No. _____

In the Supreme Court of the United States

KELLY RENEE GISSENDANER,

Petitioner,

v.

HOMER BRYSON, Commissioner, Georgia Department of Corrections,

BRUCE CHATMAN, Warden, Georgia Diagnostic and Classification Prison, and

OTHER UNKNOWN EMPLOYEES AND AGENTS, Georgia Department of Corrections,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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CAPITAL CASE

QUESTION PRESENTED

During Respondents' previous attempt to execute Petitioner, their compounded lethal injection drugs proved defective and unsafe for use.

Does Respondents' decision to again attempt to execute Ms. Gissendaner using the *same* method – i.e., with drugs obtained from the same source, pursuant to the same protocol, and with the same lack of safeguards to detect or prevent a recurrence of these defects – establish that they are violating the Eighth and Fourteenth Amendments by "knowingly and unreasonably disregarding an objectively intolerable risk of harm, and that they will continue to do so . . . into the future"? *Farmer v. Brennan*, 511 U.S. 825, 846, (1994).

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KELLY RENEE GISSENDANER respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The decision of the United States District Court for the Northern District of Georgia dismissing Ms. Gissendaner's action pursuant to 42 U.S.C. § 1983, *Gissendaner v. Bryson, et al.,* Civil Action No. 1:15-CV-689-TWT (N.D. Ga. Aug. 10, 2015), appears as Exhibit A to this petition. The decision of the Eleventh Circuit, *Gissendaner v. Bryson, et al.*, appears as Exhibit B to this petition.

JURISDICTION

The decision of the Eleventh Circuit was entered on September 29, 2015. Ms. Gissendaner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment VIII to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. art. VIII.

Amendment XIV to the United States Constitution, section 1, provides, in relevant part: "Nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. art. XIV, cl. 1.

Section 1983 of Title 28 of the United States Code states, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

STATEMENT OF THE CASE

There is no meaningful dispute that when Respondents first attempted to execute Kelly Renee Gissendaner on March 2, 2015, their compounded lethal injection drugs proved defective so that their use was "sure or very likely to cause serious illness and needless suffering." *Brewer v. Landrigan*, 562 U.S. 996 (2010), quoting *Baze v. Rees*, 553 U.S. 35, 50 (2008). But after a limited self-investigation into what caused their drugs to congeal into clumps of crystals[1], Respondents intend to make a second attempt at Ms. Gissendaner's execution **at 7:00 p.m.** today having made no meaningful changes to how they obtain[2] or handle[3] their drugs. Respondents now assert that the defectiveness that manifested that evening is *unavoidable* with compounded drugs, but nonetheless propose no safeguards to detect or prevent its recurrence. Further, Respondents have previously threatened

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[1] Respondents have submitted a video recording of the condition of their drugs on the night of March 2. See Doc. No. 9-2. Ms. Gissendaner has electronically submitted the recording as Exhibit C to this petition.

[2] Respondents will obtain their drugs from the same anonymous pharmacist who mixed the drugs that proved defective on March 2.

[3] Respondents current protocol contains no provisions on how to detect defective drugs and provides no guidance to the officials who administer the execution as to what to do when defective drugs are discovered.

not to report any future "irregularities" with their drugs in order to avoid future scrutiny by the courts. Respondents' conduct accordingly presents a substantial risk of significant harm to Ms. Gissendaner if her execution is allowed to proceed and manifests a deliberate indifference to that harm that cannot be countenanced by the Eighth Amendment. This Court should grant certiorari and stay Ms. Gissendaner's execution.

I. Course of Proceedings

Ms. Gissendaner was convicted of murder and sentenced to death in the Superior Court of Gwinnett County in 1998. The Supreme Court of Georgia affirmed Ms. Gissendaner's conviction and sentence, *Gissendaner v. State*, 272 Ga. 704, 532 S.E.2d 677 (Ga. 2000), and this Court denied her petition for a writ of certiorari, *Gissendaner v. Georgia*, 531 U.S. 1196 (2001). Ms. Gissendaner sought state habeas corpus relief, which was denied. Ms. Gissendaner filed a petition for writ of habeas corpus with the U.S. District Court for the Northern District of Georgia, which denied her relief. *Gissendaner v. Seabolt,* No. 1:09-CV-69-TWT, 2012 WL 983930 (N.D. Ga. 2012). The United States Court of Appeals for the Eleventh Circuit affirmed the denial of relief on November 19, 2013. *Gissendaner v. Seaboldt*, 735 F.3d 1311 (11th Cir. 2013). This Court denied Ms. Gissendaner's petition for a writ of certiorari on October 6, 2014. *Gissendaner v. Seaboldt*, 135 S.Ct. 159 (Mem) (U.S. 2014).

