No. 13A1231

IN THE
SUPREME COURT OF THE UNITED STATES
THIS IS A CAPITAL CASE

JOHN E. WINFIELD
Petitioner,

v.

GEORGE LOMBARDI, ET AL.,
Respondents.

Suggestions in Opposition to Application for Stay of Execution

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REASONS FOR DENYING THE STAY

Summary of Argument

Winfield alleges this Court should grant a stay of execution to decide if he must plead a specific feasible more humane method of execution in order to plead a viable Eighth Amendment method of execution claim. He also alleges this Court should grant a stay to determine whether he must show Missouri's execution method is "literally" sure or very likely to cause serious illness and unnecessary suffering in order to make a viable Eighth Amendment claim, or if he need only meet the standard of substantial risk of serious harm, which he characterizes as a lower standard. But, it is correct to deny the application for stay of execution even reviewing it under the substantial risk of serious harm standard Winfield proposes, just as it was correct to deny stays to six previous Missouri inmates who presented the same evidence Winfield now presents. Therefore, Winfield presents no proper reason for a stay, because even if this Court uses the test Winfield proposes he is not entitled to a stay. If one takes Winfield's arguments about the requirements of an Eighth Amendment claim as correct the court of appeals still acted correctly in denying a stay under the standard Winfield advocates, and there is no reason to grant a stay.

A plurality of this Court already answered the first question in *Baze*, holding that a plaintiff must propose a more humane method of execution in

order to establish the suffering from the method already employed is unnecessary. That was the narrowest holding of the Court because two Justices felt a plaintiff must make an even greater showing. This Court answered the second question by using the sure or very likely standard in denying a stay in *Brewer v. Landrigan.* The sure or very likely standard is a more specific formulation of the substantial risk of serious harm standard. There is no conflict between the two standards. But it is not necessary to reach that level of analysis to deny a stay. In light of the fact that Missouri has carried out six rapid and painless executions in six months, and the fact that the district court, the court of appeals, and this Court each denied stays based on the same evidence Winfield now offers, the stay is properly rejected on a substantial risk standard alone, without considering whether that means something different than sure or very likely or whether Winfield must plead a specific more humane method of execution.

I. The stay application fails under the *Hill* standard even if the Court uses Winfield's formulation of the *Baze* test.

In *Hill v. McDonough*, 547 U.S. 573 (2006), this Court held that a pending lawsuit does not entitle a condemned inmate to a stay of execution as a matter of course, and that the State and crime victims have an important interest in the timely execution of a death sentence. *Id.* at 583–84. This Court held stay applicants seeking a stay based on a suit challenging the manner in

which the State plans to execute them must meet *all* the elements of a stay including showing a significant possibility of success on the merits. *Id.* at 584. The Court cited *Mazvrek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam), for the proposition that a "preliminary injunction [is] not granted unless the movant, by a clear showing, carries the burden of persuasion." *Hill*, 547 U.S. at 584. Winfield does not carry that burden.

II. Winfield's Eighth Amendment claim does not entitle him to a stay.

Winfield alleges his execution using pentobarbital will violate the Eighth Amendment ban on cruel and unusual punishment. A three judge plurality in *Baze* held that for a risk of harm from execution to violate the Eighth Amendment "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." *Baze v. Rees,* 535 U.S. 35, 50 (2008) (internal quotations omitted, emphasis in the *Baze* decision). A majority of this Court recently relied on the "*sure* or *very likely* to cause serious illness and needless suffering" standard in rejecting an application to vacate a stay of execution. *Brewer v. Landrigan*, 131 S. Ct. 445, 445 (2010). Therefore, in order to survive a motion to dismiss, a lower standard than the standard required for stay, the plaintiffs must *at least* present a plausible claim that Missouri execution procedures are sure or very likely to cause serious illness and needless suffering and give rise to sufficiently imminent dangers.

