*****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' EMERGENCY MOTION TO VACATE STAY OF EXECUTION / PRELIMINARY INJUNCTION

LESLIE RUTLEDGE
Attorney General

LEE RUDOFSKY
Solicitor General

NICHOLAS J. BRONNI
Deputy Solicitor General

COLIN JORGENSEN
Senior Assistant Attorney General

JENNIFER MERRITT
Assistant Attorney General

OFFICE OF THE ARKANSAS
ATTORNEY GENERAL
323 Center St., Suite 200
Little Rock, AR 72201
(501) 682-2007
lee.rudofsky@arkansasag.gov

INTRODUCTION

Appellees have a long history of filing and dismissing claims to manipulate the judicial process and prevent Arkansas from carrying out their executions. This case—which is identical to Appellees' multiple previous challenges to Arkansas's three-drug (midazolam) lethal-injection protocol—is just the latest iteration. Moreover, despite repeatedly bringing (and then nonsuiting or losing on the merits) that same claim in both state and federal court, Appellees nevertheless sought a preliminary injunction staying their immediate executions so they could relitigate that same claim.

In granting a preliminary injunction that stayed Appellees' imminent executions, the district court ignored those basic facts. It also disregarded the fact that delaying Appellees' executions by even a few days—until after Arkansas's supply of midazolam expires—will make it impossible for Arkansas to carry out Appellees' just and lawful sentences. Immediate reversal is warranted.

BACKGROUND

A. Appellees

Appellees brutally murdered young mothers, children, and men who were unfortunate enough to cross their paths. Their guilt—and the justice of their sentences—is beyond dispute.

B. Prior Litigation

1. Arkansas Lethal-Injection Protocol.

In 2015, Arkansas adopted Act 1096, which: 1) codifies the three-drug lethal-injection protocol upheld in *Glossip v. Gross*, 135 S. Ct. 2726 (2015), as an alternative to a single-drug protocol previously upheld; 2) permits the Arkansas Correction Department to use compounded drugs; and 3) ensures supplier confidentiality. Thereafter, Arkansas adopted its current three-drug midazolam protocol.

2. Williams v. Kelley

In April 2015, Appellees filed *Williams v. Kelley*, a state court action alleging that Arkansas's execution protocol violates the Eighth Amendment and Arkansas's corresponding provision. After Arkansas removed that complaint to federal court, Appellees nonsuited. *See* No. 4:15-CV-206-JM (DE 4). Appellees then filed amended complaints in state court raising only state-law claims. *See Kelley v. Johnson*, 496 S.W.3d 346, 352 (Ark. 2016). Following motion to dismiss briefing, Appellees nonsuited their claims a second time. (DE 28-17.)[1]

3. Johnson v. Kelley

While the *Williams* motion to dismiss was pending, Appellees filed *Johnson v. Kelley*, No. 60CV-15-2921, in state court, alleging that Arkansas's

[1] "DE" refers to the docket entry in the district court.

three-drug protocol violated the Arkansas Constitution's ban on cruel-or-unusual punishment.

Because Arkansas Governor Asa Hutchinson had set Appellees' execution dates for September 2015, Appellees sought a stay pending resolution of their new case. The Arkansas Supreme Court stayed the executions "pending the resolution of the litigation." DE 28-19. Appellees then filed an amended complaint claiming that Arkansas's lethal-injection procedure violated Arkansas's ban on cruel or unusual punishment because, *inter alia*, midazolam would not sufficiently anesthetize and Appellees would experience severe pain. Appellees also alleged that the use of compounded drugs would impose cruel and unusual punishment and suggested as alternative execution methods, the firing squad, barbiturates, anesthetic gas, and opioid overdoses. (DE 28-18.)

