No. 19A-486

In The

Supreme Court of the United States

OCTOBER TERM 2019

CHARLES RUSSELL RHINES,

Petitioner

v.

SOUTH DAKOTA DEPARTIMENT OF CORRECTIONS, MIKE LEIDHOLT, Secretary, South Dakota Department of Corrections, DARIN YOUNG, Warden South Dakota State Penitentiary.

Application for Stay of Execution

BRIEF IN OPPOSITION TO APPLICATION FOR STAY OF EXECUTION

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CAPITAL CASE – EXECUTION SET FOR NOVEMBER 4, 2019, AT 1:30 P.M.

QUESTION PRESENTED

Whether Rhines' state law allegations implicate 14th Amendment due process or other constitutional concerns.

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SUMMARY OF ARGUMENT

Rhines could have brought this challenge 8 years ago. Instead, he waited until the end of the 11th day before the week scheduled for his execution to raise this issue. The issue is barred by *res judicata* because Rhines could have raised this issue in the method of execution challenge he litigated back in 2011 (or brought a stand-alone claim at any time since).

The litigation below concerning the interpretation of SDCL 23A-27A-32 does not implicate 14th Amendment due process or other constitutional concerns.

Rhines is not entitled to a stay because he cannot show a significant possibility of succeeding on the merits. Rhines' argument rests on the classification of pentobarbital as a short-acting barbiturate in a low-dosage, clinical setting. Here the drug is not being administered in a low dose in a clinical setting. Comparing the properties of low-dosage sodium thiopental or pentobarbital in a clinical setting with high-dosage pentobarbital in an execution setting is comparing apples to oranges. When used in a high-dosage, execution setting, the properties of pentobarbital are identical to the ultrashort-acting barbiturate sodium thiopental.

ARGUMENT

Rhines' petition raises matters of strictly state law statutory construction. The petition does not raise concerns of a federal constitutional dimension. The trial court properly found that all of Rhines' claims were barred by principles of *res judicata.* In addition, the evidence in the record

demonstrates that Rhines had no significant possibility of succeeding on his claims. Accordingly, the trial court did not abuse its discretion in denying Rhines' motion for a stay of execution.

A. Rhines' Petition Does Not Implicate 14th Amendment Due Process Concerns

42 U.S.C. § 1983 provides a cause of action against state actors only for plaintiffs who suffer a "deprivation of any rights, privileges or immunities secured by the Constitution and laws" of the United States at the hands of those acting with the authority of state law. Here Rhines asserts that South Dakota's intention to execute him using pentobarbital violates the 14th Amendment's due process clause. The guarantee of due process enshrined in the 14th Amendment has two components – (1) a guarantee of procedural protections when a state seeks to deprive an individual of protected liberty or property interests, and (2) a substantive protection against conduct that "shocks the conscience." *County of Sacramento v. Lewis,* 523 U.S. 833, 846 (1998).

The first component requires a two-step analysis; first a court must determine whether the plaintiff has a protected liberty or property interest and then the court must determine whether the state has provided adequate procedures for the vindication of that interest. *Wilkinson v. Austin,* 545 U.S. 209, 213 (2005). The second component does not rest on state law. This component provides substantive rather than merely procedural protections and comes into play when "the behavior of the governmental officer is so

egregious, so outrageous, that it may fairly be said to shock the contemporary conscience" regardless of whether the behavior in question conforms or fails to conform to state laws. *Sacramento,* 523 U.S. at 862, n. 8.

Rhines argues that he has a liberty interest created by state law that prevents the state from executing him using any drug other than "an ultra-short acting barbiturate" as the first drug in a two-drug cocktail. However, even assuming that the use of pentobarbital does not conform to SDCL 23A-27-32, "a mere error of state law is not a denial of due process." *Swarthout v. Cooke,* 562 U.S. 216, 222 (2011). In order to establish a liberty interest arising from SDCL 23A-27-32, Rhines must show that execution with pentobarbital would "impose [an] atypical and significant hardship" on him beyond the ordinary for those facing execution. *Sandin v. Conner,* 515 U.S. 472, 484 (1995).

Here, South Dakota's statutory requirements and the associated lethal injection protocol are not "atypical . . . in relation to the ordinary" in comparison to other states' execution protocols. Most states now use pentobarbital, a drug that has been repeatedly approved by multiple federal courts. Use of pentobarbital does not shock the conscious. Rather, as discussed below, multiple experts, including Rhines' own, have testified that there is no difference between sodium thiopental and pentobarbital and that execution by pentobarbital is humane as humanly possible.

Since Rhines has failed to demonstrate South Dakota's intent to "impose atypical and significant hardship on [Rhines] in relation to the ordinary incident of prison life," he has not established that the state's revised protocol invades a protected liberty interest. Also, South Dakota provided an adequate forum for the vindication of Rhines' rights that arise from state law. If Rhines had wanted to protest that South Dakota's lethal injection protocol is an unlawful deviation from statute, South Dakota's courts provided an appropriate venue for that suit. *Jordan v. Fisher,* 823 F.3d 805, 812 (5th Cir. 2016).

B. Rhines' Claims Are Barred By *Res Judicata*

Eight years ago, Rhines was served with formal notice of the adoption of a revised execution protocol. ERM A.12(B).C.1, Exhibit 1. The protocol designated either sodium thiopental or pentobarbital as the barbiturate to be used in the 2-drug protocol that Rhines has elected. ERM A.12(B).C.1, Exhibit 1. Specifically, it informed Rhines that if he elected the 2-drug protocol, he would "be executed by the 2-drug protocol *set forth herein.*" The protocol specifically informed Rhines that the barbiturate used would be either sodium thiopental or pentobarbital. ERM A.12(B).C.1/4, Exhibit 1. The notice was served on Rhines in the context of a then-pending challenge to his method of execution before Judge Trimble in the 7th Circuit Court.

Rhines filed his challenge on February 21, 2008. FIRST AMENDED PETITION, Exhibit 2. Then, as now, Rhines requested declaratory and injunctive relief. Then, Rhines' complaints were:

a. That 23A-27A-32 "as codified on the date of Charles R. Rhines' convictions" gave "no guidance as to the type of substances used or the quality of substances used for the punishment of death." FIRST AMENDED PETITION at Page 11, ¶¶ 37, 39.a, Exhibit 2.

b. About "the two chemical[s] specified in SDCL 23A-27A-32 in effect at the time [of] Charles R. Rhines' conviction." FIRST AMENDED PETITION at Page 12, ¶ 6, Exhibit 2.

c. That "[a]n execution pursuant to SDCL 23A-27A-32 as codified on the date of Charles R. Rhines' conviction violates the constitutions of the State of South Dakota and the United States prohibition against cruel and unusual punishment and is therefore unconstitutional." FIRST AMENDED PETITION at Page 13, ¶ 7, Exhibit 2.

d. That "a[n] execution carried out by means of the two-drug cocktail provided in SDCL 23A-27A-32 in effect at the time of Charles R. Rhines' conviction constitutes cruel and unusual punishment in violation of the constitution of the State of South Dakota and the United States as well as depriving Rhines of his right to *due process* of law." FIRST AMENDED PETITION at Page 13, ¶ 3, Exhibit 2 (emphasis added).

