

No. _____

CAPITAL CASE
EXECUTION SCHEDULED
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In The
Supreme Court of the United States

WALTER TIMOTHY STOREY,
Petitioner,
v.

GEORGE LOMBARDI, *et al.,*
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF AMICUS CURIAE THE ETHICS BUREAU AT
YALE IN SUPPORT OF PETITIONER'S PETITION FOR
WRIT OF CERTIORARI AND MOTION FOR STAY

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Interest of Amicus Curiae¹

The Ethics Bureau at Yale, a clinic composed of seventeen law school students supervised by an experienced practicing lawyer and lecturer, drafts amicus briefs in cases concerning professional responsibility; assists defense counsel with ineffective assistance of counsel claims relating to professional responsibility; and offers ethics advice and counsel on a pro bono basis to not-for-profit legal service providers, courts, and law schools.

The Ethics Bureau respectfully submits this brief as amicus curiae for two reasons. First, it has an abiding interest in ensuring that the Sixth Amendment and the Model Rules of Professional Conduct preserve the right of every criminal defendant to conflict-free, competent representation that pursues client-defined objectives. Second, it believes that when courts ignore ethical violations affecting the representation of criminal defendants, they not only damage the integrity of the proceedings at issue, but also undermine public confidence in the legal system.

Summary of Argument

Walter Timothy Storey petitions this Court to stay his execution, a request for relief that was

¹ Pursuant to Rule 37.2 of the Rules of this Court, Petitioner and Respondents have consented to the filing of this brief. The letters granting consent are filed herewith. This brief was not written in whole or in part by counsel for any party, and no person or entity other than Amicus and its counsel has made a monetary contribution to the preparation and submission of this brief.

denied by the Eighth Circuit because Petitioner did not propose an alternative method of execution. That pleading requirement is a direct result of the Eighth Circuit's interpretation of *Baze v. Rees*, 553 U.S. 35 (2008). This Court is set to decide, in *Glossip v. Gross*, No. 14-7995, whether a prisoner must establish the availability of an alternative method of execution even if the State's lethal injection protocol, as properly administered, will violate the Eighth Amendment. Petitioner seeks a stay of execution until the Court makes its decision.

This amicus brief is offered to explain why and how the requirement of pleading an alternative method of execution is a frontal assault on the ethical obligations of the lawyer for the death row inmate: the duty to pursue the objectives of the client, the obligation to avoid conflicts of interest, and the requirement that the lawyer competently represent the client. Because of the merits of this argument, Petitioner's execution should be stayed until this Court decides *Glossip*. If the argument of Amicus were adopted in *Glossip*, it would permit Petitioner to proceed with his challenge to the proposed method of execution without pleading an alternative and allow his lawyers to continue representing Petitioner without violating their ethical and professional duties.

Argument

I. Counsel Cannot Articulate an Alternative Means of Execution Unless the Client Directs the Lawyer to Do So

In every lawyer-client relationship, the client is the ultimate decision-maker; the lawyer acts as the agent charged with fulfilling the client's expressed wishes. "The client, not the lawyer, determines the goals to be pursued." Restatement (Third) of the Law Governing Lawyers, § 16A cmt. c (2000). Rule 1.2 of the Missouri Rules of Professional Conduct plainly requires a lawyer to "abide by [his] client's decisions concerning the objectives of the representation." *See* Missouri Rules of Prof'l Conduct R. 4-1.2(a) (2008).² Lawyers who violate this rule are subject to severe professional sanctions. *See, e.g., Attorney Grievance Comm'n of Md. v. Sperling*, 69 A.3d 478, 490 (Md. 2013) (lawyer subject to indefinite suspension from the practice of law because "the attorney violated Rule 1.2(a) by failing to follow the client's instruction") (quotations and citations omitted).

The Eighth Circuit's interpretation of *Baze* – specifically, its suggestion that a lawyer must propose an alternative means by which his client is to be executed in order to meet the pleading standard – flies in the face of this professional requirement. It forces the lawyer to abandon the client's set objective for the representation – and

² The Model Rules of Professional Conduct are identical to Missouri's adopted Rules of Professional Conduct cited in this brief.

instead, to concede the constitutionality of another, untested method of execution – in spite of the fact that no lawyer should be required, in the face of a method of execution that the client asserts is unconstitutional, to advocate for an alternative. As such, the Eighth Circuit’s interpretation puts lawyers representing death row inmates in a lose-lose situation when their clients have not conceded that there is any constitutional method of execution now that the method Missouri used in the past is no longer available.