Arkansas moved to dismiss, and the state trial court denied that motion. Both parties also moved for summary judgment on the midazolam claim, and the trial court denied Arkansas's motion. The Arkansas Supreme Court reversed "in toto and dismiss[ed]" Appellees' claims because under *Baze v. Rees*, 553 U.S. 35 (2008), and *Glossip v. Gross*, 135 S. Ct. 2726 (2015), Appellees had failed to meet their burdens of both pleading *and providing evidence* that their alternative execution methods are available and readily implementable. *Kelley*, 496 S.W.3d at

357-60. The United States Supreme Court declined review. *Johnson v. Kelley*, 137 S.Ct. 1067 (2017).

Thus, Appellees' claims were dismissed on the merits, the case ended, and the stay dissolved. Nevertheless, Appellees attempted to file an amended state court complaint restating the same claims. The Arkansas Supreme Court responded by making clear that Appellees' case had ended. Arkansas then moved to dismiss Appellees' amended complaint. The trial court granted that motion and held that the Arkansas Supreme Court had "dismissed the litigation, with prejudice[.]" (DE 28-23, at 5.)

C. Procedural History

On February 24, 2017, Governor Hutchinson set execution dates for eight of Appellees. Appellees then launched a legal avalanche, filing cases in multiple forums, including this case seeking a preliminary injunction.

LEGAL STANDARDS

Execution stays are reviewed "for an abuse of discretion." *Nooner v. Norris*, 491 F.3d 804 (2007). A preliminary injunction staying an execution "is an equitable remedy, and an inmate challenging a state's lethal injection protocol through a § 1983 action is not entitled to a stay of execution as a matter of course." *Id.*; *Hill v. McDonough*, 547 U.S. 573, 584 (2006). Instead, Appellees "must satisfy all of the requirements for a stay, including a showing of a significant

possibility of success on the merits." *Id.*; *see also Glossip*, 135 S.Ct. at 2736 ("A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits.").

Moreover, in imminent execution cases, "[a] court considering a stay *must* also apply 'a *strong* equitable presumption *against the grant* of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." *Hill*, 547 U.S. at 584 (quoting *Nelson v. Campbell*, 541 U.S. 637, 650 (2004)) (emphasis added). Likewise, courts "must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Hill*, 547 U.S. at 584. Reversal is required because the district court did not apply that standard.

ARGUMENT

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

A. Appellees' claim is barred by res judicata.

Appellees cannot prevail on their claim that using midazolam as the first drug in a three-drug protocol constitutes cruel and unusual punishment because their claim is bared by *res judicata*. Federal courts cannot adjudicate "claims that have already been fully adjudicated in state court." *Sparkman Learning Center v. Ark. Dep't of Human Servs.*, 775 F.3d 993, 998 (8th Cir. 2014); s*ee also* 28 U.S.C.

1738. State law determines whether a claim has been adjudicated. *Sparkman Learning Ctr.*, 775 F.3d at 998.

In Arkansas, *res judicata* applies where the first suit was contested, jurisdiction existed, the prior case involved the same parties, and there was a final determination on the merits. *Jayel Corp. v. Cochran*, 234 S.W.3d 278, 281 (2006); *see also id.* (doctrine likewise bars claims that could have been litigated). Applying that standard, Appellees' midazolam claim is barred.

First, the Arkansas Supreme Court issued a final judgment resolving the merits of Appellees' midazolam claim. Indeed, contrary to the district court's conclusion, in *Kelley*, the Arkansas Supreme Court did not simply dismiss Appellees' complaint. Rather, the Arkansas Supreme Court reversed the lower court's decision *in toto*, including its denial of summary judgment on the grounds that Appellees had failed to substantiate their midazolam claim. *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"). And that conclusion, as the state trial court later concluded in granting a motion to dismiss an amended complaint that Appellees filed after the Arkansas Supreme Court's

decision fully resolved the case on the merits and "dismissed the litigation, with prejudice[.]" (DE 28-23, 5.)[2]

Additionally, to the extent that there might be any doubt that Appellees' claims have been fully resolved on the merits, under Arkansas law, the dismissal of Appellees' claim in *Kelley* operated as a final adjudication on the merits because that dismissal was actually the *third* dismissal of Appellees' midazolam claim. *See, e.g.*, Ark. R. Civ. P. 41(b) ("dismissal operates as an adjudication on the merits" where "action has been previously dismissed, whether voluntarily or involuntarily); *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, as explained above, Appellees previously nonsuited their federal midazolam challenge in *Williams and* their subsequent filing of an amended complaint under that same case heading in state court. (DE 28-17.)