On February 9, 2015, the Superior Court of Gwinnett County ("the Superior Court") entered an order authorizing Ms. Gissendaner's execution within a seven-

day window opening at noon on February 25, 2015, and closing at noon on March 4, 2015. Respondents subsequently scheduled Ms. Gissendaner's execution for February 25, 2015. At approximately 6:30 p.m. on February 24, Respondents rescheduled Ms. Gissendaner's execution for 7:00 p.m. on March 2.

At approximately 11:30 a.m. on March 2, 2015, Respondents transported Ms. Gissendaner from Lee Arrendale Prison in Alto, Georgia, to the Georgia Diagnostic and Classification Prison in Jackson, Georgia, to await her execution. At approximately 10:19 p.m., Respondents telephoned Ms. Gissendaner's counsel to inform them that her execution would not go forward that evening because their lethal injection drugs were "cloudy" and inappropriate for use. Declaration of Lindsay N. Bennett (Submitted as Doc. No. 1-1) (Attached as Exhibit D) at ¶2. Respondents stated that they were still considering proceeding with Ms. Gissendaner's execution sometime within the thirty-six hours remaining in her one-week warrant period. *Id.* Respondents subsequently telephoned Ms. Gissendaner's lawyers twice more over the next twenty-four minutes: once to state that they might proceed with her execution after all, and another to say that it would not go forward that evening. *Id.*at ¶¶2-3.

At approximately 11:00 a.m. on March 3, Respondents informed Ms. Gissendaner's counsel that she would not be executed pursuant to the Superior Court's February 9 order. *Id.* at ¶3. Respondents subsequently announced that Ms. Gissendaner's execution would be postponed only "while an analysis is conducted of

the drugs planned for use in [the March 2] scheduled execution . . . ."[4] Respondents noted that "[t]he sentencing courts will issue new execution orders when [Respondents are] prepared to proceed." *Id.*

On March 9, 2015, Ms. Gissendaner initiated the underlying Section 1983 action in the United States District Court for the Northern District of Georgia ("the District Court"). (Doc. No. 1.) Ms. Gissendaner alleged that Respondents had violated her Eighth Amendment rights by subjecting her to prolonged uncertainty and fear of a torturous death while they deliberated for some thirteen hours over whether to proceed with her execution in spite of the evident defectiveness of their lethal-injection drugs. *Id.* The complaint also alleged that Respondents' determination to allow only a secretive self-investigation into the cause of their defective drugs would pose a substantial risk of significant harm to Ms. Gissendaner when they next attempted her execution. *Id.*

On April 16, 2015, Respondents filed a motion to dismiss this action pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. (Doc. No. 9.) Respondents attached ten exhibits to their motion, including a video showing that the drugs intended for Ms. Gissendaner's execution on March 2 had congealed into large, crystalline clumps (Doc. No. 9-2) and a number of affidavits in support of their contention that the drugs had become "unsafe" only because they had been stored at too cold of a temperature. *See*, *generally*, Docs. No. 9, 9-1, 9-3, 9-4, 9-6, 9-7.

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[4]http://www.dcor.state.ga.us/NewsRoom/PressReleases/PR_150303.html (last visited September 22, 2015). The press release was issued shortly before 2:00 p.m.

On June 5, 2015, Respondents filed a supplement to that motion which disclosed the previously-withheld results of their cold-storage testing of their lethal injection drugs. (Doc. No. 17.)[5] Respondents' supplement recorded their observations of two samples of their lethal injection drugs over an eleven-day period: one stored at room temperature, the other in a refrigerator at 34º Fahrenheit. Neither sample became "cloudy." [6]

On August 10, 2015, the District Court entered an order dismissing Ms. Gissendaner's complaint. (Doc. No. 29.) On September 18, 2015, the Superior Court entered an order authorizing Ms. Gissendaner's execution "within a time period commencing at noon on the 29th day of September, 2015 and ending seven days later at noon on the 6th day of October, 2015 . . . ." Respondents Homer Bryson and the Georgia Department of Corrections subsequently issued a press release announcing that they had scheduled Ms. Gissendaner's execution for 7:00 p.m. **tonight**.[7]

On September 22, 2015, Ms. Gissendaner filed a motion for a temporary restraining order and stay of execution in the District Court. (Doc. No. 35.) Following a hearing, the District Court denied that motion on September 28, 2015.

