Section 4: Criminal Law

Institute of Bill of Rights Law at The College of William & Mary School of Law
IV. Criminal Law

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Madison v. Alabama


Overview: Madison has been on death row for 30 years and has suffered several serious strokes resulting in dementia. Madison’s dementia rendered him unable to remember committing the crime for which he is to be executed.

Issue: 1. Whether, consistent with the Eighth Amendment, as the Supreme Court’s decisions in Ford v. Wainwright and Panetti v. Quarterman, a state may execute a prisoner whose mental disability leaves him with no memory of his commission of the capital offense; and 2. Whether evolving standards of decency and the Eighth Amendment’s prohibition of cruel and unusual punishment bar the execution of a prisoner whose competency has been compromised by vascular dementia and multiple strokes causing severe cognitive dysfunction and a degenerative medical condition that prevents him from remembering the crime for which he was convicted or understanding the circumstances of his scheduled execution.

State of Alabama, Plaintiffs-Appellees,
v.
Madison Vernon, Defendants-Appellants

Circuit Court of Mobile County, Alabama

Decided on January 16, 2018

[Excerpt; some citations and footnotes omitted]

Robert H, Smith, Circuit Judge:

ORDER

This Court held a hearing on January 16, 2018 on Defendant’s petition to suspend his execution because he claims he is incompetent to be executed pursuant to Alabama Code § 15-16-23. The Defendant was present and represented by counsel. Counsel from the Office of the Attorney General were also present for the State of Alabama. This Court received argument on the issue. The Defendant did not provide a substantial threshold showing of insanity, a requirement set out by the United States Supreme Court, sufficient to convince this Court to stay the execution. As a result, this Court hereby DENIES Defendant’s petition to stay the execution. And the State’s motion to dismiss the petition to suspend the execution is hereby GRANTED.
The nation’s death rows are starting to look like geriatric wards. Condemned inmates in many states are more likely to die of natural causes than to be executed. The rare ones who are put to death often first spend decades behind bars, waiting.

It turns out that executing old men is not easy. In November, Ohio called off an attempt to execute Alva Campbell, 69, after the execution team could not find a suitable vein into which to pump lethal chemicals. The state announced that it would try again in June 2019, by which time he would have been 71.

But Mr. Campbell suffered from what one judge called an “extraordinary list of ailments.” He used a walker, could barely breathe and relied on a colostomy bag. He was found lifeless in his cell on Saturday, having died in the usual way, without government assistance.

In Alabama last month, state officials called off the execution of Doyle Lee Hamm, 61, also because they could not find a suitable vein. Mr. Hamm has at least two kinds of cancer, cranial and lymphatic, and he may not have long to live with or without the state’s efforts.

Last week, the Supreme Court agreed to hear the case of another Alabama inmate, Vernon Madison, 67, who suffers from dementia and cannot remember the crime that sent him to death row. The court, which has barred the execution of juvenile offenders and the intellectually disabled, is now turning its attention to old people.

In 1985, Mr. Madison killed a police officer, Julius Schulte, who had been trying to keep the peace between Mr. Madison and his ex-girlfriend, Cheryl Greene, as she sought to eject him from what had been their shared home. Mr. Madison shot Ms. Greene, too, wounding her.

Mr. Madison remembers none of this. He has suffered at least two severe strokes, and he is blind and incontinent. His speech is slurred, and what he says does not always make sense.

He has asked that his mother be told of his strokes, but his mother is dead. He soils himself, saying “no one will let me out to use the bathroom,” though there is a toilet in his cell. He says he plans to move to Florida. He can recite the alphabet, but only to the letter G.
Mr. Madison also insists that he “never went around killing folks.”

A court-appointed psychologist found that Mr. Madison had “significant body and cognitive decline as a result of strokes.” But the psychologist testified that Mr. Madison understood what he was accused of and how the state planned to punish him. According to Steve Marshall, Alabama’s attorney general, that is enough.

The Supreme Court’s precedents bar the execution of people who lack a “rational understanding” of the reason they are to be put to death.

Mr. Marshall told the justices that Mr. Madison satisfied that standard. “The ability to form a rational understanding of an event,” he wrote in January in a brief urging the justices to stay out of the case, “has very limited relation to whether a person remembers that event.”

Mr. Madison’s case, which has been bouncing around the court system for more than 30 years, has taken some unusual turns.

His first conviction was reversed because prosecutors violated the Constitution by excluding all seven potential jurors who were black. His second conviction was thrown out after prosecutors committed misconduct by using expert testimony to tell the jury about evidence never properly introduced.

At Mr. Madison’s third trial, the jury voted to sentence him to life in prison. But Judge Ferrill D. McRae, of Mobile County Circuit Court, overrode that verdict and sentenced Mr. Madison to death.

I interviewed Judge McRae in 2011, not long before he died. I had sought him out because he had achieved a rare distinction. He had overridden six jury verdicts calling for life sentences, a state record, while never rejecting a jury’s recommendation of death.

Alabama juries are not notably squeamish about the death penalty, but Judge McRae said they needed to be corrected when they were seized by an impulse toward mercy. “If you didn’t have something like that,” he said of judicial overrides, “a jury with no experience in other cases would be making the ultimate decision, based on nothing.”

Alabama abolished judicial overrides last year.

In 2016, Mr. Madison came very close to being put to death. A deadlocked eight-member Supreme Court refused to vacate a stay of execution issued by a federal appeals court, with the court’s four conservative members saying they would have let the execution proceed. Justice Antonin Scalia had died a few months before, leaving the Supreme Court short-handed. Had Justice Scalia lived, Mr. Madison would almost certainly be dead by now.

The case took some additional procedural twists, and Mr. Madison returned to the Supreme Court in January after a state court again ruled against him. The Supreme Court stayed his execution, though the court’s three most conservative members — Justices Clarence Thomas, Samuel A. Alito Jr. and Neil M. Gorsuch — said they would have let it go forward.
The case, Madison v. Alabama, No. 17-7505, will be argued in the fall, and it will give the court a chance to consider some profound questions.

“Mr. Madison is one among a growing number of aging prisoners who remain on death row in this country for ever longer periods of time,” Justice Stephen G. Breyer wrote in a concurring opinion when the court considered an earlier appeal. “Given this trend, we may face ever more instances of state efforts to execute prisoners suffering the diseases and infirmities of old age.”
The US Supreme Court has granted a stay of execution for an Alabama inmate whose dementia, his lawyers say, prevents him from remembering the murder he was convicted of committing decades ago.

Alabama had planned to put Vernon Madison, 67, to death on Thursday night, but less than a half hour before the execution was to take place, Justice Clarence Thomas issued a temporary stay.

About two and a half hours later, the high court announced that a stay had been granted while the court decides what to do with an appeal from the defense.

Madison has been convicted three times in the shooting of Mobile police Cpl. Julius Schulte, who was responding to a April 1985 domestic disturbance call. Madison, who was on parole, sneaked up behind Schulte and shot him twice in the head, according to court documents. He also shot his girlfriend, who survived her wounds.

At his first and second trials, Madison argued that he was not guilty because he was mentally ill. At his third trial, he argued self-defense.

His attorneys from the Equal Justice Initiative, based in Montgomery, filed a petition Wednesday with the Supreme Court. Madison's sentence was imposed in 1994 by a judge, after a jury recommended life without parole. His lawyers argue the death sentence is unfair because a 2017 Alabama law no longer permits judicial override and they say Madison's sentence should be commuted to life without parole.

"Given Alabama's rejection of judicial override, the death sentence in this case constitutes cruel and unusual punishment and violates Mr. Madison's rights to a jury, fair and reliable sentencing and to due process and equal protection of the laws as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and Alabama law," they wrote in their petition.

In prior appeals, Madison's attorneys have argued their client doesn't fully understand why he is being punished because dementia has taken his ability to remember his crime. They also say his health is declining.
In November, the US Supreme Court agreed with a state court ruling that Madison was mentally competent.

"The state court did not unreasonably apply (two prior decisions) when it determined that Madison is competent to be executed because -- notwithstanding his memory loss -- he recognizes that he will be put to death as punishment for the murder he was found to have committed," the justices wrote.

Madison's lawyers asked Gov. Kay Ivey for clemency.

"Mr. Madison suffers from vascular dementia as a result of multiple serious strokes in the last several years, and no longer has a memory of the commission of the crime for which he is to be executed," attorneys wrote.

"He does not understand why the state of Alabama is attempting to execute him," they said.

They argue that executing someone with dementia is counter to how society treats vulnerable citizens.

CNN reached out to the governor's office and the state's Attorney General's office but didn't get a response.

There are 182 inmates on Alabama's death row, three of whom have been there longer than Madison.

Before his execution was stayed, Madison had two oranges for his last meal and did not made any statements, officials said.
“The Cruelty of Executing the Sick and Elderly: Two controversial cases in Alabama reveal a disturbing trend in the death penalty in America.”

The New Republic

Matt Ford

February 27, 2018

Vernon Madison doesn’t know why he’s going to be executed.

The state of Alabama tells him that he fatally shot a police officer in the back and wounded his ex-girlfriend during a domestic dispute in 1985. State courts tossed out his first two convictions in the 1980s before a jury found him guilty for the third time in 1994. Those jurors, who were told of Vernon’s history of mental illness, sentenced him to life imprisonment without parole. The presiding judge then used an esoteric provision of Alabama law to sentence Madison to death instead.

Now 67 years old, the longtime death-row inmate is hardly the same man who was convicted of capital murder almost a quarter-century ago. Multiple strokes have left him with vascular dementia, a severe and degenerative neurological disease that has stripped Madison of his mental functions. He can no longer see, walk independently, or control his bladder. According to his petition for review, a psychologist’s examination found that he can no longer remember the alphabet past the letter G or name the previous president of the United States.

The U.S. Supreme Court agreed to take Madison’s case on Monday. But he isn’t the only ailing death-row prisoner that Alabama wants to execute. Last week, the state tried to carry out its death warrant against Doyle Hamm, a 61-year-old inmate suffering from terminal lymphoma. Hamm’s lawyer Bernard Harcourt warned ahead of time that his client’s illness, chemotherapy regimen, and past history of drug use would make it impossible for prison personnel to find a suitable vein for a lethal injection. A misapplied injection can have horrific consequences, as shown by Oklahoma’s botched execution of Clayton Lockett in 2014.

On the night of his execution last week, the prediction came true. Alabama executioners struggled to find a workable vein for two and a half hours as they punctured him multiple times across his arms, legs, and groin. “The IV personnel almost certainly punctured Doyle’s bladder, because he was urinating blood for the next day,” Harcourt told NBC News. “They may have hit his femoral artery as well, because suddenly there was a lot of blood gushing out. There were multiple puncture wounds on the ankles, calf, and right groin area, around a dozen.” The team eventually
gave up, as the execution warrant expired at midnight.

Both men are symptomatic of America’s aging death rows. In 2013, the latest year with available data, the federal Bureau of Justice Statistics found that death-row inmates waited an average of 15 and a half years between conviction and execution. In states that rarely perform executions, the sentence is effectively life imprisonment with a chance of death. The problem isn’t limited to death row, either: Thanks to mandatory minimums and decades-long sentences, the number of American inmates over age 55 jumped fourfold between 1990 and 2010.

The procedural history of Madison’s case reads like a travelogue through the death penalty’s most persistent flaws. The state court of criminal appeals vacated his first conviction for the murder in 1986 after learning that county prosecutors had struck all seven black potential jurors before the trial. (Madison is also black.) A second trial in 1990 also resulted in his conviction, only to be tossed out again by the appeals court because one of the prosecution’s expert witnesses went beyond the factual record.

At his third trial, in 1994, Madison’s lawyers highlighted his history of mental illness. A psychologist testified for the defense that Madison’s symptoms took the form of paranoid delusions, which may have lessened his culpability when he shot and killed the police officer in 1985. After weighing the aggravating and mitigating circumstances, jurors found him guilty of murder and sentenced him to life imprisonment without parole.

That would have been the end of the legal saga in most of the country, at least where the death penalty is concerned. But Alabama was one of a handful of states that allowed judicial overrides in capital cases. (The state abolished the practice in 2017, as the Supreme Court’s intervention appeared imminent, but didn’t apply it retroactively.) Madison’s third trial judge was Ferrill McRae, who campaigned for his elected post on a tough-on-crime platform and often assigned himself the county’s capital murder cases. McRae overrode the jury and sent Madison to death row.

The Supreme Court has long interpreted the Eighth Amendment to forbid executions of those who cannot comprehend the punishment. In 1986, the justices banned executions of prisoners “who have lost their sanity” in Ford v. Wainwright, citing precedents as far back as Hanoverian England that described the practice as “savage and inhuman.” The court later ruled in the 2002 case Atkins v. Virginia that states could also no longer execute people with intellectual disabilities. In 2007, the justices expanded the prohibition in Panetti v. Quarterman to require lower courts to consider whether an inmate’s mental illness left him unable to understand why they were being executed.

“The potential for a prisoner’s recognition of the severity of the offense and the objective of community vindication are called in question,” Justice Anthony Kennedy wrote for the Panetti majority, “if the prisoner’s mental state is so distorted by a mental illness
that his awareness of the crime and punishment has little or no relation to the understanding of those concepts shared by the community as a whole.”

Madison’s lawyers drew a direct line between those rulings and their client’s plight. “Since Ford and Panetti, scientific and medical advancements have led to a greater understanding of how neurocognitive disorders manifest in individuals who suffer from cognitive decline due to formerly undefined reasons,” he argued in their petition to the court. “Vernon Madison is one of these individuals.”

In most places across the United States, the death penalty is dying out. Fewer jurisdictions are pursuing capital cases because of the extraordinary costs and risk of wrongful convictions. More states are stepping back from capital punishment by simply not performing executions or by abolishing it altogether. But it is not yet dead. Until then, those who remain to face the executioner’s needle increasingly seem to be not the worst of the worst, but rather the sick and dying, the aged and infirm, the impoverished and the incompetent.
Vernon Madison, one of the longest serving inmates on Alabama's Death Row, was scheduled to be executed at 6 p.m. Thursday, but 30 minutes before the scheduled execution the U.S. Supreme Court issued a temporary stay. The stay was later granted, and Madison's execution called off.

Madison, 67, has been on death row for over 30 years after being convicted in April 1985 of killing Mobile police Cpl. Julius Schulte. He was set to die by lethal injection at Holman Correctional Facility in Atmore Thursday night, but escaped execution for the second time via an U.S. Supreme Court order issuing a stay.