Second, the Arkansas Supreme Court (and the federal district court upon removal in *Williams*) had jurisdiction to consider Appellees' prior midazolam claims. The district court reached a contrary conclusion by reasoning that the Arkansas Supreme Court had lacked jurisdiction to resolve Appellees' midazolam claim because that court ultimately determined that Appellants were entitled to sovereign immunity. (DE 53, 32.) Yet that approach ignores the fact that the

[2] The district court's conclusion that "there has been no final judgment" likewise conflicts with those decisions.

Arkansas Supreme Court had to resolve whether Appellees had provided any evidence on summary judgment that Arkansas's use of midazolam violated Arkansas's ban on cruel or unusual punishment to determine whether sovereign immunity applied. *Arkansas State Claims Comm'n v. Duit Constr. Co*., 445 S.W.3d 496, 502 (Ark. 2014) (no immunity where state officers violate the law).

Third, as summarized above, the prior suits were fully contested in good faith, including the filing of dismissal motions in, preliminary injunction litigation, and cross-motions for summary judgment.

Forth, this case likewise involves the same claims as *Kelley*. Indeed, while the causes of action might be different and some evidence that "was not relevant in" the first case might be introduced, *Lane v. Peterson*, 899 F.2d 737, 743-44 (8th Cir. 1990), Appellees' current midazolam claim is based on *the same facts* as *Kelley* and *Williams*. In fact, the same legal standard governs both the federal and state claims. *See Johnson*, 496 S.W.3d at 357 (adopting *Baze* and *Glossip* standards).

Fifth, privity is satisfied because this case involves the same parties asserting the same rights. *See Sparkman*, 775 F.3d at 999. Therefore, res judicata applies and the injunction must be vacated.

B. Collateral estoppel bars Appellees' claim.

Collateral estoppel bars parties from relitigating previously resolved issues. *In re Scarborough*, 171 F.3d 638 (8th Cir. 1999). State law determines whether that doctrine applies, and in Arkansas, it applies to previously litigated issues that were essential to—and resolved by—the previous court's final judgment. *State Office of Child Support Enforcement v. Willis*, 59 S.W.3d 438, 444 (Ark. 2001); *see Baker Elec. Coop., Inc. v. Chaske*, 28 F.3d 1466, 1475 (8th Cir. 1994). That doctrine applies here because in *Kelley*, Appellees challenged midazolam's use and argued—as here—that its use in executions is "*sure or very likely* to cause serious illness and needless suffering" and that there are alternative execution methods that are "feasible, readily implemented, and in fact significantly reduce a substantial risk of severe pain." *Glossip*, 135 S. Ct. at 2737. Indeed, those claims were addressed in dismissal briefing and summary judgment motions, and, as discussed above, they were resolved by the Arkansas Supreme Court's conclusion that Appellees had not adduced evidence on summary judgment demonstrating that Arkansas has access to a known, feasible, readily implemented, and available alternative method of execution.

Further, Appellees cannot avoid collateral estoppel simply by pointing to new factual allegations because collateral estoppel bars relitigation of an ultimate fact issue—*i.e.*, whether the use of midazolam in lethal injection is cruel or

unusual—when that issue was determined by a final judgment in a prior proceeding. *E.g.*, *Lundquist v. Rice Memorial Hospital*, 121 Fed. Appx. 664, 668-69 (8th Cir. 2005). Thus, collateral estoppel bars Appellees' attempt to relitigate their midazolam claim.

