CAPITAL CASE.
EXECUTION SCHEDULED FOR APRIL 24, 2017

IN THE UNITED STATES SUPREME COURT

JACK HAROLD JONES PLAINTIFF/APPELLANT

v.

WENDY KELLEY, Director, Arkansas Department of Correction; RORY GRIFFIN, Deputy Director, Arkansas Department of Correction; and DALE REED, Chief Deputy Director, Arkansas Department of Correction, DEFENDANTS/APPELLEES

APPLICATION FOR STAY OF EXECUTION

Comes Jack Harold Jones, and for his Application for Stay of Execution states:

1. Jack Harold Jones hereby seeks a stay of execution so that this Court can review by certiorari filed in the normal course of business the denial of a motion for preliminary injunction (i.e. stay of execution) denied April 24, 2017 by the United States Court of Appeals for the Eighth Circuit.

2. In addition to being part of a group of death-sentenced inmates making a facial challenge to Arkansas's midazolam protocol for execution,[1] Jones also filed an

[1] McGehee et al. v. Hutchinson et al. 4:17-cv-00179-KGB in the District Court, Hutchinson et al, 17-1805 in the Eighth Circuit.

as-applied challenge in the U.S. District Court for the Eastern District of Arkansas. Jones v. Kelley et al..5:17-cv-00111-KGB. He also sought a preliminary injunction.

3. The essence of the as-applied challenge, as reflected in the complaint in the District Court, is that because of his diabetes, hypertension and numerous narcotics prescribed for him for years, he is likely to be either not rendered unconscious and thus suffer a painful death in violation of the Eighth Amendment, or be left alive but brain damaged.

4. The District Court denied a preliminary injunction against execution on April 21. Jones then sought a stay in the Eighth Circuit. That was denied on April 24. Jones now seeks a stay of execution in this Court in order to be able to petition for writ of certiorari from that denial.

5. The District Court and the Eighth Circuit erred in holding that Jones had delayed too long to bring the as-applied case, that he had engaged in improper claim splitting and had not made or proved sufficient allegations to entitle him to a preliminary injunction staying the execution. The Eighth Circuit appears to have ignored several statements by the District Court in making its decision on the preliminary injunction. Specifically, the District Court said in the hearing on the motion for preliminary injunction that it would take into account the record made in McGehee. (Hrg. at 4) Despite that, the Eighth Circuit appears to have held that

Jones was restricted to the evidence presented in the April 21 hearing. [2]

STANDARD FOR A STAY OF EXECUTION PENDING APPEAL

6. In *Barefoot v. Estelle*, 463 U.S. 880 (1983), the Supreme Court declared that "if a court of appeals is unable to resolve the merits of an appeal before the scheduled date of execution, the petitioner is entitled to a stay of execution to permit due consideration of the merits." Id. at 889. So long as a claim is not frivolous and entirely without merit, a stay is warranted. Id. at 895.

7. A court may grant a stay upon consideration of four non-dispositive factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 426 (2009). The irrevocable nature of the looming execution is a "proper consideration" in deciding whether to grant a stay. Barefoot, 463 U.S. at 893. Other equitable factors may be relevant. *Hill v. McDonough*, 547 U.S. 573, 584 (2006).

8. A stay of execution pending appeal is not the same as a preliminary injunction: a stay "simply suspends judicial alteration of the status quo." *Nken*, 556

[2] For example, the Eighth Circuit said that simultaneous setting of execution dates for three of counsel's clients would not be considered here, although it was a large part of the McGehee hearing.

U.S. at 429 (2009). The primary function of a preliminary injunction, by contrast, is to stop an actor's conduct to prevent the irreparable loss of rights until the merits of a case can be adjudicated. Id. at 429.