If the lawyer meets the Eighth Circuit’s understanding of the pleading standard by conceding an alternative means for the State to execute his client, he has violated Rule 1.2 by contradicting his client’s decision-making authority. And if the lawyer wants to avoid violating Rule 1.2 by not providing an alternative means of execution in the pleading, he has arguably violated Rule 1.3’s requirement of diligence by refusing to comply with the alleged pleading requirement. *See* Missouri Rules of Professional Conduct R. 4-1.3 (2007).

This catch-22 will arise every time a death row inmate opts to challenge the method by which the State proposes to take his life. Refusal to engage in the macabre task of actively supporting an alternative method of execution protects an important right. As this Court has held, “[b]y declaring his method of execution, picking lethal gas over the State’s default form of execution – lethal injection – [a death row inmate] has *waived any objection* he might have to it.” *Stewart v. LaGrand*, 526 U.S. 115, 119 (1999) (emphasis added). Death

row inmates – and their lawyers – therefore are forced to abandon an important Eighth Amendment argument if they are required to affirmatively choose a method of execution.

In addition, some state statutory provisions regarding the method of imposing a death sentence contemplate the likely situation that death row inmates may prefer not to choose the method of their own execution. These statutes provide a default method of execution when the “opportunity” to choose an execution method is declined by the inmate, *see* Ariz. Rev. Stat. Ann. § 13-757(B) (2013); Cal. Penal Code § 3604 (West 2014) (demonstrating that states recognize the possibility that death row inmates will “fail[] to choose,” Cal. Penal Code § 3604 – let alone advocate for – an alternative method of execution).

These choice-based state statutes regarding the method of execution also recognize the state as an appropriate alternative decision maker. The default method of execution – provided in states where death row inmates are offered a choice between means – has been pre-determined by a far more appropriate decision-maker: the state legislature itself. These state penal codes already reflect the sensible proposition that when the inmate cannot or should not decide, the responsibility to suggest an alternative method of execution should lie solely in the hands of the State.

II. Requiring Counsel to Articulate a Means of Execution Creates a Conflict of Interest

Rule 1.7, the concurrent conflict rule, likewise weighs against an interpretation of *Baze* that would burden a plaintiff with articulating an alternative means of execution when making this type of Eighth Amendment claim. This is because a lawyer representing a death row client will invariably face a conflict of interest if required to suggest a method by which the State might execute his client, in effect putting the lawyer in the position of “representing” the State.

Rule 1.7(a)(2) prohibits a lawyer from engaging in a representation if “there is a significant risk that the representation . . . will be materially limited . . . by the lawyer’s responsibilities to . . . a third person or by a personal interest of the lawyer.” Missouri Rules of Prof’l Conduct R. 4-1.7(a)(2) (2007). Usually the rule implicates conflicts that are extrinsic to the representation: perhaps the lawyer represents the opposing party in another matter, or has an independent personal familial or financial incentive to achieve an outcome that may be unfavorable to the client’s interests. *See generally* Missouri Rules of Prof’l Conduct R. 4-1.7 (2007). Here, the conflict that would necessarily follow from the Eighth Circuit’s interpretation of *Baze* is intrinsic to the representation. It would require the lawyer to make an argument that cuts against the very goals of the client’s representation, namely, preventing the client’s execution. The Eighth Circuit’s interpretation of *Baze* not only ignores that

client-defined objective, but substitutes advocacy on “behalf” of the death row inmate for a result sought by the State: a concession that an alternative method of execution is constitutional. And this cognizable, even palpable conflict, poses all the dangers inherent to the more traditional, extrinsic conflicts of interest.

This Court has repeatedly recognized that the Sixth Amendment right to the effective assistance of counsel includes the right to a representation free from conflicts of interest. *See Glasser v. United States*, 315 U.S. 60, 70 (1942). “[T]he rule against representing adverse interests [of present clients] was designed to prevent a . . . practitioner from having to choose between conflicting duties, or attempting to reconcile conflicting interests rather than enforcing a client’s rights to the fullest extent.” *Smiley v. Dir., Office of Workers Comp. Programs*, 984 F.2d 278, 282 (9th Cir. 1993).