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

Baze and *Glossip* require Appellees to show that Arkansas's protocol gives rise to a "substantial risk of severe pain." *Jones v. Hobbs*, 604 F.3d 580, 581 (8th Cir. 2010). The district court held that Appellees had shown that the use of midazolam "qualifies as an objectively intolerable risk" of severe pain and that the "risk is exacerbated" by Arkansas's compressed schedule. This Court reviews the district court's ultimate legal conclusion that midazolam presents an "objectively intolerable risk" of pain de novo. *See Heartland Academy Comm. Church v. Waddle*, 335 F.3d 684 (8th Cir. 2003); *Harbison v. Little*, 571 F.3d 531, 535 (6th Cir. 2009).

The district court's order ignores the following undisputed evidence:

- According to the manufacturer-prepared, FDA-approved drug information for midazolam, the drug can be used to induce general anesthesia, without narcotic premedication or other sedative premedication, at a dose of 0.3 to 0.35 mg/kg. (DE 28-6, 6-7).

- Appellees' anesthesiology expert concedes that midazolam *can* be used for induction of anesthesia and used as the sole anesthetic for very painful medical procedures, such as endotracheal intubation and C-section surgeries. (Tr. 942-43).
- A 20 to 30 mg dose of midazolam will induce general anesthesia in a 200-lb man sufficient to endure painful medical procedures, including laryngoscopies and endotracheal intubations. A 400-pound man would require a 40 to 60 mg dose. (Tr. 998-1000, 1057-58).
- A 500-mg dose of midazolam is far more than you would need to anesthetize a person and render him insensate to severe pain, even using the Appellees' expert data, and the effects of such a large dose would last far longer than necessary to carry out an execution. (Tr. 1003-04).
- Appellees' expert, Craig Stevens, co-authored a pharmacology textbook listing "Anesthesia" as the major clinical use of midazolam and explaining that "[i]ntravenous administration of benzodiazepines [like midazolam] can produce anesthesia and mild respiratory depression." Stevens also explains that, "[m]idazolam is used intravenously as an anesthetic for patients undergoing endoscopy, other diagnostic procedures, or minor surgery." (DE 28-5, 3, 4, & 6).

- Evidence established that regular clinical doses of midazolam (12 or 18 mg) given to 24 patients without premedication to induce general anesthesia caused them to lose consciousness and be unresponsive to stimuli. (Tr. 1089).
- Some patients who received doses of midazolam between 4.5 and 20 mgs have demonstrated BIS scores under 60, which is the level that Appellees' experts suggest represents a general anesthesia level of unconsciousness. (DE 54, 58-59; DE 28-12; Tr. 95.). Moreover, to the extent patient scores were above 60, Appellees' expert concedes that these monitors are often not reliable. (Tr. 24).

The district court erred by relying on testimony and evidence regarding the so-called "ceiling affect" dose of midazolam (DE 54 at 59-61), which has never been subject to peer review. Even Appellees' expert, Stevens, who calculated the ceiling-effect dose at 228 mg after cherry-picking data from animal and *in vitro* studies, admitted that his methodology was not sufficiently "robust" to be published in a peer-review journal. (Tr. 332). This type of untested analysis has no place in the courtroom under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and the district court clearly erred in relying upon it. Additionally, the district court did not and could not determine at what dosage the ceiling effect, if it even exists, occurs in humans. (DE 54, 60). Without being able

to determine at what dose the ceiling effect occurs, the alleged existence of a ceiling effect is irrelevant to the analysis. The more important point is that everyone appears to agree that whatever the ceiling effect, it occurs after the level at which general anesthesia can be induced by midazolam.