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[5] This testing had been completed nearly two weeks prior to Respondents' submission of their motion to dismiss, but were not included in that submission.

[6] As Ms. Gissendaner detailed in her response to Respondents' motion to dismiss, those results contradict Respondents' assertion that temperature had caused the defects in their drugs. (Doc. No. 19.)

[7] Available at: http://www.dcor.state.ga.us/NewsRoom/PressReleases/PR_150918.html) (last visited: September 21, 2015).

(Doc. No. 39.) Ms. Gissendaner appealed the dismissal of her complaint and sought a stay of execution in the Eleventh Circuit, which affirmed the District Court's orders on September 29, 2015.

REASONS FOR GRANTING THE WRIT

I. Respondents' Intent to Use Drugs that Previously Proved Dangerous With No Additional Safeguards Constitutes Deliberate Indifference.

To determine whether Respondents have indeed manifested unconstitutional "deliberate indifference," a court must examine their behavior "in light of the prison authorities' current attitudes and conduct," *Helling v. McKinney*, 509 U.S. 25, 36 (1993). This means "their attitudes and conduct at the time suit is brought and *persisting thereafter*." *Farmer v. Brennan*, 511 U.S. 825, 845 (1994).

Ms. Gissendaner respectfully submits that everything about Respondents' conduct -- both in obtaining those drugs and since the defectiveness of those drugs manifested -- establishes their deliberate indifference to the substantial risk of serious harm posed by their current method of execution. *Farmer*, 511 U.S. at 828.

A. Respondents' Self-Investigation: Tailored to Protect their Anonymous Pharmacist and Their Drug Supply

In the wake of the events of March 2, Respondents conducted a self-investigation into the cause of the defectiveness of the drugs, although much of its inquiry was concealed by Georgia's lethal injection secrecy act.[8] The limited

[8] The act classifies as a "confidential state secret" the identifying information of any "person or entity who participates in or administers the execution of a death sentence . . . . [or] that *manufactures, supplies, compounds, or prescribes the drugs*"

submissions that Respondents proffered in the district court shed no light on why the drugs precipitated. They also reveal how their self-investigation defers to and defends *the same anonymous pharmacist* who compounded the defective drugs. These aspects of Respondents' conduct call into question the good-faith in which they attempted to determine the cause of their defective drugs and further manifest their deliberate indifference.

1. The Affidavit of Robert Jones

Respondents depend heavily upon the affidavits of Robert Jones, their former general counsel, to both describe and defend the initial stages of their self-investigation into their defective drugs.[9] Per Mr. Jones, that investigation began two days after the scheduled execution, in the afternoon of March 4, when he met Respondents' pharmacist at GDCP so that the pharmacist could "inspect[] the drugs and collect[] a sample in order to test the 'ph' [sic] level of the drugs." Doc. No. 9-1 at ¶7 (attached as Exhibit E). Mr. Jones reports that Respondents' pharmacist telephoned him "[l]ater that afternoon" and "advised that the ph [sic] was within the appropriate ranges" and volunteered that "the most likely cause of the precipitation was that the drugs had been stored at a temperature that was too cold." *Id.* Mr. Jones stated that the drugs would be shipped to an independent

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used in an execution – or, *i.e.*, the very individuals and entities upon whom any meaningful investigation would center. O.C.G.A. § 42-5-36 (d)(emphases added)

[9]Mr. Jones also described the discovery of the "cloudy" drugs and Respondents' efforts to prepare a media response to Ms. Gissendaner's botched execution. Doc. No. 9-1.

laboratory and tested for the identity of the active pharmaceutical ingredient (API) and potency only. *Id.* at ¶9. He then detailed Respondents' plan to conduct a test that "should *confirm*" that theory by having "the supplying pharmacist" prepare "another sample of new execution drugs within the next week.