STATEMENT OF THE CASE

9. This appeal stems from an "as-applied" challenge to Arkansas's lethal-injection method. Jack Harold Jones has been housed on Death Row since 1996. He has poorly controlled diabetes on which he is insulin-dependent, hypertension, neuropathy and has suffered the amputation of one leg just below the knee. Additionally, as a result of spinal problems, he has been on heavy doses of Methadone and Gabapentin, as well as numerous other drugs, for years.

10. On February 27, 2017, Governor Asa Hutchinson set his execution to occur on Monday, April 24, 2017. Governor Hutchinson also set seven other men for execution. Executions were scheduled to occur two per day on April 17, 20, 24, and 27.

11. On March 27, 2017, those men and one other filed suit in federal district court for the Eastern District of Arkansas challenging Arkansas's lethal injection method and the execution schedule. See *McGehee v. Hutchinson*, No. 4:17-cv-179 (E.D. Ark). The district court held a four-day hearing in which evidence was taken regarding the function of the drugs used by the Department of Correction, other

executions using the same method, and the burden of the execution schedule on counsel for the inmates.

12. On April 15, 2017, the district court issued a preliminary injunction in the facial challenge, staying the executions of eight of the nine plaintiffs, including Williams. On April 20, 2017, the Eighth Circuit vacated the preliminary injunctions. *McGehee v. Hutchinson*, No. 17-1804 (8th Cir. 2017). The United States Supreme Court denied certiorari later that day. *McGehee v. Hutchinson*, 580 U.S. ____ (2017) (No. 16-8770).

13. On April 17, 2017, Jones filed the underlying complaint. (Doc. 2 in the Dist. Ct.) The complaint alleges that, because of his particular health problems, the lethal-injection protocol posed specific harm to him in that it would either maim him or cause him to suffer a tortuous death.. He supported his complaint with the declaration of Dr. Joel Zivot, who performed a physical examination of him on March 23, 2017. Dr. Zivot also reviewed Jones's medical records. Based on both, he determined that.

> Based on my review of Jack Jones's medical records and my physical exam, I believe that if the State of Arkansas attempts its lethal-injection protocol as written that it is unlikely that the State will succeed in killing Mr. Jones. The more likely result will be that he is left with disabling, irreversible injuries. Specifically, failure to

> adequately or promptly revive Mr. Jones in the setting of a failed execution attempt will result in permanent injury to Mr. Jones, including brain damage and other organ failure or injury. If the Arkansas lethal-injection protocol causes the death of Mr. Jones, the mechanism of that death will be hypoxia as a consequence of chemical paralysis. Mr. Jones will not be insensate after his Midazolam injection or he will suffer pulmonary edema. Mr. Jones will experience his death as choking and suffocating.

14. Dr. Zivot also noted:

> I am also particularly concerned because of Mr. Jones's prescriptions for Methadone and Gabapentin. Because of this combination of medications, I believe it is likely that he will resistant to the Midazolam and that the dosage contemplated in the protocol will not have the desired effect.

15. Jones also filed a a motion for a preliminary injunction preventing his execution before a full hearing on the merits could be had. (Doc. 8 in Dist Ct.)

16. On April 21, 2017, the district court held an evidentiary hearing to allow Jones to present evidence regarding his particular health conditions. Evidence was presented at the same hearing for an as-applied challenge brought by Marcel Williams, who is also scheduled to be executed on April 24, 2017. The district court ruled that it would consider the evidence from the *McGehee* hearing in making its determination in these matters. Later that same day, the district court entered an order

denying Jones's motion for a preliminary injunction. Doc. 24. The district court found that Jones was not diligent in bringing this action because he should have brought it with the *McGehee* complaint. The district court also found that, following this Court's ruling in *McGehee*, Jones had failed to establish a significant possibility of success under either of *Glossip's* two prongs.

17. On April 24, 2017 the Eighth Circuit denied Jones's Motion for Stay of Execution Pending Appeal. This application follows.

