*****DEATH PENALTY CASE*****
**Executions Scheduled for April 17, 20, 24, and 27, 2017**

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 17-1804

JASON McGEHEE, et al.,
Plaintiffs-Appellees,
v.
ASA HUTCHINSON, et al.,
Defendants-Appellants.

On Appeal from the United States district court for the Eastern District of Arkansas
(Hon. Kristine Baker)

# APPELLANTS' REPLY BRIEF IN SUPPORT OF EMERGENCY MOTION TO VACATE STAY OF EXECUTION / PRELIMINARY INJUNCTION

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## INTRODUCTION

Appellees ask this Court to sustain a district court order staying their imminent executions to allow for longer consideration of their repeatedly nonsuited and rejected claim that Arkansas's three-drug (midazolam) lethal-injection protocol. While they suggest longer proceedings are necessary, they do not point to anything they would do differently in a longer proceeding. Indeed, the district court already conducted a four day hearing on Appellees' claims and rejected all of them save two. In reality—like this entire proceeding—Appellees' request is nothing more than an attempt to manipulate the judicial process and make it impossible for Arkansas to carry out Appellees' just and lawful sentences.

Those sentences are based on the following:

- *Ledell Lee* – In 1995, Lee was sentenced to death for beating twenty-six year old Debra Reese to death with a tire thumper. Lee was also connected to *three* previous unsolved rapes and *another* rape and murder.
- *Marcel Williams* – Williams was sentenced to death in 1997 for kidnapping, robbing, raping, beating, and finally murdering young mother Stacy Errickson. Williams then abducted and raped two other women.
- *Kenneth Williams* – Within one year, Kenneth Williams took four lives. In 1998, he murdered two people and attempted to kill another person. Less than a month into his sentence for one of those killings, Williams escaped

and murdered Cecil Boren. Williams was only captured after he caused a car accident that killed another driver.

- *Bruce Ward* – Ward was sentenced to death nearly *thirty* years ago for strangling eighteen year old Rebecca Doss to death in a convenience store restroom. Ward had previously strangled another young woman.
- *Jack Jones* – In 1996, Jones was sentenced to death for raping and strangling Mary Phillips and attempting to murder Phillip's eleven year old daughter. Jones was also convicted for rape and murder in Florida. Jones' current execution is Arkansas's *seventh* attempt to obtain justice.
- *Terrick Nooner* – In 1993, Nooner robbed and murdered twenty-two year old Scot Stobaugh at a laundromat, shooting Stobaugh seven times.
- *Jason McGehee* – In 1996, McGehee tortured fifteen year old John Melbourne, Jr. for several hours and then murdered him.
- *Stacey Johnson* – In 1993, Stacey Johnson violently raped, beat, strangled, and sliced Carol Heath's throat so deeply that Johnson cut one-fourth of an inch into her spinal bone. Heath's two children were left alone overnight with their mother's lifeless body. This is Johnson's *fifth* execution date.

The district court's stay of their executions should immediately be reversed.

## ARGUMENT

### I. The district court's last minute stay of Appellees' imminent executions warrants immediate consideration.

Appellees suggest that there is no reason to expedite consideration of Appellants' motion because the record is voluminous, there is no harm to Arkansas from its execution drugs expiring, and there should be additional time for arguments. Res. Br. 9-11. But Appellees do not point to anything they would do differently in a longer proceeding or that expedited review would somehow be inadequate for this Court to fully consider the issues that were briefed below and previously decided—after a motion to dismiss, discovery, and cross-motions for summary judgment—before the Arkansas courts. *See Kelley v. Johnson*, 496 S.W.3d 346 (Ark. 2016). Indeed, this Court also has the benefit of the Arkansas Supreme Court's opinion reversing the state trial court's summary judgment decision and concluding that Appellees' nearly identical claims lacked any evidentiary basis. *Id.*

Appellees' suggestion that failing to immediately vacate the stay of *multiple* executions is also disingenuous at best and completely disregards "the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Hill v. McDonough*, 547 U.S. 573, 584 (2006); *see also id.* ("Both the State and the victims of crime have an important interest in the timely enforcement of a sentence."); *Nooner*, 491 F.3d at 807-808. It likewise ignores the

fact Appellees have had *numerous* opportunities to (and did) challenge their method of execution and waited till well after Governor Hutchinson set their most recent executions to bring their current challenge with the goal of claiming that there was insufficient time to review their claims until after Arkansas's supply of midazolam expired. Equity should, therefore, not permit Appellees to deliberately manipulate the judicial process to evade justice.

The only excuse Appellees' even attempt to offer for their conduct is that Governor Hutchinson only recently set the execution schedule and the execution schedule adds to the risk of the entire process. The excuse is utterly meritless because it is equally clear that Appellees believe that Arkansas's midazolam protocol itself (both the drugs used and other aspects of the protocol) violates the constitution and that their claims ripened years ago. Moreover, even if, as Appellees speculate, the unique nature of the schedule here created a risk of accident or maladministration of the protocol, that fact cannot justify Appellees' decision to sit on their rights since a risk of accident or maladministration is not a cognizable claim under the Eighth Amendment. *See Clemons v. Crawford*, 585 F.3d 1119, 1125-1127 (8th Cir. 2009); *Taylor v. Crawford*, 487 F.3d 1072, 1080 (8th Cir. 2007); *see also Zink v. Lombardi*, 783 F.3d 1089, 1100-1103 (8th Cir. 2015); *Nooner v. Norris*, 594 F.3d 592, 598-99 (8th Cir. 2010).

## II. The district court abused its discretion in concluding that Appellees had demonstrated a substantial likelihood of success on their midazolam claim.

### A. Appellees' combination claim entirely depends on succeeding on their midazolam claim.

Appellees erroneously claim that Appellants have not challenged the district court's conclusion concerning the combination of the execution schedule, use of midazolam, and other safeguards. Res. Br. 5 n.1. Yet contrary to Appellees' suggestions, this "combination" claim is not a second or separate claim. Nor did the district court conclude that the execution schedule or other safeguards standing alone would run afoul of the Constitution. Instead, the district court concluded that Arkansas's use of midazolam in its lethal injection protocol violates the prohibition against cruel and usual punishment and that the combination of other factors enhanced the harm from midazolam. (DE 54, at 56.) Thus, in other words, because—as explained in greater detail below—Appellees' midazolam claim fails as a matter of law (based on res judicata, collateral estoppel, and because they have not met the standards set forth in *Glossip v. Gross* and *Baze v. Rees*), they likewise cannot prevail on a combination claim.