Though he had been served with a copy of ERM A.12(B) on October 24, 2011, which contained explicit notice of the state's intention to use pentobarbital in the 2-drug protocol that Rhines has elected, and though Rhines' then-pending complaint for declaratory and injunctive relief contained general arguments that ERM A.12(B).C.1 denied him process that he felt was due to him under SDCL 23A-27A-32 and in opposition to the "two chemical[s]" that would be used, Rhines never raised a claim that pentobarbital is not an ultrashort-acting barbiturate within the meaning of SDCL 23A-27A-32 as codified on the date of his convictions.

During the litigation of Rhines' method of execution claims, the state had its expert opine on whether a 2-drug protocol of pentobarbital and a paralytic agent would provide a painless and humane death for an inmate. DERSHWITZ TESTIMONY at 21/22, excerpt attached as Exhibit 3. In addition to the ERM A.12(B).C.1. itself, this questioning put Rhines on further notice of the state's intent to use pentobarbital in carrying out the 2-drug protocol that he has chosen.

Judge Trimble ruled against Rhines. TRIMBLE DECISION, Exhibit 4. The South Dakota Supreme Court affirmed. AFFIRMANCE ORDER, Exhibit 5.

During Rhines' subsequent federal proceedings, the state expected Rhines to amend his complaint to further challenge the state's method of execution in federal court. The state moved peremptorily to dismiss the

claim (along with all of Rhines' other pending claims) anticipating that Rhines would continue his method of execution challenge. Remarkably, Rhines did not do so. Instead Rhines inexplicably threw in the towel on further challenging the method of his execution, brusquely stating that "the issue of the manner of execution, which was included in the latest litigation in the state court, and which was discussed at such length in respondent's brief, is not before this court and this court cannot issue any sort of judgment concerning that issue." RHINES RESPONSE TO FEDERAL MOTION FOR SUMMARY JUDGMENT, CIV # 00-5020 [DOCKET 232] at 6, excerpt attached as Exhibit 6.

"The doctrine of *res judicata* disallows reconsidering an issue that was actually litigated or which *could have been* raised and decided in a prior action. *Farmer v. South Dakota Dept. of Rev.,* 2010 SD 35, ¶ 7, 781 N.W.2d 655, 659. The factual predicate for Rhines' theory that pentobarbital is not an ultrashort-acting barbiturate existed 8 years ago and fell under the umbrella of challenges to the statute and the process allegedly due him under state law contained in the complaint for declaratory and injunctive relief. Because Rhines certainly could have brought a specific challenge to the use of pentobarbital to carry out the 2-drug protocol as part of his then-pending complaint for declaratory and injunctive relief 8 years ago, his current claims, and dependent claim for equitable injunction, are firmly barred by principles of *res judicata.*

C. Rhines Did Not Present Clear Evidence Of A Significant Possibility Of Prevailing On The Merits

Recently, in *Bucklew v. Precythe,* 139 S.Ct. 1112, 1134 (2019), this Court condemned the practice of reflexively entering stays of execution. Stays of execution "should be the extreme exception, not the norm." *Bucklew,* 139 S.Ct. at 1134. *Bucklew* reaffirmed the longstanding principle that the mere fact that an inmate has filed some claim for relief – even a potentially meritorious one – "does not warrant the entry of a stay as a matter of right." *Nelson v. Campbell,* 541 U.S. 637, 649 (2004).

"[A] stay of execution is an equitable remedy. It is not available as a matter of right, and equity must be sensitive to the state's strong interest in enforcing its criminal judgments." *Hill v. McDonough,* 547 U.S. 573, 584 (2006). Before a court grants a stay, it must consider "the relative harms to the parties," "the likelihood of success on the merits," and "the extent to which the inmate has delayed in bringing the claim." *Nelson,* 541 U.S. at 649-50. A "preliminary injunction [for a stay of execution is] *not* granted unless the movant, by a clear showing, carries the burden of persuasion." *Hill,* 547 U.S. at 584. Rhines has not carried his burden with clear evidence that the relative harms weigh in his favor, that he is likely to succeed on the merits and that he has not been purposefully and strategically dilatory in bringing his claim.

i. Relative Harms

A court considers the relative harms to the parties by balancing the competing interests of Rhines and South Dakota; specifically, Rhines' interest in being executed with sodium thiopental versus pentobarbital. *Ledford v. Georgia Dept. of Corr.,* 856 F.3d 1312, 1315 (11th Cir. 2017). "A defendant's interest in being free from cruel and unusual punishment is primary; however, a state's interest in effectuating its judgment remains significant." *McNair v. Allen,* 515 F.3d 1168, 1172 (11th Cir. 2008). Victims of crime also "have an important interest in the timely enforcement of a sentence." *Hill,* 547 U.S. at 584.

As detailed below, courts have uniformly found that sodium thiopental and pentobarbital perform exactly the same and that substituting pentobarbital for sodium thiopental does not materially alter an execution protocol. Given that there is no difference between the two drugs when administered in an execution setting, Rhines' interest in being executed with sodium thiopental instead of pentobarbital is far outweighed by the state's interest in effecting its judgment and the victims' interest in justice (after 27 years) for their murdered son. *Ledford,* 856 F.3d at 1315.

ii. Likelihood Of Success On The Merits

"[L]ike other stay applicants, inmates seeking time to challenge the manner in which the state plans to execute them must satisfy all of the requirements for a stay including a showing of a significant possibility of

success on the merits." *Hill,* 547 U.S. at 584. Rhines cannot demonstrate a significant probability of success on the merits because his claim is barred by *res judicata* and because pentobarbital meets the classification of an ultrashort-acting barbiturate in an execution setting.

Just as "[a] time-barred complaint cannot justify a stay of execution, regardless of whether its claims have merit," a claim barred by *res judicata* will not justify a stay of execution, even if it may have had merit had it been timely litigated. *Gissendaner v. Georgia Dept. of Corr.,* 779 F.3d 1275, 1284 (11th Cir. 2015); *Ledford,* 856 F.3d at 1315. Because Rhines' complaint is barred by *res judicata*, he cannot show a substantial likelihood of success on the merits and a stay of execution is not warranted. *Ledford,* 856 F.3d at 1316.

Nor is there a "significant possibility" that Rhines can succeed in proving that pentobarbital does not meet the classification of an ultrashort-acting barbiturate as contemplated by SDCL 23A-27A-32 as codified at the time Rhines was convicted. *Hill,* 547 U.S. at 584.

SDCL 23A-27A-32 does not specify sodium thiopental. It permits the use of any drug that meets the classification of an ultrashort-acting barbiturate. Courts have consistently found that there is no material difference between sodium thiopental and pentobarbital:

a. In *Ringo v. Lombardi,* 677 F.3d 793 (8th Cir. 2012), the court observed that "each court to consider the issue has uniformly held that the use of

pentobarbital in lieu of sodium thiopental" is not a material alteration to an execution protocol.

b. In *Powell v. Thomas,* 641 F.3d 1255, 1258 (11th Cir. 2011) the court stated that "[t]he replacement of sodium thiopental with pentobarbital does not constitute a significant alteration in the lethal injection protocol."

c. In *Pavatt v. Jones,* 627 F.3d 1336, 1338 (10th Cir. 2010), the court rejected an 8th Amendment challenge to Oklahoma's lethal injection protocol based on the state's substitution of pentobarbital for sodium thiopental. Though Oklahoma's statute, like South Dakota's, expressly required the use of an ultrashort-acting barbiturate, the *Pavatt* court found that the change was not sufficiently substantial to rise to the level of a legitimate claim of entitlement protected by due process. The *Pavatt* court also noted that Oklahoma's statute was "not entirely clear" whether the legislature used the term "ultrashort-acting" in the sense of how quickly the drug took effect or the duration of effect. *Pavatt,* 627 F.3d at 1340, n. 3.