Attorney General Steve Marshall issued a statement Friday morning in response to the U.S. Supreme Court's issuance of the stay. "After prior rulings that Vernon Madison is competent to face execution for the murder of a Mobile police officer 32 years ago - a cold blooded crime for which there is no doubt he is guilty - it is disappointing that justice is again delayed for the victim's family," Marshall said. "The State opposes Madison's delay tactics and will continue to pursue the execution of his death sentence."

The U.S. Supreme Court about 30 minutes prior to the execution issued a temporary stay, then was extended at 8:10 p.m., causing the execution to be called off for Thursday night.

The Supreme Court's order states the stay is in place until the justices decide whether they will grant Madison's writ of certiorari - request for a review of the case. Justices Clarence Thomas, Samuel Alito, and Neil Gorsuch would deny the application for stay, the order said.

If a majority on the U.S. Supreme Court refuses to review the case, then the stay will automatically be lifted and the Attorney General can then request a new execution date for Madison from the state supreme court.

In the certiorari request by Madison's attorneys at the Equal Justice Initiative (EJI), they say Madison is not competent to be executed.

The EJI asks that the U.S. Supreme Court to stay his execution and grant his petition for certiorari. The court should address the "substantial question of whether executing Mr. Madison, whose severe cognitive dysfunction leaves him without memory of
his commission of the capital offense or ability to understand the circumstances of his scheduled execution, violates evolving standards of decency and the Eighth Amendment's prohibition against cruel and unusual punishment."

"It is undisputed that Mr. Madison suffers from vascular dementia as a result of multiple serious strokes in the last two years and no longer has a memory of the commission of the crime for which he is to be executed," according to the EJI request. "His mind and body are failing: he suffers from encephalomacia (dead brain tissue), small vessel ischemia, speaks in a dysarthric or slurred manner, is legally blind, can no longer walk independently, and has urinary incontinence as a consequence of damage to his brain."

Madison was 34 when he was charged Schulte's death, who was responding to a domestic disturbance call. Madison also was charged with shooting the woman he lived with at the time, 37-year-old Cheryl Ann Greene. She survived her injuries.

According to court records filed by the Alabama Attorney General, here's a police account of what happened that night: Madison's neighbor's had called police, and Schulte was assigned to protect Greene and her 11-year-old daughter as Madison moved out of their house. After pretending to leave the property, Madison retrieved a pistol, crept behind the police car Schulte was sitting in, and fired two shots into the back of the officer's head. After shooting Schulte, Madison then shot Greene as she tried to flee. There were three eye witnesses.

Madison's first trial took place in September 1985. He was convicted, but a state appellate court sent the case back for a violation involving race-based jury selection.

His second trial took place in 1990. Prosecutors presented a similar case, and defense attorneys again argued that Madison suffered from a mental illness. They did not dispute the fact that Madison shot Schulte, but said he did not know that Schulte - dressed in plain clothes and driving an unmarked police cruiser - was a police officer.

He was again convicted, and a jury recommended a death sentence by a 10-2 vote. An appellate court again sent the case back to Mobile County for a retrial, this time based on improper testimony from an expert witness for the prosecution.

His third and final trial took place in April 1994. He was convicted, and the jury recommended a life sentence after both Madison and his mother, Aldonia McMillan, asked for mercy. Mobile County Circuit Judge Ferrill McRae sentenced Madison to death-- this time overriding the jury's recommendation.

In April 2017, Gov. Kay Ivey signed into law a bill that says juries, not judges, have the final say on whether to impose the death penalty. That law officially ended Alabama's judicial override policy, as Alabama was the last state to allow it.

Late Wednesday, Madison's attorneys filed two more petitions to the U.S. Supreme Court-- an application for a stay of
execution, and a petition for a writ of certiorari focused on the issue of judicial override. Madison's attorneys argued that since he was sent to death under the judicial override statute, he is entitled to a stay and a review of his case. Attorneys filed similar motions to the Alabama Supreme Court, but they denied the request earlier Wednesday.

"Because a death sentence is no longer permissible in cases where the jury has returned a sentence of life, Mr. Madison filed a challenge to his death sentence and scheduled execution in the Alabama Supreme Court. He contended that this execution would be arbitrary and capricious and constitute a violation of the Sixth, Eighth and Fourteenth Amendment," the petition states. "The judicial override in this case resulted in a death sentence that is arbitrary, disproportionate, and unconstitutional..."

The Alabama Attorney General's Office, which opposes a delay, said in a Thursday response that Madison's attorneys waited too late to file their appeal based on the judicial override issue. "Madison's inequitable conduct in delaying the filing of his most recent legal claim until the day before his scheduled execution should be sufficient to warrant denial of the requested stay of execution," the attorney general's office stated in its brief to the U.S. Supreme Court.

Madison was first scheduled to be executed by lethal injection in May 2016, but there was a temporary delay. Hours after that execution's scheduled time, the U.S. Supreme Court issued a ruling upholding an 11th Circuit Court of Appeals stay of execution. The AG's Office filed responses in opposition to those petitions.

In November 2017, the U.S. Supreme Court unanimously reversed that decision, paving the way for Madison to be executed.

Last month, Madison's attorneys from the Equal Justice Initiative filed a petition in Mobile County court to stay Madison's execution, but after a hearing the judge in that case denied the request for a stay of execution. Bryan Stevenson, founder of the EJI and one of Madison's attorneys, then filed two new petitions to the U.S. Supreme Court: One for a stay of execution, and one asking the court to review the case. The AG's Office also filed responses to those requests.

Alabama Department of Corrections spokesperson Bob Horton said Madison was visited yesterday by his sister, two friends, two attorneys, and a minister. Today, he was visited by his brother, attorney, and a minister.

Horton said in the past day, Madison has made phone calls to several attorneys, his daughter-in-law, several friends, and his spiritual advisor. His last phone call was at 8:25 p.m. yesterday to his daughter-in-law.

Thursday morning, Madison had breakfast of orange juice, eggs, two biscuits, jelly, grits, and prunes. His last meal was two oranges. He had no other special requests.

No family from either the victim's family or Madison's family were to witness the
execution. One of Madison's attorneys was to be present.
Bucklew v. Precythe

Ruling Below: *Bucklew v. Precythe*, 885 F.3d 527 (8th Cir. 2018)

Overview: Bucklew was convicted of murder, kidnapping, and rape. Bucklew is set to be executed, but he has a medical condition that would be exacerbated by lethal injection making his death extremely painful.

Issue: (1) Whether a court evaluating an as-applied challenge to a state’s method of execution based on an inmate’s rare and severe medical condition should assume that medical personnel are competent to manage his condition and that procedure will go as intended; (2) whether evidence comparing a state’s method of execution with an alternative proposed by an inmate must be offered via a single witness, or whether a court at summary judgment must look to the record as a whole to determine whether a factfinder could conclude that the two methods significantly differ in the risks they pose to the inmate; (3) whether the Eighth Amendment requires an inmate to prove an adequate alternative method of execution when raising an as-applied challenge to the state’s proposed method of execution based on his rare and severe medical condition; and (4) whether petitioner Russell Bucklew met his burden under *Glossip v. Gross* to prove what procedures would be used to administer his proposed alternative method of execution, the severity and duration of pain likely to be produced, and how they compare to the state’s method of execution.

Russell Bucklew Appellant

v.

Anne L. Precythe, Director of the Department of Corrections, et al. Appellees

United States Court of Appeals, Eighth Circuit

Decided on March 15, 2018

[Excerpt; some citations and footnotes omitted]

ORDER

Before SMITH, Chief Judge, WOLLMAN, LOKEN, COLLOTON, GRUENDER, SHEPHERD, KELLY, ERICKSON, GRASZ and STRAS, Circuit Judges

Appellant Bucklew’s petition for rehearing en banc has been considered by the court and the petition is denied. Chief Judge Smith and Judge Kelly would grant the petition. Judge Colloton and Judge Gruender would grant rehearing en banc on Point I of the petition for rehearing en banc.

Appellant Bucklew’s petition for rehearing by panel is denied. Judge Colloton would grant the petition for rehearing by panel.
Judge Duane Benton took no part in the consideration or decision of the petition for rehearing en banc.

KELLY, Circuit Judge, dissenting from the denial of the petition for rehearing en banc.

I would grant Russell Bucklew’s petition for rehearing en banc—and reverse the district court’s grant of summary judgment—for the reasons stated in the dissent from the panel opinion in this case. See *Bucklew v. Precythe*, ___ F.3d ___, 2018 WL 1163360, at *7 (8th Cir. 2018) (Colloton, J., dissenting). I would also grant Bucklew’s petition to the extent it seeks reconsideration of this court’s conclusion, in *Bucklew v. Lombardi*, 783 F.3d 1120, 1128 (8th Cir. 2015) (en banc), that those sentenced to death must plead a “feasible, readily implemented alternative procedure” for carrying out their sentence in order to state a plausible as-applied claim under the Eighth Amendment. I continue to believe that “[f]acial and as-applied challenges to execution protocols are different,” that death row inmates “need not plead a readily available alternative method of execution” to bring an as-applied challenge, and that “[a] state cannot be excused from taking into account a particular inmate’s existing physical disability or health condition when assessing the propriety of its execution method.” See *id.* at 1129 (Bye, J., concurring in the result). “While the Supreme Court has been clear on the general proposition that, so long as a state-imposed death penalty is constitutional, there must be some way for states to carry out executions, the Supreme Court has also been clear that some individuals cannot be executed.” *Id.* at 1130 (collecting cases); see also *Madison v. Alabama*, 138 S. Ct. ___, 2018 WL 514241 (Feb. 26, 2018); *Dunn v. Madison*, 138 S. Ct. 9, 12 (2017) (Ginsburg, J., concurring). In my view, neither *Glossip v. Gross*, 135 S. Ct. 2726 (2015), nor any subsequent case from the United States Supreme Court dictates the result this court reached on this issue in *Bucklew v. Lombardi*, 783 F.3d 1120 (8th Cir. 2015) (en banc).
Russell Bucklew Appellant  

v.  

Anne L. Precythe, Director of the Department of Corrections, et al. Appellees  

United States Court of Appeals, Eighth Circuit  

Decided on March 6, 2018  

Citation: Bucklew v. Precythe, 883 F.3d 1087 (8th Cir. 2018)  

LOKEN, Circuit Judge  

The issue is whether the Eighth and Fourteenth Amendments, as applied, bar Missouri officials from employing a procedure that is authorized by Missouri statute to execute Russell Bucklew.  

In March 2006, Bucklew stole a car; armed himself with pistols, handcuffs, and a roll of duct tape; and followed his former girlfriend, Stephanie Ray, to the home of Michael Sanders, where she was living. Bucklew knocked and entered the trailer with a pistol in each hand when Sanders’s son opened the door. Sanders took the children to the back room and grabbed a shotgun. Bucklew began shooting. Two bullets struck Sanders, one piercing his chest. Bucklew fired at Sanders’s six-year-old son, but missed. As Sanders bled to death, Bucklew struck Ray in the face with a pistol, handcuffed Ray, dragged her to the stolen car, drove away, and raped Ray in the back seat of the car. He was apprehended by the highway patrol after a gunfight in which Bucklew and a trooper were wounded.  

A Missouri state court jury convicted Bucklew of murder, kidnaping, and rape. The trial court sentenced Bucklew to death, as the jury had recommended. His conviction and sentence were affirmed on direct appeal. State v. Bucklew, 973 S.W.2d 83 (Mo. banc 1998). The trial court denied his petition for post-conviction relief, and the Supreme Court of Missouri again affirmed. Bucklew v. State, 38 S.W.3d 395 (Mo. banc 2001). We subsequently affirmed the district court’s denial of Bucklew’s petition for a federal writ of habeas corpus. Bucklew v. Luebbers, 436 F.3d 1010 (8th Cir. 2006). The Supreme Court of Missouri issued a writ of execution for May 21, 2014. Bucklew filed this action under 42 U.S.C. § 1983, alleging that execution by Missouri’s lethal injection protocol, authorized by statute, would constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments as applied to him because of his unique medical condition. Bucklew appeals the district court’s grant of summary judgment in favor of the state defendants because Bucklew failed to present adequate evidence to establish his claim under the governing standard established by the Supreme Court in Baze v. Rees, 553 U.S. 35, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008), and Glossip v. Gross, — U.S. ——, 135 S.Ct. 2726, 192 L.Ed.2d 761 (2015). Reviewing the grant of summary judgment de novo, we affirm.
Missouri’s method of execution is by injection of a lethal dose of the drug pentobarbital. Two days before his scheduled execution in 2014, the district court denied Bucklew’s motion for a stay of execution and dismissed this as-applied action sua sponte. On appeal, a divided panel granted a stay of execution, Bucklew v. Lombardi, 565 Fed.Appx. 562 (8th Cir. 2014); the court en banc vacated the stay. Bucklew applied to the Supreme Court for a stay of execution, and the Court issued an Order granting his application “for stay pending appeal in the Eighth Circuit.” This court, acting en banc, reversed the sua sponte dismissal of Bucklew’s as-applied Eighth Amendment claim and remanded to the district court for further proceedings. Bucklew v. Lombardi, 783 F.3d 1120, 1128 (8th Cir. 2015) (“Bucklew I”). On the same day, the en banc court affirmed the district court’s dismissal on the merits of a facial challenge to Missouri’s lethal injection protocol filed by several inmates sentenced to death, including Bucklew. Zink v. Lombardi, 783 F.3d 1089, 1114 (8th Cir.), cert denied, — U.S. ——, 135 S.Ct. 2941, 192 L.Ed.2d 976 (2015).

Our decision in Bucklew I set forth in considerable detail the allegations in Bucklew’s as-applied complaint regarding his medical condition. 783 F.3d at 1124-26. Bucklew has long suffered from a congenital condition called cavernous hemangioma, which causes clumps of weak, malformed blood vessels and tumors to grow in his face, head, neck, and throat. The large, inoperable tumors fill with blood, periodically rupture, and partially obstruct his airway. In addition, the condition affects his circulatory system, and he has compromised peripheral veins in his hands and arms. In his motion for a stay of execution in Bucklew I, Bucklew argued:

Dr. Joel Zivot, a board-certified anesthesiologist . . . concluded after reviewing Mr. Bucklew’s medical records that a substantial risk existed that, because of Mr. Bucklew’s vascular malformation, the lethal drug will likely not circulate as intended, creating a substantial risk of a “prolonged and extremely painful execution.” Dr. Zivot also concluded that a very substantial risk existed that Mr. Bucklew would hemorrhage during the execution, potentially choking on his own blood—a risk greatly heightened by Mr. Bucklew’s partially obstructed airway.