### B. Appellees' claim is barred by res judicata.

Like the district court, Appellees do not point to anything showing that they can overcome *res judicata*. In fact, Appellees do not even address their repeated attempts to manipulate the judicial process by initially filing claims in *Williams v.*

*Kelley*, No. 60CV-15-1400, then nonsuiting them when Arkansas removed them to federal court.[1]

*First*, contrary to Appellees' claim, the Arkansas Supreme Court resolved their midazolam claims in *Johnson v. Kelley*, No. 60CV-15-2921, on the merits. While Appellees argue that dismissal based on sovereign immunity cannot be a determination on the merits, Appellees ignore what happened in state court. As explained in greater detail in Appellants' motion, after Appellees had twice nonsuited their earlier challenge to midazolam and refiled in state court in *Johnson v. Kelley*, No. 60CV-15-2921, Arkansas moved to dismiss their claims. The state trial court denied that motion. Discovery then occurred and *both Appellees and Appellants moved for summary judgment*. As that suggests, just like Appellants, Appellees believed that the evidence adduced at that point was sufficient to resolve Appellees' claims. The Arkansas Supreme Court then reversed "*in toto* and dismiss[ed]" Appellees' claims because Appellees had failed to meet their burden of both pleading *and providing evidence* to support their midazolam claim in

[1] Appellees contend that res judicata cannot apply to Davis and Lee because they were not initially parties to the *Williams* case. *See* Res. Br. 15 n.2. This ignores the fact that under Arkansas law, privity exists where two parties are so identified with one another that they represent the same legal right. *Parker v. Perry*, 355 Ark. 97, 104, 131 S.W.3d 338, 344 (2003). Additionally, Appellees ignore the fact that while the initial complaint only involved Marcel Williams, McGehee, Ward, Nooner, Jones, Johnson, and Kenneth William, Appellees Davis and Lee filed motions to intervene in *Williams* and the state trial court granted those motions on May 20, 2015, and June 9, 2015, respectively.

response to summary judgment. *See Johnson*, 496 S.W.3d at 355-59 (discussing evidence); *id.* at 359 (no evidence "that the proposed alternative drugs are available to ADC for use in an execution"). Thus, the district court erred in concluding that the Arkansas Supreme Court's decision was not on the merits.

Appellees' focus on the use of the phrase "reversed and dismissed" does not change that fact. Res. Br. 8. To start, that focus elevates the word "dismissed" over the substance of the Arkansas Supreme Court's analysis and that court's explicit statement that it was reversing the trial court's decision "in toto," including the state trial court's decision denying summary judgment on the grounds that Appellees had failed to provide evidence to support their midazolam claim. Likewise, Appellees' focus on the word dismissal ignores the fact that under Arkansas law, when sovereign immunity applies because a party has not provided evidence (in response to summary judgment) to show a violation of the Arkansas Constitution's cruel or unusual punishment clause, the proper remedy is dismissal. *See Ark. Tech. Univ. v. Link*, 17 S.W.3d 809, 812-13 (Ark. 2000) (explaining that dismissal is the appropriate remedy on summary judgment where sovereign immunity prevails). Thus, contrary to Appellees' assertions, in concluding that Arkansas was entitled to dismissal, the Arkansas Supreme Court resolved the merits of Appellees' claim.

Moreover, the fact that the state trial court "refused to permit" them to amend their complaint does not show, as Appellees hint (Res. Br. 8), that their claim was not resolved on the merits. Rather, as the state trial court concluded in dismissing their attempt to amend the complaint, amendment was not permissible because the Arkansas Supreme Court had fully resolved the case on the merits and "dismissed the litigation, with prejudice[.]" (DE 28-23, 5.)

*Second*, contrary to Appellees' suggestion, there has been a final judgment in *Johnson v. Kelley*, No. 60CV-15-2921. When Appellees initially brought that case, they obtained a stay from the Arkansas Supreme Court until the state trial case was "fully and completely resolved." After the United States Supreme Court denied review of the Arkansas Supreme Court's decision reversing the state trial court, Appellants sought an order from the Arkansas Supreme Court clarifying that the stay had lifted because the case had been fully and completely resolved and the Arkansas Supreme Court agreed. *See* Formal Order in *Kelley v. Johnson*, No. CV-15-829 (Mar. 2, 2017) (Ex. 22). Indeed, the only way the stay would have automatically dissolved—under its explicit terms—is if the issuance of the Arkansas Supreme Court's mandate fully terminated the litigation in the state circuit court case. *See id*. (clarifying that stay of executions "dissolved upon issuance of [the] Court's mandate on February 24, 2017 in CV-15-992"). And consistent with that decision, the state trial court concluded that the Arkansas

Supreme Court had fully resolved the case on the merits and "dismissed the litigation, with prejudice[.]" (DE 28-23, 5.) The district court abused its discretion in determining the contrary.

Additionally, Appellees claim that the state trial court erred in its interpretation of Arkansas law and the Arkansas Supreme Court's decision because they had not appealed their state separation-of-powers and ex post facto claims does not alter that result because, *inter alia*, Appellees did not seek interlocutory review of those issues. And there is no real dispute—as the Arkansas courts have consistently concluded—that the entire case has concluded.

*Third*, Appellees' creative interpretation of Arkansas Rule of Civil Procedure 41(b) fails on its face. Like the district court, Appellees utterly fail to explain why equity requires ignoring that rule's plain requirement that "dismissal operates as an adjudication on the merits" where "action has been previously dismissed, whether voluntarily or involuntarily," in a situation where a party has repeatedly nonsuited the same claims. Ark. R. Civ. P. 41(b); *see also Ballard Group, Inc. v. BP Lubricants USA, Inc.*, 436 S.W.3d 445, 456-57 (Ark. 2014); *Brown v. Tucker*, 954 S.W.2d 262 (Ark. 1997). Indeed, if anything equity requires the application of that rule to a case like the present where Appellees have both repeatedly brought the same claims, strategically sat on their alleged federal rights

for years, and only brought the latest iteration of those claims a *month* after their executions were scheduled.

*Fourth*, contrary to Appellees' claims (Res. Br. 15 n.2) privity exists both because all the Appellees have been involved in some of their previous cases and their fellow Appellees raised those same claims in prior cases. *See Sparkman*, 775 F.3d at 999.

C. Collateral estoppel bars Appellees' claim.

Appellees' argument that collateral estoppel does not apply rests on their claim that there has been no final judgment and for the reasons explained above that argument fails. Additionally, Appellees' assertion that somehow Arkansas's fact pleading standard makes a difference, they do not point to anything demonstrating that, as applied here, a different result would have occurred under *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), or *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Indeed, those cases require a party to plead more than, as Appellees did in state court, a "bare averment that [it] wants relief and is entitled to it." 550 U.S. 544, 556 n.3 (quoting 5 C. Wright & A. Miller, Federal Practice & Procedure § 1202 (3d ed. 2004)).