d. In *Jackson v. Danberg,* 656 F.3d 157, 160 (3rd Cir. 2011), the court observed that "[p]entobarbital is a barbiturate commonly used to euthanize terminally ill patients who seek death with dignity in states such as Oregon and Washington." Quoting *Beaty,* 649 F.3d at 1075 (denying rehearing *en banc* because inmate had no likelihood of success on 8th Amendment claim based on switch to pentobarbital).

e. In *Ferguson v. Florida State Prison,* 493 Fed.Appx. 22, *2 (11th Cir. 2012), the court stated that "the use of sodium pentobarbital as the first drug in the three-drug sequence does not constitute a substantial change" to Florida's execution protocol. *Valle v. Singer,* 655 F.3d 1223, 1230 (11th Cir. 2011)(replacement of sodium thiopental with pentobarbital does not constitute a significant alteration of the execution protocol).

f. *Powell v. Thomas,* 643 F.3d 1300, 1304 (11th Cir. 2011), noted the minimal differences between sodium thiopental and sodium pentobarbital, both being "classified as barbituates" and differing only "in their length of effect," which "simply means [that pentobarbital's] effect lasts longer than that of sodium thiopental."

g. In *Jordan v. Fisher,* 823 F.3d 805, 811 (5th Cir. 2016), where the state planned to use pentobarbital in the execution of three inmates, the inmates, like Rhines, complained that state law "prevent[ed] the state from executing them using any drugs other than 'an ultrashort-acting barbiturate.'" The court ruled that switching from sodium thiopental to pentobarbital did not implicate any liberty interest.

The cases finding no significant difference between sodium thiopental and pentobarbital are consistent with the testimony of the experts who testified in Rhines' method of execution challenge (including Rhines' own expert, Dr. Heath) and the state's experiences with sodium thiopental and pentobarbital in prior executions.

Dr. Alan Dershwitz, an anesthesiologist, testified on behalf of the state. According to Dr. Dershwitz:

a. "[O]nce 5,000 mg [5g] of pentobarbital have been administered intravenously to an inmate, there is, to a reasonable degree of medical certainty, an exceedingly remote chance that the inmate could experience the effects of the subsequently administered pancuronium bromide . . . . A dose of 5,000 mg of pentobarbital will cause virtually all persons to stop breathing. In addition, a dose of 5,000 mg of pentobarbital will cause the blood pressure to decrease to such a degree that perfusion of blood to organs will cease or decline such that it is inadequate to sustain life . . . . [V]irtually every person given 5,000 mg of pentobarbital will have stopped breathing prior to the administration of pancuronium bromide. Thus, even in the absence of the administration of pancuronium bromide . . . the administration of 5,000 mg of pentobarbital by itself would cause death in almost everyone." DERSHWITZ AFFIDAVIT at ¶¶ 12-13, Exhibit 7.

b. In finding no significant difference between sodium thiopental and pentobarbital, the *Pavatt* court stated Dr. Dershwitz's similar testimony in that case "persuasively characterized a 5,000 milligram dose of pentobarbital as 'an enormous overdose' that 'would cause a flat line of the EEG, which is the deepest measurable effect of a central nervous system depressant' and 'would be lethal as a result of two physiological responses:' the cessation of respiration and the drop in blood pressure 'to

an unsurvivable level.'" *Pavatt,* 627 F.3d at 1339. The *Pavatt* court also stated that Dr. Dershwitz "credibly testified . . . that the 5,000 milligram dosage will give rise . . . to a virtually nil likelihood that the inmate will feel the effects of the subsequently administered vecuronium bromide." *Pavatt,* 627 F.3d at 1339. See also *Valle,* 655 F.3d at 1230 (finding Dr. Dershwitz's testimony that a massive dose of pentobarbital will reliably and swiftly produce death convincing).

c. In his videotaped testimony in Rhines' method of execution challenge, Dr. Dershwitz stated that:

   i. "When pentobarbital is injected intravenously, it has an onset of effect that is almost immediate. Within thirty to forty-five seconds after the drug reaches the brain, the person would be expected to lose consciousness. DERSHWITZ TESTIMONY at 9/20, excerpt attached as Exhibit 3.

   ii. "[P]entobarbital will have this profound effect to decrease circulation, it will stop breathing within a minute or two of its administration." DERSHWITZ TESTIMONY at 11/5, excerpt attached as Exhibit 3.

   iii. When asked whether a 2-drug protocol of pentobarbital and a paralytic would have the same effect as he described above, Dr. Dershwitz testified that it would. DERSHWITZ TESTIMONY at 21/22, excerpt attached as Exhibit 3.

iv. When asked whether the descriptions provided by the warden of how Eric Robert and Donald Moeller had responded to a 5 gram (5,000 mg) dose of pentobarbital were consistent with the effects that he had previously described, Dr. Dershwitz testified "[y]es, and in fact, the warden's description, although given by a medical layperson, does not differ from what [he] observe[s] when [he] give[s] patients an intravenous drug to cause them to enter a general anesthetic state." DERSHWITZ TESTIMONY at 21/22, excerpt attached as Exhibit 3.

Dr. Mark Heath, an anesthesiologist, testified for Rhines in his method of execution challenge (and for the inmate in *Smith v. Mont. Dept. of Corrections,* 2015 WL 5827252 (Mont.Dist.1)). Dr Heath's prior testimony supports the state's position that pentobarbital meets the same classification standards as sodium thiopental (which likely explains his conspicuous absence here at the end stage of Rhines' litigation):

a. Dr. Heath testified that, while "barbiturates are *typically* divided into classes, depending on how rapidly they exert their action and for how long the exert their action . . . there are different ways that people do it." According to Dr. Heath, "pentobarbital is *typically* put into the short- or medium-acting categories depending on which author is referring to it." Dr. Heath's testimony in Rhines' case (like his testimony in the *Smith* case) reflects that there are "different ways" to classify the same

barbiturate depending on performance factors and application. HEATH RHINES TESTIMONY at 21/10, excerpt attached as Exhibit 8.

b. Dr. Heath, Rhines' own erstwhile expert, fudges noticeable with the adverb *typically*. "Typically" is hardly categorical, inherently admitting of contexts where it can meet the ultrashort-acting classification depending on recognized medical variables. One such context is in procedural sedation and analgesia in pediatric emergency medicine where physicians regard "[p]entobarbital [a]s an ultra-short acting barbiturate" that is "very useful for sedation prior to diagnostic imaging procedures" when "given intravenously." Meredith, *Pediatric Procedural Sedation And Analgesia,* 1:2 JOURNAL OF EMERGENCIES, TRAUMA AND SHOCK 88 (2008). In a high-dosage context, "pentobarbital – like the 'ultrashort-acting' drugs thiopental and methohexital – is both a myocardial depressant (a decrease in SVI with unchanging PCWP) and a vasodilator (a decrease in SVRI and evidence for venodilation)." Todd, Drummond and Sang, *Hemodynamic Effects of High Dose Pentobarbital: Studies in Elective Neurosurgical Patients,* 20 NEUROSURGERY 559 (1987).

