**IN THE SUPREME COURT OF THE UNITED STATES**

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| DAVID ZINK, et al., | ) | |
| | ) | |
| Cecil Clayton | ) | |
| | ) | |
| Plaintiffs-Appellants, | ) | |
| | ) | |
| v. | ) | No.14-14A911 |
| | ) | |
| GEORGE A. LOMBARDI, et al., | ) | |
| | ) | |
| Defendants-Appellees. | ) | |

**SUGGESTIONS IN OPPOSITION TO PLAINTIFF WALTER STOREY'S MOTION FOR STAY OF EXECUTION AND TO HIS PETITION FOR CERTIORARI**

**Case Summary**

Cecil Clayton alleges at the eleventh hour this Court should stay his scheduled execution because he claims he has a significant possibility of success on the merits of the Eighth Amendment claim submitted to the court below *en banc* in *Zink v. Lombardi*. But this Court has rejected the same arguments made in stay applications by various plaintiffs in the *Zink* litigation before their executions in the last year. Storey's stay application raises claims Plaintiffs Goodwin and Storey raised unsuccessful stay applications in the court below *en banc* and his certiorari petition and stay application in this Court denied in December 2014.These are claims that this Court has repeatedly found unworthy of a stay in the past. But nothing relevant has changed.

## I. This Court should analyze the stay application under the *Hill v. McDonough* standard.

In *Hill v. McDonough*, 547 U.S. 573 (2006), this Court held that a pending lawsuit does not entitle a condemned inmate to a stay of execution as a matter of course, and that the State and crime victims have an important interest in the timely execution of a death sentence. *Id*. at 583–84. This Court held that applicants seeking a stay based on a suit challenging the manner in which the State plans to execute them must meet *all* the elements of a stay, including showing a significant possibility of success on the merits. *Id*. at 584. This Court cited *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam), for the proposition that a "preliminary injunction [is] not granted unless the movant, by a clear showing, carries the burden of persuasion." *Hill*, 547 U.S. at 584. Storey does not carry that burden. Importantly in this case there is no execuse for Claton filing this petition less than two hours before his scheduled execution. That reason alone supplies an independent and adequate reason to deny a stay.

## II. Clayton's Eighth Amendment claim does not entitle him to a stay and this has not changed as a result of the recent grant of certiorari in *Glossip v. Gross* or because inmates have the option of receiving a sedative to calm them before executions.

Clay alleges his execution using pentobarbital will violate the Eighth Amendment ban on cruel and unusual punishment. However, a three judge plurality in *Baze* held that for a risk of harm from execution to violate the

Eighth Amendment "the conditions presenting the risk must be *sure or very likely* to cause serious illness and needless suffering, and give rise to sufficiently *imminent* dangers." *Baze v. Rees,* 535 U.S. 35, 50 (2008) (internal quotations omitted, emphasis in the *Baze* decision). A majority of this Court recently relied on the "*sure* or *very likely* to cause serious illness and needless suffering" standard in vacating a stay of execution. *Brewer v. Landrigan*, 131 S.Ct. 445 (2010). Therefore, in order to survive a motion to dismiss, the plaintiffs must *at least* present a plausible claim that Missouri execution procedures are "sure or very likely to cause serious illness and needless suffering", and give rise to sufficiently imminent dangers. The standard for surviving a motion to dismiss, by contrast, is easier for a plaintiff to meet than the "significant possibility of success on the merits of the claim" standard evaluated as one of the four factors necessary for a stay under *Hill*.

The test that Storey must satisfy to justify a stay in this case, set out by the three judge plurality in *Baze*, not only requires that the alleged suffering be "sure or very likely" to occur, but also that the risk of potential suffering be "needless." The plurality held "[s]ome risk of pain is inherent in any means of execution—no matter how humane—if only from the prospect of error in following the procedure. It is clear then the Constitution does not demand the avoidance of all risk of pain in carrying out executions." *Baze*, 553 U.S. at 44. In addressing the requirement that the sure or very likely

suffering also be needless, the plurality indicated such suffering was needless if the State, without a legitimate penological justification, refused to adopt a feasible, readily implemented alternative means of execution, which substantially reduces a risk of severe pain. *Id*. at 52.