D. The district court did not apply *Glossip*.

The Supreme Court has repeatedly emphasized that, "[w]hile methods of execution have changed over the years, '[t]his Court has never invalidated a State's

chosen procedure for carrying out a sentence of death as the infliction of cruel and unusual punishment.'" *Glossip v. Gross*, 135 S. Ct. 2726, 2732 (2015) (quoting *Baze v. Rees*, 553 U.S. 35, 48 (2008)). This is unsurprising, given the historical trend of states striving to find the most humane method of execution. *See Baze*, 553 U.S. at 40-41 ("As is true with respect to each of [the other 35 States that have capital punishment] and the Federal Government, Kentucky has altered its method of execution over time to more humane means of carrying out the sentence. That progress has led to the use of lethal injection by every jurisdiction that imposes the death penalty.") The use of lethal injection, therefore, is far afield from the intentional torture and cruelty that the Eighth Amendment is focused on. *See id*. at 48 (quotation marks and citations omitted) (listing the type of intentional torturous punishments that strike at the core of the Eighth Amendment and noting that "[w]hat each of these forbidden punishments had in common was the deliberate infliction of pain for the sake of pain – superadding pain to the death sentence through torture and the like.")

It is true that the Court has acknowledged that a method of execution could theoretically violate the Eighth Amendment even if it was not intentionally torturous. But the Court has carefully and deliberately cabined the limited circumstances in which risk of pain, as opposed to intentional infliction of pain, can support an Eighth Amendment claim. Because "the Constitution does not

demand the avoidance of all risk of pain in carrying out executions," *Baze*, 553 U.S. at 47, the Court has made clear that the Constitution is only implicated where a state refuses to move from a method of execution that is "feasible, readily implemented, and in fact would significantly reduce a substantial risk of severe pain." *See Glossip*, 135 S.Ct. at 2737; *Baze*, 553 U.S. at 50-51. This is the only situation in which a State can be said to have acted wantonly enough—by ignoring an objectively intolerable risk that could easily be remedied by a tried and true alternative method of execution—to support an Eighth Amendment violation based on risk of pain. *See Baze*, 553 U.S. at 52.

When the Supreme Court announced these standards in *Baze*, the Court explicitly acknowledged the importance of strictly applying both prongs of the test. The Court was absolutely clear that such strict application of both prongs was the only way to avoid turning the courts into medical review boards trying to judge and then require best execution practices. *See Baze*, 553 U.S. at 52 n.3; *id*. at 67, 69 (Alito, J., concurring); *see also id*. at 105-06 (Thomas J,. concurring in judgment) (concluding even this strict test would "engender more litigation" and "'require courts to resolve medical and scientific controversies that are largely beyond judicial ken").

The Appellees asked the district court—and now ask this Court—to water down the standards announced in *Baze* and confirmed in *Glossip*. The district court did so. This Court should not.

E. Appellees failed to show that midazolam is sure or very likely to cause needless suffering.

Indulging every possible piece of testimony and evidence presented by the Appellees, and giving their gloss on the evidence every possible benefit of the doubt, the absolute most one could say is that the midazolam protocol *might as a speculative matter* cause serious illness and needless suffering. But that is not anywhere close enough to stay an execution. Rather, Appellees needed to show a likelihood that they could prove that Arkansas's midazolam protocol is sure and very likely to cause serious illness and needless suffering. And no view of the evidence could justify that conclusion.

*First*, Appellees' entirely mischaracterize the FDA-approved package insert for midazolam. They do so because the label shows just how specious their claims that midazolam cannot induce anesthesia are. The package insert very clearly states, repeatedly, that midazolam may be used as the sole agent to induce general anesthesia. Indeed, "[w]hen midazolam is given IV as an anesthetic induction agent, induction of anesthesia occurs in approximately . . . 2 to 2.5 minutes without narcotic premedication or other sedative premedication." (DE 28-6 at 1). Another part of the package insert explains how clinicians can use midazolam for

"induction of general anesthesia, before administration of other anesthetic agents." (DE 28-6 at 6). That section describes the proper clinical dosing "[w]hen midazolam is used before other intravenous agents for induction of anesthesia" on unpremedicated patients. (*Id.*) Typically, the induction dose is 0.3 to 0.35 mg/kg, which is between 20 to 30 mg of midazolam. (*Id.*; Tr. 630). "In resistant cases, up to 0.6 mg/kg total dose may be used for induction," (DE 28-6, at 6), which equates to approximately 40-60 mg of midazolam (*see* Tr. 998-99). The typical clinical-induction dose renders a person unconscious and insensate to pain for at least 10 minutes and up to 30 minutes. (Tr. 631, 1004).

The district court's order erroneously ignores all of this manufacturer- and FDA-approved information simply because "Black Box Warnings are altered or modified based on clinical experience with the drug." DE 54 at 63-64. There are four problems with the district court's offhand dismissal of this key evidence. First, Appellees adduced no evidence whatsoever that the FDA or manufacturer were in any way in the process of altering or modifying the approved use of the drug for induction of general anesthesia. Second, Appellees' expert, Dr. Stevens, testified on direct that he accepts FDA-approved labels, and a table in his report compares FDA labels for two classes of drugs. (Tr. 258). Third, as outlined above, the State did not merely present evidence regarding the "Black Box" warning at the top of the package insert. (*See* DE 28-6 at 1). The State reviewed

the entire insert in great detail with both of the Appellees' expert witnesses, and both of them agreed that the product information expressly states that the drug can be used to induce general anesthesia. (Tr. 312, 318, 922, 928). Fourth, the "Black Box" warning itself, to the extent it is relevant, actually refutes another clearly erroneous factual finding by the district court: It clearly shows that IV midazolam alone, even at clinical doses, can cause respiratory depression, respiratory arrest, and death. (DE 28-6 at 1).

*Second*, in addition to ignoring midazolam's FDA approved labeling, Appellees' briefing completely ignores the fact that every single expert who testified below agreed that midazolam can induce general anesthesia. On cross-examination, the Appellees' experts were forced to concede that midazolam can, in fact, be used clinically to *induce* general anesthesia. (Tr. 312, 318, 942-43, 958). The Appellees' experts simply *prefer* to use other drugs in the modern clinical setting, in combination with other drugs that are needed to maintain general anesthesia for lengthy surgeries, because other drugs work better to quickly induce and maintain anesthesia and still allow the patient to wake up and recover quickly. (Tr. 938, 958, 1000). According to the Appellees' expert, anesthesiologist Joel Zivot, "[o]ther induction agents work better than midazolam does[,]" and "midazolam [is not] the best induction agent[.]" (Tr. 958). But Dr. Zivot

conceded that "[t]here's no restriction, no one is barred from using midazolam. I could use it." (*Id.*)[2]

The fact that other drugs may be *preferable* or *better* induction agents in the clinical setting in no way negates the undisputed fact that midazolam *can* be used to induce general anesthesia and *has in fact been used clinically* as the sole anesthetic agent to induce unconsciousness for what would otherwise be very painful medical procedures such as laryngoscopies, placement of endotracheal tubes (which studies have shown is more painful than a skin incision), and incision and dissection of abdominal tissues in C-section surgeries. (DE 28-3 ¶¶ 22-23; Tr. at 999-1000).

