No. A13-_____

This is a capital case

Execution of Applicant John Winfield Scheduled June 18, 2014, at 12:01 a.m.

IN THE SUPREME COURT OF THE UNITED STATES

John E. Winfield,

Applicant,

vs.

George Lombardi, et al.,

Respondents.

Application for Stay of Execution Pending Appeal in the Eighth Circuit Court of Appeals

---

Directed to the Honorable Samuel Alito as Circuit Justice for the Eighth Circuit

---

Joseph W. Luby, Counsel of Record
Jessica Sutton
Death Penalty Litigation Clinic
6155 Oak Street, Suite C
Kansas City, Missouri 64113
(816) 363-2795

Counsel for John E. Winfield

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

CASES

STATUTES

RULES OF COURT

INTRODUCTION

To the Honorable Samuel Alito, Associate Justice of the United States Supreme Court and Circuit Justice for the Eighth Circuit:

Applicant respectfully applies for a stay of execution pending his appeal of the district court's ruling dismissing the Eighth Amendment claim that he and other prisoners asserted against the Missouri Department of Corrections' method of lethal injection. Mr. Winfield's appeal is pending in the Eighth Circuit in the matter of *Zink et al. v. Lombardi et al.*, Eighth Circuit Case No. 14–2220. A panel of the Eighth Circuit declined to stay the execution pending the appeal, and the full Eighth Circuit denied rehearing with three judges dissenting. App. A1-A2, App. B1-B3.

A. The alternative method pleading requirement and *Buckle w*

Missouri seeks to execute John Winfield with an unregulated compounded drug, from an undisclosed supplier, made of unknown ingredients, and through unknown processes. In the course of its dismissing the litigation below, the district court ruled that Mr. Winfield and his fellow plaintiffs described sufficient evidence of harm for their Eighth Amendment claim, App. C8, and indeed, the unrefuted expert reports attached to the complaint describe a "substantial risk of serious, unnecessary and substantial harm and mental anguish," and a "substantial risk of ... severe and unacceptable levels of pain and suffering." App. F24, App. G4.

The district court dismissed the claim solely because Mr. Winfield and his fellow prisoners did not specifically plead a "readily available" alternative way for the

state to kill them, and could not do so without the aid of discovery into the state's pursuit of "available" drugs and suppliers. App. C8-C10; App. D1-D2. That ruling is error. It stems from the Eighth Circuit's opinion in *In re Lombardi*, 741 F.3d 888 (8th Cir. 2014) (en banc), which misreads *Baze v. Rees*, 553 U.S. 35 (2008), and otherwise conflicts with the plain language of this Court's precedents. *See Jones v. Bock*, 549 U.S. 199, 213 (2007) ("[J]ust last Term, in *Hill v. McDonough*, 547 U.S. 573, we unanimously rejected a proposal that § 1983 suits challenging a method of execution must identify an acceptable alternative[.]").

The requirement is as unworkable in practice as it is unjustified by precedent. Within the same ruling that the district court invited the prisoner-plaintiffs to plead a different execution method, the court terminated all discovery and thus disabled the prisoners from ascertaining what pharmaceuticals and devices are "reasonably available" to the Missouri Department of Corrections. App. C9-C10, C24. The pleading requirement additionally places the prisoners' attorneys into an impossible ethical dilemma by forcing them to advocate for a client's death, and to lend their wits to help bring it about. *See* Mo. Sup. Ct. R. 4-1.2(a), 4-1.3, 4-1.7 (paralleling Model Rules of Professional Conduct).

The state's own arguments show that *Lombardi*'s alternative method pleading requirement makes a lethal injection claim impossible to bring. The state answers the discovery problem by insisting that any plaintiff must have a "plausible" claim **before** discovery, *see* Opposition to Stay of Execution at 8, and therefore, a "plausible" claim

is impossible to bring unless the prisoner somehow has information that is uniquely and peculiarly known to the state. Its solution to the ethical problem is no better. The state suggests that counsel should avoid the ethical dilemma by choosing not to bring the claim at all. Opposition at 9-10. The state's idea of a "plausible" and stay-worthy claim, then, is one that a prisoner and his or her counsel cannot conceivably plead. That may be the result desired by the state, but it does not reflect a sound reading of *Baze*.

More importantly, the dismissal below justifies a stay of execution when considered alongside this Court's entry of a stay in *Bucklew v. Lombardi*, No. 13A-1153 (order of May 21, 2014) (App. J1). The Court in *Bucklew* granted a stay pending appeal despite the state's lengthy insistence that it may execute Russell Bucklew because he, too, failed to propose a "specific, feasible, more humane method of execution." App. M7-M12. If that view were the definitive law, Mr. Bucklew would now be dead. This Court's issuance of a stay demonstrates its doubt with the rule of *Lombardi*, that an Eighth Amendment challenge to a method of execution requires the challenger to propose a feasible and readily alternative means of his own demise. Judges Bye, Murphy, and Kelly appropriately dissented from the Eighth Circuit's denial of rehearing. The dissent stated that "it would be imprudent" to proceed with additional Missouri executions in light of this Court's stay in *Bucklew*. App. A2. Judge Bye also reiterated his previous concerns about Missouri executions, including his longstanding disapproval of the *Lombardi* alternative-method requirement. *See In re*

Lombardi, 741 F.3d 888, 898-900 (8th Cir. 2014) (en banc) (Bye, J., dissenting).