The test, set out by the three judge plurality in *Baze*, not only requires that the alleged suffering be "sure or very likely" to occur, but also that the risk of potential suffering be "needless." The plurality held "[s]ome risk of pain is inherent in any means of execution—no matter how humane—if only from the prospect of error in following the procedure. It is clear then the Constitution does not demand the avoidance of all risk of pain in carrying out executions." *Id.* at 44. In addressing the requirement that the sure or very likely suffering also be needless, the plurality indicated such suffering was needless if the State, without a legitimate penological justification, refused to adopt a feasible, readily implemented alternative, which substantially reduces a risk of severe pain. *Baze*, 553 U.S. at 52. Two concurring justices would have denied the claim on the broader ground that an Eighth Amendment violation does not occur absent a method of execution deliberately designed to cause unnecessary pain. *Baze*, 553 U.S. at 94 (Thomas J. and Scalia J. concurring).

Winfield fails both prongs of the *Baze* test. Winfield does not dispute that Missouri carried out six executions using pentobarbital in six months, and no observer has seen anything inconsistent with those executions all being rapid and painless (Ex. 1, statements from over 120 witnesses over six executions supporting the position that all Missouri executions using pentobarbital have been rapid and painless). It is implausible to allege

Missouri's use of pentobarbital in executions is "sure or very likely" to cause serious illness and needless suffering, or that it creates a "substantial risk of serious harm" when time-after-time, Missouri executions using pentobarbital have been rapid and painless. Similarly, Winfield has not alleged a specific plausible more humane alternative method of execution, and does not allege the State has purposefully designed its execution method in order to cause unnecessary pain. As the executions have all been rapid and painless, such an allegation would be implausible in any event.

Winfield presents opinions from paid experts asserting various things could go wrong with Missouri executions, but never have. A speculative parade of horribles does not satisfy the requirements of a viable Eighth Amendment claim. The standard for an Eighth Amendment claim is "*sure* or *very likely*" to cause serious illness and unnecessary pain, and Winfield does not show a significant possibility of success under that standard or under the standard of showing a substantial risk of serious harm, which is really another way of saying the same thing in a less detailed manner. Franklin, Nicklasson, Smulls, Taylor, Ferguson, and Rousan presented the same evidence, this Court found the evidence insufficient, and the State executed them in a rapid and painless manner. Nothing has changed.

III. Winfield's erroneous argument for a stay is based on the allegation that relevant things have changed since this Court rejected the arguments he makes now in denying stays in six other Missouri executions is wrong.

A. Winfield does not comply with *Baze* by merely stating some unspecified, more humane method of execution exists.

Winfield alleged in the court below that, because he is willing to say some unspecified method of execution that would be constitutional exists, he has complied with the second prong of *Baze*. The argument makes the second prong of *Baze* meaningless by asserting the success or failure of a plaintiff's case depends on reciting magic words that have no practical effect. What Winfield is really saying is that all he needs to do to meet the second prong of the *Baze* test of is allege the Missouri execution procedure is not the safest procedure that is theoretically possible. That is not naming a feasible constitutional alternative method of execution that would substantially reduce a serious risk of pain, which is what *Baze* requires.

B. The *Bucklew* stay was based on Bucklew's unique health problems.

Winfield alleges that this Court's grant of stay to Russell Bucklew changes the legal landscape created by the denial of stays to the previous six Missouri inmates executed with pentobarbital. It does not. Bucklew emphasized in his stay application that his "lawsuit is based on the *unique* risks to him arising from the unstable, untreatable vascular tumors—

cavernous hemangioma—that fill his head neck and throat." (Ex. 8 at 3, emphasis in original). Bucklew did not challenge the use of pentobarbital to execute a person not suffering from his allegedly unique condition, and he argued the stress of execution with any drug could cause him to hemorrhage and suffocate (*Id.*). The Bucklew stay has no application to Winfield, who is not suffering from cavernous hemangioma. Rather, the relevant precedents in Winfield's case are the stay denials to Franklin, Nicklasson, Smulls, Taylor, Ferguson and Rousan.

C. The district court did not find Winfield is entitled to a stay of execution on the first prong of *Baze* analysis by dismissing the *Zink* litigation based on the second prong, and Winfield loses on the first prong. The denial of stay was proper even without the second prong of *Baze* analysis.

