

**UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT**

No: 14-2677

John C. Middleton

Appellee

v.

Don Roper

Appellant

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Appeal from U.S. District Court for the Eastern District of Missouri - St. Louis  
(4:03-cv-00543-CDP)

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**ORDER**

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Bye, Judge Smith, and Judge Kelly would grant the petition for rehearing en banc.

Judge Benton did not participate in the consideration or decision of this matter.

BYE, Circuit Judge, dissenting.

I again would grant the petition for rehearing en banc to reinstate the second stay of John C. Middleton's execution. I do not believe the district court abused its discretion in allowing Middleton an opportunity to exhaust any state court remedies he may have remaining. Therefore, I respectfully dissent.

Middleton is faulted for failing to exhaust his state remedies, but it is not entirely clear what procedure is available to Middleton under Missouri law to raise his competency claim. As discussed yesterday, I do not believe Missouri Supreme Court Rule 91 is the proper avenue for

pursuing a competency claim. Although I believe the district court properly resolved the question of whether Middleton exhausted his state court remedies in its first stay order, I also believe the district court reached an acceptable resolution in its second stay order. After all, the State has argued vehemently that Middleton failed to exhaust his state remedies. Considering that the exhaustion of its remedies appears to be so important to the State, it seems disingenuous for the State to now oppose a stay designed to give Middleton the opportunity to exhaust the very state remedies the State argued he needs to exhaust. Further, it bears repeating Middleton made diligent efforts to raise his competency claim multiple times before multiple state courts.

With so much attention devoted to various procedural questions, I worry we have missed the forest for the trees. Missouri is positioned to execute a man who may very well be incompetent. Significant questions have been raised as to Middleton's mental competency. That fact simply cannot be denied or overstated. But, for some reason, that fact has been ignored. It bears repeating: the Eighth Amendment "prohibits the State from inflicting the penalty of death upon a prisoner who is insane." Ford v. Wainwright, 477 U.S. 399, 410 (1986). Undoubtedly, the simplest and most prudent way to resolve any questions of Middleton's competency is to conduct an evidentiary hearing. Missouri has devoted significant portions of its recent briefs to arguing that Middleton is not mentally incompetent, and, by doing so, Missouri has implicitly underscored the need to conduct such an evidentiary hearing. This Court is not the proper venue for raising these competency arguments. Instead, they should be raised before a neutral fact-finder which can fully evaluate the evidence and arguments raised by both sides. Only then can the relevant parties be confident that commands of Ford and the Eighth Amendment have been

satisfied. Until then, the stay of execution should remain in place. Therefore, I would vote to hear the case en banc in order to stay the execution.

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July 16, 2014

Order Entered at the Direction of the Court:  
Clerk, U.S. Court of Appeals, Eighth Circuit.

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/s/ Michael E. Gans