******EXECUTION SCHEDULED FOR APRIL 24, 2017******

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS

MARCEL WAYNE WILLIAMS,

Plaintiff,

v. **Case Number 5:17-cv-103-KGB**

WENDY KELLEY, Director, Arkansas Department of Correction, in her official capacity; RORY GRIFFIN, Deputy Director, Arkansas Department of Correction, in his official capacity; and DALE REED, Chief Deputy Director, Arkansas Department of Correction, in his official capacity,

Defendants.

RESPONSE TO SHOW CAUSE ORDER

Marcel Wayne Williams, by and through undersigned counsel, hereby presents the following cause for the Court not to dismiss the instant complaint and to allow live-testimony to be presented at a hearing.

1. **Mr. Williams was not dilatory in bringing the instant action because an as-applied challenge should ripen with an execution date.**

Mr. Williams has not been dilatory in bringing his as-applied challenge to the lethal-injection protocol. First, analogous to a competency claim under *Ford v. Wainwright*, 477

U.S. 399 (1986), where a prior finding of competency does not foreclose a prisoner from proving incompetency to be executed due to a "present mental condition," *see Panetti v. Quarterman*, 551 U.S. 930, 934-35 (2007), Mr. Williams submits that his present physical condition is the foundation of his as-applied challenge to the current lethal-injection protocol. *Panetti* makes clear that the prisoner is required to show that his "current mental state" bars his execution. *Id*.; *see also Steward v. Martinez-Villareal*, 523 U.S. 637 (1998). Likewise, Mr. Williams's physical condition is constantly evolving and worsening as he ages and deteriorates in solitary confinement. See Exhibit 1. As recognized by the appellate court in *Bucklew v. Lombardi*, 783 F. 3d 1120, 1126 (2015), "the passage of time suggests that Mr. Bucklew's hemangiomas may pose significantly greater risk at this time, as it is the nature of hemangiomas to continuously expand." Whether Mr. Williams had medical conditions that could have been litigated the last time he was under a warrant—December of 2015—have little bearing on whether his current medical conditions, which have worsened since that time and present new and different challenges to this execution are ripe for review at this time.

In addition, even if there is a "strong equitable presumption against the grant of a stay," a hearing is warranted to determine whether Mr. Williams can overcome that presumption with a showing of near-certain risk of a painful or botched execution. *McGehee v. Hutchinson*, Case No. 17-1804 at *4.

2. **Mr. Williams's diabetes, hypertension, and obesity are fluid conditions.**

The Court is correct that Mr. Williams was first diagnosed with diabetes on April 24, 2015. However, this condition has gotten worse, not better. Mr. Williams's physical condition has continued to decline and an assessment of the risks of the lethal-injection protocol should be assessed at the time his execution is imminent. The risks associated with the lethal injection are based on his current medical condition. As Dr. Zivot explains in his declaration dated today, "[t]he standard medical practice for evaluating the health conditions of a patient require nearly contemporaneous physical examination. . . it would not be appropriate to based my medical decisions on information that was a year or more old." Exhibit 1.

Whether Mr. Williams was dilatory involves a factual determination that this Court must decide. Accordingly, the Court should hear testimony regarding the progression of Mr. Williams's conditions and how that impacted his ability to earlier raise this claim. In the *Bucklew* case, the Eighth Circuit remanded the matter to the district court to answer the question of whether the claim could have been brought earlier. *See Bucklew*, 783 F.3d. at 1128.

3. **Mr. Williams was diagnosed with obstructive sleep opnea on March 23, 2017.**

The Court states in its Order that there is no indication that Mr. Williams "was recently diagnosed with any medical condition that impacts the state's application of its current lethal injection protocol." ECF No. 24 at 2-3. As Dr. Zivot explains in his

declaration, Mr. Williams had previously not been diagnosed with Obstructive Sleep Apnea. Dr. Zivot diagnosed Mr. Williams with this disorder on March 23, 2017, after administering a standard questionnaire to Mr. Williams and performing a physical examination. Exhibit 1. Dr. Zivot's declaration of April 11, 2017, and today, explain that this condition poses particular risks with the administration of the lethal-injection protocol and that Mr. Williams will either suffer brain damage from a sub-lethal execution attempt or will die by suffocation. This is a risk that was previously unknown to Mr. Williams and therefore he has not been dilatory in failing to bringing it earlier.