The Eighth Circuit’s interpretation of *Baze* would place a lawyer under a severe and darkly ironic conflict: the principal goal of any lawyer representing a death row client is to prevent his client’s execution; yet the Eighth Circuit’s interpretation of the pleading rule would require the lawyer to actively advocate for a particular means of achieving his client’s death in the course of attempting to avert it. Placed in such a position, no lawyer could effectively argue both for and against his client’s execution. Moreover, requiring him to argue in favor of it is decidedly unjust on its own terms, prohibiting him from “enforcing [his] client’s

rights” – or pursuing his client’s wishes – “to the fullest extent,” *Smiley*, 984 F.2d at 282.

Generally, the Rules address conflicts of interest by requiring the lawyer to remove himself from the representation. *See* Missouri Rules of Prof’l Conduct R. 4-1.7, cmts. [2]-[4] (2007). Under the circumstances presented by this case, however, such a remedy is both impractical and illogical. Removal, while attempting to solve the conflict, carries its own burdens because a lawyer engaged in such a representation will be far more familiar with the case, its facts and procedural posture, and the client’s particular interests and goals than any potential replacement could be. The illogic of replacement as a remedy is likewise transparent: a replacement lawyer, on assuming the representation, would inherit an identical conflict. She, too, would face the prospect of advocating a means of execution while laboring to prevent one. Thus the traditional remedy is without remedial effect. Instead, only an interpretation of *Baze* that does not impose this perverse pleading burden could effectively obviate such a conflict.

Finally, Amicus recognizes that some might argue that Petitioner cannot claim a conflict because Petitioner chose to bring this suit. Even if the holding in *Baze* were clear on this point, Petitioner certainly must be free to argue for a change in the law, explaining all the reasons (including the ethical reasons) why the burden to offer an alternative means of execution should be on the State. Amicus, moreover, is of the view that this argument ignores the stark realities of death row litigation. The

avenues to relief are few and arduous, and the diligent lawyer – in order to fulfill his dedication to his client – must seize any possible source of relief, even if only provisional or temporary, when the stakes are so high and the result so final. Indeed, a death row lawyer would breach his duty of diligence should he fail to pursue a claim that might secure his client’s desired outcome. *See* Missouri Rules of Prof’l Conduct R. 4-1.3 (2007). Failing to find relief along one avenue, he must move to the next.

This suit proves by its mere existence that a “means of execution” claim does not represent a frivolous strategy by which to attempt to avoid execution altogether; if the Court should accept this case and rule in Petitioner’s favor, then Petitioner will have successfully avoided execution, at least in the short term. To deny a petitioner’s right to pursue his legal objectives, by whatever means available, would be to deny both the vitality and constitutionality of the appeals process and the very human response that must attend a sentence of death.

III. The Eighth Circuit’s Interpretation of *Baze* Forces Defense Lawyers to Breach Their Duties of Competent Representation

The duty of competence further weighs against the Eighth Circuit’s interpretation of *Baze*. Rule 1.1 requires that lawyers “provide competent representation,” acting with such “knowledge, skill, thoroughness and preparation [as is] reasonably necessary for the representation.” Missouri Rules of

Prof'l Conduct R. 4-1.1 (2007). The Restatement (Third) of the Law Governing Lawyers reaffirms these points, instructing every lawyer to “proceed in a manner reasonably calculated to advance a client’s lawful objectives, as defined by the client after consultation,” and to “act with reasonable competence and diligence.” Restatement (Third) of Law Governing Lawyers § 16(1)-(2) (2000).

If the Court were to adopt the Eighth Circuit’s interpretation of *Baze*, requiring a lawyer to propose a specific alternative method of execution when pleading to the cruel and unusual nature of one method of execution, that requirement would force lawyers to violate their duties of competent representation. Proposing such an alternative requires detailed information that the defense lawyer necessarily lacks at the pleading stage and is unlikely to ever be able to acquire. If a defense lawyer lacks the knowledge to plead his client’s case then he will necessarily breach his legally binding duty of competence. Missouri Rules of Prof'l Conduct R. 4-1.1 (2007). As such, the Eighth Circuit’s requirement would render it impossible for lawyers to competently plead to the cruel and unusual nature of the then-present method of execution.