* * * * *

[The Department of Corrections has advised it would not use a dye in flushing the intravenous line because Dr. Zivot warned that might cause a spike in Bucklew’s blood pressure.] Reactionary changes at the eleventh hour, without the guidance of imaging or tests, create a substantial risk to Mr. Bucklew, who suffers from a complex and severe medical condition that has compromised his veins.

* * * * *

The DOC seems to acknowledge they agree with Dr. Zivot that Mr.
Bucklew’s obstructed airway presents substantial risks of needless pain and suffering, but what they plan to do about it is a mystery. Will they execute Mr. Bucklew in a seated position? . . . The DOC should be required to disclose how it plans to execute Mr. Bucklew so that this Court can properly assess whether additional risks are present. TTT Until Mr. Bucklew knows what protocol the DOC will use to kill him, and until the DOC is required to conduct the necessary imaging and testing to quantify the expansion of Mr. Bucklew’s hemangiomas and the extent of his airway obstruction, it is not possible to execute him without substantial risk of severe pain and needless suffering.

Defendants’ Suggestions in Opposition argued that Bucklew’s “proposed changes . . . with the exception of his complaint about [dye], which Missouri will not use in Bucklew’s execution, are not really changes in the method of execution.”

[2, 3] Glossip and Baze established two requirements for an Eighth Amendment challenge to a method of execution. First, the challenger must “establish that the method presents a risk that is sure or very likely to cause serious illness and needless suffering, and give rise to sufficiently imminent dangers.” Glossip, 135 S.Ct. at 2737 (emphasis in original), citing Baze, 553 U.S. at 50, 128 S.Ct. 1520. This evidence must show that the pain and suffering being risked is severe in relation to the pain and suffering that is accepted as inherent in any method of execution. Id. at 2733. Second, the challenger must “identify an alternative that is feasible, readily implemented, and in fact significantly reduces a substantial risk of severe pain.” Glossip, 135 S.Ct. at 2737, citing Baze, 553 U.S. at 52, 128 S.Ct. 1520. This two-part standard governs as-applied as well as facial challenges to a method of execution. See, e.g., Jones v. Kelley, 854 F.3d 1009, 1013, 1016 (8th Cir. 2017); Williams v. Kelley, 854 F.3d 998, 1001 (8th Cir. 2017); Johnson v. Lombardi, 361 U.S. 388, 390 (8th Cir. 2015); Bucklew I, 783 F.3d at 1123, 1127. As a panel we are bound by these controlling precedents. Bucklew argues the second Baze/Glossip requirement of a feasible alternative method of execution that substantially reduces the risk of suffering should not apply to “an individual who is simply too sick and anomalous to execute in a constitutional manner,” like those who may not be executed for mental health reasons. See, e.g., Ford v. Wainwright, 477 U.S. 399, 410, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986). The Supreme Court has not recognized a categorical exemption from the death penalty for individuals with physical ailments or disabilities. Thus, in the decision on appeal, the district court properly applied the Baze/Glossip two-part standard in dismissing Bucklew’s as-applied claim.

We concluded in Bucklew I, based on a record “which went well beyond the four corners of Bucklew’s complaint,” that the complaint’s allegations, bolstered by defendants’ concession “that the Department’s lethal injection procedure would be changed on account of his condition by eliminating the use of methylene blue dye,” sufficiently alleged the first
requirement of an as-applied challenge to the method of execution—“a substantial risk of serious and imminent harm that is sure or very likely to occur.” 783 F.3d at 1127. We further concluded the district court’s sua sponte dismissal was premature because these detailed allegations made it inappropriate “to assume that Bucklew would decline an invitation to amend the as-applied challenge” to plausibly allege a feasible and more humane alternative method of execution, the second requirement under the Baze/Glossip standard. Id. In remanding, we directed that further proceedings “be narrowly tailored and expeditiously conducted to address only those issues that are essential to resolving” the as-applied challenge. Id. at 1128. We explained:

Bucklew’s arguments on appeal raise an inference that he is impermissibly seeking merely to investigate the protocol without taking a position as to what is needed to fix it. He may not be “permitted to supervise every step of the execution process.” Rather, at the earliest possible time, he must identify a feasible, readily implemented alternative procedure that will significantly reduce a substantial risk of severe pain and that the State refuses to adopt. . . . Any assertion that all methods of execution are unconstitutional does not state a plausible claim under the Eighth Amendment or a cognizable claim under § 1983.

Id. (quotation omitted; emphasis in original).

II.

On remand, consistent with our directive, the district court first ordered Bucklew to file an amended complaint that adequately identified an alternative procedure. Twice, Bucklew filed amended complaints that failed to comply with this order. Given one last chance to comply or face dismissal, on October 13, 2015, Bucklew filed a Fourth Amended Complaint. As relevant here, it alleged:

106. Based on Mr. Bucklew’s unique and severe condition, there is no way to proceed with Mr. Bucklew’s execution under Missouri’s lethal injection protocol without a substantial risk to Mr. Bucklew of suffering grave adverse events during the execution, including hemorrhaging, suffocating or experiencing excruciating pain.

107. Under any scenario or with any of lethal drug, execution by lethal injection poses an enormous risk that Mr. Bucklew will suffer extreme, excruciating and prolonged pain—all accompanied by choking and struggling for air.

128. In May 2014, the DOC also proposed a second adjustment in its protocol, offering to adjust the gurney so that Mr. Bucklew is not lying completely prone. . . . As a practical matter, no adjustment would likely be sufficient, as the stress of the execution may unavoidably cause Mr. Bucklew’s hemangiomas to rupture, leading to hemorrhaging, bleeding in his throat and through his facial
Bucklew’s as-applied claim focused on two aspects of his medical condition. First, Bucklew’s experts initially opined that his peripheral veins are so weak that injection of a lethal dose of pentobarbital would not adequately circulate, leading to a prolonged and painful execution. The district court concluded that discovery and expert opinions developed on remand refuted this claim. The lethal injection protocol provides that medical personnel may insert the primary intravenous (IV) line “as a central venous line” and may dispense with a secondary peripheral IV line if “the prisoner’s physical condition makes it unduly difficult to insert more than one IV.” Bucklew’s expert Dr. Zivot conceded, and Defendants’ expert, Dr. Joseph Antognini, agreed, that the central femoral vein can circulate a “fair amount of fluid” without serious risk of rupture and that Bucklew’s medical condition will not affect the flow of pentobarbital after it is injected through this vein.

Second, Bucklew’s experts opined that his condition will cause him to experience severe choking and suffocation during execution by lethal injection. When Bucklew is supine, gravity pulls the hemangioma tumor into his throat which causes his breathing to be labored and the tumor to rupture and bleed. When conscious, Bucklew can “adjust” his breathing with repeated swallowing that prevents the tumor from blocking his airway. But during the “twilight stage” of a lethal injection execution, Dr. Zivot opined that Bucklew will be aware he is choking on his own blood and in pain before the pentobarbital renders him unconscious and unaware of pain. Based on a study of lethal injections in horses, Dr.
Zivot estimated there could be a period as short as 52 seconds and as long as 240 seconds when Bucklew is conscious but immobile and unable to adjust his breathing; his attempts to breath will create friction, causing the tumor to bleed and possibly hemorrhage. In Dr. Zivot’s opinion, there is a “very, very high likelihood” that Bucklew will suffer “choking complications, including visible hemorrhaging,” if he is executed by any means of lethal injection, including using the drug pentobarbital.

According to Defendants’ expert, Dr. Antognini, pentobarbital causes death by “producing rapid, deep unconsciousness, respiratory depression, followed by TTT complete absence of respiration, decreased oxygen levels, slowing of the heart, and then the heart stopping.” In contrast to Dr. Zivot, Dr. Antognini opined that pentobarbital would cause “rapid and deep unconsciousness” within 20-30 seconds of entering Bucklew’s blood stream, rendering him insensate to bleeding and choking sensations. Dr. Antognini also challenged Dr. Zivot’s opinion that a supine Bucklew, unable to adjust his breathing, will be aware he is choking on his own blood and in pain from the tumor blocking his airway before the pentobarbital renders him unconscious. Dr. Antognini noted that, between 2000 and 2003, Bucklew underwent general anesthesia eight times, at least once in a supine position. In December 2016, Bucklew lay supine for over an hour undergoing an MRI, with no more than discomfort. The MRI revealed that his tumor had slightly shrunk since 2010.

In granting defendants summary judgment, the district court declined to rely on the first Glossip/Baze requirement because these conflicting expert opinions “would permit a factfinder to conclude that for as long as four minutes [after the injection of pentobarbital Bucklew] could be aware that he is choking or unable to breathe but be unable [to] ‘adjust’ his breathing to remedy the situation.” Rather, the court held that Bucklew failed to provide adequate evidence that his alternative method of execution—lethal gas—was a “feasible, readily implemented” alternative that would “in fact significantly reduce a substantial risk of severe pain” as compared to lethal injection. Glossip, 135 S.Ct. at 2737; Baze, 553 U.S. at 52, 128 S.Ct. 1520.

III.

To succeed in his challenge to Missouri’s lethal injection execution protocol, Bucklew must establish both prongs of the Glossip/Baze standard. Glossip, 135 S.Ct. at 2737. The district court held that Bucklew failed to establish the second prong of Glossip/Baze by showing that an alternative method of execution would “in fact significantly reduce a substantial risk of severe pain.” As noted, Bucklew argues the Glossip/Baze standard should not apply to an as-applied challenge to a method of execution, an argument our controlling precedents have rejected. He raises two additional issues on appeal.

[4] A. Bucklew first argues the district court erred in granting summary judgment on the second Glossip/Baze requirement because he presented sufficient evidence that his proposed alternative method of execution—death through
nitrogen gas-induced hypoxia—“would substantially reduce his suffering.” Summary judgment is not appropriate when there are material issues of disputed fact, and the Supreme Court in Glossip made clear that this issue may require findings of fact that are reviewed for clear error. See 135 S.Ct. at 2739-41 (majority opinion) and 2786 (Sotomayor, J., dissenting). However, whether a method of execution “constitutes cruel and unusual punishment is a question of law.” Swindler v. Lockhart, 885 F.2d 1342, 1350 (8th Cir. 1989). Thus, unless there are material underlying issues of disputed fact, it is appropriate to resolve this ultimate issue of law by summary judgment.

[5] Nitrogen hypoxia is an authorized method of execution under Missouri Law. See Mo. Stat. Ann. § 546.720. Missouri has not used this method of execution since 1965 and does not currently have a protocol in place for execution by lethal gas. But there are ongoing studies of the method in other States and at least preliminary indications that Missouri will undertake to develop a protocol. Defendants do not argue this is not a feasible and available alternative.

The district court granted summary judgment based on Bucklew’s failure to provide adequate evidence that execution by nitrogen hypoxia would substantially reduce the risk of pain or suffering. The court allowed Bucklew extensive discovery into defendants’ knowledge regarding execution by lethal gas. But Missouri’s lack of recent experience meant that this discovery produced little relevant evidence and no evidence that the risk posed by lethal injection is substantial when compared to the risk posed by lethal gas. See Glossip, 135 S.Ct. at 2738; Johnson, 809 F.3d at 391. Bucklew’s theory is that execution by nitrogen hypoxia would render Bucklew insensate more quickly than lethal injection and would not cause choking and bleeding in his tumor-blocked airway. But his expert, Dr. Zivot, provided no support for this theory. Dr. Zivot’s Supplemental Expert Report explained:

[W]hile I can assess Mr. Bucklew’s current medical status and render an expert opinion as to the documented and significant risks associated with executing Mr. Bucklew under Missouri’s current Execution Procedure, I cannot advise counsel or the Court on how to execute Mr. Bucklew in a way that would satisfy Constitutional requirements.

Lacking affirmative comparative evidence, Bucklew relied on Dr. Antognini’s deposition. In his Expert Report, Dr. Antognini concluded that “the use of lethal gas would not significantly lessen any suffering or be less painful than lethal injection in this inmate.” At his deposition, Dr. Antognini was asked:

Q. Why does lethal gas not hold any advantage compared to lethal injection.

A. Well . . . there are a lot of types of gases that could be used . . . [U]sing gas would not significantly lessen any suffering or be less painful. Because, again, their onset of action is going to be relatively fast, just like Pentobarbital’s onset—onset of action.
Q. That’s it? Simply because it would happen quickly?

A. Correct.

The district court concluded this opinion provided nothing to compare:

Dr. Antognini specifically stated that he believed there would be no difference in the “speed” of lethal gas as compared to pentobarbital. . . . In the absence of evidence contradicting Defendants’ expert and supporting Plaintiff’s theory, there is not a triable issue.

On appeal, Bucklew argues the district court should have compared Dr. Zivot’s opinion that lethal injection would take up to four minutes to cause Bucklew’s brain death with Dr. Antognini’s testimony that lethal gas would render him unconscious in the same amount of time as lethal injection, 20 to 30 seconds. But Dr. Antognini’s comparative testimony was that both methods would result in unconsciousness in approximately the same amount of time. Bucklew offered no contrary comparative evidence and thus the district court correctly concluded that he failed to satisfy his burden to provide evidence “establishing a known and available alternative that would significantly reduce a substantial risk of severe pain.” McGehee v. Hutchinson, 854 F.3d 488, 493 (8th Cir. 2017).

In addition, Bucklew’s claim that he will experience choking sensations during an execution by lethal injection but not by nitrogen hypoxia rests on the proposition that he could be seated during the latter but not the former. He argues there is evidence he will be forced to remain supine during an execution by lethal injection, when his tumor will cause him to sense he is choking on his own blood, whereas he could remain seated during the administration of lethal gas, which would not cause a choking sensation. But this argument lacks factual support in the record. Having taken the position that any lethal injection procedure would violate the Eighth Amendment, Bucklew made no effort to determine what changes, if any, the DOC would make in applying its lethal injection protocol in executing Bucklew, other than defendants advising—prior to remand by this court—that dye would not be used.