4. **The Defendant's recent actions concede risks of the lethal-injection protocol to Mr. Williams.**

At an evidentiary hearing, Mr. Williams can show that Defendant Wendy Kelley has recently taken actions that show that she concedes the risks particular to Mr. Williams in the lethal-injection protocol. Specifically, on April 15, 2017, Mr. Williams was taken from his cell and brought to a room where his veins were examined by a nurse in the presence of the Director. He was asked by the Director to sign a waiver allowing them to place a device in his arm in order to gain venous access. Exhibit 2. This is an admission that the current lethal-injection protocol is insufficient to provide venous access in Mr. Williams. These actions by the defendant amount to "concession[s]" that there is a "substantial risk of serious and imminent harm that his sure or very likely to occur." *See Bucklew*, 783 F.3d at 1127. These actions by the

defendant elevate the likelihood of a risk apart from the facial challenge in *McGehee v. Hutchinson* and warrant additional fact-finding by this Court.

5. **The facial challenge will be reviewed in the Supreme Court and given the exigencies of time, Mr. Williams should be allowed to make a record.**

Lastly, the decision of the Eighth Circuit Court of Appeals in *McGehee et al. v. Hutchinson et al.*, No. 17-1804 (8th Cir. 2017), while binding on this Court and that underlying case, is not final where a petition for writ of certiorari can be made to the United States Supreme Court. *See* 28 U.S.C. § 1254. At the very least, depending on the outcome of a petition for writ of certiorari to the United States Supreme Court, and any resulting decision, Mr. Williams is entitled to make his record in his as-applied challenge. Given the exigencies of time, if he is not allowed to make a record, he may be executed before he is able to show the risks particular to him that may distinguish his case from the facial challenge. *See Bucklew*, 783 F.3d at 1127. Because the risks attendant to him are greater, the calculus regarding the propriety of a preliminary injunction are different.

6. **Plaintiffs are Available for a Hearing Today or Tomorrow.**

Mr. Williams has subpoenaed Director Kelley to appear at the hearing today and Dr. Zivot is in Little Rock, prepared to testify. Counsel asks that the hearing go on today or that it be scheduled for tomorrow, April 19, 2017. Dr. Zivot can be available at that time as well.

WHEREFORE, Mr. Williams prays that the Court accept this showing of cause and allow an evidentiary hearing to proceed on his as-applied challenge to the Arkansas lethal-injection protocol.

Respectfully Submitted,

JENNIFFER HORAN
FEDERAL PUBLIC DEFENDER

By: /s/ Julie Vandiver_____

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Certificate of Service

I hereby certify that on this 18th day of April, 2017, the foregoing Response to Defendants' Motion to Dismiss was filed using the Court's CM/ECF system, which shall make service on all parties.