Indeed, the only disagreement between the experts was over whether midazolam could maintain general anesthesia for long periods of time (e.g.,

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[2] Dr. Zivot explained that the company that manufactures the BIS claims that scores under 60 mean the patient is in a state of general anesthesia and sufficiently anesthetized for surgery, but "studies have shown these monitors to be . . . very problematic" and "[t]here are many reasons why the monitors are not reliable." Tr. Vol. 1 at 24:8-25. Despite the inherent unreliability of the BIS, the State offered evidence from two different peer-reviewed studies showing that patients receiving clinical intravenous doses of midazolam had measured BIS scores under 60. (DE 28-12; Appellants' Ex. 26). Thus, the undisputed evidence adduced at the PI hearing established that midazolam *can* achieve BIS levels under 60 in regular clinical settings. Moreover, the absence of more data showing that midazolam can achieve BIS levels under 60 does nothing to prove that 500 mg of midazolam—which is roughly 10 times more than the standard clinical dose for induction of anesthesia—is insufficient to render an inmate unconscious and insensate to pain. The district court erred in relying on this evidence to find that midazolam is sure or very likely to cause needless suffering.

multiple hours). But that dispute is not relevant to Appellees' claim because executions occur in a very short window of time. The State's expert, clinical pharmacologist and toxicologist Daniel Buffington, testified that the entire duration of the lethal-injection procedure is short, and that midazolam will anesthetize the Appellees for the duration of that procedure when the second and third drugs are administered. (Tr. at 629). Anesthesiologist Joseph Antognini concurred and, after explaining in detail his calculation, opined that the 500-mg dose of midazolam in Arkansas's procedure "clearly exceeds the amount of drug that you would need" to anesthetize a person for the duration of the lethal-injection procedure. (Tr. 1003). He testified, within a reasonable degree of medical and scientific certainty, that an inmate administered 500 mg of midazolam would be unconscious and insensate to the pain that might otherwise be experienced upon the administration of the second two drugs in the protocol. (Tr. 1004-05).

Appellees' attempt to cast doubt on midazolam as a drug to *maintain* general anesthesia is a red herring. (Tr. 629). The issue here is not the maintenance of general anesthesia for a lengthy surgery; it is the ability of midazolam to induce a state of general anesthesia for a short procedure.[3] (*Id.*) The evidence below was undisputed that midazolam absolutely *can* be used to induce general anesthesia,

[3] Additionally, Appellees' focus (Res. Br. 23-24) on whether midazolam is an analgesic (*i.e.*, a pain reliever) is irrelevant because midazolam induces anesthesia and renders a patient unconsciousness and unable to feel pain.

and that the 500 mg induction dose used in Arkansas's lethal-injection procedure will keep the inmate in a state of general anesthesia *far* longer than the duration of the entire lethal-injection procedure. The second and third drugs in Arkansas's protocol are administered quickly after the midazolam, after ADC ensures the inmate is unconscious using a variety of medically appropriate methods. (DE 28-1 ¶¶ 41-43).

The district court's erroneous conclusion otherwise is based on a conclusion that "there appears at least *a possibility* that if the midazolam does not operate as defendants predict and instead has the ability to sedate the inmate quickly but not for a duration necessary to complete all injections contemplated by the Arkansas Midazolam Protocol, the inmate *may* regain some level of consciousness during the process before the second and third drugs are administered." (DE 54 at 72-73) (emphasis added). But a *possibility* is not the *high probability* needed to sustain a preliminary injunction under the "sure or very likely" *Baze* and *Glossip* standard.

*Third*, Appellees' focus on the district court's conclusion that there was mixed evidence in the published literature concerning the effects of certain doses of midazolam on humans (Res. Br. 24-25) is misplaced. Indeed, contrary to Appellees' argument, the fact that the district court correctly determined that the literature is mixed actually establishes that Appellees—who had the burden in seeking an injunction under the *Glossip* and *Baze* test—cannot show that

Arkansas's lethal injection protocol is sure or very likely to cause severe pain as required by *Glossip* and *Baze*.[4] Appellees' expert, Dr. Zivot, even conceded that everyone was engaging in nothing more than rank speculation about whether 500 mg of midazolam does or does not render one unconscious or in a state of anesthesia:

> Q. ***You cannot say with any degree of scientific certainty that an inmate administered a 500-milligram dose of midazolam is sure or very likely to suffer severe pain when they die, can you***?
>
> A. There is no scientific study that looks at 500 milligrams injections. ***We're all just speculating based on other things***.
>
> Q. So the answer is, no, you cannot say within a reasonable degree of medical or scientific certainty that an inmate administered 500 milligrams of midazolam would suffer severe pain?
>
> A. It's not a medical or scientific question that you're asking me.

(Tr. 967) (emphasis added).

*Fourth*, Appellees (and the district court in its opinion) latch on to selective excerpts of defense expert testimony from another case about the so-called "ceiling effect" of midazolam. (DE 54 at 62; Res. Br. at 25-28). They grossly misstate the

[4] As set forth in Appellants' opening brief, this expert evidence, at best, cut 50-50.

record. What Dr. Antognini was actually referring to was the *ability of the EEG machine* to register deeper levels of anesthesia after a 20 to 25 mg dose of midazolam due to the drug's pharmacological properties. Dr. Antognini never testified that the drug itself would fail to increase its effects with a higher dose. To the contrary, Dr. Antognini explained that just because the EEG may stop measuring the depth of anesthesia with midazolam does not mean that the drug itself has a ceiling effect or that you cannot achieve the anesthesia that you need to do a painful procedure. (Tr. 1051-52).

Appellees' claimed 20-25 mg "ceiling effect" dose as shown on the EEG is contracted by Dr. Stevens's own experiment that showed that the ceiling effect dose as 228 mg (DE 2 at 233). Appellees' claim is also contrary to undisputed expert testimony showing that up to 60 mg of midazolam is used clinically for the induction of anesthesia in overweight or resistant patients—the very same use approved by the FDA and described in the package insert (DE 28-6 at 6; Tr. 998-99). The district court (and Appellees) utterly failed to appreciate the critical distinction between a *measurable* ceiling effect on an EEG machine and the *actual clinical ability* to use the drug as an anesthetic in short, painful medical procedures.