ARGUMENT

A. JONES MADE A SUBSTANTIAL SHOWING OF LIKELIHOOD OF SUCCESS ON THE MERITS.

18. A district court's decision to grant or deny a preliminary injunction under the abuse-of-discretion standard. *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 664 (2004). "An abuse of discretion occurs where the district court rests its conclusion on clearly erroneous factual findings or erroneous legal conclusions." *Lankford v. Sherman*, 451 F.3d 496, 503-04 (8th Cir. 2006); see also *Glossip v. Gross*, 135 S. Ct. 2726, 2739 (2015). "[A] finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Anderson v. City*

of Bessemer City, 470 U.S. 564, 573 (1985).

19. The district court erred by concluding that Jones was unlikely to show that the midazolam protocol-as applied to him-violates the Eighth Amendment. The Supreme Court has required prisoners challenging their method of execution under the Eighth Amendment to prove that there is a risk of future harm that is "'sure or very likely to cause serious illness and needless suffering' and give rise to 'sufficiently imminent dangers.'" *Baze v. Rees*, 553 U.S. 35, 50 (2008) (quoting *Helling v. McKinney*, 509 U.S. 25, 33, 34-35 (1993)). To prevail on an Eighth Amendment claim, the Prisoner must demonstrate a "'substantial risk of serious harm,' an 'objectively intolerable risk of harm.'" Id. (quoting *Farmer v. Brennan*, 511 U.S. 825, 842, 846, and n. 9 (1994)). As set forth below, Jones presented sufficient evidence, at this stage of the case, to establish a likelihood of success on the merits. It was clear error for the district court to hold otherwise.

1. Jones brought this action at the appropriate time and in the appropriate manner.

a. Jones brought his as-applied challenge at a reasonable time given the circumstances.

20. The district court assumed without deciding that an as-applied challenge ripens with the setting of an execution date. See Order, ECF No. 24 at 4 (citing *Ford v. Wainwright*, 477 U.S. 399 (1986)). Even under that assumption, the district court

found that Mr. Jones unreasonably delayed between the setting of his execution date on February 27, 2017, and the filing of suit on April 17, 2017. The court found that Mr. Jones could and should have brought his as applied claim earlier than April 17, 2017," either as part of the *McGehee* litigation or at the same time as the *McGehee* litigation. Such a finding, given the record of the burden on counsel before the court, was unreasonable.

21. The district court clearly erred by not accounting for the pressure the execution schedule created on counsel. During this time, Rosenzweig was sole counsel not only for Jones, but also for Stacey Johnson and Kenneth Williams, two of the other eight condemned men with execution dates. The Capital Habeas Unit, representing most of the others, has five or six lawyers on staff.

22. Lawrence Fox, an ethics expert from Yale University, testified that "[t]his is an impossible situation because the lawyers here cannot be competent because they don't have enough time, they don't have enough resources, they don't have enough energy to take on this responsibility." *McGehee* R. at 438. He continued that the representation of so many clients under warrant creates a conflict of interest for counsel, "[b]ecause every hour they allocate to one client is an hour taken away from another client when, in fact, a team that's larger than your team should be working day and night around the clock on behalf of one client while another team is working

round the clock on the second client, and so on." Id. at 441. As an experienced capital defense attorney testified, having two or three clients scheduled for execution within a week causes counsel to have to choose where to expend resources, in violation of their ethical obligations to counsel. *McGehee* R. at 194. The preparation of the complaint in the as-applied challenge took time and resources that counsel simply could not provide before April 11, 2017. Evidence of the stress caused by the schedule on the resources of counsel was before the district court. Given that evidence, it was clear error for the district court to find that Jones was dilatory for failing to bring his as-applied challenge earlier than April 17, 2017.

b. *Bucklew* allows for as-applied challenges to be considered separately from a facial challenge.