Clay fails both prongs of the *Baze* test. Missouri carried out 13 executions using pentobarbital since November 2013, and no observer has seen anything inconsistent with those executions all being rapid and painless. Over 200 witnesses from 13 separate executions support the position that all Missouri executions using pentobarbital have been rapid and painless. It is implausible to allege Missouri's use of pentobarbital in executions is sure or very likely to cause serious illness and needless suffering when, time-after-time, that has not happened.

The court below sitting *en banc* has held that "[w]ithout plausible allegations of a feasible and more humane alternative method of execution, or purposeful design by the State to inflict unnecessary pain, the plaintiffs have not stated an Eighth Amendment claim…." *In re Lombardi*, 741 F.3d 888, 896 (8th Cir. 2014) (*en banc*), *cert. denied*, *sub nom. Zink v. Lombardi*, No. 13-8435 (Apr. 7, 2014). Here, Storey has not alleged a specific plausible alternative by suggesting a more humane method of execution, nor does he allege that the State has purposefully designed its execution method in order to cause unnecessary pain. Because Missouri executions have in fact all been

rapid and painless, such an allegation would be implausible in any event.

Storey, like earlier stay applicants, presents an opinion from an expert asserting various things that could go wrong with Missouri executions. But they never have. In the absence of a factual basis, a speculative parade of horribles does not satisfy the requirements of a viable Eighth Amendment claim.

Storey fails to show that the State's execution protocol is "*sure* or *very likely*" to cause serious illness and unnecessary pain, as required to succeed on his Eighth Amendment Claim. Storey's allegations are insufficient to create a significant possibility of success under this standard, or even to survive under the lesser standard for surviving a motion to dismiss. Plaintiffs Franklin, Nicklasson, Smulls, Michael Taylor, Ferguson, Rousan, Winfield, Worthington, Ringo, Christeson, Leon Taylor, Goodwin, and Williams also presented essentially the same evidence and this Court found the evidence insufficient. Plaintiff Middleton did not even seriously pursue an Eighth Amendment lethal injection claim in his stay litigation, instead concentrating on issues more specific to his case. Accordingly, Storey is not entitled to a different result on the same evidence.

### A. **The stay and certiorari grant in *Glossip v. Gross* is not applicable to this case.**

In *Glossip v.* Gross, 14-7955, this Court, at Oklahoma's request, issued a stay of three Oklahoma executions. The stay is explicitly limited to "executions using Midazolam" The certiorari petition, on which the stay is based, indicates that Oklahoma uses a three-chemical execution protocol that includes midazolam as the first chemical, a paralytic as the second chemical, followed by potassium chloride to stop the heart. The petition alleges as an undisputed fact that administering the last two chemicals, without first administering an anesthetic that causes deep unconsciousness, would result in "intense and needless pain and suffering." (*Id.* at 3). The petition also alleges that midazolam is pharmacologically unable to act as a surgical anesthetic that creates the required level of unconsciousness necessary to administer the second two chemicals. The petition alleges this is because beyond a certain point, increasing the dosage of midazolam does not increase its effect, and therefore midazolam cannot reliably produce unconsciousness (*Id.* at 2–10). The petition explicitly contrasts the use of midazolam with the use of a fast-acting barbiturate, like that used by Missouri, which the petition quotes *Baze* as stating "ensures the inmate does not experience any pain." (*Id.* at 6 quoting *Baze v. Rees*, 553 U.S, at 44).

Missouri uses pentobarbital, a fast-acting barbiturate, as the sole lethal chemical in its execution procedures. Missouri does not use midazolam as a lethal chemical. The fact that Missouri offers a pre-execution sedative such as

valium or midazolam to relieve anxiety before an inmate's execution if he wishes to receive it, does not make Missouri's protocol like that of Oklahoma. Witness statements from all 13 Missouri executions using pentobarbital show that all the executions were rapid and painless. Of the last four executions in Missouri, three of the inmates, Earl Ringo and Leon Taylor and Walter Storey declined sedatives, and one, Paul Goodwin, asked for sedatives and received valium and midazolam. In all three of these executions, a conscious inmate rapidly and painlessly went to sleep when injected with the lethal chemical, pentobarbital.

Missouri's use of midazolam as an optional sedative for inmates who are understandably anxious before their own executions has little in common with Oklahoma's protocol, which relies on midazolam to act as a necessary surgical anesthetic to prevent severe pain from the administration of a paralytic, followed by the administration of a chemical that causes a heart attack. Missouri does not violate the Eighth Amendment by offering pre-execution sedatives to inmates who want them to relieve anxiety on the day of their execution. The choice inmates made on whether to take pre-execution sedatives had no effect on the fact Missouri executions using pentobarbital were all rapid and painless. This is necessarily so as the executions of inmates who declined sedatives, like the executions of inmates who received sedatives were rapid and painless

### B. Clayton does not comply with *In re Lombardi* and *Baze* by merely stating some unspecified, more humane method of execution exists.