Based on Bucklew’s argument to the en banc court, we expected that the core of the proceedings on remand would be defining what changes defendants would make on account of Bucklew’s medical condition and then evaluating that modified procedure under the two-part Baze/Glossip standard. On remand, Director of Corrections Ann Precythe testified that the medical members of the execution team are provided a prisoner’s medical history in preparing for the execution. Precythe has authority to make changes in the execution protocol, such as how the primary IV line will be inserted in the central femoral vein or how the gurney will be positioned, if the team advises that changes are needed. While Bucklew sought and was denied discovery of the identities of the execution team’s medical members, he never urged the district court to establish a suitable fact-finding procedure—for example, by anonymous interrogatories or
written deposition questions to the execution team members—for discovery of facts needed for the DOC to define the as-applied lethal injection protocol it intends to use for Bucklew. As Bucklew did not pursue these issues, the pleadings established that defendants have proposed to reposition the gurney during Bucklew’s deposition, and Director Precythe testified that she has authority to make this type of change in the execution protocol based on review of Bucklew’s medical history, but the record does not disclose whether Bucklew will in fact be supine during the execution, nor does it disclose that a “cut-down” procedure will not be used to place the primary IV line in his central femoral vein, a procedure Dr. Antognini opined was unnecessary. Bucklew simply asserts that, in comparing execution by lethal injection and by lethal gas, we must accept his speculation that defendants will employ these risk-increasing procedures. This we will not do.

Like the district court, we conclude the summary judgment record contains no basis to conclude that Bucklew’s risk of severe pain would be substantially reduced by use of nitrogen hypoxia instead of lethal injection as the method of execution. Evidence that “is equivocal, lacks scientific consensus and presents a paucity of reliable scientific evidence” does not establish that an execution is sure or very likely to cause serious illness and needless suffering. Williams v. Kelley, 854 F.3d at 1001 (quotation omitted). Therefore, he failed to establish the second prong of the Glossip/Baze standard.

Bucklew further contends the district court erred in denying his requests for discovery relating to “M2” and “M3,” two members of the lethal injection execution team. Bucklew argues he was entitled to discovery of the medical technicians’ qualifications, training, and experience because it would “illuminate the nature and extent of the risks of suffering he faces.” For example, if M3 was not qualified to safely place his IV in the central femoral vein, this would directly impact the risk of pain and suffering. We review a district court’s discovery rulings narrowly and with great deference and will reverse only for a “gross abuse of discretion resulting in fundamental unfairness.” Marksmeier v. Davie, 622 F.3d 896, 903 (8th Cir. 2010).

Bucklew’s argument proceeds from the premise that M2 and M3 may not be qualified for the positions for which they have been hired. But we will not assume that Missouri employs personnel who are incompetent or unqualified to perform their assigned duties. See Clemons v. Crawford, 585 F.3d 1119, 1128 (8th Cir. 2009). He further argues that deposition of M2 and M3 is necessary to understand how they will handle a circumstance in case something goes wrong during Bucklew’s execution. The potentiality that something may go wrong in an execution does not give rise to an Eighth Amendment violation. Zink, 783 F.3d at 1101. “Some risk of pain is inherent in any method of execution—no matter how humane—if only from the prospect of error in following the required procedure. . . . [A]n isolated mishap alone does not give rise to an Eighth Amendment violation.” Baze, 553 U.S. at 47, 50, 128 S.Ct. 1520. Thus, the
district court’s ruling was consistent with our instruction in remanding that Bucklew ‘‘may not be permitted to supervise every step of the execution process.’’ *Bucklew I*, 783 F.3d at 1128 (quotation omitted). The *Baze/Glossip* evaluation must be based on the as-applied pre-execution protocol, assuming that those responsible for carrying out the sentence are competent and qualified to do so, and that the procedure will go as intended.

### III. Conclusion

Having thoroughly reviewed the record, we conclude that Bucklew has failed to establish that lethal injection, as applied to him, constitutes cruel and unusual punishment under the Eighth and Fourteenth Amendments. Therefore, we affirm the judgment of the district court.

COLLOTON, Circuit Judge, dissenting.

Russell Bucklew alleges that the State of Missouri’s method of execution by lethal injection violates his rights under the Eighth and Fourteenth Amendments. He seeks an injunction prohibiting an execution by that method. The district court granted summary judgment for the State, but there are genuine disputes of material fact that require findings of fact by the district court before this dispute can be resolved. I would therefore remand the case for the district court promptly to conduct further proceedings.

Bucklew’s claim under 42 U.S.C. § 1983 requires him to prove two elements: (1) that the State’s method of execution is sure or very likely to cause him severe pain, and (2) that an alternative method of execution that is feasible and readily implemented would significantly reduce the substantial risk of severe pain. *Glossip v. Gross*, — U.S. — , 135 S.Ct. 2726, 2737, 192 L.Ed.2d 761 (2015); *Bucklew v. Lombardi*, 783 F.3d 1120, 1123, 1128 (8th Cir. 2015) (en banc). On the first element, the district court concluded that taking the evidence in the light most favorable to Bucklew, there is a substantial risk under Missouri’s lethal injection protocol that Bucklew will experience choking and an inability to breathe for up to four minutes. On the second element, however, the court ruled as a matter of law that Bucklew’s suggested alternative method—execution by administration of nitrogen gas—would not significantly reduce the substantial risk that the court identified under the first element. In my view, the district court’s reasoning as to the first element is inconsistent with its summary disposition of Bucklew’s claim on the second.

On the first element, Bucklew’s theory is that he will suffer severe pain by prolonged choking or suffocation if the State executes him by lethal injection. He contends that when he lies supine on the execution gurney, tumors in his throat will block his airway unless he can ‘‘adjust’’ his positioning to enable breathing. Bucklew argues that if an injection of pentobarbital renders him unable to adjust his positioning while he can still sense pain, then he will choke or suffocate.

In assessing that claim, the district court cited conflicting expert testimony from Bucklew’s expert, Dr. Joel Zivot, and the State’s expert, Dr. Joseph Antognini. Dr.
Antognini testified that if the State proceeded by way of lethal injection using pentobarbital, then Bucklew would be unconscious within twenty to thirty seconds and incapable of experiencing pain at that point. R. Doc. 182-5, at 10, 40-41. Dr. Zivot, however, differed: “I strongly disagree with Dr. Antognini’s repeated claim that the pentobarbital injection would result in ‘rapid unconsciousness’ and therefore Mr. Bucklew would not experience any suffocating or choking.” R. Doc. 182-1, at 147. Zivot opined that Bucklew “would likely experience unconsciousness that sets in progressively as the chemical circulates through his system,” and that “during this in-between twilight stage,” Bucklew “is likely to experience prolonged feelings of suffocation and excruciating pain.” Id.

In his deposition, Dr. Zivot opined that “there will be points,” before Bucklew dies, “where he’s beginning to experience the effects of the pentobarbital, where his ability to control and regulate and adjust his airway will be impaired, although there will still be the experience capable of knowing that he cannot make the adjustment, and will experience it as choking.” Id. at 81. When directed to Dr. Antognini’s opinion that Bucklew would be unaware of noxious stimuli within twenty to thirty seconds of a pentobarbital injection, Dr. Zivot observed that Antognini’s opinion was based on a study involving dogs from fifty years ago and testified that his “number would be longer than that.” Id. at 85. When asked for his “number,” Dr. Zivot pointed to a study on lethal injections administered to horses; he said the study recorded “a range of as short as fifty-two seconds and as long as about two hundred and forty seconds before they see isoelectric EEG.” Id. at 85-86. Dr. Zivot noted that the “number” that he derived from the horse study was “more than twice as long as” the number suggested by Dr. Antognini. Id. at 86. He defined “isoelectric EEG” as “indicative of at least electrical silence on the parts of the brain that the electroencephalogram has access to.” Id.

The district court observed that “[a]n execution is typically conducted with the prisoner lying on his back,” and that the record “establishes that [Bucklew] has difficulty breathing while in that position because the tumors can cause choking or an inability to breathe.” The court understood Dr. Zivot to mean that “it could be fifty-two to 240 seconds before the pentobarbital induces a state in which [Bucklew] could no longer sense that he is choking or unable to breathe.” Thus, the court concluded that “construing the Record in [Bucklew’s] favor reveals that it could be fifty-two to 240 seconds before the pentobarbital induces a state in which [Bucklew] could no longer sense that he is choking or unable to breathe.” Again, the court reasoned that “the facts construed in [Bucklew’s] favor would permit a factfinder to conclude that for as long as four minutes [Bucklew] could be aware that he is choking or unable to breathe but be unable to ‘adjust’ his breathing to remedy the situation.” On that basis, the court presumed for purposes of the motion for summary judgment that “there is a substantial risk that [Bucklew] will experience choking and an inability to breathe for up to four minutes.”
The State disputes that there is a genuine dispute of material fact on the first element of Bucklew’s claim, but the district court properly concluded that findings of fact were required. Bucklew pointed to evidence from Missouri corrections officials that prisoners have always lain flat on their backs during executions by lethal injection in Missouri. R. Doc. 182-7, at 10; R. Doc. 182-9, at 1; R. Doc. 182-12, at 29, 91. One official testified that he did not know whether the gurney could be adjusted. R. Doc. 182-12, at 91. Another official believed that the head of the gurney “could” be raised (or that a gurney with that capability could be acquired), and that anesthesiologist would have “the freedom” to adjust the gurney “if” he or she determined that it would be in the best medical interest of the offender to do so. R. Doc. 182-7, at 14. But the State did not present evidence about how it would position Bucklew or the gurney during his execution. On a motion for summary judgment, the district court was required to construe the evidence in the light most favorable to Bucklew. Under that standard, without undisputed evidence from the State that it would alter its ordinary procedures, the court did not err by concluding that a finder of fact could infer that the State would proceed as in all other executions, with Bucklew lying on his back.

The State argues that the district court erred in discerning a genuine dispute of material fact on the first element because Dr. Zivot did not specify the length of the expected “twilight stage” during which Bucklew would be unable to adjust his positioning yet still sense pain. The State also complains that Dr. Zivot did not specify that Bucklew’s pain awareness would continue for fifty-two seconds or longer until brain waves ceased. There certainly are grounds to attack the reliability and credibility of Dr. Zivot’s opinion, including the imprecision of some of his testimony, his opposition to all forms of lethal injection, his possible misreading of the horse study on which he partially relied, and his inaccurate predictions of calamities at prior executions. But he did opine that Bucklew was likely to “experience prolonged feelings of suffocation and excruciating pain” if executed by lethal injection, R. Doc. 182-1, at 147, and that there “will be points” before Bucklew dies when his ability to regulate his airway will be impaired so that he “will experience it as choking.” Id. at 81. The district court did not err in concluding that it could not resolve the dispute between the experts on summary judgment.

On the second element of Bucklew’s claim, the district court concluded as a matter of law that Bucklew failed to show that his proposed alternative method of execution—administration of nitrogen gas—would significantly reduce the substantial risk of severe pain that the court recognized under the first element. The majority affirms the district court’s judgment on this basis. Taking the evidence in the light most favorable to Bucklew, however, a factfinder could conclude that nitrogen gas would render Bucklew insensate more quickly than pentobarbital and would thus eliminate the risk that he would experience prolonged feelings of choking or suffocation. Dr. Antognini testified that a person who is administered nitrogen gas “would be unconscious very quickly,” and that the
onset of action from lethal gas “is going to be relatively fast, *just like Pentobarbital’s onset.*” R. Doc. 182-5, at 58-59 (emphasis added). Given Dr. Antognini’s testimony that pentobarbital would render Bucklew insensate within twenty to thirty seconds, the record in the light most favorable to Bucklew supports a finding based on Antognini’s testimony that nitrogen gas would relieve Bucklew from any pain of choking or suffocating within twenty to thirty seconds. A trier of fact may accept all, some, or none of a witness’s testimony, *United States v. Candie,* 974 F.2d 61, 65 (8th Cir. 1992), and a plaintiff may rely on testimony from the defendant’s expert to meet his burden if the testimony is advantageous to the plaintiff. See *IBEW Local 98 Pension Fund v. Best Buy Co., Inc.,* 818 F.3d 775, 782 (8th Cir. 2016). If the factfinder accepted Dr. Zivot’s testimony as to the effect of pentobarbital, and Dr. Antognini’s uncontroverted testimony as to effect of nitrogen gas, then Bucklew’s proposed alternative method would significantly reduce the substantial risk of severe pain that the district court identified in its analysis of the first element.

For these reasons, there are genuine disputes of material fact that preclude summary judgment and require findings of fact by the district court. I would therefore remand the case for further proceedings. The district court may then promptly make appropriate factual findings about, among other things, how Bucklew will be positioned during an execution, whether his airway will be blocked during an execution, and how pentobarbital (and, if necessary, nitrogen gas) will affect his consciousness and ability to sense potential pain.

* * *

The State contends that we should not reach the merits of Bucklew’s claim because several procedural obstacles require dismissal of his complaint. The majority does not rely on these points, and I find them unavailing.

First, the State contends that Bucklew did not raise his present claim in his fourth amended complaint. Bucklew’s complaint, however, does allege the essence of his current theory. The complaint asserts that the tumors in Bucklew’s throat require “him to sleep with his upper body elevated” because if he lies flat, “the tumor then fully obstructs his airway.” *Id.* at 18-19. It continued: “Executions are conducted on a gurney, and the risks arising from Mr. Bucklew’s airway are even greater if he is lying flat. Because of the hemangiomas, Mr. Bucklew is unable to sleep in a normal recumbent position because the tumors cause greater obstruction in that position.” R. Doc. 53, at 35. Bucklew further alleged that execution by lethal injection “poses an enormous risk that Mr. Bucklew will suffer extreme, excruciating and prolonged pain—all accompanied by choking and struggling for air.” *Id.* at 36. The complaint was adequate under a notice pleading regime to raise a claim that the execution procedure would result in an obstructed airway and choking or suffocation.

If necessary, moreover, the district court acted within its discretion by treating the complaint as impliedly amended to include Bucklew’s present claim. *See* Fed. R. Civ. P. 15(b)(2). Bucklew clearly notified the
State of his contention in his opposition to the State’s motion for summary judgment. R. Doc. 192-1, at 1-3, 11-17. Yet rather than communicate surprise and object that the claim was not pleaded, the State addressed Bucklew’s contention on the merits. R. Doc. 200, at 4-5. Where a party has actual notice of an unpleaded issue and has been given an adequate opportunity to cure any surprise resulting from a change in the pleadings, there is implied consent to an amendment. *Trip Mate, Inc. v. Stonebridge Cas. Ins. Co.*, 768 F.3d 779, 784-85 (8th Cir. 2014).