Winfield argues that the district court order dismissing nine claims in the *Zink* litigation, but letting the tenth claim survive for two weeks before the court ultimately dismissed it in a later order, supports the argument that he is entitled to a stay of execution. It does not. Winfield is arguing that because the district court dismissed the Eighth Amendment claim in the *Zink* litigation based on the second prong of *Baze*, rather than the first, he is entitled to a stay of execution because he has a significant possibility of success on the first prong, and in his view the district court misunderstands

the second prong. In order to survive a motion to dismiss, a claim must merely be plausible. *Walker v. Barrett*, 650 F.3d 1198, 1203 (8th Cir. 2011), *citing Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Aschroft v. Iqbal*, 556 U.S. 662, 678 (2009). But the claim must have a significant possibility of success on the merits to be part of the support for a stay of execution. *Hill*, 547 U.S. at 584. This Court denied Franklin's stay motion and denied Nicklasson's stay motion based on essentially the same evidence Winfield presents, before *In re Lombardi* interpreted the second prong of *Baze* in the manner Winfield finds incorrect (Exs. 6 and 7). The thrust of those decisions was that Franklin and Nicklasson did not meet what is now the first prong of the *Baze* test. The fact that the district court dismissed the *Zink* litigation based on the second prong does not change that.

D. Alleged difficulties in Ohio and Oklahoma executions do not support the stay of a Missouri execution when Missouri executions using pentobarbital have been uniformly rapid and painless.

Winfield argues that this Court should grant a stay of his execution because he alleges difficulties occurred in Ohio and Oklahoma executions using different chemicals or combinations of chemicals. He does not and cannot argue that Missouri has not recently carried out six executions using pentobarbital in six months, and that all have been rapid and painless. Exhibit 1 to this pleading contains over 120 witness statements from the six

executions, many of which are from members of the media. None of the statements contradict the rapid and painless nature of the executions. Those executions using Missouri procedures and personnel are the historical evidence to which this Court should look.

E. Winfield is not entitled to discovery before he makes a viable claim.

Winfield alleges he should be allowed to have discovery about Missouri's execution procedures before he is required to state a viable Eighth Amendment claim. The argument has little to do with entitlement to a stay of execution and does not make sense. The discovery process exists to support a viable claim. Winfield argues he should have a right to discovery in the hope that it will produce something he can use to make a claim. But he has no such right. What Winfield really wishes to do is use discovery to find the identity of suppliers and then pressure them not to participate in executions.

It is not difficult to think of a viable Eighth Amendment claim that could be made against various hypothetical methods of execution without having discovery before filing a suit. And it is not difficult to think of alternative methods of execution that could be proposed in such a hypothetical case. Winfield cannot make a viable claim because the method he challenges complies with the Eighth Amendment, and not because of deficiencies in normal modes of procedure.

F. Winfield's allegation of a conflict of interest by counsel does not change the elements of a viable Eighth Amendment claim.

Winfield argues the pleading requirements for an Eighth Amendment claim must be changed because pleading a viable claim may have consequences that are not to his advantage, and therefore his counsel allegedly has a conflict of interest that prevents counsel from pleading a viable claim. Specifically, he alleges if counsel does plead the existence of a viable, more humane method of execution, the State might use it, increasing his chances of being executed, over a system in which he has the possibility of having a method of execution condemned with no viable alternative in place.

But it is Winfield who must choose whether to bring an Eighth Amendment claim challenging the method of execution. He must make that choice knowing that bringing the suit may have disadvantages as well as advantages. What Winfield is really saying is that he should be able to tailor the required elements of a claim so that there are no potential disadvantages in bringing the claim, because if he cannot, counsel who represents him in the suit necessarily has a conflict of interest. That is not the law. A civil suit challenging the constitutionality of a method of execution is not a habeas corpus action seeking to prevent the execution itself. Counsel does not have a conflict of interest because pleading requirements do not allow him to change one into the other, which is what Winfield is really arguing.

IV. Conclusion.

Therefore, for the forgoing reasons, this Court should deny Winfield's application for a stay of execution.

Respectfully submitted,

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