Even assuming that the district court correctly concluded that the expert evidence cut 50-50, *Glossip* and *Baze* require Appellees to be able to show a significant possibility that the execution methodology is sure or very likely to cause severe pain. Thus, Appellees cannot possibly meet their burden.

Lacking sufficient scientific evidence, the district court resorted to basing its decision on a few anecdotal accounts of executions in other states—most of which used completely different drug protocols or experienced problems unrelated to midazolam. A perfect example of the district court's selective use is its fixation on the Lockett execution. (DE 54, 14-17). Yet the Lockett execution failed not because of the midazolam, but because the IV line dislodged unbeknownst to state officials. Arkansas takes precautions to ensure what occurred in the Lockett execution cannot happen here. (DE 28-1, 30 & 44) (unlike Oklahoma, Arkansas uses two IV sites instead of one, continuously monitors the IV sites, and ensures constant real-time communication between the executioner and medical staff in the execution chamber). Perhaps most importantly, the district court fails to acknowledge that after Lockett, Oklahoma had a more recent execution with the

500 mg midazolam protocol. And witnesses to that execution reported that it "went very smoothly" and the drug dosage worked. (Tr. 423-24).

Glossip upheld a finding that a 500 mg dose of midazolam—the same dose in Arkansas's protocol—reliably produces anesthesia and renders an inmate insensate to noxious stimuli such as pain. 135 S. Ct. at 2742. It also explained that, despite the dueling experts, the only real-world evidence of the effects of a 500 mg dose of midazolam involve the "12 other executions [that] have been conducted using the three-drug protocol at issue here . . . without any significant problems." *Id.* at 2746. Since *Glossip*, even more executions have been carried out using the same protocol as Arkansas, and there is no evidence in this case or otherwise that any of those executions, when carried out pursuant to plan, suffered any significant problems. And when repeatedly pressed for evidence that Arkansas's protocol is sure or very likely to cause needless suffering, Appellees' experts had none. The claims are based on nothing more than speculation, conjecture, and assumptions of future negligence on the part of ADC's employees, which cannot support a valid Eighth Amendment claim.

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

Appellees were also required to show a significant likelihood of proving that "any risk posed by the challenged method is substantial when compared to known and available alternative methods of execution." *Glossip*, 135 S. Ct. at 2737-38.

Accordingly, they are required to point to a known alternative "that is 'feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain.'" *Id*. at 2737. It is only where "a State refuses to adopt such an alternative in the face of these documented advantages, without a legitimate penological justification for adhering to its current method of execution," that the "refusal to change its method can be viewed as 'cruel and unusual' under the Eighth Amendment." *Baze*, 553 U.S. at 52.

In an unfortunately prescient manner, the Supreme Court warned against the watering down *Glossip*'s second prong. *See id*. at 52 n.3 (noting that "articulated standards" are important to prevent courts from becoming "boards of inquiry determining best [execution] practices"); *see also id.* at 63-64 (Alito, J., concurring) ("Properly understood, this standard will not, as Justice Thomas predicts, lead to litigation that enables those seeking to abolish the death penalty to embroil the States in never-ending litigation concerning the adequacy of their execution procedures.). The district court's decision—including its adoption of the Sixth Circuit's loose interpretation of "available" over the Eleventh Circuit's stricter interpretation—does precisely what the Supreme Court warned against.

The district court erroneously assumed that an alternative method is "available" if there is any remote possibility that Arkansas can obtain drugs or tools necessary for an alternative method. *See* DE 54, at 78-80. But, as the

Eleventh Circuit concluded in *Arthur v. Commissioner of Alabama Department of Corrections*, 840 F.3d 1268 (11th Cir. 2016) and *Brooks v. Warden*, 810 F.3d 812 (11th Cir. 2016), the *Baze* and *Glossip* standard is much more demanding. If the drugs or tools for an alternative method of execution are not actually available *to Arkansas* despite normal efforts to obtain them, such an alternative cannot be considered "feasible and readily implemented" and Arkansas cannot be considered to be acting wantonly in foregoing that hypothetically potential alternative. The Eleventh Circuit's test for "availability" is more faithful to the words and purpose of the second prong set out in *Baze* and *Glossip*. It is also more faithful to the actual outcome in *Glossip*—that that pentobarbital and sodium thiopental were not "available" because Oklahoma had been "unable to procure [them] despite a good-faith effort to do so." *Glossip*, 135 S. Ct. at 2738.[3]