B. The level of harm, Missouri's recent executions, and *Bucklew*

The *Bucklew* stay and other developments also undermine the state's other argument for denying a stay, namely, that Mr. Winfield cannot show that Missouri's shrouded method of execution is "sure or very likely to cause serious illness and needless suffering." Opposition to Stay 2-3. First, the nature of the appropriate test under *Baze* was critically at issue in *Bucklew*, and Mr. Bucklew's counsel explained that the "sure or very likely" language was borrowed from a case about the risks of second-hand cigarette smoke—assuredly a risk that is less than literally "sure or very likely" to cause lung cancer or other ailments in any particular case. App. M6-M9; App. N7-N9; *Baze*, 553 U.S. at 50, quoting *Helling v. McKinley*, 509 U.S. 25 (1993). Second, the district court below agreed with the *Zink* plaintiffs and disagreed with the state's argument on the proper level of harm, and despite the state's argument that it is "implausible" to allege that Missouri's execution method is "sure or very likely" to cause severe pain after the last six executions featured no outward signs of such pain. *See* App. C8; ECF Doc. 420 (reply on motion to dismiss) at 3-4.

Third, the state's protocol has materially worsened now that the state refuses to reveal whether it even tests its execution drugs at all, which is a bait-and-switch from the state's earlier assurances to the lower courts that such testing proved the soundness of the state's drugs and eliminated any need for the prisoners to discover where the drugs were coming from, how they are made, or what they are made of. *See*

In re Lombardi, Eighth Cir. Case No. 13-3699, Motion for stay of district court discovery orders (Dec. 27, 2013), at 5 ("The name or the identifying information of whether the pharmacist is part of a national chain, a local pharmacy, or something in between, does not matter when the Court knows the end-product was potent, pure, sterile and worked effectively.").

Fourth and finally, the stay in *Bucklew* demonstrates this Court's recognition of the hazards posed by Missouri's method, and that those hazards satisfy the properly-construed test of *Baze*. The state argued below that the *Bucklew* stay was the result of Mr. Bucklew's unique medical condition, cavernous hemangiomas. Opposition at 6-7. Yet, in *Bucklew*, the state argued that Mr. Bucklew's allegations were "vague and general" and that his claim "contained only speculation." App. M8-M9. The state cannot have it both ways, and the Court should stay the scheduled execution so that Mr. Winfield may complete his meritorious appeal, and if necessary, seek this Court's review afterward. As explained in Judge Bye's dissent from the denial of rehearing, the stay in *Bucklew* makes it "imprudent to proceed with further executions in Missouri." App. A2. Mr. Bucklew's execution was stayed pending his appeal, and the court's resolution of that appeal—including the evidentiary hearing seemingly suggested by this Court's order—are likely to "shed further light on Missouri's execution protocol and allow this Court to more fully consider the claims brought by Winfield and the other inmates in Missouri's execution queue." App. A2.

STATEMENT OF JURISDICTION

Mr. Winfield seeks a stay of execution in order to litigate his appeal in the Eighth Circuit. This Court, and indeed all federal courts, "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). Because this Court has ultimate jurisdiction over the appeal that is now pending in the Eighth Circuit, it has the authority to protect that jurisdiction by staying an execution that would otherwise moot the case—a step the Court took only last month in *Bucklew v. Lombardi*, No. 13A1153. In this case, the district court issued its final order and judgment on May 16, 2014, including a dismissal of Mr. Winfield's Eighth Amendment claim. App D1-D2, App. E. The prisoners filed a notice of appeal on May 22, and Mr. Winfield moved the Eighth Circuit for a stay of execution on June 2. A panel of the Eighth Circuit denied a stay on June 6, and the Court of Appeals denied rehearing and rehearing en banc on June 12. App. A1-A2, App. B1-B3. This timely and urgent application follows.

FACTUAL AND PROCEDURAL BACKGROUND

A. Missouri's execution method

This case concerns the method of execution announced by the Missouri Department of Corrections in October 2013 and serially modified since that time. *See* ECF Doc. 144 & Ex. 1 (pentobarbital protocol); Doc. 163 at 14 (change of method of intravenous access); Doc. 397 at 1 (no disclosure of test results or existence of

testing); *Bucklew v. Lombardi*, Eighth Circuit Case No. 14-2163, Order of May 20, 2014 at 8-9 (change from methylene blue to indigo carmine to the use of no dye to verify functioning of IV lines). The state executes prisoners with a single dose of what it alleges to be pentobarbital, made by an undisclosed and non-FDA-regulated compounding pharmacy that the Department has named to its "execution team," and composed of unknown ingredients whose sources the Department also hides. Beginning with the execution of Michael Taylor in February 2014, the Department provides no testing data to show that the substance is in fact pentobarbital, or that it is pure, potent, and sterile.

B. The prisoners' evidence of harm

The expert evidence on the use of compounded pentobarbital is undisputed and was attached to the prisoners' second amended complaint. ECF Docs. 338-5, 338-6, 338-8, 338-42; App. F1-F36; App. G1-G14; App. H1-H4. Unregulated by the FDA and of unknown origin, compounded pentobarbital presents numerous hazards that create a "substantial risk of serious, unnecessary and substantial harm and mental anguish," according to pharmacology expert Dr. Larry D. Sasich. App. F24. These hazards include sub-potency or super-potency; contamination from toxins, allergens, or particles; and burning or a pulmonary embolism resulting from failure to reach and maintain the proper pH. App. F13-F20. Anesthesiologist Dr. Mark Heath agrees, concluding that Missouri's protocol is "replete with flaws that present a substantial risk of causing severe and unacceptable levels of pain and suffering during the

execution." App. G4.

What is more, the Department's protocol has materially worsened. Earlier in the litigation, the Department assured the district court that it tests its drugs to be sure they are safe, pure, and effective, so that the prisoners did not need to know the source of the drugs even though the unrefuted medical evidence—which was made part of the prisoners' complaint—stated that it was essential to know where the drug comes from, how it is made, and what it is made of. *See* ECF Docs. 187-12, 191 at 1, 191-1, 212 at 3, 290-5, 290-6, 290-11, 290-13, 290 at 8 (all concerning reliance on defendants' test results); App. F14-F15 (per Dr. Sasich); App. G2 (per Dr. Heath).

The Department made those same assurances to the Eighth Circuit when it sought mandamus relief from the district court's discovery orders:

> Because the chemical tests within the proper ranges, it does not matter who made it. Additionally, the Director will not use a chemical that fails a lab test.