*Fifth*, the district court's conclusion that midazolam has "a ceiling effect" does not demonstrate that Appellees have carried their burden (Res. Br. 27) because the district court never determined—and could not determine—at what

dose that effect occurs. To the contrary, as noted above, the district court explicitly acknowledged the lack of clarity in the literature and that there were no published studies identifying where such an effect allegedly occurred. Indeed, as described above, Appellees' anesthesiology expert Dr. Zivot admitted that the question of where the ceiling affect occurs is unanswerable at this point and any answer would be speculation. Appellees' pharmacological expert, Dr. Stevens, admitted in his report that research he did indicated that effect would occur at 200+ mgs of midazolam. And, as noted above, the experts are essentially unanimous that, whatever the ceiling effect dosage— assuming there is one—midazolam can be used to induce anesthesia.

*Sixth*, Appellees point to Florida autopsy reports to support their theory that midazolam executions are painful ***if*** the anesthetic does not work as intended. But, when repeatedly pressed, Appellees' own experts could not explain how the autopsy reports had any bearing on the critical issue before this Court: whether midazolam can render an inmate unconscious and insensate to severe pain in lethal-injection executions. When asked what his basis was for his opinion that inmates executed using midazolam in other states suffered, he answered that it was "[d]rawn from my capacity for empathy." (Tr. 1106). Dr. Zivot could not point to any evidence (other than the irrelevant autopsy reports) that any execution in Florida was "botched" using the same drug protocol as Arkansas. (Tr. 908-09).

At bottom, Appellees' entire argument concerning midazolam's use amounts to nothing more than a claim that the Eighth Amendment requires a state to use the particular anesthesia method they consider to be best or clinically appropriate in a medical setting. For instance, while Appellees concede that their own expert admitted that midazolam can be used for the induction of anesthesia and used as the sole method for extremely painful and complex procedures—including endotracheal intubation—they argue that is constitutionally insufficient because their expert believed doing so would be "poor medicine." Res. Br. 22-23. But the mere fact that their expert would prefer to use different methodologies in a clinical setting does not demonstrate a constitutional violation.

F. Appellees failed to show a readily implementable alternative execution method.

Just as Appellees do not show a likelihood of being able to prove the midazolam protocol is sure or very likely to cause serious illness and needless suffering, they do not show a likelihood of being able to prove a "known and available" method of execution that is "feasible, readily implemented, and in fact would significantly reduce a substantial risk of severe pain." Here, again, they attempt to water down the *Glossip* and *Baze* test.

*First*, Appellees claim that this Court must defer to the district court's ruling on the second prong unless it is clearly erroneous. Res. Br. 34-35. That is not correct. The district court's conclusion as to whether there was a "known and

available" alternative method of execution is based on a *legally flawed* interpretation of the meaning of the phrase "known and available" as used in *Baze* and *Glossip*. This Court should review that legal interpretation *de novo*. Assuming this Court adopts the Eleventh Circuit test or a test like it—as opposed to the *much* looser Sixth Circuit test that the district court erroneously adopted—then the Court should not give any deference to the district court's conclusion regarding whether a particular alternative method of execution is "known and available."

*Second*, Appellees assert that this Court should adopt the Sixth Circuit test instead of the Eleventh Circuit test for "availability." Appellees do not say much beyond what the district court said in its opinion. But it is noteworthy that they entirely fail to respond to Appellants' point that they successfully asked an investigator to find an entity willing to sell sevoflourene to Arkansas and thus could have (but chose not to) ask the investigator to find an entity willing to sell other drugs (like pentobarbital) to Arkansas. Why did Appellees not even ask their investigator try to find an entity willing to sell manufactured or compounded pentobarbital to Arkansas? They did not do so because they knew the response they would get—a resounding no. Appellees argue that they should not have to bear the *sole* burden of identifying alternative methods of execution, Res. Br. 36,

but the *Baze* and *Glossip* test squarely put this burden on them in order to prove a constitutional violation.[5]

*Third*, Appellees assert that the potential alternative method of execution they propose may be a method of execution never used in the history of the country (or the world). Res. Br. 39. Arkansas argued that such an untried alternative could not be considered a "known" alternative, and Appellees respond that *Glossip* "contains no 'tried and true requirement.'" *Id*. But Appellees fail to acknowledge that *Baze* made clear such a requirement was part of the "known and available" alternative test. *See Baze*, 553 U.S. at 41 ("failure to adopt untried and untested alternatives" does not support constitutional violation).

*Fourth*, Appellees wrongly assert that the question is whether Arkansas "could implement a less painful method of execution after a good-faith effort to do so[.]" Res. Br. 36. This is a perfect example of the incredibly low threshold that Appellees are trying to fit into the far stricter *Baze* and *Glossip* standard. The actual test from *Baze* and *Glossip* would not be met by "a less painful" alternative

[5] Appellees argue that the confidentiality statute should somehow shift the burden, but provide no reason why. The existence of Arkansas's partial confidentiality statute (the identities of the manufacturers and suppliers are subject to disclosure in litigation) does not automatically mean Arkansas can obtain drugs from manufacturers or suppliers who do not want to sell them for lethal injection. Indeed, just days ago, a manufacturer sued Arkansas because it believed the state intended to use its drugs to perform executions.

method of execution. Rather, it would only be met by an alternative method that "would in fact ***significantly reduce*** a substantial risk of severe pain."

Under the correct, strict standards of *Baze* and *Glossip*, Appellees have failed to meet their burden to show a likelihood of success in identifying a "known and available" method of execution that is "feasible, readily implemented, and in fact would significantly reduce a substantial risk of severe pain."

- Appellees do not and cannot deny that two of their proposed alternatives—sevoflourene and nitrogen hypoxia—have never been used before anywhere in this country (or the world) as an execution method. "[U]ntried and untested" alternatives do not satisfy *Glossip*'s demanding second prong. *See Baze*, 553 U.S. at 41 ("failure to adopt untried and untested alternatives" does not support constitutional violation).
- In light of the Supreme Court's explicit acknowledgement in *Glossip* that pentobarbital has become unavailable because anti-death penalty advocates have successfully lobbied manufacturers to prevent its sale for use in executions, the Appellees' suggestion that Director Kelly and Deputy Director Griffin could actually obtain pentobarbital if they just tried harder is unconvincing at best. *See Glossip*, 135 S.Ct. at 2733. Appellees point to Dr. Buffington's speculation that there may be some compounder in the United States willing to sell to Arkansas, *see* Res. Br. 37, but Appellees leave out

the fact that Buffington also testified that the only entities he thought might sell it (to another state) refused his request. (Tr. 688.) Appellees also concede that Director Kelly attempted to get pentobarbital in 2015 and failed, but to excuse that fact, Appellees seem to imply that the Constitution requires Arkansas to continuously (or at least once a year) try to obtain pentobarbital. Appellees additionally claim the efforts made by Ms. Kelly and Mr. Griffin were not good-faith efforts, but they never suggest what they think is required for "good faith efforts." And importantly, the district court did not conclude that Arkansas failed to perform good-faith efforts. Good-faith simply means routine efforts, not herculean efforts nor continuous searches.