> [A] sample of this new batch will be placed in the same refrigerator that stored the drugs that were to be used in the Gissendaner execution and stored at the same temperature, 37 degrees Fahrenheit. Another sample of the drugs will be stored in a newly purchased refrigerator that will maintain a constant temperature of approximately 50 degrees Fahrenheit. These samples will be photographed and closely monitored for seven days.

Id. at ¶10. Mr. Jones further promised that Respondents would "provide the results of these tests *to [the district court] and the opposing party*" in the action that underlies this petition. *Id.* at ¶11 (emphasis added).

Respondents subsequently used this promise in a number of court filings. Mr. Jones's affidavit was submitted to this Court on March 19 – the same day that it was signed – as an attachment to Respondents' supplemental brief in opposition to Ms. Gissendaner's petition for a writ of certiorari. Doc. No. 17-1. That petition was denied on March 24. Respondents also submitted Mr. Jones's affidavit to the district court as an attachment to their motions for extensions of time, Docs. No. 7 at 1, No. 8 at 1, but no mention of that testing appeared in Respondents' April 16 motion to dismiss.

2. The Affidavit of Dr. Zastre

After submitting his affidavit, Mr. Jones and the Office of the Attorney General contacted Jason Zastre, Ph.D., an associate professor of pharmacy at the

University of Georgia. In his affidavit filed with the district court and dated April 15, Dr. Zastre reports that Respondents made a specific request: "to provide assistance to the State of Georgia in evaluating what occurred in a sample of compounded pentobarbital sodium solution which apparently precipitated *after shipment on frozen gel packs and storage at approximately 37 degrees Fahrenheit over more than 7 days*." Doc. No. 9-6 at ¶3 (emphasis added) (attached as Exhibit F). After "viewing a video of the [compounded pentobarbital] solution and learning about the shipment and storage of the solution," Dr. Zastre recommended that Respondents send samples of both the precipitated solution and the powder from which it had been prepared to a testing laboratory for comparison. *Id.* at ¶4. That testing was evidently initiated on March 24 and completed on April 2, 2015.[10]

Based upon his consideration of the lab tests, Dr. Zastre offered two possible explanations for why Respondents' drugs were unsafe. [11] The first, which he considered "most *likely*," was "that the solution was shipped and stored at a temperature which was too low." *Id.* at ¶11 (emphasis added). But he also noted an

[10]The first affidavit of William King, Chief of Special Projects for Respondents' Office of Investigations and Compliance Criminal Investigations Division, indicates that he obtained and shipped these materials on March 24 – the same day that he initiated Respondents' previously undisclosed cold-storage testing. Doc. No. 9-7.

[11]Dr. Zastre attests that, based upon the lab results, "the solid particles remaining in the solution were *two different solid forms* of pentobarbital," *ibid* at ¶8 (emphasis added), which either "precipitated or fell out of solution," *ibid* at ¶9, into two different "crystalline form[s]", which he compared to how carbon can crystallize into both diamond and graphite, *ibid* at ¶7.Given where these pentobarbital crystals nearly ended up, this is an unsettling comparison. Further, as discussed in Ms. Gissendaner's pleadings, the different forms of pentobarbital revealed by this testing is another potential cause of the drugs' precipitation.

additional explanation: "the pharmaceutical solvent used to dissolve the pentobarbital sodium had absorbed some amount of water or evaporated *during the preparation process*." *Id.* (emphasis added). Dr. Zastre recommended that Respondents "store the solution at a controlled room temperature" *and* "assur[e] that the pharmacist preparing the solution takes steps to minimize the possibility that the pharmaceutical solvent evaporates or absorbs water during the pharmaceutical compounding process." *Id.* at ¶ 13. Dr. Zastre makes no reference to the testing results that call Respondents' "cold storage" theory into question, which were completed two weeks before he signed his affidavit.