This Court should adopt the Eleventh Circuit's approach to "availability." This Court's post-*Baze* cases indicate an understanding that the second prong of *Glossip* must be strictly observed and requires that an alternative be actually, as opposed to hypothetically, available. *See, e.g., Johnson v. Lombardi*, 809 F.3d 388 (8th Cir. 2015) ("Johnson's threadbare assertion that lethal gas is legally available in Missouri is not the same as showing that the method is a feasible or readily implementable alternative method of execution. Indeed, nowhere in Johnson's

[3] This is precisely why the Arkansas Supreme Court ruled against Appellees. *See* 496 S.W.3d at 359.

complaint does he plead that Missouri could readily implement the lethal-gas method.")

The district court justified its adoption of the looser Sixth Circuit standard on two grounds. *First*, it concluded that the Eleventh Circuit's test "places an almost impossible burden on plaintiffs . . . ." (DE 54, at 79.) But the district court's conclusion is belied by the record since Appellees hired an investigator to determine whether any manufacturers or suppliers would sell sevoflurane gas to Arkansas. Tr. at 212-21. And, indeed, Appellees found a willing supplier. *Id*. There is no reason Appellees could not have taken that same approach in regard to other potential alternative methods. They simply chose not to do so. *Id*. at 217-21.

Second, the district court was concerned that the stricter interpretation of *Glossip* "may put plaintiff's counsel in the position of offering a state the drugs that would be used to end their client's lives." (DE 54, at 80.) But that makes no sense in the context of a claim where the client is not fighting the propriety of his conviction or sentence. The inmate is not contesting his guilt or his sentence, but rather seeking a constitutionally proper execution. In this context, no ethical quandary is created by an inmate's attorney providing the state with information about an alternative drug that he or she believes would significantly reduce a substantial risk of severe pain. In any event, whether or not it might be discomforting to an inmate's attorney, identifying an alternative that is actually

available is critical to the test. Thus, unless Appellees can show that Arkansas is consciously disregarding an alternative that is actually available to it, Appellee's cannot show a constitutional violation.

The district court also misinterpreted *Baze*'s and *Glossip*'s requirement that the known and available alternative "would ***in fact*** substantially reduce a risk of severe pain." *Glossip*, 135 S. Ct. at 52 (emphasis added). This burden is not met "by showing a slightly or marginally safer alternative." *Id.* And it is not met by some controverted evidence or theory. *Cf id.* at 67 (Alito, J., concurring) ("[A]n inmate should be required to do more than simply offer the testimony of a few experts or a few studies. Instead, an inmate challenging a method of execution should point to a well-established scientific consensus. Only if a State refused to change its method in the face of such evidence would the State's conduct be comparable to circumstances that the Court has previously held to be in violation of the Eighth Amendment."). The district court's cursory analysis of whether the suggested potential alternatives would meet this standard fails to enforce the heavy burden on the Plaintiffs who seek a stay. (DE 54, at 80-86) (discussing six potential alternatives). The district court's analysis rather allows Appellees to obtain a stay based on little more than speculation and uncertainty. *Id.*

Furthermore, Appellees suggested, and the district court accepted, that FDA-approved, bulk manufactured pentobarbital and compounded pentobarbital were

"available for use in executions." (DE 54, at 81.) The district court did not suggest either was actually available to Arkansas. Instead, the district court suggested that Missouri, Texas, and Georgia have on at least one occasion used either FDA manufactured or compounded pentobarbital. *Id.* As explained above, this does not show that Arkansas can obtain such drugs.