- Try as they might to hide it in a footnote, *see* Res. Br. at 37 n.5, Appellees cannot explain away their previous position (in the state case challenging the midazolam protocol) that compounded drugs, including compounded pentobarbital, are so risky that they violate the Eighth Amendment. This is akin to claiming that Arkansas acted wantonly by not adopting a method of execution that an inmate just two years ago told them was cruel and unusual. Moreover, while Appellees now suggest that compounded drugs would be okay if proper safeguards were imposed, they made no similar representation in their 2015-2016 state court filings. To the contrary, Appellees made very

clear that—at least at that time—they believed compounded drugs were unsafe, had grave risks, and were unconstitutional, period. *See* DE 28-18, at 20-26 (¶¶ 51-56).

- Appellees claim that Arkansas does not contest the availability of the firing squad. Nothing could be further from the truth. Indeed, no one testified that Arkansas has the building necessary for the firing squad, or could easily retrofit a building for this purpose. Likewise, no one testified that Arkansas currently has expert marksman who are willing to be part of the firing squad. As the Arkansas Supreme Court concluded in *Kelley v. Johson*, especially in light of the absence of any history of the firing squad being authorized or used in Arkansas, it cannot be considered readily available on this record. Moreover, and perhaps more importantly, Appellees' response implicitly concedes that Dr. Groner did not opine on how often the firing squad would perfectly hit its mark on the first volley. And as noted in Appellants' opening brief, Dr. Groner conceded that if the firing squad did not perfectly hit their mark (the left ventricle), significant pain would ensue. Additionally, while appellees claim that the firing squad would be "less painful than the current [midazolam] protocol," Res. Br. 40, under *Glossip* they must prove far more. Indeed, under *Glossip*, Appellees must show that the risk of severe pain would be *significantly* lower. And without any

evidence as to how often the firing squad hit their mark perfectly or evidence as to how long consciousness persists after the first volley of shots,

Appellees cannot meet their burden of showing that this method of execution would *substantially* lessen a demonstrated risk of severe pain. *See Glossip*, 135 S. Ct. 2737. *See also* Testimony of Dr. Zivot (Tr 912) ("it certainly would seem to be painful").

## IV. The district court did not abuse its discretion in concluding that Appellees Prisoners failed to demonstrate a significant likelihood of success on their evolving standards of decency claim.

A. Introduction / Background

Plaintiffs-Appellees contended below that the "compressed" execution schedule violates the Eighth Amendment under the "evolving standards of decency" test. DE 2-2 at 25, 33. The district court correctly denied Appellees' request for a preliminary injunction on this claim (DE 54 at 53-54), because the Eighth Amendment's prohibition on "cruel and unusual" punishment does not contain within it a constitutional directive about how many executions can be held on one date or within in a certain number of days. Although Appellees have filed a notice of cross-appeal on this claim below (DE 57) and this Court has docketed the cross-appeal under a different case number (17-1805), Appellees have included a section in their *Response to Emergency Motion to Vacate Stay of Execution / Preliminary Injunction* (Entry ID 4524788) urging the Court to hold that they are

likely to succeed on the merits of the evolving standards of decency claim. *Id*. at 42-46.

The Arkansas Governor scheduled Appellees' executions as follows: Don Davis and Bruce Ward on April 17, 2017; Stacey Johnson and Ledell Lee on April 20, 2017; Marcel Williams and Jack Jones on April 24, 2017; and Jason McGehee and Kenneth Williams on April 27, 2017. DE 54 at 9. Appellee McGehee's execution has been stayed in a separate action before the district court. The State has not appealed the stay of McGehee's execution. *Lee v. Hutchinson*, No. 4:17-cv-00194 (E.D. Ark. Apr. 6, 2017). Appellee Ward's execution has been stayed in a separate action before the Arkansas Supreme Court. *Ward v. Hutchinson*, No. CV-17-291 (Ark. Apr. 14, 2017). The State has filed a motion requesting reconsideration of Ward's stay by the Arkansas Supreme Court.

The State argued below that Appellees each lack standing to pursue a claim that the scheduling of *other executions* near in time to their own violates the Eighth Amendment. DE 27 at 34-36. The State explained that the right to be free from cruel and unusual punishment is personal and applies to the circumstances of a state's execution of the *individual* to be executed—and that Appellees' claim about the global execution schedule is the sort of generalized grievance that does not give rise to Article III standing. *Id*. The district court found that Appellees have standing to bring this claim (and subsequently declined to grant a preliminary

injunction on the claim). DE 53 at 21-23. Although the State has not appealed the district court's standing determination (because the district court did not issue an injunction on this claim), this Court should affirm the district court's denial of a preliminary injunction on Appellees' evolving standards of decency claim for lack of standing. *See Hendricks v. Lock*, 238 F.3d 985, 987 (8th Cir. 2001) ("The rule is well established that a decision of a lower court can be affirmed if the result is correct although the lower court relied upon a wrong ground or gave a wrong reason.") (internal quotations and citations omitted). Alternatively, the proper course may well be to dismiss the claim. *See Pucket v. Hot Springs Sch. Dist. No. 23-2*, 526 F.3d 1151, 1156-57 (8th Cir. 2008) ("Standing . . . is a jurisdictional requirement, and thus 'can be raised by the court sua sponte at any time during the litigation.'") (quoting *Delorme v. U.S.*, 354 F.3d 810, 815 (8th Cir. 2004)).

The State asked the district court to dismiss Appellees' evolving standards of decency claim because Appellees offered no legal authority supporting the possibility that the Eighth Amendment applies to a particular execution schedule, and because this component of the Eighth Amendment is *personal* and *unique* to the individual capital defendant to be executed, so the claim fails as a matter of law. DE 27 at 36-39. The district court declined to dismiss the claim outright, but noted in its order on the State's motion to dismiss that "the Court has serious doubts about this claim[.]" DE 53 at 25.

In its subsequent 101-page *Preliminary Injunction Order*, the district court disposed of Appellees' evolving standards of decency claim in a single paragraph:

> The Court finds that plaintiffs have not established that there is a significant possibility that they will succeed on their evolving standards of decency claim. As the Court noted in its Order on defendants' motion to dismiss, the Supreme Court "affirmed the necessity of referring to 'the evolving standards of decency that mark the progress of a maturing society' to determine which punishments are so disproportionate as to be cruel and unusual." *Roper v. Simmons*, 543 U.S. 551, 561 (2005) (quoting *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958) (plurality opinion)). However, like the United States district court for the Southern District of Ohio recently determined in a method of execution case, this Court determines that neither the Supreme Court nor the Eighth Circuit Court of Appeals is prepared to recognize an evolving standards of decency claim in this context, meaning plaintiffs are unlikely to prevail on the merits of this claim. *In re Ohio Execution Protocol Litig.*, No. 2:11-CV-1016, 2017 WL 378690, at *6 (S.D. Ohio Jan. 26, 2017), *aff'd sub nom. In re Ohio Execution Protocol*, No. 17-3076, 2017 WL 1279282 (6th Cir. Apr. 6, 2017). Therefore, to the extent that plaintiffs move for a preliminary injunction on this claim, the Court denies their motion.