/s/ Julie Vandiver_____
JULIE VANDIVER

DECLARATION OF JOEL ZIVOT

1. I am a medical doctor who has previously given declarations in the related case of *McGehee v. Hutchinson* and in this case as to Marcel Williams's physical condition as it relates to the Arkansas lethal injection protocol.
2. I evaluated Mr. Williams on March 23, 2017 at the Varner Supermax Unit of the ADC. I also reviewed his medical records.
3. When I evaluated Mr. Williams, I administered the STOP-BANG questionnaire. This is a standard screening tool used in hospitals everyday all around the country to screen for Obstructive Sleep Apnea ("OSA"). As an anesthesiologist in the daily care of patients, I use the STOP-BANG screening tool and incorporate the results immediately into my anesthetic plan.
4. Mr. Williams score was in the 5-8 range which is a "High risk of OSA." Based on this screening tool, and my physical examination of Mr. Williams, I diagnosed him with OSA. My previous declaration in this case set forth the reasons why OSA poses particular harm to Mr. Williams in this lethal injection protocol.
5. I have also reviewed Mr. Williams's medical records from the ADC and there is no indication that he has ever been screened, diagnosed, or treated for OSA. It appears based on my review of the medical records, that I am the first person to ever diagnose Mr. Williams with OSA.
6. My previous declaration in this case also discussed Mr. Williams's diabetes, morbid obesity and hypertension as risk factors in the execution protocol. Those conditions are progressive. The standard medical practice for evaluating the health conditions of a patient require nearly contemporaneous physical examination. For example, if I was going to be treating a patient before an operation, before I chose my treatment plan, I would evaluate the patient the night before or the morning of the operation. It would not be appropriate to base my medical decisions on information that was a year or more old.
7. Similarly, when I examined Mr. Williams I found that his vascular venous access is poor. This is a condition that also evolves. In my practice as an anesthesiologist, evaluations of vascular access are also contemporaneous to the case and there is little value to an evaluation far in advance of the contemplated procedure. I am aware that the ADC approached Mr. Williams about placing an intravenous catheter, presumably a heparin lock, to administer chemicals in the lethal injection protocol. Any catheter placed not immediately before the execution will be without any value and will only result in further harm to Mr. Williams. It is my opinion that this will not provide the kind of guaranteed IV access contemplated by the Arkansas protocol and does not guarantee that the vascular access obtained here would still be viable at the time of execution.
8. Based on my review of Mr. Williams's medical records, his physical condition has gotten worse, in the past two years, not better. When I saw Mr. Williams on March 23, 2017, his blood pressure was 200/100. He has dangerously elevated systolic and diastolic blood pressure. His poorly controlled hypertension is another manifestation of his OSA.

9. As I related in my declaration dated April 11, 2017, I believe that the ADC will have difficulty obtaining venous access for the purpose of delivering the chemicals for the lethal injection. The lack of oxygen that Mr. Williams will suffer during the contemplated lethal injection will either cause him brain damage if he survives or cause him to die in a painful way.

I swear that the foregoing is true and correct to the best of my knowledge under penalty of perjury under the laws of the United States and the State of Arkansas.

Joel Zivot, MD

April 18, 2017
Date

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Name _____
Height _____ Weight _____
Age _____ Male / Female _____

STOP-BANG Sleep Apnea Questionnaire

Chung F et al Anesthesiology 2008 and BJA 2012

STOP		
Do you **S**NORE loudly (louder than talking or loud enough to be heard through closed doors)?	Yes	No
Do you often feel **T**IRED, fatigued, or sleepy during daytime?	Yes	No
Has anyone **O**BSERVED you stop breathing during your sleep?	Yes	No
Do you have or are you being treated for high blood **P**RESSURE?	Yes	No

BANG		
BMI more than 35kg/m2?	Yes	No
AGE over 50 years old?	Yes	No
NECK circumference > 16 inches (40cm)?	Yes	No
GENDER: Male?	Yes	No

TOTAL SCORE		

High risk of OSA: Yes 5 - 8

Intermediate risk of OSA: Yes 3 - 4

Low risk of OSA: Yes 0 - 2

sleep wake

DECLARATION OF JOSH LEE

1. I am an Assistant Federal Public Defender in the District of Colorado. Before holding this position I worked in the Capital Habeas Unit in Little Rock. I represented Marcel Williams.
2. On Friday, April 15, 2017, I received a phone call from Marcel Williams. He called me because it was after hours and he was unable to get through to the office at the Capital Habeas Unit. Mr. Williams informed me that he had been removed from his cell and taken to see the Director. He was told that because they would have trouble accessing his veins that they needed him to sign a consent form to put some device in his arm. He told me he refused. He wanted me to let his current attorneys know, so I relayed that information to Scott Braden by telephone.

I swear the foregoing is true and correct to the best of my knowledge under penalty of perjury under the laws of the United States and the States of Arkansas and Colorado.

Josh Lee

Josh Lee

4-18-17

Date