23. The district court erred in finding that Jones engaged in "claim splitting" by bringing his as-applied challenge separately from the facial challenge in *McGehee*. Order, ECF No. 24 at 3. The Court committed clear error by finding this a sufficient reason to deny a preliminary injunction when the same tack was taken in the *Bucklew* case. There, this Court found that the as-applied challenge was distinct from the facial challenge and declined to affirm the district court on a claim preclusion defense, explaining that "[i]t is by no means certain how the principle that applies claim preclusion to claims that could have been filed in the earlier action-part of the rule

against 'claim splitting'-would be applied in this unusual situation." *Bucklew v. Lombardi*, 783 F.3d 1120, 1127 & n.1 (8th Cir. 2015). Given *Bucklew*, it was reasonable for Jones to bring the claim that was specific to his own unique medical claim apart from the facial challenge in *McGehee*. It was clear error to deny a stay on the grounds that Jones had impermissibly engaged in "claim-splitting."

2. Jones Made a Sufficient Showing as to Both Prongs of *Glossip*.

24. The district court also held that Mr. Jones failed to make a sufficient showing that he could meet both prongs of the Glossip test to warrant a preliminary injunction. Doc. 24 a 5-6. *Glossip v. Gross*, 135 S. Ct. at 2737, requires a Plaintiff challenging the method of execution to prove that 1) "the State's lethal injection protocol creates a demonstrated risk of severe pain" and 2) that "the risk is substantial when compared to the known and available alternatives."

25. For the reasons that follow, Mr. Jones made a sufficient showing, at the preliminary injunction stage, for the district court to find that he was likely to establish both prongs. The district court's ruling to the contrary was clear error.

a. Mr. Jones presented evidence that his execution is sure or very likely to cause needless suffering.

26. The district court held a preliminary-injunction hearing on April 21, 2017. Jones presented testimony from Dr. Zivot, an anesthesiologist who evaluated Jones,

reviewed his medical records, and found that he was likely to either not die from the lethal injection protocol or to die from suffocation. Jones's medical records, which corroborated the existence of his multiple health problems, were introduced into evidence. For these reasons, as explained below, the district court committed clear error by concluding that "Mr. Jones fails to offer sufficient evidence in addition to the evidence already presented (in *McGehee*) to establish a significant possibility that he could successfully show that Arkansas's execution protocol, as applied to him, is sure or very likely to cause severe pain." Order, Doc. 24 at 8.

27. At the preliminary injunction hearing Dr. Zivot testified as follows about Jones' s health conditions and how they will affect administration of the lethal-injection protocol:

- "Well, the issue with Mr. Jones has several components. Chiefly, his chronic pain has required that he is dosed daily with methadone, which is a long-acting narcotic, and gabapentin, which has two purposes. It has a role in treating neuropathic pain. It's also an antiseizure medication. Individuals who take chronic methadone and chronic gabapentin may experience a decreased sensitivity to drugs like midazolam. Maybe I should be a bit more strong and direct. Not 'may,' but 'will.' (Hrg. 70)

- ❑ "Why I think that is important here is, because the dose of midazolam that will be given to Mr. Jones, even though, as we have discussed, it's a larger dose than is normally given in a clinical setting, there is a real possibility that it will still be ineffective." (Hrg. 70-71)
- ❑ "Mr. Jones is on a significant amount of methadone and a very large dose of gabapentin. His pain is such that a single agent is not sufficient to manage it, and so he requires two separate agents. My concern is that when he is given midazolam, and as we discussed before, in the setting of someone who has neuropathy in the way that the -- and I use this in quotations -- consciousness check is done, it may fail to be certain, because certainty is necessary that Mr. Jones is truly unresponsive in the way that their protocol demands. And so as his responsiveness will not be easy to evaluate, he next will be given vecuronium, and then his death will be as a consequence of suffocation where he is aware that he is suffocating, which I would contend is extremely painful and terrifying." (Hrg. 71)
- ❑ "I have some concern, additionally, in the setting of his diabetes, in a diabetic such as him, his blood sugar can fluctuate wildly, and I have some concern about the way that his blood sugar will be managed

around the time of his execution. A very low blood sugar will cause brain injury, which is not a part of the execution protocol. And so his medical conditions will need to be carefully monitored at all times. Mr. Jones probably has some sleep apnea as well. His STOP-BANG score is not as high as Mr. Williams', as we discussed, but it's still an issue. By itself, I don't know that I would consider it much, but in the setting of these other problems, I think it becomes germane." (Hrg. 71-72)