Second, the State argues that the five-year statute of limitations bars Bucklew’s claim, because he was aware of his claim in 2008 and did not file his complaint until May 9, 2014. A claim under § 1983 accrues when a plaintiff has “a complete and present cause of action” and “can file suit and obtain relief.” *Wallace v. Kato*, 549 U.S. 384, 388, 127 S.Ct. 1091, 166 L.Ed.2d 973 (2007) (quoting *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 201, 118 S.Ct. 542, 139 L.Ed.2d 553 (1997) ). Bucklew asserts that he did not have knowledge of his present claim, and therefore could not have filed suit and obtained relief, until his medical condition progressed and he was examined by Dr. Zivot in April 2014. As evidence that Bucklew could have brought his claim earlier, the State relies on a 2008 petition that Bucklew submitted to the Missouri Supreme Court. The petition sought funding for an expert witness to investigate the interaction of the State’s existing execution protocol with Bucklew’s health condition. The possible claim addressed in the 2008 funding petition, however, focused on the potential for uncontrolled bleeding and ineffective circulation of drugs within Bucklew’s body under the State’s former three-drug execution protocol. The petition does not demonstrate that Bucklew was then on notice of a claim that a future execution protocol using the single drug pentobarbital would create a substantial risk of severe pain resulting from tumors blocking his airway while laying supine during an execution.

Third, the State urges that Bucklew’s claim is barred by *res judicata* or claim preclusion, because Bucklew could have litigated his as-applied challenge to the execution protocol in an earlier case styled *Zink v. Lombardi*, No. 12-04209-CV-C-BP. In *Zink*, a group of inmates sentenced to death, including Bucklew, brought a facial challenge to Missouri’s execution protocol. A complaint was filed in August 2012, and the eventual deadline for motions to amend pleadings was January 27, 2014. Principles of claim preclusion do not bar Bucklew’s as-applied challenge if he was unaware of the basis for the claim in time to include it in the *Zink* litigation. *See Whole Woman’s Health v. Hellerstedt*, — U.S. ——, 136 S.Ct. 2292, 2305, 195 L.Ed.2d 665 (2016). The State again points to Bucklew’s 2008 funding petition in support of its preclusion defense, but for reasons discussed, that petition does not establish that Bucklew’s present claim was available to him in 2008. At oral argument, the State argued that Bucklew could have added his as-applied challenge to the *Zink* litigation after he was examined by Dr. Zivot in April 2014, because the district court granted the *Zink* plaintiffs leave to amend their complaint in May 2014. But the court’s order allowed the *Zink* plaintiffs leave
to amend only a single count of the complaint to allege a feasible alternative method of execution. The order did not reopen the pleadings deadline for as-applied claims by the several individual plaintiffs. See Zink v. Lombardi, No. 12-04209- CV-C-BP, 2014 WL 11309998, at *4-5, 12 (W.D. Mo. May 2, 2014). The State therefore has not established that Bucklew’s as-applied claim is barred by res judicata.

* * *

For these reasons, I would reverse the judgment of the district court and remand for further proceedings to be conducted with dispatch.
The court agreed to hear an appeal from a
death row inmate in Missouri with a rare
medical condition that he says will cause
excruciating pain if he is put to death by
lethal injection. Lawyers for the inmate,
Russell Bucklew, said his condition,
cavernous hemangioma, would make him
choke on his own blood during his execution.

In 2015, in Glossip v. Gross, the Supreme
Court ruled against inmates challenging
Oklahoma’s lethal injection protocol, saying
they had failed to identify an available and
preferable method of execution.

In the new case, Bucklew v. Precythe, No.
17-8151, Mr. Bucklew did propose an
alternative, saying lethal gas was preferable
to the state’s current method of an injection
of a lethal dose of pentobarbital. But the
United States Court of Appeals for the Eighth
Circuit, in St. Louis, ruled in March that Mr.
Bucklew had not shown that his alternative
would be less painful.

Mr. Bucklew was convicted of murdering a
man who had been seeing his former
girlfriend and of kidnapping and raping her.
The Supreme Court stayed his execution in
March by a 5-to-4 vote.
“Death-Row Inmate With Rare Disease Gets U.S. Supreme Court Review

Bloomberg

Greg Stohr

April 30, 2018

The Supreme Court agreed to hear an appeal from a Missouri death-row inmate who says his rare medical condition means the state’s lethal-injection method probably would cause him to choke on his own blood.

Convicted murderer Russell Bucklew, 49, says Missouri’s execution protocol method would be unconstitutional in his case because he suffers from cavernous hemangioma, a disease that has caused blood-filled tumors in his head, neck and throat.

The Supreme Court broadly upheld lethal injection a decade ago but left open the possibility that individual inmates could press challenges based on their own particular circumstances.

The court voted 5-4 to halt Bucklew’s execution on March 20 while the justices considered whether to take up his appeal. Justice Anthony Kennedy, the swing vote on death-penalty cases, voted with the court’s liberal wing in the majority.

Bucklew, who has proposed the state look to lethal gas an alternative way of killing him, says a federal appeals court made a series of errors in letting his execution go forward. Bucklew says the appeals court improperly assumed that the state’s medical team would be able to manage his condition during the execution.

Bucklew was convicted of bursting in the home where his ex-girlfriend, Stephanie Ray, was staying in 1996. Bucklew shot and killed the homeowner, Michael Sanders, before abducting Ray and raping her. He isn’t challenging his conviction or death sentence.

Missouri Attorney General Josh Hawley urged the Supreme Court not to hear the appeal, saying Bucklew waited too long to raise the issue and hasn’t provided enough evidence of a risk of severe pain.

The case, which the court will hear during the nine-month term that starts in October, is Bucklew v. Precythe, 17-8151.
A Missouri appeal over whether lethal injection would violate the Constitution's ban on cruel and unusual punishment could delay a Mississippi case over similar issues.

Lawyers for some death row inmates in Mississippi are asking a federal judge to postpone an August trial on Mississippi's death penalty procedures. They say state Attorney General Jim Hood doesn't oppose the delay.

If U.S. District Judge Henry T. Wingate agrees, no executions in Mississippi are likely until after the Missouri case is decided. Arguments in the Missouri case are set for this fall, and a ruling might not come until 2019. Mississippi hasn't executed anyone since 2012, in part because of legal challenges to the state's lethal injection methods, as well as the state's difficulty in obtaining drugs.

The U.S. Supreme Court in April agreed to review the Missouri case, brought by an inmate named Russell Bucklew. The inmate says his rare medical condition could cause him to choke on his own blood during an execution. The court blocked Bucklew's execution in March after he argued that a tumor in his throat is likely to rupture and bleed during the administration of the drugs that would be used to kill him.

Both the Missouri and the Mississippi cases hinge on what an inmate must do to show an alternate execution method is available that would reduce risk of needless suffering. That's required to meet a previous Supreme Court ruling that says inmates challenging a method of execution must show that there's an alternative that is likely to be less painful.

In the Mississippi case, inmates are arguing they should be put to death using a single large dose of a barbiturate called pentobarbital.

Mississippi prison officials have said they're not going to use pentobarbital anymore because they can't obtain the drug after manufacturers opposed to its use in executions cut off supplies. But lawyers for the Mississippi inmates argue that doesn't make any sense because Texas, Missouri and Georgia continue to execute inmates using pentobarbital that they're obtaining from somewhere.

Lawyer Jim Craig, who represents some of the inmates, said it would be a waste of time
to have a trial when the Supreme Court is likely to clarify the law at issue.

Death row inmates in the Mississippi case include Richard Jordan, sentenced for kidnapping and killing a Harrison County woman in 1976; Ricky Chase, sentenced for the 1989 killing of a 70-year-old vegetable salesman in Copiah County; Thomas Loden, sentenced for the 2000 kidnapping, rape and murder of an Itawamba County waitress; Roger Thorson, sentenced for killing a former girlfriend in Harrison County in 1987; and Robert Simon, sentenced for the 1990 killings of three members of a Quitman County family.

The Missouri case is Bucklew v. Precythe, 17-8151.
Gamble v. United States


Overview: Terance Martez Gamble was pulled over in 2015 for a broken tail light on his car when a gun and drug paraphernalia was discovered in the car. Seven years prior, Gamble was convicted of second-degree robbery and was barred from owning a firearm. Gamble was charged for illegal possession of a firearm by the State of Alabama and the Federal Government, for the exact same incident in 2015. Gamble claims that his federal indictment should be dismissed on the ground that it violated his Fifth Amendment protection from Double Jeopardy.

Issue: Whether the Supreme Court should overrule the “separate sovereigns” exception to the double jeopardy clause.

UNITED STATES OF AMERICA., Plaintiff-Appellee,
v.
TERANCE MARTEZ GAMBLE, Defendant-Appellant

United States Court of Appeals, Eleventh Circuit

Decided on July 28, 2017

[Excerpt; some citations and footnotes omitted]

We review de novo, as a pure question of law, any possible violation of the Double Jeopardy Clause. *United States v. McIntosh*, 580 F.3d 1222, 1226 (11th Cir. 2009).

The Supreme Court has determined that prosecution in federal and state court for the same conduct does not violate the Double Jeopardy Clause because the state and federal governments are separate sovereigns. *Abbate v. United States*, 359 U.S. 187, 195, 79 S. Ct. 666 (1959). We have followed the precedent set by *Abbate* in *Hayes*, stating that unless
and until the Supreme Court overturns *Abbate*, the double jeopardy claim must fail based on the dual sovereignty doctrine. *United States v. Hayes*, 589 F.2d 811, 817-18 (5th Cir. 1979). We have, more recently, stated that “[t]he Double Jeopardy Clause does not prevent different sovereigns (i.e., a state government and the federal government) from punishing a defendant for the same criminal conduct.” *United States v. Bidwell*, 393 F.3d 1206, 1209 (11th Cir. 2004).

In *Sanchez-Valle*, the Supreme Court stated that the states were separate sovereigns from the federal government because the States rely on authority originally belonging to them before admission to the Union and preserved to them by the Tenth Amendment. *Puerto Rico v. Sanchez-Valle*, 579 U.S. __, __, 136 S. Ct. 1863, 1871 (2016). It explained that prior to forming the Union, the States possessed separate and independent sources of power and authority, which they continue to draw upon in enacting and enforcing criminal laws. *Id.* State prosecutions therefore have their most ancient roots in an “inherent sovereignty” unconnected to, and indeed pre-existing, the U.S. Congress. *Id.* The Supreme Court differentiated Puerto Rico from the States, stating that it was not a sovereign distinct from the United States because it had derived its authority from the U.S. Congress. *Id.* at 1873-74. It concluded that the Double Jeopardy Clause bars both Puerto Rico and the United States from prosecuting a single person for the same conduct under equivalent criminal laws. *Id.* at 1876.

The district court did not err by determining that double jeopardy did not prohibit the federal government from prosecuting Gamble for the same conduct for which he had been prosecuted and sentenced for by the State of Alabama, because based on Supreme Court precedent, dual sovereignty allows a state government and the federal government to prosecute an individual for the same crime, when the States rely on authority originally belonging to them before admission to the Union and preserved to them by the Tenth Amendment. Accordingly, we affirm.

**AFFIRMED.**
The U.S. Supreme Court agreed Thursday to reconsider its long-standing view that putting someone on trial more than once for the same crime does not violate the Constitution's protection against double jeopardy.

Among the provisions of the Fifth Amendment is that no person shall be "subject for the same offence to be twice put in jeopardy of life or limb." That's popularly understood to mean that nobody can be put on trial twice for the same crime.

But in a line of cases stretching back more than 150 years, the Supreme Court has ruled that being prosecuted twice — once by a state and again in federal court — doesn't violate the clause because the states and the federal government are "separate sovereigns."

The court has held that when a defendant in a single act breaks both a federal and a state law, that amounts to two distinct offenses and can result in two separate prosecutions. Barring states from prosecuting someone already tried in federal court "would be a shocking and untoward deprivation of the historic right and obligation of the states to maintain peace and order within their confines," the court has said.

Lawyers for an Alabama man, Terance Gamble, urged the justices to consider overturning those earlier decisions.

Convicted of robbery in 2008, Gamble was pulled over seven years later for a traffic violation. Police found a handgun in his car, so he was charged with violating Alabama's law barring felons from possessing firearms. The local U.S. attorney charged him with violating a similar federal law. Because of the added federal conviction, his prison sentence was extended by three years.

Gamble's lawyers said the foundations for those earlier rulings began to crumble in 1969 when the Supreme Court ruled that the double jeopardy provision, originally meant to be a check on federal power, also applied to the states. It is inconsistent, they said, to let parallel actions of state and federal officials produce a result that would be impermissible if done by either jurisdiction alone.

And his lawyers said Congress has dramatically expanded the number and scope of federal laws in recent years, creating more duplications with state laws, a problem the earlier Supreme Court decisions never envisioned.
The court will hear Gamble's appeal in the fall. He is set to be released from federal prison in 2020.
On June 28, the U.S. Supreme Court agreed to hear a case challenging the legal principle that the federal government and those of the states represent “separate sovereigns,” a long-held doctrine that has provided a work-around for state and federal prosecutors faced with constitutional double jeopardy concerns.

In the case, captioned Gamble v. United States, Terance Martez Gamble challenged prosecutions over charges of being a felon in possession of a firearm. Those cases—which resulted in convictions—were brought by Alabama state prosecutors and U.S. attorneys.

Gamble argued the dual convictions violated constitutional protection against facing double jeopardy for the same offense. He is currently serving nearly three additional years in federal prison beyond his Alabama state court sentence.

The decision by the nation’s highest court comes at a critical moment for supporters of changes to New York’s double jeopardy protections that go beyond the Fifth Amendment. Lawmakers and the state Attorney General’s Office are pushing for the close of a so-called loophole that could serve as a kind of “get out of jail” scenario for those in President Donald Trump’s orbit. Under certain circumstances, individuals close to the president, facing federal prosecution, could see a pardon absolve them of not only federal charges, but bar state prosecutors from bringing a similar case under New York law.