3. Respondents' Press Release and Motion

On April 16 – the same day Respondents filed their motion to dismiss – they issued a press release stating that they concluded that "[t]he most likely cause of this precipitation [of their lethal injection drugs] was that the drugs were shipped and stored at a temperature, which was too low." Respondents omitted any mention of the alternative explanation: that the drug had been manufactured improperly. Respondents' motion to dismiss made one reference to Dr. Zastre's identification of improper manufacture as a possible cause for the dangerousness of their drugs. Doc. No. 9 at 9. Before that, however, they noted "the pharmacist who prepared the execution drugs . . . . *concluded* that the precipitation in the drugs resulted from cold storage," and then asserted that Dr. Zastre "ultimately reached [the] *same* [sic] conclusion as that of the compounding pharmacist." *Id.* at 8 (emphases added). Respondents later returned to this point when arguing that "Plaintiff's general

claim that improperly mixed, or, *as GDC's investigation revealed*, drugs that are stored *too cool*, could lead to severe pain" does not entitle her to injunctive relief. Doc. No. 9 at 31 (emphases added). Respondent presented this investigation as having excluded the "mixing" or manufacture of their drugs as the cause of their defectiveness, despite their own expert's assessment to the contrary.

4. Respondents Disclose Their Cold-Storage Testing.

Following numerous press inquiries concerning the undisclosed testing described by Mr. Jones, Respondents filed a supplement to their motion to dismiss on June 5, 2015. Doc. No. 17.[12] That submission included a second affidavit and investigative report from William King, the Chief of Special Projects for Respondents' Office of Investigations and Compliance Criminal Investigations Division, detailing a series of tests that he conducted from March 24 through April 2 that roughly parallel those described in Mr. Jones's March 19 affidavit. Doc. No. 17-2 at 2, ¶1 (Attached as Exhibit G).[13] Per Mr. King's affidavit and report, Mr. Jones requested his "assistance" on March 24 in documenting "the condition of two newly prepared samples of pentobarbital, which would be stored at different temperatures" at the Georgia Diagnostic and Classification Prison. *Id.* at 2, ¶¶ 2-3. Per Mr. King, one sample was stored "at room temperature" while another "was

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[12]Chris McDaniel, *Georgia Won't Release Results Of Experiment To Determine Why Execution Drug Had Pieces Floating In It,* BUZZFEED NEWS, May 26, 2015. Respondents initially denied Mr. McDaniel's Open Records Act request on the grounds of "attorney-client privilege." *Id.*

[13]Mr. King's affidavit consists of three documents with separate page numbering. To avoid confusion, Ms. Gissendaner will cite to the page numbering appended to the document by the district court's ECF system.

stored at a colder temperature, in a refrigerator located in the same room which was used to store the pentobarbital which was prepared for the execution of Inmate Gissendaner." *Id.* Mr. King maintained that log between "March 24-27, 2015 and March 30-April 3, 2015" – a total of nine days measured over an *eleven-day period. Id.*[14] Mr. King's log indicates that the temperature of the room in which the unrefrigerated drugs were stored ranged from 67º F to 72º F, while every measure of the temperature of the refrigerator in which the "R" sample was stored was 34º F. *Id.* at 9-10. Mr. King concluded that "*No changes* were noted to either sample during the inspection periods." *Id.* at 5. A review of Mr. King's log confirms that he described each sample as "clear" for each of the days he observed them. *Id.* at 9-10.

5. Respondents' Reasons for Withholding this Testing Demonstrate a Lack of Good Faith

In their supplement, Respondents cited "several factors" to explain why they chose not to divulge their test results, which included suggestions that it was irrelevant[15] or merely overlooked.[16] Doc. No. 17 at 4. But the simplest explanation

[14] March 28-29 was the Memorial Day holiday.

[15]Respondents state that their testing "was not included as an attachment" to their motion to dismiss because it "neither *added nor detracted* from the overall explanation for why the drugs precipitated." *Id.* (emphasis added). This is facially incorrect. Respondents' own testing demonstrated that storage temperature was likely *not* the reason the drugs precipitated.