DE 54 at 53-54 (quotations and citations in original).

The State is prepared for these executions and has devoted significant time and resources to this solemn endeavor. DE 28-1, ¶¶ 33-34. Appellees' evolving standards of decency claim fails as a matter of law, and Appellees failed to offer anything aside from their own fantasies about what constitutes an evolving standard of decency under the Eighth Amendment to support their claim. The district court's decision on the evolving standards of decency claim was correct and should be affirmed.

B. Argument

Appellees offer no legal support whatsoever for their evolving standards of decency argument. This is unsurprising because no court has ever held or even intimated the possibility that the Eighth Amendment applies to a particular execution schedule. Appellees can cite no case where any court has ever come anywhere close to concluding that the constitutional prohibition against cruel and unusual punishment includes a right to be the only person executed on a given day or in a given week or under any particular schedule. This Court should not take it upon itself to be the first.

Appellees' evolving standards of decency challenge against the execution schedule runs headlong into an insurmountable obstacle—the "evolving standards of decency that mark the progress of a maturing society" protected by the Eighth

Amendment under *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) are *personal* and *unique* to the individual capital defendant to be executed and have nothing to do with surrounding circumstances such as whether other capital defendants are scheduled to be executed or not. *See, e.g.*, *Callins v. Collins*, 510 U.S. 1141, 1149 (1994) (Blackmun, J., dissenting) (evolving standards of decency requires "due consideration of the *uniqueness of each individual defendant* when imposing society's ultimate penalty") (emphasis added); *Washington v. Watkins*, 655 F.2d 1346, 1373 n.52 (5th Cir. 1981) (noting that evolving standards of decency "ensures that an *individual* death sentence is consistent with public attitudes and evolving standards of decency" and "ensures that *capital defendants are treated as unique human beings*, with appropriate consideration given to whether imposition of the death penalty *in the particular case* would further the retributive and deterrent values in whose absence capital punishment would not comport with the dignity of man") (emphases added). To be sure, the execution *method* to be applied to an individual capital defendant must meet the "evolving standards of decency" requirement—but surrounding and fully extraneous circumstances such as whether *other* capital defendants are scheduled to be executed are completely irrelevant to the inquiry.

Appellees sidestep this point in their response, though it was raised below. To the extent Appellees offer any responsive argument, they merely assert that

somehow the execution schedule violates "dignity of the person" as stated in *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008) and that their claim is somehow "akin" to the claims in *Atkins v. Virginia*, 536 U.S. 304 (2002) and *Roper v. Simmons*, 543 U.S. 551 (2005). Res. Br. 43, 46. But *Kennedy* held that the Eighth Amendment prohibits the death penalty for the rape of a child where the crime did not result, and was not intended to result, in the death of the victim (554 U.S. at 420-21)—and *Roper* and *Atkins* held that the executions of juveniles and mentally retarded persons violate the Eighth Amendment because the offenders have diminished personal responsibility for the crime. 543 U.S. at 571-73; 536 U.S. at 318, 320. All of these cases involved classes offenders and culpability concerns related to the type of crime and proportionality of punishment. These cases have nothing to do with execution schedules, and Appellees' evolving standards of decency claim has nothing to do with their crimes or proportionality of punishment. *Kennedy*, *Atkins*, and *Roper* do not support Appellees' claim that the execution schedule violates evolving standards of decency—Appellees have still offered no authority supporting their claim.

Moreover, Appellees' complaints about multiple executions on the same day or in the same week are unfounded because scheduling multiple executions on the same day or in the same week is not some unprecedented or ludicrous notion—in fact it is and has been commonplace, especially in Arkansas. Publicly-available

sources (of which the Court can take judicial notice)—like the searchable execution database on the website for the Death Penalty Information Center (DPIC) (https://deathpenaltyinfo.org/views-executions)[6]—show that numerous states including Arkansas have held multiple executions on the same day, on consecutive days, and two and three days apart. The DPIC includes 27 executions held in Arkansas since 1990, and even in that small sample size, there are *four* occasions where multiple executions have been held on the same day in Arkansas: two lethal-injection executions on May 11, 1994; *three* lethal-injection executions on August 3, 1994; *three* lethal-injection executions on January 8, 1997; and two lethal-injection executions on September 8, 1999.

*Ten* of the last 27 executions in Arkansas—over a third of the executions in Arkansas since 1990—have occurred on the same day as another execution. The testimony of former ADC Director Larry Norris, who oversaw those executions as ADC Director, confirms that all of these lethal-injection executions were performed successfully and without any Eighth-Amendment violation related to scheduling multiple executions on the same day or otherwise. DE 28-2 at ¶¶ 13-14, 20-23, 27; Tr. 709-17. The testimony of current ADC Deputy Director Dale Reed—who was at that time the Warden of the Cummins Unit and was in charge of the ten executions scheduled as multiple executions—confirms that the lethal-

[6] Printed pages of the DPIC information are included in the record as attachments to ADC Director Kelley's affidavit, DE 28-1.

injection executions were performed successfully and without any problems related to the scheduling of multiple executions together. Tr. 539-544. The evidence in this case confirms that the execution schedule challenged by Appellees is consistent with the standards of decency for executions in Arkansas—and there is no reason to believe the ADC cannot successfully complete the scheduled executions as it has done many times in the past.

The DPIC information, *supra*, also shows that other states have held multiple executions on the same day on many occasions: two lethal-injection executions by Texas on January 31, 1995; two lethal-injection executions by Illinois on March 22, 1995; two lethal-injection executions by Texas on June 4, 1997 (as well as lethal-injection executions by Texas on May 28, June 2, June 3, June 11, June 16, and June 17, 1997—*eight executions by Texas in a 22-day period*); two lethal-injection executions by Illinois on November 19, 1997; two lethal-injection executions by South Carolina on December 4, 1998; and two lethal-injection executions by Texas on August 9, 2000. Moreover, on numerous occasions, executions in Florida, Georgia, Louisiana, Mississippi, Oklahoma, South Carolina, Texas, and Virginia have been carried out within days of other executions—often on consecutive days. The execution schedule at issue in this case is not some outlier that offends basic notions of decency but is, in fact, entirely consistent with executions that have been taking place in Arkansas and

nationwide for decades. Appellees' assertions that "two executions a day" was common "[m]ore than a half century ago" but that "our society has long ago abandoned such barbarism" (Res. Br. 43) is simply false.

