STATE OF MISSOURI
SUPREME COURT

STATE OF MISSOURI,	)	
Respondent,	)	
	)	
v.	)	No. SC79735
	)	
JOSEPH FRANKLIN,	)	
Appellant.	)	

State's Motion for Reconsideration

of Its Motion to Set Execution Date

In denying as "premature" the State's request to set an execution date pending the "prompt[] resol[ution]" of Appellant Joseph Franklin's pending challenge to Missouri's lethal injection protocol, this Court has deviated from its standard course in capital cases and imposed a *de facto* moratorium on the death penalty. Because that order will further delay justice for Appellant's victims and the people of Missouri, the State asks this Court to reconsider.

A neo-Nazi serial killer, Appellant fired a rifle at worshippers leaving a synagogue in St. Louis on October 8, 1977, killing one and injuring two, because he believed that Jews were "enemies of the white race." He fled after the shootings and did not confess until 1994 while serving federal sentences for other crimes. A jury convicted Appellant of capital murder in 1997—15 years ago—and sentenced him to death. At his trial, the State introduced evidence that Appellant had also murdered two African Americans in Utah

and an interracial couple in Wisconsin, and bombed a synagogue in Tennessee. His guilt and capital sentence have been affirmed on direct appeal, state post-conviction review, and federal habeas corpus review.

Since 2005, Appellant's fellow petitioners in the recently filed *Zink v. Lombardi* case have brought four other civil cases—three in federal court and one in state court—challenging the State's execution procedures, all without success. *See Taylor v. Crawford*, 487 F.3d 1072 (8th Cir. 2007); *Clemons v. Crawford*, 585 F.3d 1119 (8th Cir. 2009); *Middleton v. Missouri Dept. of Corrections*, 278 S.W.3d 193 (Mo. banc 2009); *Ringo v. Lombardi*, 677 F.3d 793 (8th Cir. 2012). There is little reason to believe the new arguments they raise in *Zink v. Lombardi* will fare any better, or that their new case will be more promptly decided. Each of the three earlier federal lawsuits took over two years to resolve.[1]

During their three unsuccessful federal court challenges, inmates on Missouri's death row have argued that this Court should not set execution dates as long as those cases were pending. Each time, this Court rejected their arguments and proceeded to schedule executions. For example, while *Taylor v. Crawford* was pending, this Court set execution dates for Timothy

[1] See Table 1, below, for the filing and disposition dates of death row inmates' prior legal challenges to Missouri's lethal injection protocol.

Johnson, Case No. SC74064, Marlin Gray, Case No. SC75496; and Michael Taylor, Case No. SC77365. While *Clemmons v. Crawford* was pending, this Court set execution dates for John Middleton, Case No. SC80941; Dennis Skillicorn, Case No. SC78864; and Reginald Clemons, Case No. SC75833. And while *Ringo v. Lombardi* was pending, this Court set execution dates for Roderick Nunley, Case No. SC76981; Richard Clay, Case No. SC78373; and Martin Link, Case No. SC78466.[2]

Some of those execution dates were later stayed—on a case by case basis upon examination of their individual merits—but this Court has never before categorically refused to set any executions dates solely because death row inmates have raised yet another new legal theory to challenge Missouri's lethal injection protocol. On the contrary, Johnson, Gray, Skillicorn, and Link were all executed while civil cases challenging the drug protocol were pending.

Once an inmate sentenced to death has exhausted all of his direct appeals, post conviction, and habeas proceedings, setting an execution date is essentially a ministerial act. *See State v. McKenzie*, 894 P.2d 289, 292 (Mont. 1995) (citing cases from Nebraska, Oklahoma, Kansas, and Virginia). Death

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[2] See Table 2, below, for the list of execution dates this Court scheduled during the pendency of death row inmates' prior challenges.

row inmates should not be able to avoid the scheduling of their execution dates just by filing successive lawsuits. This is the eighth bite at the apple, either directly or indirectly, for these petitioners: each has exhausted his direct appeals, post conviction proceedings, and federal habeas review, and one or more of them has taken part in the four prior civil suits challenging Missouri's lethal injection protocol. They will surely file a ninth case on some other grounds if they do not prevail in their most recent case. If filing any challenge to Missouri's execution procedures is sufficient cause for this Court not to set an execution date, no execution date will ever be scheduled again.

From 1995 to 2005, this Court set dates for the regular, predictable, and—after all appeals were exhausted—swift execution of 55 heinous criminals. Since 2005, however, Missouri's death row inmates have maintained a constant barrage of unsuccessful legal challenges to the State's lethal injection protocol. All of their challenges have failed. The Court's August 14, 2012 Order declining to set an execution as long as Appellant and his cohorts keep at least one case pending in any court effectively grinds the wheel of justice to a halt. Effectively, this Court's recent decision grants Missouri's death row inmates a right of filibuster over their own executions.