c. According to Dr. Heath, "[i]f the intended dose of pentobarbital were to be successfully delivered into the circulation of a person and carried to their brain in this dose [5,000 mg] it would cause complete depression of all the brain activity such that there would be no electrical activity in the brain whatsoever. The electrical activity of the brain sustains many important

bodily functions, but in particular it sustain[s] respiration, the rhythmic breathing, that we do all the time and when pentobarbital *or any barbiturate* would stop all activity in the brain . . . [i]t would stop breathing from occurring." HEATH RHINES TESTIMONY at 23/3, excerpt attached as Exhibit 8.

d. In testimony given by Dr. Heath in the *Saar* case (which was used to impeach his testimony in Rhines' method of execution challenge) Dr. Heath testified that sodium thiopental, like pentobarbital, will produce death in 60 seconds. HEATH SAAR TESTIMONY at 70/16, 71/13, excerpt attached as Exhibit 9.

e. In Rhines' method of execution challenge, Dr. Heath testified that, like sodium thiopental, the respiratory arrest secondary to brain inactivity secondary to pentobarbital administration occurs within "60 seconds." HEATH RHINES TESTIMONY at 81/19, 87/4, excerpt attached as Exhibit 8.

f. In the *Cooey* case, when asked how long an execution would take using massive doses of sodium thiopental, Dr. Heath (in the context of a discussion concerning the efficacy of pentobarbital) stated that it "would be the same as using massive doses of some other anesthetic." HEATH COOEY TESTIMONY at 40, excerpt attached as Exhibit 10. In fact, believing that Ohio could not carry out an execution because it did not have *pentobarbital*, Dr. Heath extolled pentobarbital as superior to

sodium thiopental and testified that it should be used *instead*. As an example, Dr. Heath referenced an execution using sodium thiopental that had taken 14 minutes start to finish and opined that "if you give a massive dose of pentobarbital, which can be done very quickly, in all likelihood the person is going to be dead in less time than that [*e.g.* less than 14 minutes]." HEATH COOEY TESTIMONY at 41, excerpt attached as Exhibit 10. When asked to describe the difference between administering pentobarbital and sodium thiopental, Dr. Heath testified that "[sodium] thiopental is given in large volumes, and so it takes a long time. It can take longer to get it in. One can give a comparable or a larger dose of pentobarbital more quickly." HEATH COOEY TESTIMONY at 41, excerpt attached as Exhibit 10. Dr. Heath even went so far as to state that, if states would simply use pentobarbital instead of sodium thiopental "there would be no litigation, or at least I would not participate in the litigation, or I would work for your [the state's] side to say that I think this is a safe and humane procedure." HEATH COOEY TESTIMONY at 70, excerpt attached as Exhibit 10.

g. Dr. Heath, of course, did not testify for Montana when it switched to pentobarbital. Instead, in *Smith* (again on behalf of the inmate) Dr. Heath testified to the exact opposite of his testimony in *Cooey,* claiming that pentobarbital is *not* the "same as" sodium thiopental and is slower. Apparently not aware of Dr. Heath's *Saar* and *Cooey* testimony, the *Smith*

court credited his testimony over the state's expert, Dr. Evans, because it believed Dr. Heath's *Smith* testimony was "consistent" with his testimony in certain, undescribed prior cases while Dr. Evans' allegedly was not. *Smith,* 2015 WL 58827252 at *4. The *Smith* court's lack of awareness of Dr. Heath's testimonial prevarication over the years undoubtedly influenced the court to believe that barbiturate classifications are stricter than they really are, and probably changed the outcome of the case. One wonders if the *Smith* court would have been so enamored of Dr. Heath if it had been aware of the sweeping inconsistencies in his testimony over the years and the widespread rejection of his opinions and testimony as a basis for holding a lethal injection protocol unconstitutional or for staying an execution by state and federal courts.

h. While Rhines' current expert, Dr. Craig Stevens, lacks Dr. Heath's breadth of experience, he does not appear to lack the zeal for distorting science in service of thwarting the implementation of the death penalty. In one of the 5 death penalty cases he appears to have participated in to date, the court ruled that Dr. Stevens' testimony was a "sham" because of the same methodological error underlying his testimony in this case – his classification structure and data are based on "clinical doses." *Loden v. State,* 264 So.3d 707, 712 (Miss. 2018). In *Loden,* Dr. Stevens testified to the alleged "ceiling effect" of midazolam. The *Loden* court criticized Dr. Stevens' methodology for extrapolating this "ceiling effect" "from studies

conducted on cells in laboratory dishes (*in vitro*) and studies examining the blood concentration of midazolam in humans *who were administered clinical doses* of midazolam at five to fifteen milligrams." *Loden,* 264 So.3d at 712 (emphasis added). Dr. Stevens' persistence in testifying to midazolam's alleged "ceiling effect" according to clinical dosages is remarkable given that the *Loden* court found him guilty of the exact same "sham" midazolam methodology that *Glossip* had explicitly and soundly rejected three years earlier. Another court simply dismissed his testimony because he had failed to "cite probative support for his conclusions" about midazolam. *Jordan v. State,* 266 So.3d 986 (Miss. 2018).

i. Dr. Heath's tactic in *Smith* (and basically all cases in which he testifies), is to assert that a state should be using the drug it *doesn't* have. When Ohio had sodium thiopental, Dr. Heath claimed in *Cooey* that pentobarbital was superior; when Montana had pentobarbital, Dr. Heath claimed sodium thiopental was superior. Dr. Heath is an avowed anti-death penalty zealot whose testimonial track record reveals more devotion to that cause than to objective medical science. HEATH RHINES TESTIMONY at 63/5-67/10, excerpt attached as Exhibit 8; HEATH SMITH DEPOSITION at 13/12, excerpt attached as Exhibit 11 (Dr. Heath wrote of his "strong opposition to the imposition of the death penalty").

Eyewitness accounts of executions conducted in South Dakota confirm that, as Dr. Heath himself has reported, pentobarbital is the "same as" sodium thiopental:

a. During the execution of Elijah Page (who tortured Chester Poage for hours – beating and kicking him, poisoning him, stabbing him, drowning him and ultimately beating his skull in with a rock), Warden Weber and other witnesses reported that the execution was performed "like clockwork" and that "it was just a matter of seconds" after the administration of sodium thiopental that Page started "snoring, and his chest heaved a couple times." WEBER 23AUG10 AFFIDAVIT at ¶ 7, Exhibit 12. Page's "death occurred within a matter of minutes." WEBER 23AUG10 AFFIDAVIT at ¶ 10, Exhibit 12.

b. As with Page, Eric Robert (who bludgeoned Correctional Officer Ron Johnson with a lead pipe, breaking his bones, amputating a finger, cracking his skull open and exposing his brain before suffocating him with plastic wrap) was "conscious for only 45 seconds" following the administration of a massive dose of pentobarbital. Robert "expelled his last breath approximately 90 seconds" after administration of the drug. "Robert exhibited virtually no signs of pain or physical distress during either the seconds he remained conscious after the injection commenced or during the period of unconsciousness before he died. WEBER 22OCT12 AFFIDAVIT at ¶¶ 3, 4, Exhibit 13.

c. During the execution of Donald Moeller (who kidnapped, beat, stabbed, raped and cut the throat of 9-year-old Becky O'Connell), Moeller uttered a final sentence about 30 seconds after the warden signaled to commence the administration of the drugs. Moeller lost consciousness about 15 seconds later and "expelled a few last deep breaths approximately 60 seconds after [the warden] signaled to commence the injection." WEBER 1NOV12 AFFIDAVIT at ¶ 4, Exhibit 14. Media witnesses described the process as "very quick" and that Moeller was "gone" in "a matter of [a] minute." WEBER 1NOV12 AFFIDAVIT at ¶ 5, Exhibit 14.