28. Director Kelley testified that on April 15, 2017, that she would conduct an expanded consciousness check as a result of the testimony she heard, although she did not identify what that might be. (Hrg. 81)

29. This bolsters Jones's allegation that there is a substantial risk of serious and imminent harm that is sure or very likely to occur"-a concession that distinguishes this case from *McGehee*. See *Bucklew*, 783 F.3d at 1127. The district court erred by not considering it as such.

30. For these reasons, the district court committed clear error by finding that Jones had not produced sufficient evidence to establish that he likely could establish the first prong of *Glossip*.

b. Jones presented evidence that there are feasible alternatives that reduce the risk of severe pain.

31. The district court held that Jones "failed to establish that there is a significant possibility that" an alternative method of execution is feasible. Order, Doc. 24 at 6. The district court found he had not offered any alternatives other than those which it considered itself bound to reject under *McGehee*.

i. *Glossip's* second prong does not apply in this as-applied challenge.

32. This suit challenges Arkansas's method of execution as it applies specifically to Jones . As previously articulated by Judge Bye, "a death row inmate in a facial challenge must identify an alternative method of execution, a death row inmate in an as-applied challenge is not required to do so." *Bucklew*, 783 F.3d at 1129 (Bye, J., concurring). Judge Bye's concurrence explained:

> In stating the pleading standard, the Court relies on cases involving facial challenges to the general constitutionality of a particular execution protocol. Those cases did not involve a death penalty inmate arguing his unique medical condition would substantially enhance the likelihood and severity of a painful death. It is my position a death row inmate alleging an Eighth Amendment as-applied challenge need not plead a readily available alternative method of execution. A state cannot be excused from taking into account a particular inmate's existing physical disability or health condition when assessing the propriety of its execution method.

33. Accordingly, the Court should hold that second prong of *Glossip* does not apply to an as-applied challenge and overturn the district court's conclusion that an

alternative method must be established.

ii. The district court erred in relying on this Court's decision in *McGehee*.

34. The district court relied exclusively on this Court's decision in McGehee v. Hutchinson, No. 17-1804 (8th Cir. 2017). The district court stated that this decision was "binding" on the district court. Order, Doc. 31 at 6. In *McGehee*, this Court held only that sevoflurane and nitrogen hypoxia "are not likely to emerge as more than a 'slightly or marginally safer alternative'" under Glossip due to their novelty as execution methods. *McGehee*, No. 17-1804, Slip Op. at 7. Even assuming *Glossip's* second prong applies here, however, the relative safety of these methods when compared to midazolam is an entirely different question in this as-applied challenge in light of Jones's unique and significant medical conditions. Thus, *McGehee* did not purport to consider-let alone decide-the factual question of whether other methods of execution, including novel methods, are materially and significantly safer in the unique circumstances of this case.

iii. Jones sufficiently alleged multiple available alternative methods in the district court that will be significantly safer in the unique circumstances of this case.

35. As set forth above, and assuming this requirement applies at all, the district court failed to analyze whether alternative methods are available and will

offer a meaningfully reduced likelihood of severe pain and suffering in Jones's execution. The following methods meet that test here:

36. ***Pentobarbital***. Mr. Williams showed that pentobarbital, whether in manufactured or compounded form, is available to the State with reasonable efforts. The evidence in McGehee showed that Missouri has obtained manufactured pentobarbital in the recent past (McGehee, No. 4:17-cv-179, ECF 2-2, Ex. 18); Texas and Georgia have used compounded pentobarbital in many recent executions. The State's own expert pharmacist, Daniel Buffington, testified that he believes it is available, a point he has also made in the past. McGehee, No. 4:17-cv-179, Tr. 695-700, 702. And the State's law shielding the drug suppliers has allowed the State to rapidly restock its supply of execution drugs. Id., Tr. 1226.