WHEREFORE, the State respectfully asks this Court to reconsider its prior ruling and set an execution date for Appellant.

Respectfully submitted,

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Table 1
Challenges to Missouri Execution Procedures

Taylor v. Crawford, 05-4173

Filed June 3, 2005 U.S. Dist. Ct. W.D. Mo

Claim 8th Amendment challenge to 3 chemical execution protocol

Rejected January 31, 2006

Rejection Affirmed June 4, 2007

Citation *Taylor v. Crawford*, 487 F.3d 1072 (8th Cir. 2007)

Clemons v. Crawford, 07-4129

Filed July 9, 2007 U.S. Dist Ct. W.D. Mo

Claim 8th Amendment challenge to implementation of 3 drug protocol

Rejected July 15, 2008 judgment on the pleadings

Rejection Affirmed November 10, 2009

Citation *Clemons v. Crawford*, 585 F.3d 1119 (8th Cir. 2009)

Middleton v. Missouri Dept. of Corrections, 08AC-CC-00595

Filed July 24, 2008 Circuit Court of Cole County

Claim Challenge to Missouri Execution Protocol under the Missouri Administrative Procedure Act

Rejected August 13, 2008 Motion to Dismiss with Prejudice granted

Rejection Affirmed February 24, 2009

Citation *Middleton v. Missouri Dept. of Corrections*, 278 S.W.3d 193 (Mo. banc 2009).

Ringo v. Lombardi, 09-4095

Filed May 15, 2009 U.S. Oct. W.D. Mo.

Claim Missouri execution protocol violates the Controlled Substances Act and the Food Drug and Cosmetic Act.

Rejected August 15, 2011 Summary Judgment granted because the inmates failed to state a sufficient injury in fact to create a case or controversy.

Appellate Decision May 8, 2012

Citation *Ringo v. Lombardi*, 677 F.3d 793 (8th Cir. 2012) (case dismissed as moot because Missouri's stock of sodium thiopental had expired).

Zink v. Lombardi, 12AC-CC00396 Fed. No. 2:12CV-4209

Filed June 26, 2012 in the Circuit Court of Cole County, removed to United States District for the Western District of Missouri by Defendants.

Claims Missouri execution procedures are cruel and unusual punishment, violate the Food Drug and Cosmetic Act, violate the *Ex Post Facto* Clause, and violate the Separation of Powers provision of the Missouri Constitution.

Status Defendants filed a motion to dismiss on August 8, 2012. On August 20, 2012, Plaintiffs moved to remand the case to Cole County.

Table 2

Execution Dates Set During Pending Litigation

Inmate	Case No.	Date Set	Execution Date	Pending Litigation When Date set
1. Timothy Johnson (executed)	SC74064	8/1/2005	8/31/2005	*Taylor v. Crawford* (D.Ct.)
2. Marlin Gray (executed)	SC75496	9/26/2005	10/26/2005	*Taylor v. Crawford* (D.Ct)
3. Michael Taylor (stayed based on *Taylor v. Crawford*)	SC77365	1/3/2006	2/1/2006	*Taylor v. Crawford* (D.Ct)
4. John Middleton (stayed based on *Middleton v. MDOC*)	SC80941	6/27/2008 Also 8/15/2008	7/30/2008 then 9/17/2008	*Clemons v. Crawford* (D.Ct) *Middleton v. DOC* pending during second date set
5. Dennis Skillicorn (executed)	SC78864	4/20/2009	5/20/2009	*Clemons v. Crawford* (8th Cir.)
6. Reginald Clemons (Stayed based on *Clemons v. Crawford*)	SC75833	5/18/2009	6/17/2009	*Ringo v. Lombardi* (D.Ct) *Clemons v. Crawford* (8th Cir.)
7. Roderick Nunley (based on challenge to sentence unrelated to Ringo v. Lombardi)	SC76981	8/19/2010	10/20/2010	*Ringo v. Lombardi* (D.Ct)
8. Richard Clay (commuted by Governor)	SC78373	12/10/2010	1/12/2010	*Ringo v. Lombardi* (D.Ct)
9. Martin Link	SC78466	1/7/2011	2/9/2011	*Ringo v.*

(executed)				*Lombardi* (D. Ct.)

Certificate of Service

I hereby certify that a true and correct copy of the foregoing document was electronically filed on August 29, 2012, and should be served by the electronic filing system on counsel for the plaintiff.

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