[16]Respondents state that they "were *focused* on the independent laboratory testing results and the observations of Dr. Zastre . . . ." *Id* (emphasis added). It strains credulity to suggest that Respondents forgot about a test that they had repeatedly promised to divulge to this Court. Immediately after asserting that this testing is irrelevant, moreover, Respondents state that it "had been [their] intention to have [it] *ready should [the district court] hold a hearing on this matter . . . .*" *Id.*

remains the most likely: Respondents withheld this information because it undercut their preferred explanation for their botched execution. In the end, Respondents' "cold storage" theory has no reliable foundation. Dr. Zastre did not consider the results of Respondents' cold-storage testing when drafting his affidavit.[17] This leaves the anonymous compounding pharmacist who supplied them with Respondents' defective drugs as the only other source for Respondents' "cold storage" theory. Doc. No. 9-1 at ¶7. His hearsay opinion should be viewed with skepticism, as it absolves him of any responsibility for the execution going awry and has preserved his future viability as a source of lethal injection drugs. The fact that the new batch of drugs did not precipitate in Respondents' refrigerator strongly suggests that the drugs obtained for Ms. Gissendaner's execution on March 2 were compounded improperly. Likely explanations include that the pharmacist did not

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It is impossible to reconcile Respondents' assessments of this evidence as both too irrelevant to attach to their motion but sufficiently relevant to disclose at the hearing on the same motion.

[17] Respondents assert that Dr. Zastre was aware of this testing, but offer no explanation for why he did not acknowledge or address this testing, which was concluded some two weeks before he signed his affidavit. Doc. No. 26 at 11.

adjust the pH of the solution correctly,[18] or that the pharmacy used pentobarbital, and not pentobarbital sodium, to prepare their solutions.[19]

Respondents, in announcing their testing, stated that it "should *confirm* whether the problem with the drugs that were to be used in the Gissendaner execution was that they were stored at too cold a temperature . . . ." *Id.* at ¶10 (emphasis added). It has, if not in the way that Respondents anticipated. The contradictions within Respondents' own submissions emphasize that the question of why their lethal injection drugs became unsafe remains unanswered and confirm the need for a stay of execution. Going forward exhibits deliberate indifference.

B. Respondents Concede that the Defects with Their Drugs Are "Unavoidable"

Respondents have also asserted that their "use of compounded drugs makes incidents like the one that transpired at GDC on March 2 *all but unavoidable*." Doc. No. 9 at 30 (emphasis added). Respondents' concession belies their claim that they have solved why their drugs were unsafe.[20] It also contradicts their many

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[18] As detailed in Ms. Gissendaner's complaint, an out-of-balance pH risks that the API of the drug will "fall out of solution in the form of particles" that would cause excruciating pain if injected and "reduce the potency of the drugs so that they would not kill the prisoner or would kill them much more slowly" than intended. Doc. No. 1 at 16-17. None of the testing that Respondents have submitted to this Court establishes that the pH of this drug was within acceptable limits.

[19] The use of pentobarbital, which is only very slightly soluble in water, as opposed to sodium pentobarbital could accordingly explain the appearance of precipitated material in the syringes.

[20] Indeed, this concession calls into question both Respondents' preferred (if dubious) explanation for their defective drugs and their proposed solution. Respondents assert that their drugs precipitated because they were stored and transported at too cold of a temperature. For their concession to be true,

previous representations to this Court and the courts below as to the absolute safety of their compounded drugs and, accordingly, why no court need scrutinize how and from whom they were obtained.

In *Gissendaner I*, for example, Respondents sought to assuage any concerns about their secret drugs by insisting that the compounded pentobarbital that they now obtain and the FDA-approved pentobarbital that they formerly used "are the *exact* same . . . ." Transcript of *Gissendaner I* Motions Hearing of 02/24/2015 at 17 (Doc. No. 1-3 at 45) (emphasis added) (attached as Exhibit H). In another action, Respondents mocked the notion that compounded pentobarbital posed *any* risks:

> So you are saying that they can't take pentobarbital, which is described as a pretty easy process, you take a liquid and you take a dry powder and you put them together. I mean, *this isn't difficult, it isn't something difficult to compound,* and you are just speculating that, oh well, a compound pharmacy whose sole job is to compound drugs is completely incapable of doing the one thing that they are supposed to do, and that is to compound a drug.

Transcript of Motions Hearing in *Wellons v. Owens*, No. 1:14-CV-1827-WBH of 06/16/2014 at 30-31 (Doc. No 1-5 at 9-10) (emphasis added) (attached as Exhibit I).