The district court suggests that Arkansas's confidentiality statute (shielding in most instances the identity of a manufacturer and supplier of drugs) should aid ADC in obtaining drugs. (DE 54, at 82.) But that Arkansas could not obtain a particular drug prior to the confidentiality statute being put in place does not automatically mean that Arkansas can obtain that drug simply because the statute exists. Indeed, the district court fails to wrestle with the fact that even after the statute was enacted, Director Kelley tried to but could not obtain FDA-approved and bulk-manufactured pentobarbital. (*See* Tr. at 1265; DE 28-1.) The district court appears to discount the Director's efforts because they occurred in 2015, not 2017. (DE 54, at 75.) But a constitutional rule that would require ADC to continuously search for an alternative drug is unworkable and has not been required by any court to date. Moreover, in 2016, Rory Griffin attempted to obtain FDA-approved and bulk manufactured pentobarbital and could not obtain it. (DE 28-13, 3-8.) While the district court found that Griffin's search was in anticipation of litigation, it did not find that search lacked good-faith. And in light of Director

Kelly's inability to locate manufactured pentobarbital in 2015, this Court should conclude that it is not "available" to Arkansas.

With respect to the compounded pentobarbital, it is impossible to understand how the district court determined that such an alternative would *in fact* substantially reduce a risk of severe pain. In their state court complaint in 2016, Appellees spent pages detailing the "grave risks" of compounded drugs, including compounded pentobarbital. (DE 28-18.) Appellees pled that compounded drugs carried such grave risk of causing pain and suffering that their use would be cruel or unusual. *Id*. They supported this pleading with an affidavit from Larry Sasich. *Id*. Given Appellees' previous pleadings, it cannot be said with any certainty that compounded pentobarbital would "in fact substantially reduce a risk of severe pain."

Appellees next posit that a gas overdose of sevoflurane or nitrogen hypoxia as available alternative methods of execution. The district court acknowledged that neither of these alternatives have ever been used in the United States. (DE 54, at 82.) Nonetheless the district court found them to be "known and available alternatives." With respect to nitrogen hypoxia, the Court relied on the fact that Louisiana had studied it as a potential method of execution and that Oklahoma has adopted it (but not used it). With respect to sevoflurane, the Court merely relied on Dr. Steven's testimony that he believed it could be done. (DE 54, at 83.)

Methods that have never been used in the United States cannot logically qualify as "known and available" alternatives. If they did, they would render the second prong of *Baze* and *Glossip* into nothing more than a test of imagination. Indeed, it would undermine the entire purpose of the test, which would be to determine whether or not the State was unreasonably refusing to move to a tried and true alternative. *A fortiori*, a state would have a justifiable reason for not moving to an execution method that had never been used before. Arkansas thus cannot be considered to be acting wantonly by not adopting such a novel execution method.

Appellees' last alternative is the firing squad. Even assuming that the necessities for a firing squad (facility, plan, training, etc.) were available, the district court erroneously concluded that the Appellees showed a likelihood of success in proving that this method of execution would in fact substantially reduce a risk of severe pain. The district court primarily relies on Groner's testimony regarding the firing squad. (DE 54, at 83-85.) Groner is a pediatric trauma surgeon whose patients are often child gunshot victims, and he conceded that he was not an expert in marksmanship. *Id*. He is also not a firearms expert. (Tr. at 602.)

Groner opined that there is less risk of pain associated with the firing squad than midazolam. His opinion was based on his view that if shot in the left ventricle with multiple bullets, an inmate would lose consciousness (from blood loss to the

brain) within a few seconds. He did not base this opinion on any studies or scientific articles. Instead, he based it on his experience as a trauma surgeon. But he conceded that his trauma patients do not arrive at the hospital until at least several minutes (sometimes much longer) after they have been shot. *Id*. at 612-13. Thus, it is unclear what the basis for his opinion is.