The performance of pentobarbital during the executions of Robert and Moeller conform to Dr Heath's description in *Saar* of the performance of sodium thiopental in an execution setting – that sodium thiopental will produce death in 60 seconds. HEATH SAAR TESTIMONY at 70/16, 71/13, excerpt attached as Exhibit 9.

Which brings us to the debacle of facile statutory construction and result-oriented reasoning that is the *Smith* decision. As here, the inmate in *Smith* claimed that the use of pentobarbital for his execution did not conform to a statute requiring an "ultrashort-acting barbiturate." Applying a literal interpretation of the statute and rigid approach to general barbiturate classifications, the *Smith* court agreed and shamefully enjoined the use of

pentobarbital for the execution of a vicious killer.[1]

a. The *Smith* court's decision rests on the central fallacy that the classification or performance of an ultrashort-acting barbiturate that the legislature had in mind was according to its use "in a clinical setting." Courts have consistently rejected the proposition that an execution is a medical procedure subject to medical or clinical standards.[2] In *Baze v. Rees,* 553 U.S. 35, 60 (2008), the Court rejected the application of medical standards of practice to the execution context. Because medical standards are "drawn from a different context," they are not applicable in an execution setting. *Baze,* 553 U.S. at 60. See also *Walker v. Johnson,* 448 F.Supp.2d 719, 723 (E.D.Va. 2006) ("execution by lethal injection is not a medical procedure and does not require the same standard of care as one"). Even before *Baze, Emmett v. Johnson,* 511 F.Supp.2d 634, 642 (E.D.Va. 2007), ruled that making an "analogy to clinical medical standards in evaluating the methods used for conducting executions is without constitutional basis" because "surgery and execution have the polar opposite medical objectives." *Emmett,* 511 F.Supp.2d at 642.

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[1] *State v. Smith,* 705 P.2d 1087 (Mont. 1985)(Smith shot two men in the head point blank with a sawed-off .22 rifle in order to steal their car and "eliminate any witnesses" to his theft).

[2] See also *Gregg v. Georgia,* 428 U.S. 153, 173, 96 S.Ct. 2909 (1976)(constitution does not require the use of medically optimal standards in executions)*; Ex parte Aguilar,* 2006 WL 1412666 (Tex.Crim.App. 2006)(doctors do not ordinarily prepare fluids for injection or insert or monitor IV lines in hospital settings); *Hamilton v. Jones,* 472 F.3d 814, 817 (10th Cir. 2007)(anesthetic monitoring as done in a surgical suite is not necessary in execution setting given the massive dosages of anesthetic administered).

b. For statutes, like SDCL 23A-27A-32, that are written to meet constitutional standards, the analogy to clinical medical standards is equally inapposite. Lethal injection is "designed to ensure a quick, indeed a painless death, and thus there is no need for" standards applicable to "a hospital surgery suite" where the goal "is to ensure that the patient will wake up at the end of the procedure." *Taylor v. Crawford,* 487 F.3d 1072, 1084 (8th Cir. 2007).

c. Despite the acknowledged discrepancy between clinical and execution standards, the *Smith* opinion repeatedly referenced clinical sources – testimony from Dr. Heath founded on the performance of "both pentobarbital and thiopental" "in a clinical setting," "significant research that classifies thiopental as being ultrashort-acting" when used *in a clinical setting,* some 28,600 search engine results describing sodium thiopental as ultrashort-acting *in a clinical setting,* a package insert classifying pentobarbital that had been manufactured for use *in a clinical setting* as short-acting. *Smith,* 2015 WL 5827252 at *3. *Smith* found clinical-based data such as these to be "[o]f significant import" to its decision. *Smith,* 2015 WL 5827252 at *3.

d. *Smith's* premise is flawed at its core. The *Smith* court apparently was oblivious to the then-recent decision of this Court in *Glossip v. Gross,* 135 S.Ct. 2726 (2015), in which the court expressly rejected measuring execution drug performance according to clinical standards. In *Glossip,*

the inmate's expert, applying a clinical standard, opined that midazolam would not serve as a suitable anesthetic. To this Justice Alito replied:

> Petitioners emphasize that midazolam is not recommended or approved for use as the sole anesthetic during painful surgery, but there are two reasons why this is not dispositive. First, as the District Court found, the 500-milligram dose at issue here "is many times higher than a normal therapeutic does of midazolam." The effect of a small dose of midazolam has minimal probative value about the effect of a 500-milligram dose. Second, the fact that a low dose of midazolam is not the *best* drug for maintaining unconsciousness during surgery says little about whether a 500-milligram dose of midazolam is *constitutionally adequate* for purposes of conducting an execution. We recognized this point in *Baze,* where we concluded that although the medical standard of care might require the use of a blood pressure cuff and an electrocardiogram during surgeries, this does not mean those procedures are required for an execution to pass Eighth Amendment scrutiny.

Glossip, 135 S.Ct. at 2742, excerpt attached as Exhibit 15. Unlike the *Glossip* court, *Smith* failed to appreciate that the Montana legislature was not prescribing a barbiturate for use in a clinical setting; it was prescribing a drug for use in an execution setting. Comparing one to the other is comparing apples to oranges . . . cheese to chalk . . . donuts to dumptrucks. *Glossip,* 135 S.Ct. at 2742, Exhibit 15.

e. As *Smith* correctly points out, and which is not disputed here, barbiturates are typically classified according to how quickly they wear off. Thus, "ultrashort-acting" and "short-acting" refer *not,* as the names might suggest to a layman, to the time it takes for the barbiturate to act on the system but to how long before it wears off. How *quickly* a barbiturate takes effect is described as "ultrafast-acting" or "fast-acting."

Smith found that pentobarbital was short- and fast-acting based on its clinical classification and enjoined its use in Smith's execution. *Smith,* 2015 WL 5827252 at *5.

f. This was a glaring error. According to *Glossip,* the "probative" question is how a drug will perform in an execution. *Glossip,* 135 S.Ct. at 2742, Exhibit 15. According to *Glossip,* "[t]he relevant question" was whether midazolam was suitable in "the huge dose administered in the Oklahoma protocol." *Glossip,* 135 S.Ct. at 2743, Exhibit 15.

g. *Smith* did not address "[t]he relevant question;" instead it fixed on standards having "minimal probative value" to high-dosage administrations of pentobarbital. *Glossip,* 135 S.Ct. at 2743, Exhibit 15. Clearly the Montana legislature was not contemplating the clinical classification or properties of the barbiturate that it was prescribing for use in an execution. Prescribing a barbiturate for execution based on a clinical propensity to wear off quickly (ultrashort-acting) would defeat the purpose of the execution. To administer a clinical dosage of sodium thiopental only to have Smith wake up 5-8 minutes later would thwart the purpose of execution and frustrate the statute. Thus, the Montana legislature clearly was not prescribing a barbiturate for execution purposes based on its ultrashort-acting properties in a clinical setting. The legislature clearly contemplated that any drug used would meet the

performance criteria of an ultrafast-/ultrashort-acting drug in a high-dosage, execution setting.