New York, like many states, currently does not allow someone to be prosecuted on state charges after a federal pardon. New York’s loophole, according to the office of Attorney General Barbara Underwood, allows for a unique trick of the law: absent a specific exemption, if a defendant pleads guilty, or if a federal jury is sworn in at trial, state law bars charging that defendant over the exact same criminal acts.

One such exemption is if a court nullifies a prior criminal proceeding, such as when an appellate court vacates a conviction. However, state law does not speak to what happens if the president were to issue a strategically timed pardon under circumstances that triggered double jeopardy protections.

The issue was raised most recently when Trump pardoned conservative political activist Dinesh D’Souza in May. D’Souza
pleaded guilty to campaign finance fraud before U.S. District Judge Richard Berman of the Southern District of New York, and was sentenced in September 2014 to five years of probation.

“We can’t afford to wait to see who will be next,” Underwood said in a statement at the time. “Lawmakers must act now to close New York’s double jeopardy loophole and ensure that anyone who evades federal justice by virtue of a politically expedient pardon can be held accountable if they violate New York law.”

Things appeared to be moving forward earlier this year when Democrats in the state Legislature introduced a bill in April to reverse that rule in New York. Assemblyman Joe Lentol, D-Brooklyn, and Sen. Todd Kaminsky, D-Long Beach, sponsored the bill in their respective chambers.

The legislation was sent to committee in each chamber, where it stayed through the end of this year’s legislative session. There were two reasons the bill did not make it to the floor for a vote in either chamber. The most obvious was Republican opposition in the Senate. Sen. Patrick Gallivan, R-Elma, chairs the Crime Victims, Crime and Correction Committee in the Senate. He called the bill “disgraceful” and compared it to Gov. Andrew Cuomo’s executive order pardoning thousands of parolees this year so they could vote.

“I think it’s disgraceful. It’s OK that the governor pardons 35,000 people and has parole officers handing out and directing parolees, murderers, rapists, where they go to vote?” Gallivan said. “But God forbid a president, just like President Obama, just like President Clinton, pardons somebody, now we’re going to question the president just because of what his party is?”

The bill’s sponsors will tell you that it’s not about party, it’s about Trump. But as written it would apply to his successors.

“This bill would not just apply to the current president, it will apply to any president going forward,” Kaminsky said. “I think the president’s actions have laid bare a loophole that needs to be closed.”

That idea also turned out to be the other big obstacle to the bill, Lentol said. Criminal justice advocates were worried the legislation would be used by prosecutors in New York to bring charges indiscriminately against people other than Trump and his allies.

“The major flaw with the bill is that it would allow a lot of district attorneys power, and sometimes maybe inappropriately charge someone with a crime,” Lentol said. “The bill has wide scope and I think we need to narrow it in order for it to not be used by folks who may be unscrupulous.”

Kaminsky’s answer to that concern was a section of the bill that exempts certain offenders from also being charged by the state. According to the bill, a state prosecutor would not be able to bring charges against someone if a “reprieve, pardon, or other form of clemency was granted five years or more after entry of judgment for such offense.”

“I think the exception that the bill already contains is pretty broad,” Kaminsky said.
Whatever concerns lawmakers in Albany may have over the state’s move to deal with double jeopardy issues may now have to contend with the U.S. Supreme Court’s decision to hear the *Gamble* case. New York University School of Law professor Richard Pildes called the move a highly significant challenge to decades of doctrinal precedent.

“I thought it was quite dramatic that they announced their decision to reconsider this issue,” Pildes said. “At least four of them are certainly very interested in whether the court should engage in a major reconsideration of the doctrine. I think you can read that much into the grant.”

As the petition itself notes, interest in the issue among the justices appears to be growing. Quoting the court’s 2016 ruling in *Puerto Rico v. Sanchez Valle*, Gamble noted that both Justices Ruth Bader Ginsburg and Clarence Thomas have called for a fresh examination of the doctrine.

Pildes noted that it’s tough to bring a challenge to the separate sovereigns exception.

“It’s very hard to have these cases teed up to squarely present the issue,” he said.

Even Gamble noted in his petition that the few cases that have been brought to challenge the doctrine “have been riddled with vehicle problems.” These challenges will ultimately mean worries about the potential impact of *Gamble* on any move by New York to close its double jeopardy loophole are likely to be unfounded, according to Columbia Law School professor and former Manhattan federal prosecutor Daniel Richman.

Even if *Gamble* were to do away with the separate sovereigns exception, Richman said, “The question becomes, do the elements of one prosecution overlap with the elements of the other prosecution?”

In reality, this is so rarely the case that, for Richman, the concern becomes largely an academic one and “a bit of a red herring.”

More often than not, when federal and state charges are lined up, “there’s no overlap, or almost no overlap, that would ring Fifth Amendment chimes in the absence of the dual sovereign analysis,” he said.

“This is just a reminder of the thinness of federal double jeopardy protections, even putting the dual sovereign protections aside,” he added.

The potential impact of *Gamble* is, for now at least, not deterring those in support of closing the state’s double jeopardy loophole from moving forward.

Lentol said he’s exploring other options to garner support for the bill. One would allow only the state attorney general to bring state charges against someone who’s received a federal pardon. That would help curb the possibility of having a district attorney target someone acquitted of a federal crime, Lentol said.

Another option would be to have the bill sunset at the end of Trump’s presidency, Lentol said.

Both options could build an appetite for the legislation to pass during next year’s legislative session. Kaminsky believes if the
Senate passes the bill, the Assembly will follow suit. That seems unlikely for now while Republicans hold the majority in the upper chamber. Democrats need to gain at least one seat in this year’s election for that to change.
“Don’t Gamble on Double Jeopardy”

Cato Institute

Ilya Shapiro

December 4, 2017

Terance Gamble was convicted of second-degree robbery in Alabama in 2008. That’s a felony, so he was barred from possessing a firearm under both federal and state law. Seven years later, Gamble was pulled over for a broken taillight. Smelling marijuana, the police officer searched the car and found, among other things, a 9mm handgun. Alabama prosecuted Gamble under its “felon-in-possession” statute and he was ultimately sentenced to a year in prison. Concurrent with the state’s prosecution, however, the U.S. attorney charged Gamble with the same offense under federal law. He was sentenced to 46 months in prison and will be released early in 2020, nearly three years after he would have been released from state prison.

At both the trial and appellate level, Gamble argued that the federal prosecution violated his Fifth Amendment right against being placed twice in jeopardy for the same crime. But given the “dual sovereignty” exception to that Double Jeopardy Clause, which the Supreme Court created 60 years ago—the idea that federal and state prosecutions have to be counted separately—the courts had to ignore that objection. Cato has joined the Constitutional Accountability Center in filing a brief urging the Court to review Gamble’s case and overturn this misguided exception—as we’ve done before in Walker v. Texas and Tyler v. United States, which presented the same issue.

We make three principal arguments. First, none of the Framers would have contemplated such a large exception to Double Jeopardy protection. Even before the Founding, English jurist and legal theorist William Blackstone wrote that it was considered a “universal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once, for the same offence.” And in congressional debates before the enactment of the Fifth Amendment, Rep. Roger Sherman observed that “the courts of justice would never think of trying and punishing twice for the same offence.” Second, the practical magnitude of the dual-sovereignty exception is much greater today than it was 60 years ago. For most of our nation’s history, the federal government left most criminal matters to be handled by the states; there were relatively few offenses punishable by both authorities. But in recent decades, there has been “a stunning expansion of federal criminal jurisdiction into a field traditionally policed by state and local laws,” as Justice Clarence Thomas wrote in dissent in Evans v. United States (1992). Now that nearly every state crime has a federal analog,
the dual-sovereignty exception risks entirely swallowing the Double Jeopardy rule. Finally, the Supreme Court created the dual-sovereignty exception a decade before it held that the Double Jeopardy Clause fully applies to the states. Now that we know that it does, there’s no reason why a state prosecution shouldn’t “count” when a defendant objects to having been prosecuted twice.

As Justice Hugo Black once put it, also in dissent, “If double punishment is what is feared, it hurts no less for two ‘Sovereigns’ to inflict it than for one.” Bartkus v. Illinois (1959). The Court should take this common-sense advice and put an end to the misguided dual-sovereignty exception, at least as it works in practice in modern times.
Blockbuster decisions about the president’s travel ban and public sector unions dominated the news during the final week of the Supreme Court’s term. Less noticed was the Court’s surprising announcement that next term it will hear an important double jeopardy case, *Gamble v. United States*. The Court’s decision in *Gamble* could have implications for the Mueller investigation and the president’s ability to undermine it by pardoning witnesses against him. How the Court—which by then may include a new Justice Kavanaugh—resolves the case also could provide new clues about its willingness to overturn firmly-established constitutional precedents.

The petitioner, Terance Gamble, was convicted of robbery in Alabama in 2008. That felony conviction made it illegal for him to possess a firearm under both Alabama and federal law. In November 2015 police in Mobile pulled Gamble over for a broken taillight and smelled marijuana. When they searched his car they found marijuana, a scale, and a 9 mm handgun.

Alabama prosecuted Gamble for the state crime of being a felon in possession of a firearm. He was convicted and served a one-year sentence. While the state case was pending, federal prosecutors charged him with the federal version of the same offense, based on the same incident. Gamble pleaded guilty to the federal charge but preserved his right to appeal and argue that this second conviction violated the double jeopardy clause of the Fifth Amendment. The federal case resulted in Gamble being sentenced to an additional three years in prison.

**Double Jeopardy and Dual Sovereignty**

The protection against double jeopardy is one of the English common law doctrines that the framers of our Constitution included in the Bill of Rights. The Fifth Amendment provides: “No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb.” The government is not allowed to prosecute you repeatedly for the same conduct until it gets the result that it wants. Once jeopardy attaches — typically when you plead guilty or a jury is sworn in — the government generally gets one shot at the prosecution.

But the clause is subject to a “dual sovereignty exception.” For more than 150 years the Supreme Court has said it does not violate double jeopardy for a state and the federal government to prosecute a defendant for crimes based on the same act and
consisting of the same elements. The rationale is that within our federalist system the federal and state governments are two different sovereigns, each with the right to enforce its own laws. State and federal crimes based on the same conduct thus have not been considered to be the same “offence” for purposes of double jeopardy.

Gamble’s Arguments

In urging the Court to take his case, Gamble argued the dual sovereignty exception is inconsistent with the history and purpose of the Fifth Amendment and should be discarded. He first relied on history and original intent, claiming the exception did not exist at common law and that a conviction or acquittal in another country was commonly understood to bar a prosecution in England based on the same misconduct.

Gamble also noted that the Supreme Court first adopted the dual sovereignty exception back when the Fifth Amendment was considered not to apply to the states. That’s no longer the case – the double jeopardy clause is now one of the protections in the Bill of Rights that the Court has incorporated to the states through the Fourteenth Amendment. Gamble argued this makes the older holdings suspect and ripe for reexamination. Now that double jeopardy clearly applies to the states as well, he argued, it’s improper to allow the state and federal government to do together what each could not do on its own.

Gamble also claimed the dual sovereignty exception undermines the purpose of the double jeopardy clause. The clause is supposed to promote finality. It protects an individual from repeated exposure to the stress, humiliation, and expense that accompany a prosecution. These injuries from a repeated prosecution, Gamble urged, are the same whether those prosecutions are from the same sovereign or two different ones.

Finally, Gamble argued the exception needs to be overturned due to the dramatic growth of federal criminal law. When the exception was first adopted the federal criminal code was much less extensive. It would have been relatively rare for the same conduct to be prosecutable by both federal and state authorities. But with the dramatic expansion of the federal criminal code in the past few decades, in the hands of a creative prosecutor most state crimes may now be prosecuted federally as well. As a result, the risk of the harm resulting from a dual prosecution are far greater. These changed circumstances, Gamble argued, require a new legal standard.

The Government’s Response

In urging the Court not to take the case, the government argued there is no reason to reconsider a doctrine that has been firmly established for more than 150 years. It claimed the dual sovereignty exception is part of the unique American system, where the federal and state governments each preserve their own sovereign spheres of influence. It argued that English common law precedents involving prosecutions in other countries have no relevance to our federal system, where both federal and state governments have territorial jurisdiction over
crimes occurring within their respective borders.

The application of the double jeopardy clause to the states is irrelevant, according to the government. Even before application to the states, if Gamble were correct the clause still would have prevented federal prosecution for a crime already prosecuted by a state – but the Supreme Court has rejected that argument for more than 150 years. Application of double jeopardy to the states, the government said, simply means a state cannot itself prosecute someone twice for the same crime. It has no effect on whether the state and federal governments may proceed separately to prosecute the same misconduct.

The government also argued that abandoning the exception could lead to state and federal governments interfering with each other’s law enforcement efforts. A state prosecutor could thwart federal law enforcement priorities by bringing a case for the same conduct and thereby foreclosing a federal prosecution — and vice-versa. This could lead to a “race to the courthouse” with federal and state prosecutors competing to get their charges filed first. Such a system would be inconsistent with the respect that state and federal governments owe each other under our federal system.

(In his reply brief, Gamble has a nice response to this point: “The purpose of the Double Jeopardy Clause, like the purpose of the Free Speech Clause or Free Exercise Clause, is not to protect the State and federal governments from each other but, rather, to secure the rights of the individual by circumscribing the powers of both.”)

As for the expansion of federal criminal law, the government argued this makes the exception more important, not less. That expansion means there are more potential opportunities for federal law enforcement potentially to encroach on the states. Federalism demands that the states be allowed to preserve their own sphere of influence and law enforcement priorities when it comes to crimes committed within their borders.

The bottom line argument for the government was that there is no good reason to disturb such a well-settled constitutional doctrine. Dual prosecutions are relatively rare, and judges always have the ability to take such factors into account when fashioning an appropriate sentence.

**Why Did the Court Take the Case?**

*Gamble* presents a fascinating mix of issues and implications. It’s not at all clear why the Court took the case. There was no split in the lower courts or other compelling reason to re-examine such a settled doctrine. That the Court agreed to hear the case anyway is probably a sign it’s inclined to rule in Gamble’s favor. On the other hand, the Court re-scheduled consideration of the case in conference a remarkable eleven times before finally deciding to grant the petition on the final day of the term. That suggests at least some members of the Court were really wrestling with the decision.