Groner conceded that if it takes more than a few second to lose consciousness, getting shot with five bullets would amount to significant pain. Groner also conceded that he could not provide any opinion as to how often the firing squad would hit their target—the left ventricle. He could not say whether it would be 100, 75, 50, or 25 percent of the time. *Id*. at 605. And he conceded that the Utah firing squad protocol contemplates the potential need for a second volley of shots when the first volley leaves inmates conscious. *Id*. at 606-07.

The district court never expressly concludes that the firing squad will in fact substantially reduce a risk of severe pain. But to the extent that can be implied from the district court's decision concluding that the firing squad is a reasonable alternative, its decision is based on nothing more than speculation. Indeed, in this vein, the district court pointed to the fact that some prison officers are qualified to and can shoot prisoners from guard towers. (DE 54, at 85.) But that officials can shoot a prisoner from a guard tower if an emergency occurs does not mean that they could reliably shoot the left ventricle in the perfect spot to ensure quick loss of

consciousness. It is precisely this type of non-scientific speculation that would render the *Baze* and *Glossip* test meaningless.

II. The district court failed to properly consider the public interest or weigh that interest against Appellees' dilatory conduct.

"Both the State and the victims of crime have an important interest in the timely enforcement of a sentence," *Hill*, 547 U.S. at 584, and that interest weighed heavily against issuing an injunction in a case that does not concern guilt or innocence. *See Nooner*, 491 F.3d at 807-08. Indeed, Appellees have had multiple opportunities to challenge their convictions, sentences, *and*—critically—their method of execution. Their guilt is beyond dispute, and Arkansas is entitled to see that their victims receive justice *decades* after Appellees' horrific crimes. The district court's bare passing reference to those facts demonstrates that it abused its discretion in failing to consider those facts. (DE 54, at 86.)

Further, the district court failed to consider the fact that the preliminary injunction in this case will make it *impossible* for Arkansas to perform lawful executions because Arkansas's supply of midazolam (the critical component of Arkansas's lethal injection protocol) expires in *two weeks*. Nor did the district court consider the fact that Appellees—knowing that fact—waited until the very eve of their executions to bring this action. Indeed, as Appellees' *repeated* challenges (and countless voluntary dismissals) of their midazolam claim demonstrate, Appellees did not *suddenly* discover their midazolam claim. And

equity should not permit them to deliberately manipulate the judicial process to evade justice.

CONCLUSION

For the foregoing reasons, the preliminary injunction should be vacated.

Respectfully submitted,

LESLIE RUTLEDGE
Attorney General

LEE RUDOFSKY
Solicitor General

NICHOLAS J. BRONNI
Deputy Solicitor General

COLIN JORGENSEN
Senior Assistant Attorney General

JENNIFER MERRITT
Assistant Attorney General

/s/ Lee Rudofsky
OFFICE OF THE ARKANSAS
ATTORNEY GENERAL
323 Center St., Suite 200
Little Rock, AR 72201
(501) 682-6302
Lee.Rudofsky@arkansasag.gov

April 15, 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:

Scott Braden
scott_braden@fg.org

Julie Vandiver
julie_vandiver@fd.org

Jeff Rosenzweig
jrosenzweig@att.net

Lee Short
leedshort@gmail.com

Attorneys for Appellees

s/ Lee Rudofsky
Lee Rudofsky

CERTIFICATE OF COMPLIANCE

Pursuant to Rules 27(d)(2) and 32(c)(1) of the Federal Rules of Appellate Procedure, the undersigned hereby states that the applicable portions of this motion contain 5,183 words in proportionally sized 14-point Times New Roman font. The brief was prepared in Microsoft Office Word 2010. The electronic version of the brief has been scanned for viruses and is virus-free.

/s/ Nicholas J. Bronni
Nicholas J. Bronni