37. The State has made effectively no effort to obtain pentobarbital in any form. In *McGehee*, the district court heard from the two people responsible for obtaining execution drugs for the State. Approximately two years ago, ADC Director Wendy Kelley unsuccessfully sought a barbiturate from three sources. Id., Tr. at 1232. She has not tried again. Id., Tr. 1220. ADC Deputy Director Rory Griffin testified that he has never tried to obtain a barbiturate. Id., Tr. 809. Griffin admitted he has not tried to get pentobarbital because "I have the drugs I need to conduct the execution." Id., Tr. 872.

38. ***Sevoflurane***. The evidence in *McGehee* showed that sevoflurane is a gas that has the properties of a barbiturate and that it can cause death on its own. Id., Tr. 270-71. As such, it would cause less pain to Jones than midazolam. It is fairly simple to administer. Id., Pls' Ex. 16 at 35. And, as the State admitted, Plaintiffs have identified at least one supplier willing to sell it to the ADC for executions. Id., Tr. 212-16. So this alternative meets even the "immediately available" test the State advances. Jones also established that the machine necessary to administer it was for sale 35 miles away from Little Rock. See Resp. Mot. Dismiss at 11.

39. Sevoflurane would significantly reduce the risk of pain to Jones because of the possibility of compromise of IV access. Miller's Anesthesia, a leading textbook in the field, states that "[i]n adults, an inhaled induction of anesthesia is used when IV access is not available . . . . Sevoflurane is currently the most commonly used volatile anesthetic for inhalation induction . . . ." Miller's Anesthesia at 1656 (8th ed. 2015).

40. In addition, general anesthesia machines also include apnea monitors. "An important safety feature . . . . is an integrated carbon dioxide apnea alarm that cannot be disabled while the ventilator is in use." See Rajnish K. Jain and Srinivasan Swaminathan, Anaesthesia Ventilators, Indian J. Anaesth. (Sep.-Oct. 2013) (available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3821270/)

41. Jones has apnea. Tr. 17, Testimony of Dr. Joel Zivot; Jones presented testimony that "Even the minimal sedation from midazolam can cause airway obstruction and cessation of efficient breathing." Id. On the other hand, executing him using a machine that by design guards against a possible complication significantly reduces risk of serious harm.

42. ***Firing squad***. The district court heard and credited extensive evidence in *McGehee* regarding the availability and efficacy of the firing squad to facilitate a constitutional execution. In light of Jones's medical conditions, the firing squad does offer a method that is highly likely to cause significantly less pain and suffering than midazolam. See id., ECF 53 at 83-86. Particularly, where Jones has poor venous access and respiratory problems, execution by firing squad is likely to be the method that poses the least health-based risks.

iv. The District Court erred in not taking into consideration Appellees' Recent Statements and Actions Regarding Drug Acquisition.

43. The district court wholly deferred to this Court's decision in *McGehee* on the issue of drug availability. Order, Doc. No. 24 at 6. In that case, this Court held that the Appellants had not shown that Arkansas could acquire alternative drugs for lethal injection because, in part, "the difficulty of obtaining drugs for use in lethal injection is well documented." *McGehee v. Hutchinson*, Case No. 17-804 (Opinion

Apr. 17, 2017), Slip Op. at 7. However, it was established in the district court that since the evidence had closed in *McGehee*, the Appellee-Defendants had made statements in other legal matters that they were legally authorized to disregard the manufacturer's restriction on sale to prisons for the purpose of lethal injection. This new information should have recast the calculus as to drug availability.