The Court’s action is even more surprising considering it just reaffirmed the dual sovereignty doctrine two years ago in a case
called *Puerto Rico v. Sanchez Valle*. In an opinion by Justice Kagan, the Court held that Puerto Rico and the United States are not separate sovereigns for purposes of double jeopardy and thus the defendant could not be prosecuted by both. But the majority opinion did not question the validity of the dual sovereignty exception and took it as settled law.

Justice Ginsburg, joined by Justice Thomas, wrote a concurrence in *Sanchez Valle* criticizing the dual sovereignty exception and suggesting it should be revisited in an appropriate case. Gamble relied heavily on that concurrence when urging the Court to grant his petition. Since *Sanchez Valle* was decided Justice Gorsuch also has joined the Court, and perhaps he was a third vote to take the case. But it takes four Justices to grant *certiorari* and it’s not clear where the fourth vote came from – or whether there will be five votes to actually overturn the dual sovereignty exception.

Arguments about the understanding of the clause in common law England may appeal to originalists like Justice Gorsuch. But conservative Justices also may be concerned about federalism and whether a federal prosecution can effectively trump a state’s own law enforcement efforts. On the other hand, arguments about the purpose of the clause and protecting defendants from repeated harassment may resonate with Justices on the Court’s more liberal wing, as suggested by Justice Ginsburg’s concurrence in *Sanchez Valle*. The case could lead to some very interesting voting alignments.

### Potential Implications of Gamble

*Gamble* has potential implications for prosecutions that could be brought by special counsel Robert Mueller. An issue looming over the Mueller investigation has been whether president Trump might pardon members of his own family or potential witnesses against him — or even himself. One safeguard against that has been the availability of state prosecutions. The president cannot grant pardons for state crimes. That leaves open the possibility that even if Trump pardoned people such as Paul Manafort, New York state prosecutors might be able to pursue financial crimes that violated New York law. Reports that Mueller has been cooperating with the New York Attorney General’s office have noted that state prosecutions could be used as leverage to induce cooperation in Mueller’s inquiry even if Trump pardoned witnesses for federal crimes.

If the dual sovereignty exception is discarded, however, this safety net could be trimmed. For example, if Paul Manafort were convicted of financial crimes by federal prosecutors and then Trump pardoned him, New York state prosecutors may no longer be able to prosecute Manafort for the state crimes covering the same misconduct.

This highlights an interesting side effect of abandoning the dual sovereignty doctrine: it would mean the president could, in some cases, effectively grant pardons for state crimes by pardoning a federal defendant who had already been placed in jeopardy for the federal version of those same crimes. This would represent a dramatic expansion of the
pardon power and of presidential ability to interfere with state law enforcement.

Another interesting aspect of Gamble that will deserve attention is the role of stare decisis. The upcoming confirmation hearings for Trump’s Supreme Court nominee Brett Kavanaugh will undoubtedly focus on the doctrine of stare decisis and how it applies to landmark cases such as Roe v. Wade.

The same week that it agreed to hear Gamble, the Court overruled a forty-one year precedent involving public unions when it decided the Janus case. Gamble is asking the Supreme Court to overrule constitutional holdings that have been on the books for decades. Gamble will present the Court with another opportunity to discuss stare decisis and when it is appropriate to overturn settled Supreme Court precedents. That discussion will be closely watched, particularly if a new Justice Kavanaugh is on the Court.

Practically speaking, even if the dual sovereignty doctrine is overturned the effect may be relatively limited. In many situations state and federal crimes do not entirely overlap and both state and federal prosecutions for the same general conduct will still be possible. And my experience is that cases involving dual prosecutions are pretty rare. Prosecutors are busy; if justice is being pursued by their counterparts they are usually happy to turn their attention to other cases and not duplicate those efforts.

Some states, including New York, already provide a broader double jeopardy protection by statute. Professor Jed Shugerman has noted this could have implications for New York state prosecutions of people like Paul Manafort and Michael Cohen if they are prosecuted by Mueller and then pardoned by President Trump. That remains true whether or not Gamble overturns the dual sovereignty exception – unless New York amends its law, as Shugerman has urged. Professor Shugerman has also suggested Mueller may be strategically refraining from filing certain charges, effectively reserving those charges for the state prosecutors in the event Trump grants a pardon. That sort of tactic could become even more important based on the Court’s decision in Gamble.

But of course the Mueller investigation is not the norm. The unprecedented issues and concerns surrounding the Mueller investigation do not affect routine law enforcement. Most prosecutors, most of the time, do not have to worry about the president potentially obstructing their investigations by granting pardons. Gamble thus looms potentially larger in the Mueller investigation that it does for law enforcement generally.

Gamble should be argued late this year or early in 2019. The Court’s decision to hear Gamble seems like a sign that the dual sovereignty exception’s days may be numbered. But the decision, and how the Court reaches it, could end up having implications that extend far beyond the facts of Gamble’s own case.
Garza v. Idaho


Overview: Gilberto Garza Jr. entered into two plea agreements waiving his right to appeal for aggravated assault and possession of a controlled substance. When sentenced, the Court acknowledged Garza’s appeal waiver, but simultaneously informed him of his right to appeal and his right to a lawyer if he did decide to appeal. Garza claims that his trial counsel was constitutionally inadequate because the lawyer would not file an appeal, even after Garza repeatedly requested for one.

Issue: Whether the “presumption of prejudice” recognized in Roe v. Flores-Ortega applies when a criminal defendant instructs his trial counsel to file a notice of appeal but trial counsel decides not to do so because the defendant’s plea agreement included an appeal waiver.

Gilberto GARZA Jr., Petitioner-Appellant
v.
State of IDAHO, Respondent

Supreme Court of the State of Idaho

Decided on November 6, 2017

[Excerpt; some citations and footnotes omitted]

BURDICK, Circuit Judge:

Gilberto Garza, Jr., appeals the Ada County district court’s order dismissing his petitions for post-conviction relief. Garza signed two plea agreements relating to charges of aggravated assault and possession of a controlled substance with intent to distribute. As part of his plea agreements Garza waived his right to appeal. Despite the waivers, Garza instructed his attorney to appeal. Garza’s attorney declined to file the appeals, citing the waivers of appeal in the plea agreements. Garza then filed two petitions for post-conviction relief, alleging his counsel was ineffective for failing to appeal. The district court dismissed Garza’s petitions concluding Garza’s counsel was not ineffective in failing to appeal. The Court of Appeals agreed and affirmed. We granted Garza’s timely petition for review and affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

This appeal involves two underlying convictions and two corresponding petitions for post-conviction relief. On January 23, 2015, Garza entered an Alford plea to aggravated assault (assault case), and on February 24, 2015, he pleaded guilty to possession of a controlled substance with
The plea agreements bound the district court to sentence Garza to five years in prison for the assault case (two years fixed, three indeterminate), and another five years in prison for the possession case (one year fixed, four indeterminate). The sentences were to run consecutively, along with another prison sentence previously imposed on Garza. The district court accepted the plea agreements and imposed sentence in accordance with them on the same day Garza entered the possession plea. In both binding Idaho Criminal Rule 11(f)(1)(c) plea agreements, Garza waived his right to appeal, and waived his right to request relief pursuant to Idaho Criminal Rule 35. The court acknowledged that Garza had waived his right to appeal but advised Garza of his appeal rights anyway. Garza did not appeal the convictions or sentences in the underlying cases.

Approximately four months later, Garza filed a petition for post-conviction relief in each case, asserting among other things that his trial attorney was ineffective for not filing notices of appeal. Garza stated in his affidavit submitted in the possession case that he asked his attorney to appeal, and in his affidavit submitted in his assault case that his attorney failed to appeal despite numerous phone calls and letters from Garza. Garza’s former attorney stated in an affidavit that he did not file an appeal because Garza “received the sentence(s) he bargained for in his [plea] agreement” and “an appeal was problematic because [Garza] waived his right to appeal in his Rule 11 agreements.”

The court appointed an attorney for Garza and issued a notice of intent to dismiss all of Garza’s claims except for his claim of ineffective assistance of counsel. After both parties responded to the notice, the court dismissed all post-conviction claims except for the ineffective assistance of counsel claim regarding the failure to file an appeal. The parties then filed crossmotions for summary adjudication on Garza’s remaining claim for post-conviction relief, where Garza sought a reopening of the appeals period in the underlying criminal cases on the basis of ineffective assistance of counsel. The district court dismissed Garza’s petitions, and the Court of Appeals affirmed. We granted Garza’s timely petition for review.

II. ISSUE ON APPEAL

1. Was Garza’s attorney ineffective when he did not file an appeal after Garza requested it even though Garza had waived his right to appeal as part of a Rule 11 plea agreement?

III. STANDARD OF REVIEW

When addressing a petition for review, this Court will give “serious consideration to the views of the Court of Appeals, but directly reviews the decision of the lower court.” State v. Schall, 157 Idaho 488, 491, 337 P.3d 647, 650 (2014) (quoting State v. Oliver, 144 Idaho 722, 724, 170 P.3d 387, 389 (2007)). “Proceedings for post-conviction relief are civil in nature, rather than criminal, and therefore the applicant must prove the allegations in the request for relief by a preponderance of the evidence.”
State v. Dunlap, 155 Idaho 345, 361, 313 P.3d 1, 17 (2013). The district court may grant a motion by either party for summary disposition for post-conviction relief when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. I.C. § 19-4906(c). This Court exercises free review over the district court’s “determination as to whether constitutional requirements have been satisfied in light of the facts found.” Dunlap, 155 Idaho at 361, 313 P.3d at 17 (quoting State v. Pearce, 146 Idaho 241, 248, 192 P.3d 1065, 1072 (2008)).

IV. ANALYSIS

A criminal defendant is permitted to waive his right to appeal as part of a plea agreement. State v. Murphy, 125 Idaho 456, 457, 872 P.2d 719, 720 (1994). The waiver is valid and will be upheld as long as it was entered into knowingly, voluntarily, and intelligently as part of a plea agreement. Id. In this case, the district court found that Garza did not show that his plea was not knowing, voluntary, or intelligent, nor did Garza raise this issue on appeal. The sole issue remaining is whether, despite the appeal waiver, Garza still had the right to appeal and therefore his counsel was ineffective for failing to file an appeal at his request.

This Court has not yet decided whether counsel is ineffective if counsel denies his client’s request to file an appeal when the client waived the right to appeal in a binding Idaho Criminal Rule 11 plea agreement. Garza argues that the district court erred in requiring him to show, rather than presuming, his counsel was deficient and that Garza was prejudiced when his attorney declined to file an appeal in light of the waiver. For the reasons discussed below, we affirm the district court’s dismissal of Garza’s petitions for post-conviction relief.

Criminal defendants have a Sixth Amendment right to “reasonably effective” legal assistance. Roe v. Flores-Ortega, 528 U.S. 470, 476 (2000) (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)); see also Booth v. State, 151 Idaho 612, 617, 262 P.3d 255, 260 (2011). A defendant claiming ineffective assistance of counsel must show that (1) counsel’s representation was deficient; and (2) counsel’s deficient performance prejudiced the defendant. Strickland, 466 U.S. at 688–92; Self v. State, 145 Idaho 578, 580, 181 P.3d 504, 506 (Ct. App. 2007). To show counsel was deficient, the defendant has the burden of showing that his attorney’s representation fell below an objective standard of reasonableness. Aragon v. State, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988). Generally, when trial counsel fails to file an appeal at a criminal defendant’s request, such performance is professionally unreasonable and therefore deficient. Flores-Ortega, 528 U.S. at 477; Beasley v. State, 126 Idaho 356, 362, 883 P.2d 714, 720 (Ct. App. 1994). To show that counsel’s deficient performance was prejudicial, the defendant must show there is a reasonable probability that, but for counsel’s deficiencies, the result of the proceeding would have been different. Strickland, 466 U.S. at 669; Aragon, 114 Idaho at 761, 760 P.2d at 1177. This test applies to claims that counsel was ineffective for failing to file a notice of appeal. Flores-
Ortega, 528 U.S. at 477. However, whether counsel was ineffective becomes unclear when the reason the attorney did not file the appeal is because the client waived the right to appeal as part of a plea agreement.

Neither the United States Supreme Court nor this Court have decided whether an attorney has provided ineffective assistance of counsel if the attorney declines to file an appeal after a defendant has requested it, when the defendant has waived the right to appeal as part of a plea agreement. There is a federal circuit split regarding the issue, which involves differing interpretations of the United State Supreme Court’s decision in Flores-Ortega. The Flores-Ortega case did not involve an appeal waiver, but rather dealt with whether an attorney provided ineffective assistance of counsel when she failed to appeal because it was unclear if her client wanted to appeal. See Flores-Ortega, 528 U.S. at 475. The Court held “when counsel’s constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken, the defendant has made out a successful ineffective assistance of counsel claim entitling him to an appeal.” Id. at 484.

A majority of federal circuit courts have interpreted Flores-Ortega to apply even in situations where the defendant has validly waived his right to appeal. Those circuits hold that attorneys are ineffective when they do not file an appeal after the clients requested it, regardless of whether the defendants had waived their rights. See Campbell v. United States, 686 F.3d 353, 360 (6th Cir. 2012); United States v. Poindexter, 492 F.3d 263, 265 (4th Cir. 2007); United States v. Tapp, 491 F.3d 263, 266 (5th Cir. 2007); Watson v. United States, 493 F.3d 960, 964 (8th Cir. 2007); Campusano v. United States, 442 F.3d 770, 775 (2d Cir. 2006); United States v. Sandoval-Lopez, 409 F.3d 1193, 1198 (9th Cir. 2005); United States v. Garrett, 402 F.3d 1262, 1267 (10th Cir. 2005); Gomez-Diaz v. United States, 433 F.3d 788, 794 (11th Cir. 2005). Under the majority approach, an attorney is required to file an appeal at his client’s request, even if the attorney thinks the appeal would be frivolous. Campusano, 442 F.3d at 771–72. When counsel fails to follow his client’s express direction to appeal, prejudice is presumed. Id. at 772. “The prejudice in failure to file a notice of appeal cases is that the defendant lost his chance to file the appeal, not that he lost a favorable result that he would have obtained by appeal.” Sandoval-Lopez, 409 F.3d at 1197.