The *Baze* Court opined that in order to be constitutional, any alternative method of execution “must be feasible, readily implemented, and in fact significantly reduce a substantial risk of severe pain.” *Baze v. Rees*, 553 U.S. 35, 37 (2008). With that standard in mind, this case arose because the logistics of procuring pharmaceuticals to carry out lethal injections have become quite complex. As a

result, Missouri has been forced to identify alternative methods of execution since its former methods are no longer available. But if the Court were to place the burden to plead a specific alternative method of execution on the defense lawyers, then they would be forced to address not only the medical risks of an alternative method, but also the logistics by which the State could procure, transport, and administer it. It is entirely unreasonable to ever place such a burden on the defense at any time, but especially at the pleading stage.

It would be impossible, for example, for the defense lawyer to know which drugs are available to the State and from whom it could purchase those drugs. No information, however, is available to Petitioner or his lawyers about other drugs the State might consider using or about the range of drugs the pharmacy – or any available pharmacy – could produce if asked to do so. The alternative options depend on a complicated calculus that includes the combination of chemical availability, the pharmacy’s manufacturing capabilities, and research into various drugs. As such, before obtaining discovery, there would be no information available to a death row inmate’s lawyer to propose an alternative method that is both “feasible and readily implemented.” As a result, to place the burden of advocating the constitutional logistics of a method of execution on the defense counsel is simply absurd.

Moreover, the Eighth Circuit’s interpretation of the pleading standard would force the defense to investigate which drugs are likely to “significantly

reduce a substantial risk of severe pain.” *Baze*, 553 U.S. at 37. Once again, it is unclear how the defense lawyer might suggest such an alternative when the lawyer, at the pleading stage, has no information about which other drugs are available to the State.

Pleading standards are meant to filter out plaintiffs with “largely groundless claim[s]” and prevent them from wasting judicial resources while protecting the rights of plausible claims to be brought. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007). Too high a pleading standard would force a plaintiff to plead facts that it cannot know without any discovery, and will prevent meritorious causes of action regarding the Eighth Amendment implications of any given method of execution from ever getting to trial or even discovery.

The cause of action in this and similar cases concerns a core constitutional right. There is ample testimonial evidence that the method the State intends to employ causes a substantial risk of severe pain. The Eighth Circuit’s proposed pleading standard, however, would render it nearly impossible for any claim to be brought against a State for using a cruel and unusual method of execution, since it would simultaneously require a defense lawyer to supply information the lawyer simply cannot possess at such an early stage of litigation.

Moreover, such a standard would render it impossible for a defense lawyer to satisfy his duty of competent representation; if he cannot obtain the information necessary to bring a meritorious claim

then he cannot “act with such knowledge, skill, thoroughness and preparation as is reasonably necessary for the representation.” Missouri Rules of Prof'l Conduct R 4-1.1 (2007). Such a strict standard would force lawyers to breach their legally binding ethical duties and would unconscionably preclude meritorious claims from being decided on the merits.

Conclusion

Petitioner Storey sits on death row in Missouri. Missouri can no longer obtain from its European supplier the chemicals it needs to administer a lethal injection. So Missouri has developed an alternative, the use of which Petitioner and his lawyers assert would constitute cruel and unusual punishment in violation of the Eighth Amendment. He seeks a stay of execution until this Court adjudicates this question – an adjudication that the State of Missouri should welcome, for it could not possibly have an interest in violating that important constitutional prohibition. Yet, according to the Eighth Circuit, in order to pursue this adjudication, Petitioner and his lawyers must identify, in the initial complaint and before any discovery occurs, an alternative to this flawed means of execution – an alternative as to which they must concede constitutionality.

This is an impossible task for an ethical lawyer. If the lawyer were to pursue the suggested course, he would be engaging in unethical conduct: ignoring his client's stated objective for the representation, laboring under a conflict of interest, and entering into scientific and logistical terrain about which he is incompetent. This Court has

granted certiorari to address this issue in *Glossip v. Gross*, No. 14-7995, and it should grant Petitioner a stay of execution so that his execution will not moot his claims.

Respectfully submitted,

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