44. The ADC argued in a suit filed by a drug manufacturer to replevy its drugs that the seller "failed to state any viable claim against the ADC." Emergency Motion for Immediate Stay 17, Arkansas v. McKesson Medical-Surgical, No. 17-317 (Ark. Sup. Ct. Apr. 20, 2017). In state court, ADC insisted that "[n]o valid legal theory supports McKesson's argument that a person who purchases a product must use that product in a certain way . . . ." Id. ADC prevailed on this argument, and the Arkansas Supreme Court vacated McKesson's injunction. Formal Order, Arkansas v. McKesson Medical-Surgical, No. 17-317 (Ark. Sup. Ct. Apr. 20, 2017). The ADC should not be allowed to argue in one court that the drug manufacturer's restrictions make the chemicals not available to them while arguing in another court that the restrictions do not limit them from using the drugs in any way they like. The district court erred in not considering this additional evidence that was not at issue in *McGehee*. See Resp.

Mot. Dismiss for Marcel Williams, Doc. No. 29, at 9-10.[3]

B. JONES WILL SUFFER IRREPARABLE HARM IF A STAY IS NOT GRANTED

45. "Irreparable harm occurs when a party has no adequate remedy at law." *Rogers Grp., Inc. v. City of Fayetteville*, Ark., 629 F.3d 784, 789 (8th Cir. 2010) (quotation omitted). Appellees will execute Jones if the Court does not grant preliminary relief. Execution is the ultimate irreparable harm. This requirement is satisfied.

C. THE BALANCE OF HARDSHIPS TILTS IN JONES'S FAVOR.

46. . Jones's execution should be stayed because the balance of hardships favors injunctive relief. The district court erred in finding otherwise. Without intervening injunctive relief, Jones stands to suffer the irreparable harm of either a torturous death or a sub-lethal execution attempt that leaves him with permanent organ damage. The evidence presented in the district court shows that the midazolam is likely not to cause an unconscious state or a sufficiently unconscious state.

47. Even if Jones is able to be sedated by the midazolam, his neuropathy is

[3] The District Court noted at the hearing on April 21 that it considered all arguments made for either Jones or Williams to have been made for both. (Hrg 95)

going to confound the consciousness check and he will likely be injected with the painful second and third drugs while he is still able to sense pain. Tr. R. 15, 29. Paling in comparison, the only hardship a preliminary injunction would work against the Defendants would be a delay in the schedule of an execution.

48. As a result, the balance of equities favors Jones and a preliminary injunction should have been granted by the district court. Because the same equities are considered in this request for a stay, the balance of equities weighs in Jones's favor and his execution should be stayed pending appeal.

D. INJUNCTIVE RELIEF WOULD SERVE THE PUBLIC INTEREST.

49. Jones made a showing in the district court that injunctive relief is in the public interest. Here, "the public interest is served only by enforcing constitutional rights and by the prompt and accurate resolution of disputes concerning those constitutional rights." *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson Cnty*., Tenn., 274 F.3d 377, 400 (6th Cir. 2001) "[I]t is always in the public interest to prevent violation of a party's constitutional rights." *G & V Lounge, Inc. v. Michigan Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir.1994). While the public may have an interest in seeing judgments carried out, it also has an interest that its citizens not be tortured to death in the name of the people. "[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 rights." *In re Ohio Execution Protocol Litig*., 840 F. Supp. 2d 1044, 1057 (S.D. Ohio 2012). A stay should issue to allow full consideration of this matter.

CONCLUSION

Jones prays that this Court grant this Application for Stay so that Jones may proceed to file a petition for writ of certiorari to review the decision of the Eighth Circuit denying the stay.

JACK HAROLD JONES

/s/ Jeff Rosenzweig

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CERTIFICATE OF SERVICE

I, Jeff Rosenzweig, hereby certify I have served Lee Rudofsky, Nicholas Bronni and Jennifer Merritt by email this 24th day of April, 2017.

/s/ Jeff Rosenzweig

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JEFF ROSENZWEIG