h. In a clinical setting, an ultrafast-/ultrashort-acting barbiturate (according to Rhines' current expert, Dr. Stevens) will take effect "within 10-30" seconds." According to the testimony of Rhines' former expert, Dr. Heath, in *Saar,* an ultrafast-/ultrashort-acting barbiturate will take effect *and* shut down respiration in 60 seconds. According to Dr. Heath's deposition testimony in *Smith,* an ultrafast-/ultrashort-acting barbiturate takes effect in "20 to 30 seconds." HEATH SMITH DEPOSITION at 26/19, Exhibit 11. Elsewhere in his *Smith* testimony, Dr. Heath states that sodium thiopental administered at its "fastest possible" rate would still take "some tens of seconds to transition from full consciousness to full and deep unconsciousness." HEATH SMITH DEPOSITION at 79/15, Exhibit 11. This is the same as pentobarbital in an execution setting, which, according to Dr. Heath takes effect in "several tens" of seconds, "10, 20, 30" seconds depending on variables like heart rate or how good an inmate's circulatory system is. HEATH SMITH DEPOSITION at 39/11, Exhibit 11.

i. Even if a clinical dose of pentobarbital would not act as fast as a clinical dose of sodium thiopental, Dr. Heath admitted in *Smith* that "[i]f one gave a dose [of pentobarbital] higher than, as with most drugs, the more one gives, the more rapidly one sees the effects." HEATH SMITH

DEPOSITION at 30/9, Exhibit 11. According to Dr. Heath, the time it takes to travel from the injection site to the brain is the same for a large or small dose of a drug, but "all drugs that are used to produce sedation and unconsciousness will exert their effects at a more rapid rate if you give more." HEATH SMITH DEPOSITION at 31/4, Exhibit 11. In other words, high-dosage pentobarbital acts as fast or faster than a clinical dose of sodium thiopental.

j. Ultimately, it is not necessary to extrapolate the matching performance of clinical sodium thiopental and high-dosage pentobarbital from comparisons between Dr. Heath's vacillating testimony in his myriad cases. Dr. Heath put a bow on it in his *Smith* deposition testimony; when finally pushed to stop splitting hairs over clinical classifications and speculative administration mishaps, Dr. Heath was forced to admit in *Smith* that "[i]f proper administration of the drug occurs, *whether it is thiopental or pentobarbital*, if proper administration occurs in the intended multi-gram [execution setting] dose into the circulation and carried to the brain, then there's *no difference between the drugs,* because both will produce deep unconsciousness that will outlast the duration of the execution." HEATH SMITH DEPOSITION at 89/22-90/5, Exhibit 11.

k. Just as a clinical dose of sodium thiopental would not be effective to perform an execution, it is just as clear that, in the context of an execution, sodium thiopental is *not* an ultrashort-acting barbiturate

because it never wears off. In an execution setting, a 3-5 gram dose of sodium thiopental will "outlast the duration of the execution." HEATH SMITH DEPOSITION at 89/22-90/5, Exhibit 11. *Smith's* literal application of clinical classifications to an execution statute renders the statute inoperable; a clinical dose of sodium thiopental would not be sufficient to produce death, and the duration of effect of a lethal dose places the drug well outside the classification of ultrashort-acting.

l. Like *Glossip,* the *Pavatt* court noted the inherent contradiction of applying a strict clinical classification in an execution setting. *Pavatt* found that it was "not entirely clear" that Oklahoma's statute used the term "ultrashort-acting" in the clinical sense of how short it lasts. *Pavatt,* 627 F.3d at 1340 n. 3. Given that short action is not desirable in an execution context, the *Pavatt* court sensibly believed that the statute used the term ultrashort-acting "in a different sense, to refer to how quickly the barbiturate takes effect." *Pavatt,* 627 F.3d at 1340 n. 3. The *Pavatt* court's observation makes sense given the 8th Amendment mandate to eliminate to the extent possible any conscious suffering secondary to cessation of respiration.

m. Likewise, in *Owens v. Hill,* 758 S.E.2d 794, 802 (Ga. 2014), the court rejected the clinical mainstay of sterilized drugs as having any application in an execution setting. "[S]terility is simply a meaningless issue in an execution where, as the record showed, unconsciousness will set in almost

> instantaneously from a massive overdose of anesthetic, death will follow shortly afterward before consciousness is regained, and the prisoner will never have an opportunity to suffer the negative medical effects from infection or allergic reactions from a possibly non-sterile drug. Particularly unpersuasive is Hill's expert's testimony that certain contaminants also could have the following effect: 'Their blood pressure would drop precipitously, and ultimately its possible that they could die.' Such a side effect obviously would be shockingly undesirable in the practice of medicine, but it is certainly not a worry in an execution . . . . [S]uch a side effect would be irrelevant in an execution inducing nearly instantaneous unconsciousness and the rapid onset of death before consciousness is regained." *Owens,* 758 S.E.2d at 802.

In the *Smith* court's defense, its decision could only be as good as the evidence before it. The decision does not reflect that a *Glossip* argument was squarely presented to the *Smith* court. *Smith's* focus on clinical classifications in texts, testimony, literature, manufacturer package inserts and other sources, and the fact that *Glossip* is not even mentioned in the opinion, rather affirmatively demonstrates that it was not. But, as *Glossip* found, clinical performance has "minimal probative value;" "the relevant question" is the drug's performance in the dosage administered in an execution. *Glossip,* 135 S.Ct. at 2742. The evidence conclusively demonstrates that execution dosages of pentobarbital meet the classifications of an ultrashort-acting barbiturate.

Consistent with *Glossip,* Dr. Joseph Antognini, a distinguished anesthesiologist, describes for the court how a "short-acting" drug can behave like an "ultrashort-acting drug," and *vice-versa,* depending on variables such as dosage or method of administration:

a. In high dosages "the actions of pentobarbital . . . are consistent with the actions of an ultra-fast acting/ultra-short acting barbiturate that is administered in a large lethal dose." ANTOGNINI REPORT at ¶ 11, Exhibit 16.

b. Barbiturate "classification is not absolute, and depends in large part on the dose of the drug and the route it is administered (oral versus intravenous)." ANTOGNINI REPORT at ¶ 12, Exhibit 16.

c. A prevailing textbook at the time of SDCL 23A-27A-32's codification reported that the classifications of barbiturates are "often altered depending on the route of administration (oral versus intravenous) [and] dose." ANTOGNINI REPORT at ¶ 13, Exhibit 16, citing Miller, ANESTHESIA (1st Ed. 1981).

d. Studies report that classifications of barbiturates are so inexact, "dose-dependent," and archaic that "[i]t is surprising that th[ese] classification[s] still persist in pharmacology textbooks." ANTOGNINI REPORT at ¶¶ 14, 15, Exhibit 16.

e. A textbook written by Rhines' own expert in this case, Dr. Craig Stevens, demonstrates the fluidity of barbiturate classification. Though Dr.