Respondents have now acknowledged that what they once said was inconceivable – a problem with their compounded drugs – they now declare inevitable. But they refuse to adjust their protocol and procedures to acknowledge and prevent those risks. Their "knowingly and unreasonably disregarding an

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compounded drugs would have to have a particular sensitivity to temperature. If that is the case, however, then the solution proposed by Dr. Zastre – which, as his affidavit notes, is based upon the temperature requirements for Nembutal, the FDA-approved pentobarbital – would not be well-founded.

objectively intolerable risk of harm, and . . . continu[ing] to do so . . . into the future" is deliberate indifference. *Farmer*, 511 U.S. at 846.

C. There is Nothing in Respondents' Protocol to Detect these "Unavoidable" Defects

The district court appeared to base part of its misplaced confidence in Respondents upon the notion that their "entire *method* of execution . . . includes . . . safeguards" that were put in place to detect problems such as those which manifested on March 2. Doc. No. 29 at 13. There is *no evidence* in the record that such safeguards exist or that Respondents intend to implement any going forward. Respondents' current lethal injection procedures and protocols make no provision for inspecting their drugs. *See* Plaintiff's Ex. 3, Doc. No. 1-1 at 92-104. Respondents offer no evidence that "safeguards" exist except to say that "the cancellation of [Ms. Gissendaner's] execution proves as much." Doc. No. 34 at 6. But a still-unidentified person happening to notice that a clear solution had taken on the consistency of cottage cheese is not evidence of the adequacy or even the *existence* of safeguards. Further, nothing about accounts of the events of March 2 evidences that Respondents have any procedures in place to detect and guard against the possibility of precipitated drugs.

D. Respondents' Threats to Ignore Future "Irregularities"

Perhaps the most troubling aspect of Respondents' submissions below is their thinly-veiled threat to both the district court and Ms. Gissendaner that allowing her action to proceed would force them to *conceal* any future Eighth Amendment violations. Allowing Ms. Gissendaner's challenge to proceed, Respondents warned,

"could create a self-fulfilling prophesy if officials *ignored irregularities in order to avoid recriminations like those now raised by Plaintiff*." Doc. No. 9 at 21. This raises the possibility that if Respondents' drugs were to again prove defective this evening, they might choose to proceed with Ms. Gissendaner's execution rather than fulfill their constitutional obligations. Indeed, Respondents subsequently underscored this risk when asking rhetorically "[w]hy would [Respondents] merely 'notice' cloudiness and then take the enormous step of cancelling her execution?" Doc. No. 34 at 5 (emphasis added).

Respondents subsequently promised the Eleventh Circuit Court of Appeals that if their drugs again precipitate, they "will most definitely postpone Appellant's execution." Respondents' Response at 9 (Attached as Exhibit J). While Appellees' assurances are welcome, they are no substitute for safeguards, especially when they rest upon the willingness of officials of unknown qualifications to "take the enormous step of cancelling [an] execution" when they could instead "ignore irregularities . . . [and] avoid recriminations."

E. Respondents' Conduct Establishes Their Deliberate Indifference

Ms. Gissendaner now faces imminent execution by a lethal injection of drugs that Respondents will have mixed, stored, and handled in the same manner as the "cloudy" drugs they obtained for her botched execution on March 2, 2015 – drugs that Respondents themselves concede were unsafe. Respondents are attempting to execute Ms. Gissendaner without having ever determined *why* their drugs proved defective, insisting that their secretive and superficial self-investigation serve as

the last word on the matter. The evidence is clear that Respondents engineered their investigation to protect their drug supply, promoting an explanation that would insulate the anonymous compounding pharmacist who mixes their drugs from any responsibility for the defectiveness of those drugs. It also shows that Respondents initially concealed the results of their cold-storage testing of their drugs, which disproved their self-serving explanation for the drugs' defectiveness. Going forward, moreover, Respondents have suggested that they might conceal any future "irregularities" with their lethal injection drugs in order to "avoid recriminations like those" that Ms. Gissendaner now presents to this Court. Everything about Respondents' conduct both during and after March 2 establishes their deliberate indifference to Ms. Gissendaner; it further demonstrates that they are "knowingly and unreasonably disregarding an objectively intolerable risk of harm, and that they will continue to do so . . . into the future." *Farmer v. Brennan*, 511 U.S. 825, 846, (1994). For Petitioner, the future is tonight.