Appellees want this Court to hold that the evolving standard of decency has changed over the last few years with respect to execution schedules, but Appellees offer no authority or evidence to support such a conclusion beyond the fact that there have been no multiple executions since 2000 and the fact that some states have acknowledged that debriefing of staff is important for executions. Res. Br. 44-45. *First*, the fact that a state or states adopt a policy or recognize a government interest does not suddenly constitutionalize the notion behind the policy or interest. *Second*, the recent trends are mostly a product of the fact that executions *as a whole* have declined in recent years. Arkansas has not had an execution since 2005, so of course Arkansas has not had multiple executions in the same day since before 2005. Many other states have experienced declines in executions, and there are simply far fewer executions nationwide in recent years, so of course multiple executions are less common and executions are not scheduled closely together as often. As much as Appellees would like a rule that executions must be spaced days, weeks, months, or years apart, a decline in the number of executions does not mean that evolving standards of decency suddenly prohibits executions on the same day or within days or weeks of other executions.

Appellees' concern about debriefing of staff (Res. Br. 44-45) is completely undermined by the evidence in this case. Unrebutted evidence established that Arkansas has recognized the importance of *mandatory* debriefing of *all staff involved in executions* and has held such debriefing for *all executions* over the last several decades. R. 549-50 (Dale Reed, Warden of the Cummins Unit at the time of many recent Arkansas executions including the *four* dates of multiple executions: "[W]e had a mandatory debriefing after every one . . . It was effective, in my opinion. It's an effective process."); DE 28-2 at ¶ 25 (former ADC Director Larry Norris: "In my experience, the debriefing process was a formal one, and it was mandatory. Participants were afforded an opportunity to talk about their concerns, feelings, and express their emotions as much as they wanted to. Additional services were available to staff if requested."). And unrebutted evidence established that the State continues to recognize the importance of staff debriefing, and mandatory debriefing will be held after each day of executions in the current execution schedule. DE 28-1 at ¶ 28 (ADC Director Wendy Kelley: "A debriefing with mental health professionals is conducted with all participants.").

The publicly-available sources of information about execution schedules are buttressed by the testimony offered by ADC Director Wendy Kelley below. Of 196 executions in Arkansas since 1913, 84 condemned inmates have been executed on the same night as at least one other inmate, including multiple occasions where

three or four inmates have been executed on the same night. DE 28-1, ¶ 15. This expanded information might show that multiple executions are becoming less common in Arkansas (as they are nationwide, because executions as a whole have declined)—but a declining trend does not mean that multiple executions suddenly violate evolving standards of decency under the Eighth Amendment.

Scheduling executions on the same day or within days of other executions is commonplace in Arkansas and other states that perform executions, and does not violate evolving standards of decency under the Eighth Amendment. Appellees are trying to constitutionalize policy and have the Court serve as a reviewer of best practices—directly contrary to the courts' well-settled deference to executive-branch action, especially in the prison context. *See, e.g.*, *Bell v. Wolfish*, 441 U.S. 520, 547-48 (1979) (discussing the "wide-ranging deference in the adoption and execution of policies and practices" afforded by courts to prison officials and the Executive Branch and citing cases). But if the Court takes that leap, what rule should the Court command from the judicial branch? Executions cannot occur on the same day? Executions cannot occur on consecutive days? Executions must be set a week apart or a month apart? How is this Court to decide such a question except for simply replacing the Executive Branch's policy judgment with its own? The district court declined to step in the place of the Arkansas legislature and the ADC, and so should this Court.

Appellees' logic—that multiple executions on the same day or within days of other executions violates evolving standards of decency because it is less common than in the past—would mean that the death penalty *itself* violates the Eighth Amendment because there are fewer executions under *any* schedule than there were 10 and 20 years ago. This is obviously not the law because, as noted by the district court in the same order where the district court declined to issue an injunction on Appellees' evolving standards of decency claim, "it is settled that capital punishment is constitutional." *Glossip*, 135 S. Ct. at 2732. This Court should not accept Appellees' invitation to transform the evolving standards of decency test into a judicial moratorium on capital punishment.

## CONCLUSION

No matter what excuse Appellees attempt to make, they cannot avoid the undisputed fact that they could have brought a federal constitutional challenge to Arkansas's midazolam protocol—including challenging items aside from the drugs used—at any time after the protocol was adopted in early 2015. Indeed, blatantly attempting to manipulate the judicial system and shield themselves from justice, Appellees *brought* a federal constitutional challenge to Arkansas's lethal injection protocol in 2015 and later *voluntarily dropped* that challenge to avoid litigating in federal court.

Because Appellees intentionally—and strategically—sat on their alleged federal rights for years, they are not entitled to a stay that would allow them to litigate claims that could have been calmly and fully litigated if they had pursued them years earlier. Indeed, it would violate basic principles of equity and the Supreme Court's repeated admonishment that death row inmates cannot sit on their rights and then demand a stay to litigate claims on the eve of their executions. And sustaining stays issued in response to such tactics would only encourage other inmates to do what Appellees have done here.

As is oft said, justice delayed is justice denied.[7] Here, as a result of decades of strategic litigation, justice has long been denied to Appellees' victims and their loved ones. Now, the time has come to see that justice done.

[7] "A sense of confidence in the courts is essential to maintain the fabric of ordered liberty for a free people and three things could destroy that confidence and do incalculable damage to society: that people come to believe that inefficiency and delay will drain even a just judgment of its value; that people who have long been exploited in the smaller transactions of daily life come to believe that courts cannot vindicate their legal rights from fraud and over-reaching; that people come to believe the law—in the larger sense—cannot fulfill its primary function to protect them and their families in their homes, at their work, and on the public streets." Chief Justice Burger, "What's Wrong With the Courts: The Chief Justice Speaks Out", U.S. News & World Report (vol. 69, No. 8, Aug. 24, 1970) 68, 71 (address to ABA meeting, Aug. 10, 1970).

For those reasons, the preliminary injunction / stay of execution should be vacated.

Respectfully submitted,

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April 17, 2017

## CERTIFICATE OF SERVICE

I, Lee Rudofsky, hereby certify that on April 15, 2017, I filed the foregoing with the Clerk of the Court via email and also provided the foregoing via email to the following:

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## CERTIFICATE OF COMPLIANCE

The undersigned hereby states that the applicable portions of this motion contain 9,827words in proportionally sized 14-point Times New Roman font. The brief was prepared in Microsoft Office Word 2010. It is overlengthen pursuant to the reasons explained in the accompanying motion. The electronic version of the brief has been scanned for viruses and is virus-free.

*/s/ Lee Rudofsky*
Lee Rudofsky