In re Lombardi, Eighth Cir. Case No. 13-3699, Petition for Writ of Mandamus (Dec. 13, 2013), at 16; *see also* Motion for stay of district court orders (Dec. 27, 2013), at 5 ("The name or the identifying information of whether the pharmacist is part of a national chain, a local pharmacy, or something in between, does not matter when the Court knows the end-product was potent, pure, sterile and worked effectively.").

But the Department has since refused to disclose any test results, and indeed, it successfully resisted all discovery of whether it even tests the drugs **at all**. *See* Depo of Matthew Briesacher (Mar. 21, 2014), at 43-44, 72-73; ECF Doc. 397 at 1 (motion for

protective order); Doc. 415 at 11-12, 20; App. C24. We are left, then, with the Department's say-so that the drugs are what it says they are, coupled with its argument that the prisoners are speculating without benefit of the very information that the Department refuses to provide. ECF Doc. 196 at 1 (district court noting "Catch-22").

C. Procedural history

Some two months after the Department announced its new protocol and dubiously named its supplier a secret member of the "execution team,"[1] the district court ordered a limited disclosure of the Department's pharmacy, testing laboratory, and prescribing physician. ECF Docs. 203-05. The Eighth Circuit eventually vacated that order, reasoning that an Eighth Amendment claim could not go forward under *Baze v. Rees*, 553 U.S. 35 (2008), without the plaintiffs proposing an alternative method of execution, that the prisoners' ex post facto claim failed as a matter of law, and that the pharmacy's and laboratory's identities were not relevant to the remainder of the prisoner's then-pending claims. *See In re Lombardi*, 741 F.3d 888, 895-97 (8th Cir. 2014) (en banc) ("*Lombardi I*").

The Eighth Circuit clarified its ruling on rehearing. It distinguished *Hill v. McDonough*, 547 U.S. 573 (2006), and this Court's holding that there is "no specific

[1] *See* Mo. Rev. Stat. § 546.720.2, defining "execution team" as "those persons who administer lethal gas or lethal chemicals and those persons, such as medical personnel, who provide direct support for the administration of lethal gas or lethal chemicals."

pleading requirement that a prisoner must identify an alternative, authorized method of execution to proceed in a § 1983 action." *In re Lombardi*, 741 F.3d 903, 905 (8th Cir. 2014) (en banc) ("*Lombardi II*"), quoting *Hill*, 547 U.S. at 582. *Hill* differed from the present case, the Eighth Circuit concluded, because the prisoner in *Hill* conceded that "other methods of lethal injection the Department could choose to use would be constitutional," and alleged and "that the challenged procedure presents a risk of pain the State can avoid while still being able to enforce the sentence ordering a lethal injection." *Id.* The Court pointed out that the *Zink* prisoners included no such allegations in their complaint. *Id.*

Mr. Winfield and his fellow plaintiffs therefore amended their complaint to include the allegedly missing language from *Hill*. App. I49, I51. They also asserted nine additional claims that are not at issue in this application. App. I2-I6. The district court dismissed these claims over the course of two orders. App. C1-C24, App. D1-D2. On the Eighth Amendment claim, the court ruled that the prisoners showed a sufficient enough risk of harm to proceed further. App. C8. Nevertheless, the court reasoned that the prisoners lacked a viable Eighth Amendment claim without having pleaded a specific alternative method that is "reasonably available" and "less likely to create a substantial risk of harm." App. C9-C10. The district court deferred its ruling on the claim in order to allow the prisoners to plead a specific alternative, which they declined to do. App. C10. Plaintiffs explained that *Baze* does not require a prisoner to specifically plead an alternative method, that the complaint's language from *Hill* made

their claim sufficient under *Lombardi II*, that they could not specify a "feasible" and "readily implemented" alternative under *Baze* without discovery of the Department's attempts to obtain other lethal injection drugs, and that it is unethical for plaintiffs' counsel to recommend that the state kill their clients in any particular way. ECF Doc. 442 at 1-3. The district court then dismissed the Eighth Amendment claim and issued its final order and judgment on May 16, 2014. App. D1-D2; App. E1.

Meanwhile, on May 9, 2014, the Missouri Supreme Court scheduled Mr. Winfield's execution for June 18. The prisoners filed a notice of appeal in the underlying *Zink* litigation, and Mr. Winfield moved for a stay during the pendency of that appeal. A panel of the Eighth Circuit denied the motion for stay on June 6, 2014. App. B1-B3. Mr. Winfield petitioned for rehearing the next day, which the Eighth Circuit denied on June 12 over the dissent of three judges. App. A1-A2.

REASONS FOR GRANTING THE STAY

The standard for granting a stay of execution is well-established. A federal court must consider the prisoner's likelihood of success on the merits, the relative harm to the parties, and the extent to which the prisoner has unnecessarily delayed his or her claims. *Hill v. McDonough*, 547 U.S. 573, 584 (2006); *Nelson v. Campbell*, 541 U.S. 637, 649-50 (2004). All of these factors weigh in favor of staying Mr. Winfield's execution pending his prompt and meritorious appeal below.

I. Mr. Winfield brings a meritorious Eighth Amendment claim and is likely to succeed in his appeal.

Mr. Winfield must show a "significant possibility of success on the merits" to obtain a stay. *Hill v. McDonough*, 547 U.S. 573, 584 (2006). That standard, of course, is the same one that this Court employed when it stayed the execution of Missouri prisoner Russell Bucklew on May 21. Mr. Winfield shows a "significant possibility" of success because the questions he presents are substantially the same as those underlying the *Bucklew* litigation. *See* Order on Rehearing (App. A2) ("In addition to the same concerns I have noted in previous dissenting opinions in related matters, I believe it would be imprudent to proceed with further executions in Missouri in light of the Supreme Court's recent stay of Russell Bucklew's execution.") (per Bye, J., dissenting, joined by Murphy and Kelly, J.J.).