F. Respondents' Plan to Use the Same Drugs for Ms. Gissendaner's Upcoming Execution Establishes a Present and Substantial Risk

Ms. Gissendaner respectfully submits that the substantial risk presented by Respondents' deliberate indifference cannot be deprecated. Nor does Ms. Gissendaner's claim "*still* amount[] to speculation . . . ." Doc. No. 29 at 14-15 (emphasis added). On the contrary, the events of March 2 show that Ms. Gissendaner has *never* been speculating. To review: there is no meaningful dispute that the lethal injection drugs Respondents obtained for Ms. Gissendaner's March 2

execution attempt were so defective that "their use . . . is sure or very likely to cause serious illness and needless suffering." But after a limited self-investigation, Respondents changed *nothing* about how they obtain their drugs. Further, they have threatened not to report any future problems with their drugs. Accordingly, it is not "speculation" to observe that this course presents a substantial risk of significant harm to Ms. Gissendaner; it is a recognition of the compelling "*evidence* that the use of the drug is sure or very likely to cause serious illness and needless suffering." *Brewer v. Landrigan*, 562 U.S. 996 (2010), quoting *Baze v. Rees*, 553 U.S. 35, 50 (2008). Indeed, if this is "speculation," it is difficult to imagine what could be "evidence," short of a repeat of the incident that ends in Ms. Gissendaner's agonizing death.

The district court below erred in diminishing this risk, holding that "even assuming the drugs were defective, *that alone* does not necessarily mean that it is significantly likely that defective drugs will be obtained again." Doc. No. 29 at 14 (emphasis added). But there is much more than "that alone." Respondents have obtained the lethal injection drugs that they intend to use tonight from the same anonymous pharmacist who mixed the drugs that proved defective on March 2. And Respondents intend to handle and administer those drugs *in the same way* that they did on March 2. Given that there is nothing contained in Respondents' protocol to ferret out defective drugs (which Respondents concede are "unavoidable"), Respondents are exhibiting deliberate indifference. Indeed, Respondents propose to change nothing in response to Ms. Gissendaner's botched

execution save (perhaps) to buy a new refrigerator – a solution to a problem that their own testing shows is not a factor in why their drugs coagulated. See Doc. No. 19 at 17-20.*[21]

G. Respondents' Deliberate Indifference to the Prospect of an Unconstitutional Execution Violates the Eighth Amendment

Ms. Gissendaner respectfully submits that Respondents' behavior, as detailed above, manifests a "deliberate indifference" to whether their administration of lethal injection poses a substantial risk of serious harm, and accordingly violates her rights pursuant to the Eighth Amendment. *Farmer*, 511 U.S. at 828 (*citing Helling v. McKinney*, 509 U.S. 25 (1993); *Wilson v. Seiter*, 501 U.S. 294 (1991); *Estelle v. Gamble*, 429 U.S. 97 (1976)). In order to show that she is entitled to an injunction to prevent a violation of her Eighth Amendment rights, Ms. Gissendaner must demonstrate that Respondents are "knowingly and unreasonably disregarding an objectively intolerable risk of harm, and that they will continue to do so . . . into the future." *Farmer*, 511 U.S. at 846. In examining whether Respondents' have indeed manifested unconstitutional "deliberate indifference," this Court must examine their behavior "in light of the prison authorities' *current attitudes and conduct*," *Helling*, 509 U.S. at 36

[21]The district court also concludes that "it is not enough to show that the State *may* obtain defective lethal injection drugs." Doc. No. 29 at 13 (emphasis added). There is no "may." Respondents *have* obtained defective lethal injection drugs. More significantly, as Respondents intend to obtain the drugs for their next attempt to execute Ms. Gissendaner *from the same source*, changing nothing as to how they store and handle those drugs, there is certainly a substantial risk that they will find themselves with defective drugs again.

(emphasis added), which means "their attitudes and conduct at the time suit is brought and persisting thereafter," *Farmer,* 511 U.S. at 845. Given the deliberate indifference to Ms. Gissendaner's Eighth and Fourteenth Amendment protections as reflected in their attitudes and conduct since their drugs proved defective on March 2, 2015, Ms. Gissendaner asks this Court to grant her a stay of execution and certiorari review.

CONCLUSION

For the foregoing reasons, Petitioner KELLY RENEE GISSENDANER respectfully requests that this Court grant the writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted this, the 29th day of September, 2015.

Respectfully submitted,

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