Two federal circuit courts and a federal district court in an undecided circuit follow the minority approach and hold that Flores-Ortega does not require an attorney be presumed ineffective for failing to appeal upon request when there has been a waiver of the right to appeal. See Nunez v. United States, 546 F.3d 450, 456 (7th Cir. 2008), vacated on other grounds by Nunez v. United States, 554 U.S. 911 (2008); United States v. Mabry, 536 F.3d 231, 242 (3d Cir. 2008); Maes v. United States, No. 15-CV-240-SM, 2015 WL 9216583, at *3 (D.N.H. Dec. 16, 2015). The minority approach does not presume deficiency or prejudice when an attorney denies his client’s instruction to file an appeal when there has been an appeal
waiver, and instead requires the defendant meet the test in *Strickland*, which requires showing deficient performance and prejudice. *Nunez*, 546 F.3d at 456. The minority approach holds that when a defendant waives his appellate rights, he no longer has a right to appeal, and therefore an attorney is not bound to file an appeal at his client’s request. *Id.* at 455.

Though few other states have addressed the issue, the ones who have continue to apply the *Strickland* test. See *Buettner v. State*, 2015 MT 348N, ¶¶ 14–15 (Mont. 2015) (applying the two-prong test of *Strickland* to determine that counsel was not ineffective in failing to file a notice of appeal); *People v. Miller*, 784 N.Y.S.2d 680, 681–82 (N.Y. App. Div. 2004) (“Where, as here, a defendant makes an informed and intelligent waiver of the right to appeal, ordinarily he or she will be precluded from arguing ineffective assistance of counsel, except to the extent that the claimed ineffective assistance impacts upon the voluntariness of the plea.”); *Stewart v. United States*, 37 A.3d 870, 877 (D.C. Ct. App. 2012) (holding *Flores-Ortega* did not control when there had been an appeal waiver, and stating that “[defendant’s] claim of ineffective assistance of counsel in relation to the failure to file a notice of appeal is palpably incredible . . . .”); *Kargus v. State*, 169 P.3d 307, 320 (Kan. 2007) (citing Kan. Admin. Regs. § 105-3-9) (applying a modified adaptation of *Flores-Ortega*, however, it is limited by statutory language stating an attorney must “file notice of appeal in a timely manner, unless a waiver of the right to appeal has been signed by the defendant”).

In a recent case, this Court discussed *Flores-Ortega* in the context of an ineffective assistance of counsel claim when counsel did not consult with a defendant about filing an appeal after the defendant waived his right to appeal. *McKinney v. State*, 162 Idaho 286, __, 396 P.3d 1168, 1171–72 (2017). In *McKinney*, a defendant waived his right to appeal as part of a Rule 11 sentencing agreement, and then sought post-conviction relief on the ground that his attorney was ineffective for not consulting with him about appealing his sentence, despite having waived his appeal rights in the plea. *Id.* at __, 396 P.3d at 1179. This Court interpreted *Flores-Ortega* to not compel a bright-line presumption of deficiency or prejudice in the failure to consult context. *Id.* Rather, this Court considered whether counsel’s failure to consult with the defendant about filing an appeal was deficient conduct that prejudiced the defendant, and concluded it was not. *Id.*

In this case, we decline to presume counsel ineffective for failing to appeal at Garza’s request when Garza has waived the right to appeal as part of a plea agreement. Rather, to show ineffective assistance of counsel, Garza must show deficient conduct and resulting prejudice. In so holding, we conclude that *Flores-Ortega* does not require counsel be presumed ineffective for failing to appeal at the client’s direction in situations where there has been a waiver of the right to appeal, as there was here.
The *Flores-Ortega* Court made clear that a presumption of prejudice applies in the context of an ineffectiveness claim because an attorney’s deficient performance deprives the defendant of his or her opportunity for an appellate proceeding. Notably, *Flores-Ortega* did not address whether this principle has any force, let alone controls, where the defendant has waived his right to appellate and collateral review. *Mabry*, 536 F.3d at 240 (citations omitted). In fact, the Court in *Flores-Ortega* stated, “The even more serious denial of the entire judicial proceeding itself, which a defendant wanted at the time and to which he had a right, similarly demands a presumption of prejudice.” 528 U.S. at 483 (emphasis added). Once a defendant has waived his right to appeal in a valid plea agreement, he no longer has a right to such an appeal. Thus, the presumption of prejudice articulated in *Flores-Ortega* would not apply after a defendant has waived his appellate rights. Therefore, an attorney who declines to file the appeal when there has been a waiver will not be presumed ineffective, nor will the attorney be found to have violated the Idaho Rules of Professional Conduct.

This approach is consistent with other areas of Idaho law. Idaho courts do not presume a defendant is prejudiced when an attorney fails to follow his client’s instruction to file a Rule 35 motion, despite the client having the right to do so. *Hassett v. State*, 127 Idaho 313, 316, 900 P.2d 221, 224 (Ct. App. 1995).

[T]o prevail on a claim of ineffective assistance of counsel an applicant . . . must show both that counsel’s performance was deficient and that the deficiency prejudiced the applicant. Where the alleged deficiency is counsel’s failure to file a . . . motion, a conclusion that the motion, if pursued, would not have been granted, is generally determinative of both prongs of the test. If the motion lacked merit and would have been denied, counsel ordinarily would not be deficient for failing to pursue it, and, concomitantly, the petitioner could not have been prejudiced by the want of its pursuit. *Id.* (quoting *Huck v. State*, 124 Idaho 155, 158–59, 857 P.2d 634, 637–38 (Ct. App. 1993)). As the district court correctly stated, “[i]t would seem anomalous to presume prejudice in the failure-to-appeal context when the defendant waived the right to appeal, yet not presume prejudice in the Rule 35 context even when the defendant has not waived the right to file a Rule 35 motion.” Other Idaho cases have adopted similar policies regarding when counsel is ineffective:

When considering whether an attorney’s failure to file or pursue a motion to suppress or strike evidence constitutes incompetent performance, the court is required to examine the probability of success of such a motion in order to determine whether counsel’s decision against pressing the motion was within the wide range of permissible discretion and sound trial strategy. In *Carter v. State*, 108 Idaho 788, 794-795, 702 P.2d 826, 832-33 (1985), the Idaho Supreme Court held that counsel’s failure to move to suppress the defendant’s confession constituted ineffective assistance because it was obvious that the confession would have been suppressed. In *Maxfield v.*
State, 108 Idaho 493, 501, 700 P.2d 115, 123 (Ct. App. 1985), we held that newly appointed counsel’s failure to renew a motion to suppress was not deficient, since previous counsel had been unsuccessful on the same motion and no new grounds existed. Because it was clear that the new motion would have been denied as well, counsel’s failure to make the motion was not deficient. See also, Davis v. State, 116 Idaho 401, 406, 775 P.2d 1243, 1248 (Ct. App. 1989), (counsel’s failure to timely file a motion to suppress evidence seized from defendant’s home was not deficient because defendant had failed to show that the items would have been suppressed); State v. Youngblood, 117 Idaho 160, 165, 786 P.2d 551, 556 (1990) (failure to move to suppress items seized was not error where items were obviously subject to plain view exception to exclusionary rule); State v. Walters, 120 Idaho 46, 56, 813 P.2d 857, 867 (1991) (failure of counsel to object to inadmissible opinion testimony was ineffective assistance.) Huck, 124 Idaho at 158, 857 P.2d at 637. While the above cases do not deal with appeal waivers specifically, they show the policy of this Court to not presume counsel ineffective automatically when counsel exercises judgment in declining to file a motion where it would obviously be denied, or where the motion had previously been unsuccessful. See Davis, 116 Idaho at 406, 775 P.2d at 1248.

Moreover, a criminal defense attorney has a duty to the judicial system to exercise professional judgment and not file frivolous litigation, “and an appeal in the teeth of a valid waiver is frivolous.” Nunez, 546 F.3d at 455; See also Idaho Rules of Professional Conduct 3.1. The defendant, even if allowed his appeal, will very likely still have his appeal dismissed as a result of the waiver, and “[t]here is no point in a constitutional rule that would yield an exercise in futility.” Nunez, 546 F.3d at 456. Garza’s attorney chose to exercise professional judgment and uphold the plea agreements that contained his client’s original desire to waive his right to appeal. Such an exercise of judgment that keeps frivolous and futile litigation out of the courts will not be presumed ineffective assistance of counsel.

Additionally, a plea agreement is a bilateral contract, to which both the State and defendant are bound. McKinney, 162 Idaho at __, 396 P.3d at 1178. Once a defendant has accepted the plea, he should be bound by the waiver therein. Nunez, 546 F.3d at 455. “Empty promises are worthless promises; if defendants could retract their waivers . . . then they could not obtain concessions by promising not to appeal.” United States v. Wenger, 58 F.3d 280, 282 (7th Cir. 1995). “[Garza] exchanged the right to appeal for prosecutorial concessions; he cannot have his cake and eat it too.” Id. Moreover, a lawyer has a duty to avoid taking actions that will cost their client the benefit of the plea bargain. Nunez, 546 F.3d at 455. If an attorney files an appeal despite a waiver in the plea agreement, the agreement may be breached, and the State may now be entitled to disregard the plea in its entirety. Here, filing an appeal would have been a direct violation of the plea agreement, and the State would have been free to revoke the benefits of the plea given to Garza. When Garza’s
attorney declined to file an appeal because the right to appeal had been waived, counsel ensured Garza would not be in breach of the plea. We are cognizant that there are conceivable situations where a defendant who has waived his right to appeal as part of a plea agreement may still seek to challenge his conviction or sentence, for example if he is sentenced illegally or the State breaches the plea agreement. This is properly done in a petition for post-conviction relief or writ of habeas corpus, rather than on direct appeal.

In this case, we decline to presume Garza’s counsel ineffective when counsel failed to file an appeal at Garza’s request because of the appeal waiver. Rather, to show ineffective assistance of counsel for failing to appeal in light of the waiver, Garza needed to show both deficient performance and resulting prejudice. The district court concluded that Garza was unable to show any non-frivolous grounds for appeal, and therefore could not show prejudice. Accordingly, we affirm the district court’s dismissal of Garza’s petitions for post-conviction relief.

V. CONCLUSION

We affirm the district court’s dismissal of Garza’s petitions for post-conviction relief. This Court does not presume counsel to be automatically ineffective when counsel declines to file an appeal in light of an appeal waiver. Rather, a defendant needs to show deficient performance and resulting prejudice to prove ineffective assistance of counsel. Because Garza cannot show such grounds, his petitions for post-conviction relief were properly dismissed by the district court, and the district court is affirmed.

Justices JONES, HORTON, BRODY and TROUT, Pro Tem, CONCUR.
The U.S. Supreme Court today took up *Garza v. Idaho*, No. 17-1026, involving the intersection of two recurring themes: lawyer decisions v. client decisions in the conduct of a case and how to apply rules developed for trials to the context of plea-bargained cases, which most cases are now. In the course of a criminal trial, the lawyer makes most of the decisions, but a few are reserved for the client personally. Whether to appeal is a client decision. In *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), the Court dealt with the issue of ineffective assistance claims for a lawyer's failure to appeal, with or without consulting the client. If the lawyer is found to have performed deficiently, the "prejudice" question is only whether there is a reasonable probability the client would have appealed, not that he would have prevailed on appeal.

The wrinkle in the *Garza* case is that the defendant pleaded guilty and waived his right to appeal as part of the bargain. From the Brief in Opposition:


It seems to me that the situation here is quite different from *Flores-Ortega*. In that case, the lawyer's allegedly ineffective failure to file an appeal denied the client an entire judicial proceeding that he was entitled to. The Court relied heavily on the distinction between a claim that a proceeding was conducted unfairly and a claim that a proceeding did not happen at all. In this case, the proceeding was one that the client voluntarily gave up in return for a reduced sentence. The proceeding not happening at all was precisely what he agreed to, and a finding that he had no right to it is quite different from a finding that he would not have prevailed in it.

“Justice to Resolve Circuit Split Over Appeal Waivers”
The U.S. Supreme Court on Monday agreed to resolve a split among the circuit courts on the question of when an inmate has a right to file an appeal of his conviction despite the fact his plea agreement specifically waives that right.

The case comes to the court from Idaho, where in early 2015 petitioner Gilberto Garza Jr. entered an Alford plea to aggravated assault and a guilty plea to possession of a controlled substance. (An Alford plea is a guilty plea in which the defendant maintains his innocence of a crime, but nevertheless concedes prosecutors have enough evidence to prove he is guilty beyond a reasonable doubt.)

Both plea agreements included a provision specifying that Garza waited his right to appeal.

At a joint sentencing hearing, the district court accepted both plea agreements, acknowledged the appeal waiver, but went on to advise Garza of his right to appeal and his right to be appointed counsel if he did so.

Later, Garza filed a pro se petition for postconviction relief, asserting he repeatedly instructed his trial counsel to file a notice of appeal on his behalf, but that the lawyer failed to do so. He said this failure was proof he received ineffective counsel in his case.

Garza’s attorney acknowledged he declined to file an appeal on his client’s behalf, but said he explained that the waiver the inmate had agreed to made an appeal problematic.

For its part, the government said if Garza still wanted to press his case, he was required to show actual prejudice from the loss of a chance to appeal his case.

Every federal circuit has weighed in on the issue presented in the case. In doing so, eight circuits have adopted the “presumption of prejudice” set forth by the Supreme Court in the 2000 case *Roe v. Flores-Ortega*, but two circuits have deferred, requiring a showing of actual prejudice.

The district court adopted the view of the minority of circuits and denied Garza’s appeal, although it noted there is a split among the circuits that the Supreme Court had not resolved. The Idaho Court of Appeals and state Supreme Court later affirmed the ruling.

In a petition for a writ of certiorari filed on Garza’s behalf, Amir Ali of the Roderick & Solance and the MaCarthur Justice Center in Washington, D.C., says these decisions were “wrong and troubling.”

“While a plea waiver may substantially limit the scope of issues available to a defendant if he chooses to appeal, even the broadest
waiver leaves open a number of significant issues, including those going to voluntariness or competence to enter the plea, ineffective assistance of counsel during the plea process, and the legality of the sentence imposed,” Ali write. “Where trial counsel refuses a criminal defendant’s instruction to file a notice of appeal, counsel thus deprives the defendant of a counseled direct appeal on these issues “altogether.”

As is their custom, the justices did not explain their rational for taking up the case on Monday.
The case is Markle Interests LLC et al. v. U.S. Fish and Wildlife Service et al., case number 14-31008, in the U.S. Court of Appeals for the Fifth Circuit.