A. The *Lombardi* "alternative method" requirement cannot and will not persist.

1. This Court stayed Russell Bucklew's execution despite Mr. Bucklew's failure to propose an alternative method.

Prominently featured before this Court in *Bucklew* was the issue of whether the prisoner must propose an alternative method of execution in order to bring a viable Eighth Amendment claim. The district court answered that question affirmatively, and the state argued the point at length when opposing a stay. App. M7-M12. The state defended the district court's ruling that Mr. Bucklew's complaint "did not allege or even acknowledge a feasible and more humane alternative method of execution," and therefore, that Mr. Bucklew "failed to allege sufficiently an Eighth Amendment claim." App. M9. The state went on to criticize various modifications recommended by Mr. Bucklew, such as the proposal that the Department allow a non-execution team physician to be present in order to revive Mr. Bucklew during a botched execution, because the proposals "are not really changes in the method of execution." App. M10-M12.

For his part, Mr. Bucklew strenuously disagreed. He argued *Baze v. Rees*, 553 U.S. 35 (2008), does not require the prisoner to propose an alternative means of his demise, particularly in light of the Court's earlier rulings in *Hill v. McDonough*, 547 U.S. 573, 582 (2006), and *Jones v. Bock*, 549 U.S. 199, 213 (2007), both of which disclaimed such a pleading requirement. App. K19-K22; App. N6. He argued that he could not allege an alternative method without the ability to discover undisclosed facts

"regarding the drugs to be used, their origin, and the ingredients used in compounding them." App. K13; App. L3; App. N5-N7. And he argued that the alternative-method requirement creates an untenable conflict of interest between the prisoner and counsel, who, in order to fulfill this requirement, must advocate for the client's death and help to bring it about in a particular manner. App. K29-K31; App. L3.

Mr. Winfield advances the same arguments now as those described above, and indeed, the alternative-method issue is the only reason why the district court rejected his claim. App. C7-C10; App. D1-D2. It bears repeating that a stay applicant must show a "significant possibility of success on the merits." *Hill*, 547 U.S. at 584. If a prisoner were required to plead an alternative method in order to survive a motion to dismiss, then Mr. Bucklew could not have shown a "significant possibility of success on the merits" without specifying such an alternative himself.

The *Bucklew* ruling casts grave doubt on the Eighth Circuit's precedent. *In re Lombardi*, 741 F.3d 888, 896 (8th Cir. 2014) (en banc), states that an Eighth Amendment claim requires either a "a plausible allegation of a feasible and more humane alternative method of execution" or a "purposeful design by the State to inflict unnecessary pain." Russell Bucklew would have been executed on May 21 if that were the law.

2. This Court's precedents expressly disapprove any requirement that a prisoner propose an alternative execution method.

Less than one year before *Baze v. Rees*, 553 U.S. 35 (2008), the Court remarked as follows in *Jones v. Bock*, 549 U.S. 199, 213 (2007):

> In *Hill v. McDonough*, 547 U.S. 573 (2006), we unanimously rejected a proposal that §1983 suits challenging a method of execution must identify an acceptable alternative.

The opinion in *Baze* does not remotely suggest that the Court was departing from *Jones* and *Hill*, or that the Court was creating a new pleading or proof requirement of an alternative execution method. The Court instead disapproved any test that compares one method to another, which would "transform courts into boards of inquiry charged with determining 'best practices' for executions, with each ruling supplanted by another round of litigation touting a new and improved methodology." *Baze*, 553 U.S. at 51. Indeed, *Baze* did not distinguish or even cite *Jones* or *Hill*.

The Court in *Baze* was confronted with the specific claim that Kentucky's execution protocol violated the Eighth Amendment because the state could easily change to a one-barbiturate method or at least discontinue the use of the paralytic agent pancuronium bromide. 553 U.S. at 56-57. That specific claim required the prisoner to show that the proposed alternative was feasible, available, and likely to reduce a significant risk of pain. *Id.* at 52, 61. The *Baze* opinion simply addressed the claim before the Court. It did not erect a new standard for pleading or proving every

Eighth Amendment claim relating to manner of execution. In order to do so, it would have had to overrule *Jones* and *Hill*. It is exceedingly unlikely that the Court would do such a thing silently. *Shalala v. Illinois Council on Long Term Care*, 529 U.S. 1, 18 (2000) ("This Court does not normally overturn, or so dramatically limit, earlier authority *sub silentio*.").

3. The "alternative method" pleading requirement effectively bars Eighth Amendment claims in lethal injection cases because prisoners lack the discovery needed to propose a "feasible" and "readily implemented" alternative, and the requirement creates an impossible conflict of interest between lawyer and client.

Even if the Eighth Circuit's rule were consistent with *Baze*, the prisoners could not satisfy it without full and fair discovery into the Department of Corrections' efforts to identify, select, procure, and test execution drugs. Mr. Winfield cannot show that an alternative method is "feasible" and "readily implemented," *see Baze*, 553 U.S. at 52, without knowing what efforts the defendants have attempted, even as the defendants themselves insist that suppliers are hesitant to furnish them with lethal injection drugs. ECF Doc. 189-1 (Lombardi Aff.) ¶¶ 5-6, 10. The state resisted any and all discovery of their present or previous suppliers, and they refused to comply with any such discovery after the *Lombardi* rulings. ECF Doc. 397; Depo. of Matthew Briesacher (Mar. 21, 2014), at 43-44, 72-73; Eighth Circuit Exhibit 13 (Response to Sixth Interrogatories) at 5-13. The district court's dismissal order stayed all discovery. App. C24. The order therefore prevents compliance with its own directive to propose an alternative, because the prisoners cannot discover specific information that is

uniquely and peculiarly available to the defendants. The practical effect is to disable any and every Eighth Amendment claim targeting any method of lethal injection, unless the prisoner somehow knows how and where his executioner may readily obtain the instruments of his death—and in a regime where that very information is kept secret by the executioners, their supervisors, and their attorneys.

