruction should be given only when it addresses an issue reasonably raised by the evidence." *United States v. Tanner*, 628 F.3d 890, 904 (7th Cir. 2010). Grady has failed to point to any cognizable legal justification for starting the fire at the Planned Parenthood facility. Nothing in the record suggests otherwise. At trial, Grady asserted that his proposed definition of the term was a "more common sense definition" and did not contend that any legal justification existed for his behavior. There was simply no legal basis to include the phrase and the district court acted well within its discretion in omitting it. Accordingly, we find no error with the instruction.

III. CONCLUSION

Because we find no error with the instruction as given, we AFFIRM Grady's conviction.