Stevens's report states that there are only "two ultra-short-acting barbiturates: sodium thiopental and methohexital," his textbook identifies both sodium thiopental *and* pentobarbital as short-acting. ANTOGNINI REPORT at ¶ 16, Exhibit 16, citing Brenner and Stevens, PHARMACOLOGY at 209, Table 19-1 (2018)(excerpt attached to ANTOGNINI REPORT. Dr. Stevens' table classifies pentobarbital administered orally by pill for insomnia as a short-acting barbiturate. He classifies the onset of the pill-form of the drug as fast. He does not have a classification for pentobarbital administered intravenously. As Dr. Heath has testified, drugs act faster when administered in higher dosages and, when pentobarbital is administered intravenously in a high dosage, it is no different than sodium thiopental. Dr. Stevens classifies an intravenous administration of sodium thiopental as short-acting, not ultrashort-acting. He classifies the onset of intravenous sodium thiopental as "very fast," not ultrafast. The fact that Dr. Stevens himself fails to use the allegedly fixed and "widely accepted" nomenclature of "ultrafast" (or "ultrashort" when referring to Zaleplon's duration of action) is further evidence that, as Dr. Heath stated, there "are different ways that people" classify drugs "depending on which author is referring to it."

f. It is worth noting that Dr. Stevens' chart classifies every intravenously-administered drug as "very fast." Under the circumstances, it is reasonable to infer that he would likewise classify intravenously-

administered pentobarbital as "very fast" or, in Dr. Heath's words, "the same as" sodium thiopental. Dr. Stevens' classification of sodium thiopental as "short," rather than "ultrashort" acting belies his testimony that barbiturate classifications are rigid *and* that there is any difference between sodium thiopental and pentobarbital.

g. According to Dr. Stevens, duration of action, like duration of onset, is a function of lipid solubility. Dr. Stevens testified that drugs that are more lipid soluble wear off more quickly than drugs that are less lipid soluble. Thus, the fact that Dr. Stevens classifies both sodium thiopental and pentobarbital as "short" signifies that their lipid solubility is the same, at least in his opinion when he approved this chart for publication in the textbook he wrote. And the fact that Dr. Stevens classifies all intravenously-administered drugs as "very fast" acting, and the fact that intravenous pentobarbital would likewise be classified as "very fast," is further evidence that the lipid solubility of intravenous pentobarbital and intravenous sodium thiopental are the same, particularly in high dosages as Dr. Heath has said.

h. Barbiturates can meet different classification criteria depending on dosage. ANTOGNINI REPORT at ¶ 17, Exhibit 16; HEATH SMITH DEPOSITION at 89/22-90/5, Exhibit 11; HEATH COOEY TESTIMONY at 40, excerpt attached as Exhibit 10.

i. In the execution context, classification of sodium thiopental as "ultra-short acting" is "meaningless" because the drug's duration of action at that dosage would far exceed the time criterion for that classification. ANTOGNINI REPORT at ¶ 18, Exhibit 16. High dosage, intravenous administration alters pentobarbital's properties to match those of sodium thiopental in an execution setting. ANTOGNINI REPORT at ¶ 13, Exhibit 16, citing Miller, ANESTHESIA (1st Ed. 1981).

j. As noted in *Smith* and by Dr. Heath, "the purpose of the development of ultra-fast-acting barbiturates" is "a very quick transition from consciousness to unconsciousness." ANTOGNINI REPORT at ¶ 18, Exhibit 16. "[P]entobarbital at the dose administered in the South Dakota protocol (5 grams) would induce rapid unconscious within 20-30 seconds," consistent with the classification criteria of an ultrashort-acting barbiturate. ANTOGNINI REPORT at ¶¶ 20, 21, Charts C and D, Exhibit 16.

k. "[A] drug that is typically considered 'short-acting' can be 'ultra-short acting," and . . . an 'ultra-short acting' drug can be 'short-acting' depending on the variable of dosage" and route of administration. ANTOGNINI REPORT at Charts C and D, Exhibit 16. "When a drug is given intravenously, there is typically a vary rapid rise in the concentration . . . . A typical clinical dose is the general baseline for classifying drugs as 'ultrashort-' or 'short-acting.' But, since duration of

action is a function of dosage, the classification can change if the dosage changes." ANTOGNINI REPORT at Charts C and D, Exhibit 16.

Here, the *Smith* decision was more instructive of what *not* to do than *what* to do. "[I]t is . . . a well-established canon of statutory construction that 'a statute susceptible of more than one meaning must be read in the manner which effectuates rather than frustrates the major purpose of the legislative draftsmen.'" *In re Goerg*, 844 F.2d 1562, 1567 (11th Cir. 1988), quoting *Schultz v. Louisianan Trailer Sales, Inc.*, 428 F.2d 61, 65 (5th Cir. 1970). "'[I]n cases where a literal approach would functionally annul the law, the cardinal purpose of statutory construction – ascertain legislative intent – ought not be limited to simply reading a statute's bare language; we must also reflect upon the purpose of the enactment, the matter sought to be corrected and the goal to be attained.'" *State v. Cameron*, 1999 SD 70, ¶ 21, 596 N.W.2d 49, 54, quoting *Desmet Ins. of South Dakota v. Gibson*, 1996 SD 102, ¶ 7, 552 N.W.2d 98, 100.

As used in SDCL 23A-27A-32 as codified at the time of Rhines' conviction, the term "ultrashort-acting barbiturate" is arguably susceptible of two meanings – clinical or lethal. The state would argue that its meaning, in the context of a lethal injection statute, is limited to its properties as a lethal agent, but *Smith* demonstrates that minds can differ. Since "ultrashort-acting barbiturate" is susceptible of two meanings, it must be given a construction here that does not thwart the statute's purpose or render it an absurdity.

a. Rhines' interpretation of the statute is absurd for two reasons. First, a clinical dosage of sodium thiopental would not effect death; he would wake up in 5-8 minutes. Second, a lethal dosage of sodium thiopental is *not* ultrashort-acting. As Dr. Heath points out, sodium thiopental in a lethal dose will "outlast the duration of the execution." HEATH SMITH DEPOSITION at 89/22-90/5, Exhibit 11. As Dr. Antognini points out, this duration would exceed the time-criterion for ultrashort-acting. ANTOGNINI REPORT at ¶¶ 18, 20, Chart D, Exhibit 16. Rhines' literal interpretation would annul the statute because no drug could qualify. *Cameron*, 1999 SD 70 at ¶ 21, 596 N.W.2d at 54.

b. The state's interpretation is both logical and consistent with SDCL 23A-27A-32's purpose. In the context of a lethal injection statute, it makes more sense, as *Glossip* points out, to classify drugs based on their lethal rather than clinical properties. And, as *Pavatt* pointed out, the performance metric of interest to the legislature was not how short the drug lasted but how quickly it took effect. All evidence, Rhines' own especially, demonstrates that pentobarbital acts in an ultrafast manner in an execution setting.

c. The legislature's intent in drafting SDCL 23A-27A-32 was to meet constitutional standards for execution and therefore must be interpreted in light of the numerous cases which have held that there is no

constitutional difference between sodium thiopental and pentobarbital. If there is no constitutional difference, there is no statutory difference.