The lack of discovery aside, the pleading standard imposed by the district court and the Eighth Circuit would require counsel and other death row attorneys to violate the rules of professional ethics. Mr. Winfield's attorneys cannot suggest any means for the state of Missouri to kill him because he has neither selected a means of death nor directed his attorneys to seek such means. In every lawyer-client relationship, "the client, not the lawyer, determines the goals to be pursued." Restatement (Third) of the Law Governing Lawyers, § 16A cmt. c (2000). Rule 1.2 of the Missouri Rules of Professional Conduct requires a lawyer to "abide by a client's decisions concerning the objectives of the representation." Mo. Sup. Ct. R. 4-1.2(a).

By determining that *Baze* closes the courthouse door to Mr. Winfield's Eighth Amendment pleading if counsel fails to recommend another method for killing him, the district court's rule and the Eighth Circuit's precedent violate counsel's obligation under Rule 1.2(a). A court would instruct counsel to abandon the client's objective and instead to concede the constitutionality of an untested method of execution. If counsel were to meet the pleading standard by conceding an alternative means for the state to execute Mr. Winfield, counsel would violate Rule 1.2 by contradicting Mr.

Winfield's decision-making authority as client. But if counsel wished to avoid violating Rule 1.2 by not providing an alternative means of execution in the pleading, counsel would arguably violate Rule 1.3's requirement of diligence by refusing to comply with the pleading requirement. See Mo. Sup. Ct. R. 4-1.3.

Refusal to engage in the macabre task of actively supporting an alternative method of execution protects an important right for Mr. Winfield. As this Court has held, "[b]y declaring his method of execution, picking lethal gas over the State's default form of execution—lethal injection—[a death row inmate] has **waived any objection** he might have to it." *Stewart v. LaGrand*, 526 U.S. 115, 119 (1999) (emphasis added). Mr. Winfield—and his counsel—therefore are forced to abandon an important Eighth Amendment argument if they are required to affirmatively choose a method of execution.

An alternative-method requirement would create a concurrent conflict of interest and nonsensically require removal of Mr. Winfield's counsel. The concurrent conflict rule prohibits representation if "there is a significant risk that the representation … will be materially limited … by the lawyer's responsibilities … to a third person …" Mo. Sup. Ct. R. 4-1.7(a)(2). The conflict that arises from the alternative-method requirement is both intrinsic to the representation and yet inimical to it. The district court and the Eighth Circuit would require counsel to make an argument that cuts against the very goal of the client's representation: preventing his execution. The court's application of *Baze* not only ignores that client-defined

objective, but it describes advocacy on "behalf" of the death row inmate as a concession to the state's desired result: that an alternative method of execution is constitutional. This is a cognizable, even palpable, conflict that poses all the dangers of the more traditional, extrinsic conflicts of interests.

By embracing the conflict of interest inherent in the district court's directive and the Eighth Circuit's precedent, and helping the state select a method to kill Mr. Winfield, his attorneys would become ineffective. The Court has repeatedly recognized that the Sixth Amendment right to effective assistance of counsel includes the right to a representation free from conflicts of interest. *See Glasser v. United States*, 315 U.S. 60, 70 (1942). "[T]he rule against representing adverse interests [of present clients] was designed to prevent a … practitioner from having to choose between conflicting duties, or attempting to reconcile conflicting interests rather than enforcing a client's rights to the fullest extent." *Smiley v. Dir. Office of Workers Comp. Programs*, 984 F.2d 278, 282 (9th Cir. 1993). Requiring counsel to argue in favor of a method for killing Mr. Winfield is decidedly unjust; it prohibits counsel from "enforcing [the] client's rights"—or pursuing Mr. Winfield's wishes—"to the fullest extent." *Smiley*, 984 F.2d at 282.

Generally, the Rules address conflicts of interest by requiring the lawyer to remove herself from the representation. See Mo. Sup. Ct. R. 4-1.7, cmts. [2]-[4]. Under the circumstances of this case, however, such a remedy is both impractical and illogical. Removal would bring heavy burdens by replacing counsel who are familiar

with the case's complex facts and Byzantine procedural history with less well-informed counsel. Replacement counsel, in turn, would fail as a remedy because the new counsel would labor under the same conflict. A death row lawyer would breach his duty of diligence should he fail to pursue a claim that might secure his client's desired outcome. *See* Mo. Sup. Ct. R. 4-1.3. The Eighth Circuit's pleading requirement is as unworkable and inequitable in practice as it is unjustified by precedent.

B. Mr. Winfield shows a sufficient risk of severe pain to justify further proceedings on his claim.

1. Bucklew and the district court both repudiate the state's reading of *Baze*, i.e., that the state must prevail unless its method is proven to be literally "sure or very likely" to cause serious illness or needless suffering.

The district court agreed with Mr. Winfield and his fellow plaintiffs in a critical respect. It rejected the defendants' argument that an Eighth Amendment claim requires that a prisoner allege and literally prove that the state's method of execution is "**sure or very likely** to cause serious illness or needless suffering," as opposed to the *Baze* court's definition of that term: "[T]o prevail on such a claim there must be **a substantial risk of serious harm**, an objectively intolerable risk of harm that prevents prison officials from pleading that they were subjectively blameless for purposes of the Eighth Amendment." *Baze v. Rees*, 553 U.S. 35, 50 (2008) (opinion of Roberts, C.J.). *See* Motion to Dismiss (ECF Doc. 354), at 10-13; Opposition to Motion to Dismiss (ECF Doc. 398), at 8-10; Reply (ECF Doc. 420), at 2-4; Exhibit 1 (order on motion to dismiss), at 8 (agreeing with plaintiffs). The state persisted in this

position when opposing Mr. Winfield's stay motion below. Opposition to Rehearing, at 2-4. Of course, the question was fiercely litigated in the *Bucklew* litigation, and this Court granted a stay. App. M6-M9; App. N7-N10.