Clayton argues that because he is willing to admit that some unspecified method of execution that would be constitutional exists, he has complied with *In re Lombardi*. That claim is without merit. What Storey is really saying with this argument is that all he needs to do to meet the test of *In re Lombardi* and *Baze* is to offer a vague admission alleging the Missouri execution procedure is not the safest procedure theoretically possible. This ambiguous statement is insufficient to support a stay. *Baze* and *In re Lombardi* require that he articulate a feasible constitutional alternative method of execution that would substantially reduce a serious risk of pain. The plaintiffs executed since the *In re Lombardi* decision made this argument, and this Court has rejected their claims for stays and petitions for certiorari, and nothing relevant changed on this issue after their executions.

### C. The district court did not find that the plaintiffs satisfied the first prong of *In re Lombardi* and *Baze* analysis.

Plaintiffs have argued that the district court order dismissing nine claims in the *Zink* litigation, but letting the tenth claim survive for two weeks before the court ultimately dismissed it in a later order, supports the argument that they are entitled to stays of execution. It does not. Storey, like the other plaintiffs, contends that because the district court dismissed the

Eighth Amendment claim in the *Zink* litigation based on the second prong of *In re Lombardi*, the court implicitly found that plaintiffs had satisfied the first prong, and that he is therefore entitled to a stay of execution. Storey argues he has a significant possibility of success on the first prong, and in his view the district court and the court below misunderstand the second prong.

In order to survive a motion to dismiss a claim must merely be plausible. *Walker v. Barrett*, 650 F.3d 1198, 1203 (8th Cir. 2011). But to support a stay application the claim must have a significant possibility of success on the merits, a significantly higher standard. *Hill*, 547 U.S. at 584. This Court denied Franklin and Nicklasson's stay motions based on essentially the same evidence Storey now presents, before *In re Lombardi* was decided. The thrust of those decisions was that Franklin and Nicklasson did not meet the first prong of what is now the *In re Lombardi* test. The fact that the district court dismissed the *Zink* litigation based on the second prong of the *In re Lombardi* test does not change this finding. Additionally, Winfield, Middleton, Worthington, Ringo, Leon Taylor, and Goodwin were executed in June, July, August, September, October and December 2014, after the district court analysis Storey alleges justifies a stay.

D. **Alleged difficulties involving other states' execution protocols do not support the stay of a Missouri execution when Missouri executions using pentobarbital have been uniformly rapid and painless.**

Missouri has carried out 12 rapid and painless executions since November 2013, using pentobarbital as the lethal chemical. Over 200 witness statements confirm this, many from members of the media. None of these witness statements indicate any inmate suffered any discomfort at all. The witness statements from the most recent executions, the executions of Ringo, Taylor, and Goodwin all indicate that within seconds of the injection of the lethal chemical, pentobarbital, a conscious inmate rapidly fell asleep (Ex. 1). Ringo and Leon Taylor declined pre-execution sedation; Goodwin asked for and received it (Ex. 4). None demonstrated any discomfort. Clayton attempts to link the use of midazolam as a mandatory *anesthetic* in Oklahoma's execution procedure, followed by painful chemicals that paralyze breathing muscles and stop the heart, the use of which *requires complete anesthesia*, with its use as an optional pre-execution sedative to reduce an inmate's anxiety in Missouri. There is no connection. In Missouri, the inmate is awake when he receives pentobarbital, a fast- acting barbiturate and the sole lethal chemical used in Missouri. Any alleged defect of midazolam as an *anesthetic* in Oklahoma's three-chemical execution procedure is irrelevant to Missouri procedures. The 13 rapid and painless Missouri executions are the proper comparison, not executions in other states using procedures over which Missouri has no control. Further, if Clayton does not want a sedative he may say no, as Ringo and Taylor, and Storey did. Like all Missouri executions

using pentobarbital, their executions were rapid and painless. In fact through counsel he has implicitly done that already.

## III. Conlusion

This Court should deny the motion for a stay of execution and the petition for the writ of certiorari.

Respectfully submitted,

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