Rhines cannot demonstrate a "significant possibility" of succeeding on the merits of his claim. *Hill,* 547 U.S. at 584.

a. The claim is barred by *res judicata* because Rhines could have litigated this claim in the method of execution litigation before Judge Trimble in 2011. As noted just days ago by the South Dakota Supreme Court, Rhines' complaint for declaratory judgment and injunctive relief before Judge Trimble "argued that the state's protocols violated due process" and that the issue of the process due Rhines under SDCL 23A-27A-32 as codified on the date of his conviction was "fully litigated during a court trial, which included expert medical testimony." *Rhines v. S.D. Dept. of Corrections,* 2019 SD 59, ¶ 3. The Supreme Court noted that the "circuit court reviewed the parties' evidence" and "made detailed findings of fact." *Rhines,* 2019 SD 59 at ¶ 4. Rhines filed a motion to appeal Judge Trimble's ruling but the Supreme Court "denied his motion, concluding that he had not demonstrated probable cause that an appealable issue existed." *Rhines,* 2019 SD 59 at ¶ 4. Rhines had a full and fair opportunity to litigate the state's alleged non-compliance with the process allegedly due him in his then-pending complaint for declaratory and injunctive relief. Though Rhines certainly could have, he did not take advantage of that opportunity to litigate this aspect of the method of his

execution. There has been a final judgment rendered on the process due Rhines under the statute. *Rhines,* 2019 SD 59 at ¶ 4. Consequently, Rhines' claims are firmly barred by principles of *res judicata. Lippold v Meade Co. Bd. of Comm.,* 2018 SD 7, ¶ 28, 906 N.W.2d 917, 925.

b. Nor can Rhines prevail on the substance of his claims. Rhines' gimmick of applying clinical standards to the execution setting has been rejected by this Court in *Baze* and *Glossip.* Rhines' clinical interpretation of SDCL 23A-27A-32 would render the statute a nullity. Given the 8th Amendment constraints that necessarily guide the legislature's actions in this context, the legislature's selection of an ultrashort-acting barbiturate obviously was driven by the speed with which the drug took effect, not by how quickly it wears off. *Pavatt,* 627 F.3d at 1340 n. 3.

c. As Dr. Antognini points out, drugs can cross back and forth between classification boundaries depending on the method of administration and dosage given. Sodium thiopental administered in a low dosage at a slow rate would take effect slowly and wear off over a longer period of time; as such it could be considered slow-acting in terms of onset and short- or intermediate-acting in terms of duration. Pentobarbital administered in a massive dosage takes effect as fast as sodium thiopental or any other drug in the ultrashort-acting classification. ANTOGNINI REPORT at ¶¶ 12, 16, 18, 20, Charts C and D, Exhibit 16.

d. According to Rhines' own expert in the case before Judge Trimble, "there's *no difference between the drugs.*" HEATH SMITH DEPOSITION at 89/22-90/5, Exhibit 11. Indeed, when Dr. Heath was on the warpath against sodium thiopental in the *Cooey* case, he stated that "[o]ne can give a comparable or a larger dose of pentobarbital more quickly" than sodium thiopental. HEATH COOEY TESTIMONY at 41, excerpt attached as Exhibit 10. Given this Court's preference for measuring an execution drug's performance according to high-dosage metrics, the South Dakota Supreme Court's approval of the protocol as codified on the date of Rhines' conviction 27 years ago, and the intrinsic absurdity of applying clinical standards to a non-therapeutic process, Rhines stands no realistic chance of succeeding on the merits of his claim.

iii. Delay

A prisoners' long delay in pursuing a claim creates a strong equitable presumption against the grant of a stay. *McGehee v. Hutchinson,* 854 F.3d 488, 491 (8th Cir. 2018). "Given the state's significant interest in enforcing its criminal judgments, there is 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." *Nelson,* 541 U.S. at 650. "[A] plaintiff cannot wait until a stay must be granted to enable him to develop facts and take the case to trial – not when there is no satisfactory explanation for the delay." *Sepulvado v. Jindal,* 729 F.3d 413,

420 (5th Cir. 2013), quoting *Reese v. Livingston,* 453 F.3d 289, 291 (5th Cir. 2006). A prisoner is not entitled to a stay in order to conduct discovery to make out a claim. *Beaty v. Brewer,* 649 F.3d 1071, 1075 (9th Cir. 2011).

Courts have often refused to grant a dilatory stay request sought on the eve of an execution. For example, in *McGehee,* a group of prisoners elected to forego certain federal claims and chose instead to challenge the execution protocol exclusively in state court. Only after the state supreme court rejected their state-law claims, and the Governor scheduled their executions, did the prisoners present a claim in federal court. *McGehee,* 854 F.3d at 491. The *McGehee* court overturned the district court stay of the scheduled executions because the 8th Amendment claims made in the federal litigation could have been litigated at the same time as the earlier state claims. Without specifically addressing whether the claims were technically barred by *res judicata, McGehee* ruled that the prisoners' use of "piecemeal litigation" and dilatory tactics was sufficient reason by itself to deny a stay. *McGehee,* 854 F.3d at 491, quoting *Hill*, 547 U.S. at 584-85.

In *Ledford* the court denied a stay despite the fact that the inmate's claims were not necessarily barred by the statute of limitations because he had not been timely in waiting until five days before his execution to raise his claim. *Ledford,* 856 F.3d at 1315; *Crowe v. Donald,* 528 F.3d 1290, 1292 (11th Cir. 2008); *Diaz v. McDonough,* 472 F.3d 849, 851 (11th Cir. 2006); *Hill v. McDonough,* 464 F.3d 1256, 1259-60 (11th Cir. 2006). Also, in *Jones v. Allen,*

485 F.3d 635 (11th Cir. 2007), an inmate facing imminent execution filed a last-minute challenge to Alabama's protocol, which had been adopted four years earlier. The *Allen* court concluded that the inmate's delay "leaves little doubt that the real purpose behind his claim is to seek a delay of his execution, not merely to effect an alteration of the manner in which it is carried out." *Jones,* 485 F.3d at 640.

Similarly, here, South Dakota identified pentobarbital as one of two ultrashort-acting barbituates that would be used in its two-drug protocol 8 years ago. Rhines could have challenged the inclusion of pentobarbital in the 2-drug protocol 8 years ago. Yet, only 11 days from the week set for his execution, Rhines raises this challenge for the first time.

Rhines has failed to show any equitable basis for excusing his delay under these circumstances. *Ledford,* 856 F.3d at 1312. He has been sentenced to death for 26 years and, only now, with his execution imminent, has he decided to challenge this aspect of the procedure for lethal injection that the state has had in place for the last 8 years. *Jones,* 485 F.3d at 640.

Though the *Smith* case held a full trial on the inmate's statutory compliance claim, the significant difference between this case and *Smith* is that Smith did not wait until the last minute to bring his claim. A year ago, Rhines, through the same lawyers that represent him here, brought a claim challenging the enactment of the policy on the grounds that it had not been promulgated by the APA. He should have brought this claim a year ago as

well. This sort of last-minute, stay-baiting litigation is extremely prejudicial to the state because it forces the state to assemble a hasty defense and inhibits the state from marshalling its full best evidence against the claim.

The injustice of further delay is a particularly intolerable here considering that, because of his violent criminal history, Rhines would have been sentenced to life in prison for the burglary and his first, non-fatal stab wound to Donnivan Schaeffer's stomach. Rhines' capital sentence is his punishment for pounding a hunting knife into the base of Donnivan Schaeffer's skull and killing him. But so far, all he has served is life in prison, the same sentence he would be serving if he had walked out after stabbing Donnivan just once and let him live. In other words, he has not yet been punished for murdering Donnivan. It is time for him to be punished for this killing. Equity howls against delay in this case.

CONCLUSION

Because Rhines failed to meet his burden of persuasion with a clear showing that law and equity favored his request for a stay of execution, the trial court and South Dakota Supreme Court did not err in denying the motion. Rhines' allegations implicate purely matters of state law; he has not identified issues sufficient to implicate federal constitutional concerns.

Dated this 4th day of November 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing brief was served on Caroline Heller at hellerc@gtlaw.com.

Dated this 4th day of November 2019.

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