The natural starting point is, of course, *Baze* itself. The relevant portion of the Chief Justice's plurality opinion quotes *Helling v. McKinney*, 509 U.S. 25 (1993); *see Baze*, 553 U.S. at 50. At the place the Chief Justice quotes it, this noncapital opinion sets out a general principle to govern prospective relief concerning prison conditions that ambiently affect prisoners' health:

> We have great difficulty agreeing that prison authorities may not be deliberately indifferent to an inmate's current health problems but may ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year.

Helling, 509 U.S. at 34-35, cited in *Baze*, 553 U.S. at 50.

Helling concerned a prisoner's exposure to second-hand cigarette smoke from his cellmate, and the Court held that the prisoner stated a viable Eighth Amendment claim. 509 U.S. at 35. Needless to say, no single individual can possibly prove that second-hand smoke is "sure or very likely" to cause lung cancer or similarly serious harms. But that was not the actual test: "McKinney states a cause of action under the Eighth Amendment by alleging that petitioners have, with deliberate indifference, exposed him to levels of ETS [environmental tobacco smoke] that pose **an unreasonable risk of serious damage** to his future health." *Id.* (emphasis added).

The Chief Justice in *Baze* explained what the "sure or very likely" language from *Helling* actually means:

> We have explained that to prevail on such a claim there must be a "**substantial risk of serious harm**," an "objectively intolerable risk of harm" that prevents prison officials from pleading that they were "subjectively blameless for purposes of the Eighth Amendment."

Baze, 553 U.S. at 50, emphasis added, citing *Helling*, and quoting *Farmer v. Brennan*, 511 U.S. 825, 842, 846 & n. 9 (1994). This is the language that appears throughout the Chief Justice's opinion as the legal standard on the merits in *Baze*. *Id.* at 50, 52 & n.3; see also *id.* at 116 (Ginsberg, J., dissenting) (reflecting three votes for similar standard, and not disputed by the Chief Justice as to his phrasing of the test); *id.* at 36-37 (syllabus).

Defendants below also cited this Court's one-paragraph summary ruling in *Brewer v. Landrigan*, 131 S. Ct. 445 (2010), but nothing in *Landrigan* altered *Baze*. *See* Motion to Dismiss (ECF Doc. 354), at 10; Reply (ECF Doc. 420) at 3; App. M6, M9; Opposition to Rehearing at 2. It is true that the Court recited the "sure or very likely" language in vacating a stay of execution. But it never altered the **definition** of that language from *Baze*, and it noted that the language came from the Court's earlier opinion in *Helling*, which, again, was a case about the risks caused by second-hand cigarette smoke in which the prisoner stated a viable Eighth Amendment claim. *See Landrigan*, 131 S. Ct. at 445. It is unlikely that the Court intended for *Landrigan* to modify *Baze*. *See Edelman v. Jordan*, 415 U.S. 651, 671 (1974) (lesser precedential value of summary rulings). And in any event, the district court in *Landrigan* expressly stated that it was issuing a TRO because it could only "speculate" that a non-FDA-approved drug "will cause pain and suffering." 131 S. Ct. at 445. The Court's

summary ruling means only that speculation does not satisfy *Baze*. And the Court's later grant of a stay to Mr. Bucklew reflects its agreement with Mr. Bucklew's view of the relevant Eighth Amendment test.

2. Mr. Winfield shows a sufficient risk of harm for a viable Eighth Amendment claim.

The district court agreed with the prisoners in a second critical respect: they bring an Eighth Amendment claim involving a sufficient "risk and level of pain that the current execution protocol carries." App. C8. Plaintiffs below pled that the defendants' use in lethal injections of what they represent to be pentobarbital from an undisclosed compounding pharmacy creates a substantial risk of severe pain or an objectively intolerable risk of severe pain. App. I11-I51. Compounding pharmacies are not subject to the government regulation on which Americans rely for the identity, purity, potency, and efficacy of the medications they take—and on which experts and courts have relied in rendering opinions and making judgments about the substances which the defendants have used in past lethal injection litigation. App. I23-I43. Among other problems, reputable vendors of pentobarbital will not sell the drug to the Department of Corrections, unregulated compounded drugs involve precursor chemicals from unknown and unregulated suppliers, and compounding pharmacies lack the institutional competence to test either the precursor chemicals or the product they tender to their customers. App. I29-I32.

Attached to and included within the complaint are analyses from pharmacology expert Larry D. Sasich and anesthesiologist Mark J.S. Heath. Dr.

Sasich explains that compounded drugs are unreliable because they are largely unregulated. App. F5-F8. Compounding pharmacies represent "an emerging, substandard drug industry responsible for making large quantities of unregulated, unpredictable and potentially unsafe drugs." App. F7. The drugs they make often contain counterfeit or substandard ingredients, and drug compounders often use poor practices; as a result, the process of compounding "often results in drugs which are contaminated, sub-potent or super-potent, or which do not have the strength, quality or purity ... required for the safe and effective treatment of patients." App. F8.

Reputable suppliers of pharmaceutical ingredients generally sell directly only to FDA-approved manufacturers of finished products. App. F12. That leaves compounding pharmacies to depend on the unregulated "grey market" in which ingredients may come from China, India, or other countries that do not reliably inspect pharmaceutical ingredients; the drugs may not even be what they purport to be, and it is all but impossible to trace the active ingredient to its original manufacturer in order to verify its quality. App. F11-F13. In light of these hazards, "The potential harm associated with the use of such contaminated or sub-potent drugs is extremely high." App. F8. That harm is enhanced by the secrecy concerning the Department of Corrections' supplier, which creates even greater uncertainty as to the origins and quality of the drug's ingredients. App. F10.

Dr. Sasich outlines four specific hazards from the use of compounded pentobarbital in executions. First, there is a "substantial risk" that the drug may be

sub-potent or super-potent, either from (a) the fact that Missouri's protocol specifies no means of adjusting the measurements of the chemical to account for the drug's hygroscopic (water-absorbing) nature, (b) chemical degradation caused by impurities or contamination, (c) a compounding error, or (d) the possibility that Defendants' drug is not actually pentobarbital. App. F13, App. F17-F20. Sub-potent pentobarbital risks "acute intoxication, life-threatening but not fatal respiratory depression, and/or paradoxical stimulation." App. F19. Super-potent pentobarbital, meanwhile, may result in "suffocation and gasping for breath, before the loss of consciousness." App. F20.

A second problem Dr. Sasich identifies is the danger that compounded pentobarbital will be contaminated with dangerous allergens, toxins, bacteria, or fungus—any of which could induce severe allergic or blood reactions that are "highly unpredictable, rapidly evolving and potentially painful and agonizing." App. F15-F17. A third danger arises from particle contamination. The compounded pentobarbital may contain foreign particles that will either contaminate the solution or precipitate out of it, creating a "substantial risk of pain and suffering" on injection, as well as a risk of pulmonary embolism. App. F16-F18. Fourth and finally, Dr. Sasich states that the dosage form of the drug may fail to reach or maintain the proper pH, which risks burning on injection, the precipitation of solid particles that could cause a pulmonary embolism, or the multiplication of bacteria and fungus that may "create instability and/or incompatibility with human blood." App. F18.

All told, Dr. Sasich concludes, compounded pentobarbital creates a "**substantial risk of serious, unnecessary and substantial harm and mental anguish**." App. F24 (emphasis added). Anesthesiologist Dr. Heath agrees. He states that sub-potent pentobarbital may severely disable the prisoner without actually killing him. It carries a risk that the prisoner "will be unconscious for an extended period of time while breathing inadequately, before waking up in a permanently brain-damaged state." App. G2. Dr. Heath concludes that Missouri's protocol is "replete with flaws that present a **substantial risk of causing severe and unacceptable levels of pain and suffering** during the execution." App. G4 (emphasis added).

To make matters worse, the defendants are administering expired drugs. Dr. Sasich explains that United States Pharmacopeia Chapter <797> defines the "Beyond Use Date" (BUD) as the date or time after which a compounded sterile preparation should not be administered, stored, or transported. Chapter <797> of the USP assigns BUDs for drugs compounded from non-sterile Active Pharmaceutical Ingredients (High Risk Compounding). If the drug is stored at room temperature, the BUD is 24 hours; if refrigerated, 3 days, and if frozen, 45 days. App. H1-H2. Based on laboratory reports disclosed by the defendants—which they ceased disclosing after their first three pentobarbital executions—the drugs used in Joseph Franklin's execution in November were stored at room temperature and were compounded sixteen days before the execution, and the defendants administered an expired drug.

App. H3. A similar analysis governs the drug with which Allen Nicklasson was executed the next month. App. H3-H4. Dr. Sasich described the state's practices as a "very troubling deviation from USP standards," which carries a "very high risk that the compounded drug will degrade or allow for more rapid growth of bacteria." App. I36 (quoting Sasich Dec. of Jan. 17, 2014 (ECF Doc. 285-3)). Improper storage creates "a very substantial, even grave, risk that the prisoner will suffer severe pain and/or an immediate severe allergic reaction." App. I37.

3. Missouri's six compounded-pentobarbital executions do not justify denying a stay.

The state will likely argue, as it did below, that its six pentobarbital executions have been relatively uneventful and indeed "painless," based on reports of non-medical witnesses who did not believe the prisoners were experiencing pain, and also that the courts denied stays in all six cases. Opposition to Stay at 8 & Ex. 1. But the argument does not remotely defeat the prisoners' claims, even leaving aside recent events in other states (*see* Part II.B.4, below). For one thing, the Department of Corrections switched to a new compounding pharmacy after their third propofol execution, when their previous supplier was publicly outed.[2] For another, the propofol used for each execution is separately compounded, and the expert evidence of record states that there is no way to ensure the reliability and safety of the state's

[2] *See* The Guardian, *Michael Taylor executed by Missouri using compounded pentobarbital*, Feb. 26, 2014, available at http://www.theguardian.com/world/2014/feb/26/michael-taylor-executed-by-missouri-using-compounded-pentobarbital

propofol from batch to batch or execution to execution. App. H1. Finally, the state now refuses to disclose whether it even tests its drugs at all, never mind the identity, credentials, or complaint-history of its current pharmacy. *See* Depo of Matthew Briesacher (Mar. 21, 2014), at 43-44, 72-73; ECF Doc. 397 at 1 (motion for protective order); Doc. 415 at 11-12, 20; Eighth Circuit Exhibit 13 at 5-13. Dr. Sasich's words ring even truer with the state's about-face on testing: "The additional documents that I have reviewed provide no evidence that Missouri actually knows what will be injected into a condemned prisoner." App. H4.

4. Intervening developments support a stay of execution.

Baze remarked that Kentucky's former execution method was not likely to be "objectively intolerable" under the Eighth Amendment because it was "widely tolerated" by the thirty states that used the same method. *Baze v. Rees*, 553 U.S. 35, 53 (2008). But Missouri's method and the secrecy attending it are not "widely tolerated" today. To the contrary, recent developments disfavor the state's rush toward a hasty execution with secretive methods.

Three recent executions shed light on the substantial risk of serious harm that execution drug failure can cause. Twelve seconds into his execution in Oklahoma, which utilized a three-drug cocktail that included pentobarbital obtained from an unnamed compounding pharmacy within the state, Michael Lee Wilson uttered his

chilling final words: "I feel my whole body burning."[3] A week later, Ohio executed Dennis McGuire with a combination of drugs never before used in lethal injection in the United States, and he "struggled, made guttural noises, gasped for air and choked for about 10 minutes."[4] Finally, Clayton Lockett's execution in Oklahoma just weeks ago was horribly botched: he regained consciousness, writhed, groaned and took 43 minutes to die, reportedly from a heart attack—though that was only after the blinds were drawn on the execution chamber to obscure what really happened from public scrutiny.[5]

Oklahoma and Ohio have temporarily stayed executions,[6] this Court halted Russell Bucklew's execution only weeks ago, and the State of Louisiana is under orders to disclose the "identity of the [execution] drugs' manufacturers and sources" and the "entities involved in supplying and testing those lethal chemicals." *In re LeBlanc*, No. 14-30198, 2014 WL 1245251 (5th Cir. Mar. 27, 2014) (denying state's mandamus petition). Even Missouri's Attorney General believes that the state's

---

[3]Rick Lyman, *Ohio Execution Using Untested Drug Cocktail Renews the Debate over Lethal Injections*, New York Times, Jan. 17, 2014, at A15.

[4]Alan Johnson, *Inmate's Death Called 'Horrific' Under New, 2-Drug Execution,* The Columbus Dispatch, Jan. 17, 2014.

[5]Katie Freckland, *Clayton Lockett writhed and groaned. After 43 minutes, he was declared dead*, The Guardian, April 30, 2014, available at http://www.theguardian.com/world/2014/apr/30/clayton-lockett-oklahoma-execution-witness.

[6]Mark Berman, *Oklahoma attorney general agrees to delay execution for six months*, Washington Post, May 8, 2014; Elizabeth Barber, *Federal judge orders halt to executions in Ohio until mid-August*, Christian Science Monitor, May 28, 2014.

"creeping" secrecy "may not be prudent."[7] And President Obama has asked Attorney General Eric Holder to review how the death penalty is applied in the United States, following the "deeply disturbing" events in Oklahoma.[8]

John Winfield seeks a stay so that the courts may carefully and soundly determine whether Missouri's execution method is constitutional. His premature execution would violate a growing consensus of caution with respect to novel methods of execution that are shrouded in secrecy.[9] "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man." *Atkins v. Virginia*, 536 U.S. 304, 311 (2002), quoting *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958). "The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Id.* at 311-12.

II. The remaining considerations justify a stay.

In addition to the merits of Mr. Winfield's claim, the Court must also consider the balance of harms and whether Mr. Winfield has unduly delayed his claim. *Nelson v. Campbell*, 541 U.S. 637, 649-50 (2004); *Nooner v. Norris*, 491 F.3d 804, 808 (8th Cir. 2007). These factors also weigh in favor of a stay.

---

[7]Jeremy Kohler, *Missouri attorney general: State needs its own execution pharmacy*, St. Louis Post-Dispatch, May 29, 2014.

[8]Peter Baker, *Obama Orders Policy Review on Executions*, New York Times May 2, 2014.

[9]*E.g.*, Jason Riley, *Flawed executions in other states cause more death penalty scrutiny in Kentucky* (June 1, 2014), available at <<http://www.wdrb.com/story/25653974/sunday-edition-flawed-executions-in-other-states-cause-more-death-penalty-scrutiny-in-kentucky>>

Bearing in mind that the death penalty is "obviously irreversible," *Evans v. Bennett*, 440 U.S. 1301, 1306 (1979) (Rehnquist, J., granting stay as circuit justice), the protocol at issue here carries a "substantial risk" that Mr. Winfield's last conscious memory will be the experience of severe pain. App. F24; App. G4; App. H4. That risk is one that the state itself wishes to avoid, according to its own filings. *See* ECF Doc. 189-1 (Lombardi Aff.) ¶ 9 ("As Director I believe it is important to have confirmation that the chemicals used in the lawful execution of the Plaintiffs are pure, potent and sterile. Any chemical that is not pure, potent and sterile will not and shall not be used."); ECF Doc. 178 at 7 (arguing that court must presume that the Director "is highly motivated to carry out executions properly"). And although the state has an interest in enforcing criminal judgments without unnecessary delay, it does not have a legitimate interest in executing prisoners illegally or unconstitutionally. "[T]he public interest has never been and could never be served by rushing to judgment at the expense of a condemned inmate's constitutional right." *In re Ohio Execution Protocol Litigation*, 840 F. Supp. 2d 1044, 1059 (S.D. Ohio 2012).

Neither has Mr. Winfield delayed his constitutional claims in the slightest. He brought suit on June 26, 2012, or only six weeks after the Department announced an execution method featuring the use of the anesthetic propofol. ECF Doc. 1-1, at 1, 24-25; ECF Doc. 1-2 at 1. The Department changed its protocol several times before announcing the compounded-pentobarbital method on October 22, 2013. ECF Doc. 338-2, Doc. 144, Doc. 163 at 12. Mr. Winfield and the other prisoners proffered an

amended complaint as promptly as possible, on November 8, 2013, marshaling expert evidence in support of their claim that the protocol violates the Eighth Amendment. ECF Doc. 147. The prisoners offered a second amended complaint on January 27, 2014, which they filed with the district court's leave one week later. App. I1.

Mr. Winfield, then, has been asserting an Eighth Amendment claim against the current protocol since November 8, 2013, or some two weeks after the protocol was announced. Mr. Winfield's execution was not scheduled until May 9, 2014. The district court dismissed the *Zink* case on May 16, and there is no reasonable way for the prisoners' appeal to be resolved before the scheduled execution date of June 18. This is certainly not a case, then, in which "a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." *Hill*, 547 U.S. at 584. This Court should stay Mr. Winfield's execution to allow full and fair litigation of his meritorious claim, and to preserve its authority to review that claim after the appeal.

CONCLUSION

The application for stay of execution pending appeal should be granted.

Respectfully submitted,

/s/ Joseph W. Luby
Joseph W. Luby, Mo. Bar 48951
Death Penalty Litigation Clinic
6155 Oak Street, Suite C
Kansas City, MO 64113
816-363-2795
jluby@dplclinic.com

/s/ Jessica Sutton
Jessica Sutton, Mo. Bar 63600
Death Penalty Litigation Clinic
6155 Oak Street, Suite C
Kansas City, MO 64113
816-363-2795
jsutton@dplclinic.com

Attorneys for Applicant John E. Winfield